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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,

Michael P. Regan
Council on Judicial Administration, Chair

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

John M. Lundin
Litigation Committee, Chair

LinkBuilder Add-in for MS Word[1]

Description

The CM/ECF LinkBuilder add-in for Word (LinkBuilder) automates the creation of cross-document hyperlinks between filings in the federal court's CM/ECF system. LinkBuilder will search a Microsoft Word document for citations to CM/ECF filings and insert a hyperlink to the corresponding file in the CM/ECF system. LinkBuilder can recognize and link to attachments to the record, as well as page specific references to create pinpoint access to specific information in the case.

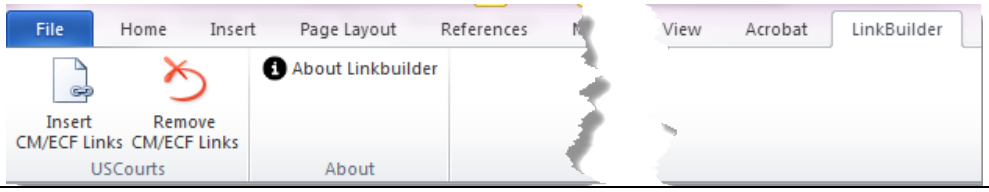
Before you begin

Before using the LinkBuilder program, there are a few things you should be aware of.

1. Download the LinkBuilder.dotm file from https://www.ned.uscourts.gov/internetDocs/cmecf/LinkBuilderv1_10.dotm
2. You must have a login and password for PACER.
3. LinkBuilder requires Internet access to obtain the data needed to create the hyperlinks.
4. Check to see if the court in which you are filing has the LinkBuilder Report installed. The Report is not necessary, but will allow you to create hyperlinks without incurring PACER fees. To determine if the report is installed:
    1. Log in to the court's CM/ECF system.
    2. Click on **Search**.
    3. Type **LinkBuilder** in the Search field and check the results. (Note: In some courts it may be in a sub menu, such as "Local Reports" or "Other Reports".
    4. If the LinkBuilder Report is not installed, you can still use the LinkBuilder add-in, but you must use the Docket Report option (described below).
5. LinkBuilder cannot create hyperlinks to more than one case number per document unless the two documents are cited differently in text (ie., Criminal Doc. # and Civil Doc. #).
6. No links are created to "text only" entries in the court docket. If there is no PDF document associated with the filing, no hyperlink will be created.
7. No links are created to sealed, restricted or ex parte entries.
8. LinkBuilder is compatible with Word 2007 - 2016 for Windows. It is not available for Mac.

Installing LinkBuilder

Follow the steps in the table below to install the LinkBuilder add-in for Word.

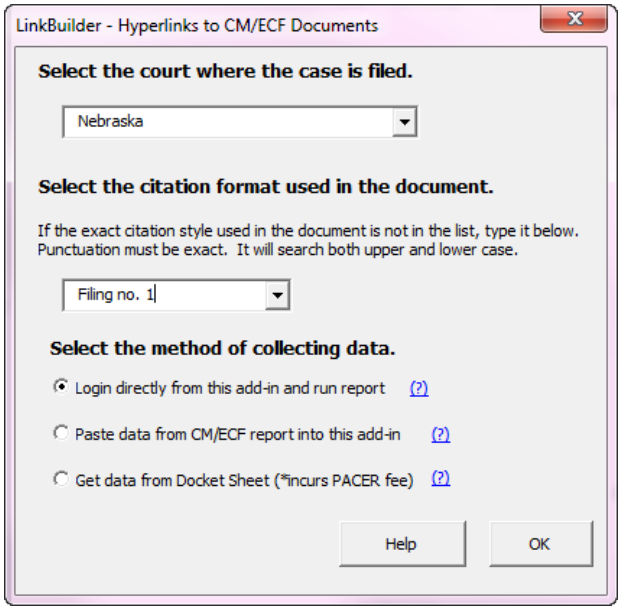
STEP	ACTION
1	If Word is currently running, close it and any open documents.
2	Save the Linkbuilder.dotm file to Word's Startup folder: In Windows 7, Windows 8, and Windows 10 the Startup folder is: C:\Users\<*user name*>\AppData\Roaming\Microsoft\Word\STARTUP
3	Restart Word.
4	Check the ribbon for a new LinkBuilder tab which contains several buttons. 

[1] **Public Domain Notice**. This work is in the public domain in the United States because it is a work of the United States Federal Government under the terms of Title 17, Chapter 1, Section 105 of the U.S. Code. Users of LinkBuilder are not to state or imply the Federal Government, Judiciary, and/or the District of Nebraska endorses their use of the LinkBuilder feature.

Using LinkBuilder

Follow the steps in the table below to create hyperlinks in your document.

STEP	ACTION
1	Open any Word document with CM/ECF citations.
2	Click the **Insert CM/ECF Links** button on the LinkBuilder tab.
3	Choose the court where the case is filed.
4	Choose the citation "phrase" used in the document. This is what LinkBuilder will search for when creating hyperlinks. The following phrases are pre-entered. If your document contains a different phrase you can type a custom phrase in the drop down box. Use the number one(1) as a placeholder for the filing number in your phrase.
5	Choose the method of collecting the data for the links.
6	Once your selections are made, click **OK** and follow the instructions on the screen to access the data and create the hyperlinks.



Possible phrases	Examples of recognized citations:
Filing no. 1	Filing No. 1
Filing 1	Filing No. 12 at ECF p.5
Docket no. 1	*(links to filing 12 and opens to page 5)*
Doc. #1	Filing No. 21-5, at CM/ECF p.22
Doc. 1	*(links to attachment #5 of filing 21, and opens to page 22.)*
ECF No. 1	Filing No. 3-1 at ECF pp. 5-6
ECF 1	*(links to attachment #1 of filing 3, and opens to page 5.)*

Log in directly

Use this option to access the report directly from the add-in screens. You will be prompted to log in to PACER. (Note: There are no PACER charges for this report.)

Paste data from CM/ECF

Use this option if you are already logged in to CM/ECF in a web browser. In CM/ECF, click on Reports then run the LinkBuilder Report (Use Search option to find it's location.) When the data is displayed, press **CTRL+A** to select all the data, then **CTRL + C** to copy it. Return to the LinkBuilder window and click **PASTE** to paste the data into the add-in window. There are no PACER charges for running this report.

Get data from Docket Sheet (CM/ECF v6.0 or higher only)

Use this option if the court in which you are filing does not have the LinkBuilder report installed. Note: The standard PACER fees will apply for running the docket report.

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Re: Comment on Proposed Amendment to Commercial Division Rule 6 to Permit the Court to Require Hyperlinking in Electronically Filed Documents

Dear Ms. Millett:

We represent The Bureau of National Affairs, Inc. which offers the online legal research service Bloomberg Law. We write in response to the request for public comment issued by the Office of Court Administration ("OCA") in connection with the proposed amendment to Commercial Division Rule 6 regarding hyperlinking.

Although Bloomberg Law commends OCA and the Commercial Division Advisory Council ("Advisory Council") for their efforts to promote efficiency in New York's court system, Bloomberg Law opposes the inclusion of reference to specific private legal research platforms in the court's rules. There are almost no other state-wide rules in New York that require parties or their attorneys to conduct business with specific private companies in order to comply with a court's rule. Public policy concerns would strongly discourage such a requirement. In addition, the Advisory Council's memorandum in support of the proposed rule ("Memo") states that "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." (Memo at 11). Identifying only Lexis/Nexis and Westlaw by their brand names in the proposed rule, however, unfairly favors these two companies over many other private online legal research providers in the marketplace with their own technology and innovations. The logical and likely result of substantially limiting the number of "court approved" providers would be the stifling of competition and, thereby, less innovation and efficiencies as well as increased costs and added burdens for New York's litigants. In sum, OCA must be commercially neutral in any amendment it issues in connection with Commercial Division Rule 6 and hyperlinking.

Bloomberg Law

Bloomberg Law is a nationally recognized legal research platform that is currently used by several state courts, the Federal Courts, and by over 100,000 subscribers throughout the

United States. In New York State alone, thousands of attorneys from legal practices and companies of all sizes – including solo practitioners, in-house counsel, and the country's largest law firms – are Bloomberg Law subscribers. Bloomberg Law was introduced in 2009 with a focus on business law and offers new and innovative legal research tools that are not available in services provided by its competitors. Bloomberg Law has achieved tremendous growth in the online legal research market in the past decade despite significant competition from Lexis/Nexis, Westlaw, Casemaker, Fastcase, Loislaw, HeinOnline, and Google Scholar to name but a few competitors. The attorneys and firms practicing in New York's Commercial Division are especially important clients to Bloomberg Law and it has taken great efforts to tailor its services and functionality to meet the needs of attorneys practicing in the Commercial Division.

Bloomberg Law provides a robust search function for federal and state cases and statutes with a pricing structure that is distinguished from many of its competitors. Notably, it offers a case database – similar to Westlaw and Lexis/Nexis – which includes millions of unpublished decisions. Bloomberg Law also provides many unique services in its all-inclusive platform such as access to original Bloomberg business news coverage, the ability to perform docket searches for both state and federal courts, and exclusive access to a New York Commercial Division Practice Guide written by experienced attorneys who regularly appear before the Commercial Division. Included in their subscription, each Bloomberg Law subscriber also has access to model letters, forms, and checklists organized by practice area which streamlines legal tasks and allows attorneys to provide efficient and cost-effective legal services for their clients. Bloomberg Law also provides unique AI-driven tools such as Brief Analyzer, Points of Law, and SmartCode which improve research efficiency. The unique content available through Bloomberg Law is developed by attorneys with extensive legal experience in each practice area and is constantly updated and improved in response to new developments in the law, feedback from its customers, and through technological innovations developed by Bloomberg Law's employees. Like many online legal research providers, Bloomberg Law is constantly evolving to meet the ever-changing needs of attorneys and their clients and it is always looking for new ideas to improve its product and assist attorneys in efficiently practicing law.

Absence of Brand Names in Court Rules

The voluminous Uniform Civil Rules for New York State Trial Courts are almost entirely bereft of private commercial entities identified by brand name. Commercial Division Rule 5 – introduced in the original state-wide Commercial Division Rules in 2006 – states in part, "Decisions can be found on the Commercial Division home page of the Unified Court System's internet website: www.courts.state.ny.us/comdiv or in the New York Law Journal." (22 NYCRR § 202.70(g), Rule 5). This rule, however, does not require attorneys or parties to subscribe to the New York Law Journal. This rule also appears to be antiquated as it was introduced before the New York State Courts Electronic Filing System was widely available. Now that e-filing is mandatory in Commercial Divisions cases throughout the state (*see* Admin Order of Chief Admin Judge of Cts AO/245/19), almost all Commercial Division decisions are available to the

public without the need to subscribe to the New York Law Journal. Similarly, Commercial Division Rule 31(c) – which was also introduced in the initial 2006 state-wide Commercial Division Rules – states in part that requested jury charges are to be submitted to the court, "by hard copy and disk or e-mail attachment in WordPerfect 12 format, as directed by the court." (22 NYCRR § 202.70(g), Rule 31(c)). This rule also appears to be archaic as WordPerfect 12, which was released in 2004, does not appear to be commercially available for purchase or download. It is hard to fathom a Commercial Division Justice refusing to accept proposed jury instructions because it is not formatted on software released more than 15 years ago and which is no longer commercially available. We are unaware of any Uniform Civil Rules for New York State Trial Courts being added or amended since 2006 that identify private commercial entities by brand name. While the Appellate Division, Second Department, recently modified its "Technical Guidelines" for e-filed documents to include hyperlinking, it did so without reference to brand names. (Memo at 3 ("All electronically-filed briefs should contain bookmarks or hyperlinks to the authorities cited in those briefs.")).

Although the identification of the New York Law Journal and WordPerfect in the rules was likely intended to create efficiencies for the courts and litigants at the time they were drafted, changes in technology and innovation inherently make certain products more or less desirable over time. Based on the lack of inclusion of other brand names in the New York State court rules, and the rapid changes in technology and services utilized by courts and practitioners alike, we do not believe that brand names should be identified in the court's state-wide rules. Inclusion of brand names will require constant rule revisions as companies come in and out of favor and result in companies seeking to have their brand names included in the rules for their commercial benefit. Neither of these outcomes are optimal or beneficial to the courts or the litigants appearing before the courts.

The Proposed Rule is Against New York Public Policy

The lack of specific brand names in the New York State court rules is a testament to the public policy favoring increased competition between legal service vendors. It is undisputed that New York's laws are intended to prevent the restraint of free trade because such actions are against public policy. (*See e.g.* NY Const, art III, § 17 ("The legislature shall not pass a private or local bill in any of the following cases: . . . Granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever."); General Business Law § 340(1) ("Every contract, agreement, arrangement or combination whereby . . . Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained . . . is hereby declared to be against public policy, illegal and void.")).

By identifying the brand names Lexis/Nexis and Westlaw in the proposed hyperlinking rule, and encouraging Commercial Division Justices to grant special privileges to those companies, the New York Unified Court System would essentially create an online legal

research service duopoly in the area of commercial litigation. This restraint of trade will be to the detriment of Bloomberg Law, other online legal research service providers, their respective subscribers, and the public. Many law practices do not subscribe to multiple online legal research platforms due to cost. Commercial Division practitioners – which are a key target market for Bloomberg Law – will inevitably favor Lexis/Nexis and Westlaw's products if their services are granted a level of exclusivity through the proposed rule and it is highly likely that Bloomberg Law will lose a substantial number of subscriptions in favor of the vendors endorsed by New York's courts. With a duopoly in place, Lexis/Nexis and Westlaw will also have less incentive to create new innovations or reduce their subscription prices for customers because commercial litigation practitioners will effectively be precluded from switching to another competitor's product.

The Advisory Council specifically mentions in its Memo that the Commercial Division serves "as a laboratory for innovation in the court system" and that "[t]his proposal is an excellent example of the opportunities technology provides to improve the efficiency and productivity of the New York State courts." (Memo at 5). Bloomberg Law supports innovation and efficiency in the court system, especially within the Commercial Division. The current proposal, however, will exclude numerous legal product and service providers not named Westlaw or Lexis/Nexis which are spending tremendous resources to develop advancements in legal technology that benefit the public as well as the Commercial Division. Experiments in the court system should not prejudice those innovators that seek a common goal of efficiency within the courts.

Although the Advisory Council's Memo supporting the proposed rule claims, "it is the rare practitioner indeed who does not subscribe to [Westlaw] or [Lexis/Nexis]," there is no reference to data or studies supporting such an assertion. (Memo at 15). Our client advises us that some of its commercial litigation customers do not subscribe to either Lexis/Nexis or Westlaw and have chosen Bloomberg Law as an alternative to both of those services.

Bloomberg Law provides a world class legal research platform and its subscribers should not face additional hurdles that Lexis/Nexis and Westlaw subscribers do not face. While we appreciate that Commercial Division Justices and their law clerks have access to Lexis/Nexis and Westlaw, and facilitating their ability to navigate voluminous documents is an admirable objective which we support, it cannot be done at the expense of stifling competition. Both Lexis/Nexis and Westlaw have applications (Lexis for Microsoft Office and West Drafting Assistant, respectively) for subscribers that can create hyperlinks to legal citations in electronically filed briefs in a matter of seconds. It is our understanding that Commercial Division Justices and their law clerks have access to such applications in their subscriptions and they can use those applications to create hyperlinks in any filed brief thereby avoiding any anti-competitive effects that would result from the inclusion of Lexis/Nexis and Westlaw in the rules. Further, many judges and law clerks have a preference for a particular research service and by

running the application of their preferred service, they will not be beholden to the service selected by the filing practitioner.

Private vendors should not be favored by New York's courts because it is against public policy. The addition of the brand names Lexis/Nexis and Westlaw to the rules will ultimately restrain trade and reduce competition.

The Exceptions to the Proposed Rule Will Not Prevent the Stifling of Competition

Although the proposed hyperlinking rule is at the discretion of individual justices with respect to legal authority citations, this discretion is insufficient to ameliorate its anti-competitive effects. In opposing the Advisory Council's 2016 hyperlinking rule proposal, the New York City Bar Association observed:

> "That the proposed rule is discretionary provides an inadequate safeguard against potential problems because it imposes no limits on the discretion of those who apply it. A judge could adopt the hyperlinking requirement by individual part rule and, therefore, impose substantial burdens on all litigants without regard to the particular circumstances of the parties, counsel, and the size and complexity of a case."[1]

The clear intent of the proposed rule, by its plain language, is to encourage the proliferation of hyperlinking. If adopted, the proposed rule will undoubtedly serve as the model rule which Commercial Division Justices will incorporate into their individual part rules including the memorialization of the Lexis/Nexis and Westlaw brand names.

The option for litigants to cite to government websites will also not resolve the disadvantage that Bloomberg Law subscribers will face under the proposed rule. Bloomberg Law subscribers will be forced to incur additional time and effort to find alternative government citation sources – if they even exist – that Lexis/Nexis and Westlaw subscribers will not. This will result in higher legal costs being passed on to clients, lost hours by attorneys who choose not to pass those additional costs on to clients, and lost Bloomberg Law subscribers who choose to simply switch their online legal research platform to one of the court's approved services. Similarly, the option to seek court approval to be excused from hyperlinking is inadequate because it will be an additional burden to Bloomberg Law subscribers who, in addition to the time and effort required to make such an application, risk that their request will be seen as a nuisance to the judge before whom they are appearing.

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[1] 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.

Request for Removal of Brand Names From Proposed Rule

We respectfully request that New York's court rules do not incorporate private brand names of online legal research platforms. To the extent that the second paragraph of the proposed rule is adopted, we propose that references to Lexis/Nexis and Westlaw be stricken as follows:

> 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.

We thank you for your consideration of these comments. We welcome any further discussion and, to the extent that the court's access to Bloomberg Law subscriptions is a considered factor in whether to approve the proposed rule, our client is confident that it has a variety of available solutions which will provide the court with the electronic access to cases, statutes, rules and other legal authority it needs.

Very truly yours,

Vincent J. Syracuse

From: Sanderson, Joseph <joseph.sanderson@kirkland.com>
Sent: Monday, December 23, 2019 6:59 PM
To: rulecomments
Subject: Comment: Mandatory Hyperlinking

The proposal for mandatory hyperlinking in Commercial Division briefs is well-intentioned, but could be improved as follows:

- First, the proposal fails to account for the fact that some Justices "opt out" of CPLR 2214(c)'s provision allowing reference to documents already available on NYSCEF in lieu of refiling them as exhibits, which can result in voluminous filings with large numbers of refiled exhibits. The proposal should be amended to provide that in the Commercial Division, Justices may not "opt out" of that provision as to electronic copies if hyperlinks are required, but may require that previously-efiled documents be included in working copy bundles.
- Second, the proposal should consider introducing a rule to standardize pinpoint page citations, similar to the "PageID" system used in some federal courts or the California state courts' rule requiring that all filings be paginated with the cover of the brief as page 1 rather than restarting numbering when the substantive portion of the brief begins. That may avoid the problem of how to convert a pinpoint citation to hyperlinks when lawyers tend to be inconsistent about whether they are citing to the page of the PDF or the page printed on the document.
- Third, the proposal should consider that some justices currently require parties to *predict* the URL of exhibits to be filed alongside a brief, which often creates problems if multiple parties have a simultaneous filing deadline (either because the Justice has a bundling rule or because of a simultaneous schedule). This practice should not be expanded unless parties have additional time after the filing is complete to supply a hyperlinked version of the brief.
- Fourth, if hyperlinked briefs are required, parties should have at least one business day after the initial deadline to file a hyperlinked version of the brief. This will allow parties to have the URLs for the exhibits and other supporting documents. This is presumably just as technologically feasible within NYSCEF as any other submission of a corrected brief.

Joseph Myer Sanderson

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2020

New York State
Association of County Clerks

M E M O R A N D U M

February 10, 2020

To: rulecomments@nycourts.gov

From: Hon. Sandra DePerno
President, NYSACC
Oneida County Clerk

cc: Hon. Nancy T. Sunshine, Kings County Clerk
Hon. Elizabeth Larkin, Cortland County Clerk
Co-Chairs NYSACC Courts Committee

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

Thank you for the opportunity to comment on the proposed court rule. Notably, Jeff Carucci, Statewide Coordinator, NYSCEF, is currently studying the impact of this proposed rule on NYSCEF. Many of the County Clerks who use NYSCEF, defer to Mr. Carucci to address the impacts of this proposed court rule on NSYCEF.

A few County Clerks concerned with the ever-present threat of malware, inquired as to whether the required use of hyperlinks poses a threat to the security of their county. Specifically, Theresa Philbin, Schuyler County Clerk, commented that "Schuyler County uses the NYSCEF system itself. We do not import them into our COTT system. However, my biggest concern is our IT policy. Will these hyperlinks just reach out to the internet? Or are they being sourced into some sort of in house "library" maintained by NYSCEF? It could be very easy to download a virus to our computers. Seeing as how our County had a very serious malware attack a couple years ago, they have severely restricted our access to many websites."

The Cortland County Clerk inquired as to whether the proposed court rule imposes any restrictions on the use of hyperlinks. Are the hyperlinks limited to government websites or recognized legal databases, such as Westlaw or Lexis? Is there is a risk of virus/malware from a hyperlink? In addition, there may be a fiscal impact on certain counties which use a private vendor operated electronic filing system.

In considering this proposed court rule, NYSACC requests that the issues identified in this memorandum receive due consideration.

From: Beeken, Timothy K.
Sent: Tuesday, December 10, 2019 9:45 AM
To: Mindy Jeng
Subject: RE: Hyperlinking proposal

Hi Mindy,

Here are MACA's Board's thoughts after spending a day with the proposal:

We generally agree with the proposal's assessment of the benefits for the court.

We are concerned about additional cost for litigants and adding time pressure and other obstacles to lawyers' work on their filings. We also are concerned about costs that may less easily be borne by small firms and solo practitioners than by large firms. We see the Advisory Council believes it takes but moments to create hyperlinks; in our experience, a large number of hyperlinks takes substantial time to create and then additional time to proof to ensure they are correct. Additionally, conversion of a hyperlinked Word file to a PDF that still has the hyperlinks can require a different use of counsel's PDF software than counsel is accustomed to using to prepare PDFs for e-filing. Our overarching question in this regard is whether the benefit to the court is worth the cost to the litigants it serves.

The mandatory part of the proposal is okay as far as it goes, but would seem to make a difference only in the following circumstances:

1. Citations to earlier filings in the case, such as the pleadings. (We question, however, whether the ability to provide a hyperlink overrides the provision of CPLR 2214(c) that merely citing to previous filings on NYSCEF is not sufficient when a rule provides otherwise, such that a summary judgment movant still would be required to attach copies of the pleadings by CPLR 3212(b).)

2. Citations to earlier filings in a motions sequence; namely, the movant's supporting affidavits and exhibits could be hyperlinked to in opposition and reply papers, and the opponent's supporting papers also could be hyperlinked to in the reply. In our experience, the parties at times do cite to earlier filings in motion sequences but it is not an especially common phenomenon.

Also, any additional work like adding hyperlinks is cutting into time counsel presently spend on the substance of their papers—time that can be a matter of days on orders to show cause and on motion papers generally. In order to avoid reducing the amount of time counsel has available to write persuasively in support of her client's case, when hyperlinked papers are required it should be subsequent to the CPLR 2214(b) or stipulated filing deadlines; the hyperlinked versions should be in the nature of working copies. This after-the-filing approach also could make it workable for the movant to hyperlink citations to her supporting affidavits and exhibits in her memorandum of law.

We strongly oppose that part of the proposal that would allow the court to require hyperlinked legal citations in memoranda of law. The sheer volume of legal citations in typical Commercial Division memoranda of law makes this too much burden to place on the practitioner. Instead, we urge the court to invest in NYSCEF functionality that is comparable to the feature of the federal NextGen CM/ECF by which the system converts legal citations to live hyperlinks after the memoranda are filed; we understand that functionality was originated by courthouse technologists at the U.S. Court of Appeals for the Fifth Circuit. We believe it would be far more cost effective to make that investment in

NYSCEF than to burden every Commercial Division practitioner with having to hyperlink every case she cites. Indeed, such functionality would be so universally useful to judges, from the lowest courts of record to the Court of Appeals, it would seem a necessary priority for the court system as it contemplates the continued development of NYSCEF to which the courts have committed.

We fully agree that the court should encourage the use of hyperlinked briefs. But we believe the court system would realize greater progress in this area if its encouragement were not limited to yet another new Commercial Division rule, but rather went beyond that to providing sessions to show the bar how to perform these tasks and to get direct feedback from practitioners on the burdensomeness of the necessary procedures.

We are very grateful to you and OCA for reaching out to us for our input. We had not seen a proposal published for comment and were completely unaware of the existence of this proposal before you called me about it last week. We believe rulemaking always is better with input from all constituencies. Thank you!

On behalf of the Executive Board of the Managing Attorneys and Clerks Association,
Tim Beeken

WILLKIE FARR & GALLAGHER LLP

787 Seventh Avenue
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Tel: 212 728 8000
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July 15, 2020

VIA EMAIL & MAIL

Hon. Lawrence K. Marks
Chief Administrative Judge
Office of Court Administration
25 Beaver Street, 11th Floor
New York, New York 10004

Re: *Proposal To Require Hyperlinking To Westlaw Or LexisNexis*

Dear Judge Marks,

We represent The Bureau of National Affairs, Inc. (an affiliate of Bloomberg L.P.), which owns and distributes a comprehensive legal research platform, Bloomberg Law ("BLAW"), that competes directly with Westlaw and LexisNexis. We write in response to the Commercial Division Advisory Council's (the "Council") proposal to amend Rule 6 (the "Proposed Amendment") to require all filings in the Commercial Division to hyperlink solely to Westlaw and Lexis/Nexis, thereby excluding BLAW. We respectfully submit that the Judiciary in the State of New York should not be putting its thumb so heavily on the scales of competition between legal research providers, effectively setting a standard that cuts the most recent market entrant (and all other potential entrants) out of the market, let alone without due process. Not only is this bad policy, it also is unconstitutional and violates the Donnelly Act.

The Proposed Amendment currently reads as follows:

> 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.

The text highlighted above presents the crux of the problem. If adopted, the Proposed Amendment would require all lawyers practicing before the Commercial Division—a leading court when it comes to litigation technology innovation—to use only Westlaw or Lexis/Nexis to the exclusion of all other legal research platforms. This would effectively create a state-sanctioned duopoly for the two market leaders in legal research and make it impossible for BLAW (or anyone else) to compete. This is especially problematic because BLAW's core customers—large law firms—regularly practice before the Commercial Division.

The offending language—which mandates the use of two particular legal research platforms to the exclusion of all others—is not necessary and should be removed. Lawyers do not need to be required to use Westlaw or Lexis/Nexis in their submissions. BLAW has invested a tremendous amount of time and money to make sure that it is an effective substitute and, in many cases, is more cost effective for practitioners and has greater functionality than either Westlaw or Lexis/Nexis.

BLAW understands that many judges and clerks in the Commercial Division already utilize Westlaw or Lexis/Nexis, and are familiar with those platforms. BLAW further understands that this familiarity may be perceived by the Commercial Division as a natural impediment to allowing litigants to hyperlink using BLAW (or other platforms). But this is not a reason to grant Westlaw and Lexis/Nexis a duopoly and thereby displace all other competitors without any hearing, fact-finding or any other appropriate process. Moreover, to alleviate any concerns about the use of BLAW, BLAW is willing to provide access to hyperlinked materials via its services, at no charge, to all judges and clerks in the Commercial Division who seek to permit hyperlinking. This should remove any impediment to implementing a hyperlinking rule that does not exclude BLAW by rendering Westlaw and Lexis/Nexis mandatory.

The Proposed Amendment is Unnecessary and Bad Policy

There is no reason to grant Westlaw and Lexis/Nexis exclusivity in the Rules of the Commercial Division. Westlaw, Lexis, and BLAW are all nationally recognized legal research platforms. All are utilized in various state and federal courts around the country, as well as by a multitude of practitioners. BLAW has over 100,000 subscribers, including some of the country's most prominent law firms (among them, numerous practitioners before the Commercial Division).

Like Westlaw and Lexis/Nexis, BLAW provides robust legal research search capabilities covering federal and state cases, statutes, and regulations, as well as a vast library of unpublished opinions. Like Westlaw and Lexis/Nexis, BLAW offers in-platform functionalities that permit users to determine whether legal authorities are still good law, or where they have been questioned or appealed. Additionally, BLAW has developed an expansive database of state court dockets, a feature not offered in similar quantity or quality by either Westlaw or Lexis/Nexis. From a functionality perspective, there is little to distinguish BLAW from its primary competitors, Westlaw and Lexis/Nexis, and in fact there are certain features that BLAW provides that its competitors do not.

No basis therefore exists to require litigants before the Commercial Division, many of whom are BLAW subscribers, to forgo the legal research platform of their choice in order to hyperlink to legal authorities on competitor platforms. Obviously, if a court with the prominence of the Commercial Division requires litigants to hyperlink using only Westlaw and Lexis/Nexis, it creates tremendous pressure for lawyers to avoid or dispense with BLAW subscriptions in favor of the services provided by the other two. Other courts, and certainly those within New York state, are likely to follow the Commercial Division's lead. Thus, the Proposed Amendment would function as a state endorsement of a duopoly held by Westlaw and Lexis/Nexis.

Granting such a duopoly to Westlaw and Lexis/Nexis, when other competitive alternatives exist, is bad policy for the New York Courts. New York public policy strongly favors free competition between economic actors and actively discourages restraints of trade that would diminish such competition. This public policy is enshrined in the Donnelly Act, Section 340 of the General Business Law, which has been the law of New York State since the late 19th century. The Donnelly Act states that "[e]very contract, agreement, arrangement or combination whereby [a] monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained or whereby for the purpose of establishing or maintaining any such monopoly or unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state any business, trade or commerce or the furnishing of any service is or may be restrained, ***is hereby declared to be against public policy, illegal and void***." N.Y. Gen. Bus. Law § 340 (McKinney) (emphasis added).

This public policy in favor of free competition has been stated in no uncertain terms by the Court of Appeals. In *Aimcee Wholesale Corp. v. Tomar Prod., Inc.*, the Court of Appeals stated that "New York's antitrust law represents a public policy of the first magnitude. By its very terms . . . section 340 of the General Business Law declares every contract, agreement or conspiracy whereby a monopoly is or may be established or which in any way enervates free competition to be 'against public policy, illegal and void.'" 21 N.Y.2d 621, 625–26, 237 N.E.2d 223, 224–25 (1968). The Court of Appeals made clear in *Aimcee Wholesale* "[t]he importance of our State's antitrust policy." *Id.* New York's strong public policy in favor of free competition should not be ignored by one of its own courts in the interest of expedience or convenience, especially since, as noted above, there is no compelling reason to favor one (or two) legal research platforms over their competitors. It would send an unfortunate and regrettable message to the public for one of the leading divisions of the New York State court system to adopt practices contrary to the state's long-standing public policy.

The Proposed Amendment is Unconstitutional

The Proposed Amendment is not only bad policy, but it is also unconstitutional. Article III, § 17 of the New York constitution states that "[t]he legislature shall not pass a private or local bill in any of the following cases: . . . Granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever." N.Y. Const. art. III, § 17.

In *The Matter of Application of Union Ferry Co., of Brooklyn*, the New York Court of Appeals held that the constitutional prohibition in Article III, § 17 (numbered differently at the time) is aimed at preventing the grant to corporations or individuals "not merely privileges and franchises not possessed by others, but the right to exclude others from the exercise or enjoyment of like privileges or franchises." 98 N.Y. 139, 150–51 (1885) ("the grant of a particular power to a private corporation is not 'exclusive' simply because the same power is not possessed by other corporations, *so long as there is nothing to prevent the granting of such power to any other corporation*.") (emphasis added).

In *Consumers Union of U.S., Inc. v. State*, the Court of Appeals held that "two elements are required in order for a bill to offend article III, 17. First, the bill must be directed at a single entity . . . . Second, the bill must confer a privilege upon the single entity to the exclusion of all others. Both elements singleness and exclusivity must be present. Otherwise, all legislation directed at a single entity would be invalid." 5 N.Y.3d 327, 361, 806 N.Y.S.2d 99, 118, 840 N.E.2d 68, 87 (2005). In *Consumers Union*, the Court of Appeals considered Empire Blue Cross's conversion from a not-for-profit to a for-profit insurer. In 2002, the Legislature enacted the Health Care Workforce Recruitment and Retention Act (the "HCWRRA"), Chapter 1 of which stated that its purpose was "allow[ing] [Empire] to convert to a for-profit corporation, giving Empire the ability to raise the capital needed to compete effectively in the current health care market" *Id.* at 344. The law put in place several stipulations regarding Empire's conversion process, including that an appropriate plan be submitted to state regulatory authorities, and that public hearings on the conversion be held. Plaintiffs, who included Empire subscribers whose premiums and benefits would be adversely affected by the conversion, sued to prevent the conversion under a variety of theories, including that the HCWRRA violated Article III, § 17.

Although the Court of Appeals rejected that argument, its reasoning is instructive in the context of the Proposed Amendment. Unlike the Proposed Amendment, which explicitly creates a privilege and franchise exclusively for the benefit of Westlaw and Lexis/Nexis, and cuts other legal research platforms out of the market, the HCWRRA did not confer an exclusive privilege on Empire under the meaning of Article III because it did not "*prevent others from seeking to convert under similar parameters*, or promise Empire that other not-for-profits will not be granted similar rights." *Id.* at 361 (emphasis added). The Court of Appeals held that, because the HCWRRA granted Empire only the right to operate as a for-profit insurer—but did not foreclose others from enjoying that right—it did not violate Article III, § 17.

Here, by contrast, the Proposed Amendment clearly does what the Court of Appeals in *Consumers Union* explained was not permitted. It forecloses other legal research platforms from being used by litigants in the Commercial Division. Additionally, because administrative grants of exclusive franchises and privileges are given less deference than legislative grants—due to the fact that there is no presumption of constitutionality for administrative action—it is unlikely that the Proposed Amendment would survive scrutiny under Article III, § 17. *See AFA Protective Sys., Inc. v. Crouchley*, 63 Misc. 2d 695, 698, 313 N.Y.S.2d 504, 507 (Sup. Ct. Nassau Cty. 1970). This is especially true where no due process was afforded to BLAW and it is being excluded without justification and without any hearings, fact finding, or other empirical basis.

The Proposed Amendment is Illegal

The Proposed Amendment violates the Donnelly Act. In *American Consumer Indus., Inc. v. City of New York*, the First Department considered—and invalidated—a state-sanctioned monopoly similar to that which would result from the Proposed Amendment. In that case, the plaintiff, a New Jersey corporation qualified to do business in New York, was engaged in the business of manufacturing ice for sale and delivery to customers in New York City. In 1964, it purchased a route that serviced the Washington Market. In 1967, the Washington Market closed, and most of its tenants—including many of the plaintiff's regular customers—moved their respective businesses to the Hunts Point Market. Plaintiff continued to serve those customers at the Hunts Point Market for a short time after the move until its trucks were denied admittance to the market area on the basis that, in 1965, the defendant Commissioner of Markets had entered into an agreement with the Rubel Corporation giving it an exclusive franchise to sell and deliver ice to the occupants of the Hunts Point Market. The plaintiff sued under a variety of legal theories, including that granting Rubel Corporation an exclusive franchise to sell ice to the tenants of the Hunts Point Market violated the Donnelly Act.

The First Department struck down the exclusive franchise under § 340 of the Donnelly Act, holding that it did not meet the standard for a valid exercise of the police power, under which such a franchise would have to be "reasonable, necessary and appropriate for the protection of the public health and comfort . . . [and] must not violate fundamental law, interfere with the enjoyment of fundamental rights beyond the necessities of the case, and must bear a real, substantial relation to the object to be achieved." *Am. Consumer Indus., Inc. v. City of New York*, 28 A.D.2d 38, 41, 281 N.Y.S.2d 467, 473 (1967). The First Department held (1) that there was nothing in the record to support the City's contention that the exclusive franchise was a "reasonable exercise of the police power" and (2) that "[t]he franchise for an ice monopoly cannot be designed to promote public safety or public health for no hazard has been shown to exist, or the reasonable likelihood that such a hazard will develop." *Id*. at 42-43. The First Department further held that "[p]ublic convenience and the general prosperity cannot be said to be affected by reason of the nature of the franchise and the return therefrom. Nor has a public necessity for this exclusive privilege been shown, and no aspect of the public morals is involved. In fact none of the criteria associated with the exercise of the police power are present except, perhaps, in the most nebulous fashion. The record and the exhibits label the franchise as designed solely for revenue purposes. Such an objective does not warrant and will not support the exclusive privilege granted." *Id.*

Like the ice franchise in *American Consumer*, the Proposed Amendment, which would grant Westlaw and Lexis/Nexis an exclusive franchise in the Commercial Division, would not promote public safety or public health, would generate little conceivable public convenience or general prosperity, and is not based on any public necessity or other evidence supported by any record. That is, none of the criteria associated with the exercise of the police power supports the creation of an exclusive franchise for the benefit of Westlaw and Lexis/Nexis. To the extent that the exclusive franchise arises from the convenience to judges and clerks in the Commercial Division who already have access to Westlaw or Lexis/Nexis, this is not sufficient under § 340 to warrant an exclusive franchise, and as noted above, is resolved by BLAW's offer to provide access to hyperlinked materials through its services to the Commercial Division free of charge. In addition, as the First Department noted in *American Consumer*, the fact that the plaintiff *was* able to deliver ice to customers in the Hunts Points Market during the

several weeks before its trucks were turned away suggested that there was no need for an exercise of the police power to grant an exclusive franchise to Rubel Corporation. That same is true here, where BLAW is equally capable of providing the same services as do Westlaw and Lexis/Nexis.

Finally, the Proposed Amendment seeks to displace competition and name winners without appropriate process supporting rulemaking that effectively sets a standard for the New York courts. But the Council did not engage in the type of reasoned decision making, supported by a clear record following a fair process involving hearings and fact-finding through which BLAW (and others) could be heard. Indeed, the record is devoid of any evidence supporting the exclusion of BLAW, let alone any indication that it was a deliberate choice with a legitimate justification following a fair process. The Supreme Court (and other courts) has rejected similar government acts as illegal. *See, e.g.*, *F.T.C. v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225, 133 S. Ct. 1003, 1010, 185 L. Ed. 2d 43 (2013) (rejecting state action immunity challenge to antitrust violation and holding, "immunity will only attach to the activities of local governmental entities if they are undertaken pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition."); *Houston KP, LLC v. City of Houston*, No. CV H-14-2928, 2015 WL 12732864, at *5 (S.D. Tex. July 14, 2015) ("Because of the importance of free enterprise embodied in federal antitrust laws, state-action immunity is disfavored.").

*****

For the reasons set forth above, we believe the Proposed Amendment—as currently worded—should be rejected. BLAW, a widely-used, nationally-recognized legal research platform, which provides core features nearly identical to those offered by Westlaw and Lexis/Nexis, should not be barred from the Commercial Division by dint of a hyperlinking requirement. While we have no objection to hyperlinking in principle, the Proposed Amendment needs to be revised to remove references to specific competitors (*i.e.*, Westlaw and Lexis/Nexis), which would thereby exclude all other competitors (including BLAW).

We are available at your convenience to discuss this letter.

Respectfully,

Jeffrey B. Korn

Copy to:

Eileen Millett

MEMORANDUM

TO: Office of Court Administration

FROM: Commercial Division Advisory Council

DATE: June 9, 2020

RE: **Response to Public Comments Concerning Proposed Rule Regarding Hyperlinking**

SUMMARY

On December 23, 2019, the Office of Court Administration (the "OCA") released for public comment a recommendation of the Commercial Division Advisory Council (the "Council") to adopt a proposed amendment to Rule 6 of the Commercial Division Rules addressing the use of hyperlinks in electronically filed court papers. Shortly thereafter, several law firm blogs commented favorably on the proposed amendment as "a long-awaited and welcome rule change"[1] to make use of "this relatively simple technology,"[2] consistent with "a trend in courts around the country."[3]

Since then, the constraints imposed by the COVID-19 pandemic on the operation of the New York State courts, including the Commercial Division, have underscored the timeliness, practicality, and utility of the proposed amendment. Many judges and their staff, particularly in downstate counties, have been working remotely for many weeks,

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1 "Hyperlinks Requirement in the Commercial Division … The Latest Proposal from the Advisory Council," Farrell Fritz New York Commercial Division Practice Blog (Jan. 9, 2020).

2 "Proposed New Commercial Division Rule on Hyperlinking in Legal Memoranda," Fineman Krekstein & Harris Business Courts Blog (Jan. 15, 2020).

3 "Commercial Division Advisory Council Proposes Requiring Briefs to Include Hyperlinks to NYSCEF Docket Entries," Patterson Belknap NY Commercial Division Blog (Jan. 14, 2020).

using the electronic versions of e-filed papers rather than hard copies. Having hyperlinks in those electronic filings to other cited filings in the record, and to cited authorities, would be a tremendous time-saver for chambers that no longer have access to the hard-copy court file and now have no choice but to work exclusively with electronic versions of filings. Remote working has likewise accustomed many practitioners to greater dependence on electronic documents, in which hyperlinks would offer parallel time-saving and convenience. In the current environment of remote work—which may persist for weeks or months, and is likely to make lasting changes in court operations and law practice—the case for hyperlinking has never been more timely or compelling.

The deadline for public comment, however, was February 24, 2020, before the impact of COVID-19 was felt on court operations or law practice in the state. The OCA received five comments, one from the New York City Bar Association (the "City Bar"), one from the Executive Board of the Managing Attorneys and Clerks Association (the "Managing Attorneys"), one from the New York State Association of County Clerks (the "County Clerks"), one on behalf of the online legal research service Bloomberg Law ("Bloomberg"), and one from an associate at Kirkland & Ellis LLP, Joseph Sanderson ("Sanderson").

Notably, none of the comments disputes that the proposed rule would advance its principal objective: enabling court personnel to access cited materials more quickly, thereby facilitating the efficient administration of justice. Nonetheless, the City Bar opposes the rule on the ground that it would impose burdens on small firms and solo practitioners; the Managing Attorneys express concern that the rule would create additional time pressure to complete filings; the County Clerks express concern about

malware; Bloomberg objects to the proposed rule's reference to specific legal databases (Lexis/Nexis and Westlaw); and Sanderson proposes certain modifications to the proposed rule, including that parties have an additional business day after the initial deadline to file a hyperlinked version of a brief.

The Council crafted and recommended the proposed rule with all of these concerns in mind and believes that the rule as proposed appropriately balances these concerns against the significant efficiencies—conceded by the commentators—that the rule would achieve for the overburdened chambers of the Commercial Division Justices and for many practitioners and their clients. To allay further the concerns expressed about burden on small law offices, however, the OCA might wish to consider a minor revision to the proposed rule outlined below.

The Council notes that not one of the comments received opposes hyperlinking in legal filings in principle, and they almost uniformly acknowledge the significant efficiencies to be gained from hyperlinking for the court. Of the approximately 180 bar associations in the State of New York, only the City Bar has expressed opposition to the proposed rule, and that opposition is on behalf of a constituency—small law firms and solo practitioners—whose legitimate concerns there is every reason to believe the Commercial Division Justices will accommodate. Hyperlinking is routinely required in legal filings in many courts across the country, without any evidence of undue burden on practitioners and enthusiastic support from the judges. For the Commercial Division to fail to embrace this widely available, easy-to-use technological tool when other courts are doing so successfully would be inconsistent with Chief Judge DiFiore's Excellence Initiative and the "collective goal of administering a high-functioning court system that

provides all litigants with just and timely dispositions and first-rate service." (The State of Our Judiciary 2019 Excellence Initiative: Year Three, February 2019, page i.)

DISCUSSION AND ANALYSIS

The City Bar's comments acknowledge the significant benefits of hyperlinking:

> 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.

(City Bar comments at 1.) Indeed, the City Bar emphasizes that its objection "is not to hyperlinking; we strongly support it **where appropriate.**" (*Id.* at 5 (emphasis in original).) Rather, its "objection is to **mandatory** hyperlinking done without regard to the burdens on the parties and its benefits to the court" (*id.* (emphasis in original)), "rather than taking an evolutionary and more measured approach" (*id.* at 2). The City Bar recommends that individual justices, after consultation with the parties and consideration of the benefits and burdens, direct them to hyperlink cited authorities and NYSCEF filings in particular cases where appropriate. (*Id.* at 5.)

The Council believes that the proposed rule as written is indeed "evolutionary" and "measured," and fairly takes into account the balancing of benefits and burdens advocated by the City Bar, including the cost and administrative constraints of small law firms and solo practitioners. The proposed rule balances these issues in several ways.

First, the proposed rule requires hyperlinking only in e-filed cases. If a firm has the technological and administrative ability to e-file, it almost certainly has the technological and administrative ability to hyperlink. Adding a hyperlink to a brief is a skill easily learned and takes seconds using technology that e-filers already use to prepare briefs for filing (Word and/or Adobe), and, as the City Bar acknowledges, Lexis/Nexis and Westlaw offer modules that can hyperlink citations automatically. (*Id.* at 4.)

Second, the proposed rule mandates hyperlinking only to cited parts of the record that already are docketed on NYSCEF. For most filings, that will be just a handful of citations. This requirement is not meaningfully more burdensome than the internal bookmarking that Rule 6 already requires.

Third, the rule confers discretion on individual Justices to require hyperlinking in their individual part rules or in individual cases. The Council has the utmost confidence that the Justices of the Commercial Division will exercise that discretion wisely and fairly after weighing the benefits and burdens of hyperlinking in relation to their particular dockets. The City Bar offers no facts or arguments to suggest that, in exercising this discretion, the experienced Justices of the Commercial Division will disregard the constraints of small law firms and solo practitioners.

Finally, the proposed rule permits a party to seek exemption from otherwise required hyperlinking by certifying in good faith that it cannot comply without undue burden. The City Bar protests that "the burden is high" to obtain exemption (*id.*), but on the face of the proposed rule, the burden is not high: the rule requires merely that the party certify 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." Such a "showing of good cause" might include precisely the kinds of administrative and cost constraints about which the City Bar's comments express concern. The Council believes that there is no basis to think the Commercial Division Justices will disregard genuine showings of undue burden in considering requested exemptions from hyperlinking, or that they will be insensitive to the cost constraints of small law firms.

While the Council is confident that the proposed rule as currently written will not unduly burden small law firms or solo practitioners in the manner the City Bar fears, the OCA might consider a minor revision to the proposed rule to simplify it and alleviate the *perception* of burden that appears to have motivated the comments. By revising the second paragraph of the proposed rule to strike the words "by individual part rule or in an individual case," the rule would underscore that the Court is to exercise its discretion as the individual Justice thinks best, without prescribing how that discretion is to be exercised. The revised paragraph would read as follows:

> **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.**

This modest change would not meaningfully impede achievement of the proposed rule's objectives while perhaps mitigating the perception—however unwarranted—that the rule would encourage judges to disregard the legitimate interests and concerns of parties represented by smaller law firms, through a part rule or otherwise.

The Managing Attorneys' comments also acknowledge the "benefits for the court" from the proposed rule and express "full agree[ment] that the court should encourage the use of hyperlinked briefs." (Managing Attorneys' comments at 1, 2.) The Managing Attorneys echo the City Bar's concerns about "costs that may less easily be borne by small firms and solo practitioners than by large firms" (*id.* at 1)—notwithstanding that small firms and solo practitioners generally do not have a managing attorney or managing attorney's office. In formulating this proposal, the Council

recognized that hyperlinking provides efficiencies and cost savings for the clients represented by members of the Council; in contrast, the Managing Attorneys, who provide practice support to litigators (including assistance with court filings) in their respective law firms, have no responsibility for or direct involvement with clients.

The Managing Attorneys' principal objection appears to be that adding hyperlinks would "cut[] into time counsel presently spend on the substance of their papers" (*id.* at 2). The Managing Attorneys "strongly oppose that part of the proposal that would allow the court to require hyperlinked legal citations in memoranda of law" as too burdensome and suggest that the court should instead "invest in NYSCEF functionality that is comparable to the feature of the federal NextGen CM/ECF by which the system converts legal citations to live hyperlinks after the memoranda are filed." (*Id.*) To avoid this purported burden, the Managing Attorneys suggest that the filing of hyperlinked copies "should be subsequent to the CPLR 2214(b) or stipulated filing deadlines." (*Id.*) This suggestion is also made in Sanderson's comments; he recommends that "parties should have at least one business day after the initial deadline to file a hyperlinked version of the brief. This will allow parties to have the URLs for the exhibits and other supporting documents." (Sanderson comments at 1.)

The Council believes that the Managing Attorneys' protestations about burden are exaggerated. The Council (including those Council members who practice in law firms with managing attorneys' offices) has carefully considered the time it would take to add hyperlinks even to the lengthiest legal memoranda and concluded that the benefits to the Justices of the Commercial Division and to many clients and practitioners outweigh the burden of that extra time, which will seldom be significant. To be sure, inserting and

testing hyperlinks in a brief adds an additional step before e-filing, and in large law firms that responsibility may rest (at least in part) with managing attorneys, but accommodating that extra step simply requires planning, just as do cite-checking, proofreading, preparing a table of contents and table of authorities, bookmarking, converting a document to PDF/A format for e-filing, and similar routine pre-filing tasks. Improvements in the administration of justice—including the benefits of hyperlinking that the Managing Attorneys concede—should not be held hostage to the Managing Attorneys' apparent reluctance to assume an additional responsibility (one they already manage capably for many federal court filings). Nor should such improvements await advancement in NYSCEF functionality, for which there is currently no funding. And if, for a particular motion in a particular case, there is genuine concern that a hyperlinked filing could not practicably be made within the required period, a party could seek leave (or the parties could stipulate) to file hyperlinked copies one business day after the otherwise applicable deadline, as Sanderson suggests.

The County Clerks' comments ask whether "there is a risk of virus/malware from a hyperlink." To avoid any such risk, the proposed rule requires or permits hyperlinks only to NYSCEF-docketed materials and legal materials in Lexis/Nexis or Westlaw databases or state or federal government websites.

Bloomberg, a competitor to Lexis/Nexis and Westlaw, commends the OCA and the Council "for their efforts to promote efficiency in New York's court system" (Bloomberg comments at 1), but opposes as "against public policy" and stifling competition the proposed rule's express reference to particular private vendors (*id.* at 3-5). The proposed rule provides for hyperlinking to the Lexis/Nexis and Westlaw

databases not out of any desire to stifle competition, but to reflect the reality that the Justices of the Commercial Division have access to those particular legal databases, and not to others. Should Bloomberg's (or any other vendor's) legal database become widely available to Justices in the Commercial Division, the rule can be amended at that time to reflect those changed circumstances. In the meantime, permitting hyperlinking to a database to which the court has no access would fail to serve the principal objective of the proposed rule: increased efficiency for the court.

CONCLUSION

For the reasons set forth above, the Council respectfully requests that the proposed amendment to Rule 6, either as originally proposed or with the small revision discussed above to accommodate the concerns raised by the City Bar, be adopted.