New York State Bar Association
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Comments on Proposed Amendment to Commercial Division Rule 17, Relating to Word Limits in Papers Filed with the Court

COMMERCIAL & FEDERAL LITIGATION SECTION

Com-Fed #4 April 30, 2018

The Commercial and Federal Litigation Section of the New York State Bar Association ("Section") is pleased to submit these comments in response to the Memorandum of John W. McConnell, counsel to the Chief Administrative Judge Lawrence K. Marks, dated March 14, 2018, ("Memorandum"), proposing an amendment to the Rules of the Commercial Division (the "Rules") to substitute word limits in place of the page limits set forth in the current rules.

The proposal of the Commercial Division Advisory Council ("Advisory Committee") seeks to amend the Rules to so as to eliminate incentives to squeeze additional content into allotted page limits under the current rule. The formal proposal by the CDAC ("CDAC Memorandum") is attached as Exhibit A.

I. EXECUTIVE SUMMARY

The Advisory Committee's proposal seeks to amend Commercial Division Rule 17, which "specifies that briefs and memoranda may be no longer than 25 pages, that reply memoranda may be no longer than 15 pages, and that affidavits and affirmations may be no longer than 25 pages…" to read as follows:

> **Length of Papers**. Unless otherwise permitted by the court: (i) briefs or memoranda of law shall be limited to 7,000 words each; (ii) reply memoranda shall be no more than 4,200 words and shall not contain any arguments that do not respond or relate to those made in the memoranda in chief; (iii) affidavits and affirmations shall be limited to 7,000 words each. The word count shall exclude the caption, table of contents, table of authorities, and signature block. The signature block of every brief, memorandum, affirmation, and affidavit shall include the phrase "Words" followed by the number of words in the document. That phrase constitutes a certification by the signatory that the document complies with the word count limit. The signatory may rely on the word count of the word-processing system used to prepare the document.

II. SUMMARY OF PROPOSAL

As stated in the Memorandum, the Advisory Committee believes that "[a] length limit encourages attorneys to focus on strong, concise arguments, and ensures that judges and opposing counsel are not overwhelmed with meandering, repetitious briefs." *Memorandum at* 1. To that end, according to the Advisory Committee, "[a] word limit serves this purpose better than a page limit because a word count is a much more precise way of measuring the amount of content in a brief." *Id.* The Advisory Committee goes on to state that "the advent and wide adoption of word-processing software with one-click word-count functionality means that the burden on practitioners to comply with the new standard will not be high." *Id.*

The Advisory Committee's position is that, under Commercial Division Rule 17, "attorneys have incentives to unfairly squeeze additional content into the allotted pages" (*Id.*) and "have developed techniques to 'cheat' the limit, which include moving text into footnotes and block quotes, widening page margins, decreasing font size, and changing line spacing." *Id.* It is the Advisory Committee's belief that "[t]hese techniques undercut the page limit rule's purpose and decrease readability of papers" (*Id.*) and that "[c]hanging to a word limit will eliminate these incentives since these strategies will no longer be effective." *Id.*

The Memorandum goes on to state that "the amended rule ensures that both sides have equal space for argument, regardless of the capabilities of their software" (*Id.* at 2) and that "[m]oving to a word limit will also harmonize the Commercial Division with the New York Court of Appeals and the Appellate Departments for the First and Second Department, which set word limits for briefs." *Id.* at 2.

III. COMMENTS

The Section views favorably the positions taken by the Advisory Committee and fully endorses its proposal to incorporate the aforementioned language into Commercial Division Rule 17 which would specify word limits in lieu of page limits for papers filed in Commercial Division cases. The Section therefore recommends that the amendment to Rule 17 be adopted.

NEW YORK STATE
Unified Court System
OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

JOHN W. McCONNELL
COUNSEL

MEMORANDUM

March 14, 2018

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on Proposed Amendment of Rule 17 of the Rules of the Commercial Division (22 NYCRR §202.71[g], Rule 17), Relating to Word Limits in Papers Filed With the Court

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The Administrative Board of the Courts is seeking public comment on a proposed amendment of Rule 17 of of the Rules of the Commercial Division (22 NYCRR §202.71[g], Rule 17), proffered by the Commercial Division Advisory Council, relating to length limitations in papers filed with the Court (Exh. A). In brief, the proposal substitutes word limits in place of the page limits set forth in the current rule: 7000 words (currently 25 pages) in briefs, memoranda of law, affidavits and affirmations; and 4200 words (currently 15 pages) in reply memoranda. The Council believes that this approach will eliminate incentives to squeeze additional content into allotted page limits under the current rule, and will increase the readability of court papers.

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Persons wishing to comment on the proposed rule should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than May 15, 2018.**

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

EXHIBIT A

MEMORANDUM

TO: Commercial Division Advisory Council

FROM: Subcommittee on Procedural Rules to Promote Efficient Case Resolution ("Subcommittee")

DATE: January __, 2018

RE: Proposal to amend Commercial Division Rule 17, concerning length of papers, to employ word limits instead of page limits

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Introduction

Commercial Division Rule 17 specifies that briefs and memoranda may be no longer than 25 pages, that reply memoranda may be no longer than 15 pages, and that affidavits and affirmations may be no longer than 25 pages. *See* Comm. Div. Rule 17. The Subcommittee proposes amending Rule 17 to specify a word limit, rather than a page limit.

A length limit encourages attorneys to focus on strong, concise arguments, and ensures that judges and opposing counsel are not overwhelmed with meandering, repetitious briefs. A word limit serves this purpose better than a page limit because a word count is a much more precise way of measuring the amount of content in a brief. Moreover, the advent and wide adoption of word-processing software with one-click word-count functionality means that the burden on practitioners to comply with the new standard will not be high.

Under the current page-limit standard, attorneys have incentives to unfairly squeeze additional content into the allotted pages. Attorneys have developed techniques to "cheat" the limit, which include moving text into footnotes and block quotes, widening page margins, decreasing font size, and changing line spacing. These techniques undercut the page limit rule's purpose and decrease readability of papers. Changing to a word limit will eliminate these incentives since these strategies will no longer be effective.

Word limits are also more equitable. By directly regulating the content of the brief, rather than the number of "pages" within which that content appears, the amended rule ensures that both sides have equal space for argument, regardless of the capabilities of their software. *See* 1998 Adv. Comm. Notes for FRAP 32(a)(7) ("The aim of these provisions is to create a level playing field. The rule gives every party an equal opportunity to make arguments, without permitting those with the best in-house typesetting an opportunity to expand their submissions.").

Moving to a word limit will also harmonize the Commercial Division with the Court of Appeals and the Appellate Departments for the First and Second Department, which set word limits for briefs. *See* 22 NYCRR 500.13 (Court of Appeals); 22 NYCRR 600.10(d)(1)(i) (1st Department); 22 NYCRR 670.10.3(a)(3) (2nd Department).[1] The United States Court of Appeals for the Second Circuit also employs word limits, *see* Local Rule of Appellate Procedure 32.1 (a)(4), as does the Delaware Court of Chancery. *See* Chancery Court Rule 171(f).

The Proposed Amendment

The Subcommittee proposes amending Rule 17 as follows (deletions indicated by strikethrough; additions indicated by underline):

> **Length of Papers**. Unless otherwise permitted by the court: (i) briefs or memoranda of law shall be limited to ~~25 pages~~ 7,000 words each; (ii) reply memoranda shall be no more than ~~15 pages~~ 4,200 words and shall not contain any arguments that do not respond or relate to those made in the memoranda in chief; (iii) affidavits and affirmations shall be limited to ~~25 pages~~ 7,000 words each. The word count shall exclude the caption, table of contents, table of authorities, and signature block. The signature block of every brief, memorandum, affirmation, and affidavit shall include the phrase "Words" followed by the number of words in the document. That phrase constitutes a certification by the signatory that the document complies with the word count

[1] The third and fourth departments both still employ page limits. *See* 22 NYCRR 800.8(a) (3rd Department); 22 NYCRR 1000.4(f)(3) (4th Department).

limit. The signatory may rely on the word count of the word-processing system used to prepare the document.

Discussion

Word Counts: The amendment attempts to ensure that practitioners will still be able to present roughly the same amount of content as under the current Rule. The selected word counts – 7,000 and 4,200 – assume that practitioners can fit roughly 280 words per page. 280 words per page times 25 pages is 7,000 words; 280 words per page times 15 pages is 4,200 words. In employing this estimate, the Subcommittee has not performed its own empirical analysis of Commercial Division briefs, but instead relies on the ratio employed by the Federal Rules Advisory Committee in recommending a 14,000 word limit in lieu of a 50 page limit for federal appellate briefs in 1998. The same ratio also appears to have also been employed by the Court of Appeals and the Appellate Divisions for the First and Second Judicial Departments in setting their respective word limits, as those Courts all also set a maximum limit of 14,000 words for principal briefs. *See* 22 NYCRR 500.13(c); 22 NYCRR 600.10(d)(1)(i); 22 NYCRR 670.10.3(a)(3).

In 2016, the Federal Rules Advisory Committee revised its estimated ratio downward to 260 words per page, and endorsed an amendment to FRAP 32 which reduced the word limit downward from 14,000 to 13,000 to reflect this revised ratio. *See* Rule 32.1(a)(4) of the Federal Rules of Appellate Procedure. In response, the Second Circuit enacted Local Rule 32.1, which maintain the 1998 word counts. The Subcommittee recommends employing the 1998 estimate of 280 words per page because this results in a neat conversion of 25 pages into 7,000 words. At the 2016 ratio of 260 words per page, the indicated word count would be 6,500 for opening and answering briefs, and 3,900 for reply briefs, which the Subcommittee believes would be

materially more confusing for practitioners. Furthermore, the Court of Appeals and the First and Second Departments have not revised their own maximum word counts down from 14,000 to 13,000.

Some word-count jurisdictions continue to provide separately for maximum page lengths for typewritten or handwritten briefs, for which it is not so easy to obtain a word count. *See, e.g.*, 22 NYCRR 670.10.3(b) and (d) (Rules of the Appellate Division, Second Department). The Subcommittee believes that typewritten or handwritten briefs are vanishingly rare in the modern Commercial Division and therefore that to specifically provide for such briefs would add unnecessary complexity to the Rule.

Text Excluded from the Word Count: The Subcommittee believes it is prudent to specify that certain mandated sections of briefs and memoranda need not be included in the word count. Typically, the page containing the caption, pages containing tables of contents and authorities, and pages containing nothing but signature blocks are excluded from page-count calculations, and the Subcommittee therefore recommends excluding these sections from the word count as well. Explicitly excluding such sections from the word count is consistent with the approach taken in the jurisdictions whose rules the subcommittee reviewed. For example, the Delaware Chancery Court rule provides that "The front cover, table of contents, table of citations, signature block, and any footer included pursuant to Rule 5.1(c)[2] do not count toward the limitation. All other text counts toward the limitation." Chancery Court Rule 171(f)(1)(A) and (B).

[2] Rule 5.1(c) governs filing of confidential documents under seal, and provides that such documents should have a footer on every page stating that "THIS DOCUMENT IS A CONFIDENTIAL FILING. ACCESS IS PROHIBITED EXCEPT AS AUTHORIZED BY COURT ORDER."

Certification of Compliance: Enforcement of a word-count rule is not as straightforward as enforcement of page-count rules. If a judge suspects a brief has too many pages, the judge need only count to twenty-six. This kind of spot-checking is not feasible with a word-count limit. The enforcement solution adopted by most jurisdictions (including the Court of Appeals, the Appellate Divisions for the First and Second Departments, and the United States Court of Appeals for the Second Circuit) is to require practitioners to include a separate "certificate of compliance" in which they must certify the number of words in the brief. *See, e.g.*, 22 NYCRR 500.10(c)(1) (Court of Appeals mandates that signatory of a brief "shall certify the total word count for all printed text"); 22 NYCRR 600.10(d)(1)(v) (First Department requires practitioners to include a "printing specifications statement" disclosing the "processing system, typeface, point size, and word count.").

The Subcommittee believes that a separate certificate is an overly complicated solution to this problem. The Delaware Chancery Court has adopted a more practical solution which instructs practitioners to include a word count in the signature block:

> Any document listed in paragraph (f)(1) of this rule must include in the signature block the phrase "Words", followed by the number of words in the document. Use of that phrase constitutes a certification by the signatory of the document, whether counsel or an unrepresented party, that the document complies with the typeface requirement and the type-volume limitation. In so certifying, the signatory may rely on the word count of the word-processing system used to prepare the document.

Chancery Court Rule 171(f)(2).

The Subcommittee believes this solution is the most efficient way to enable courts to ensure compliance with the rule, while not imposing an unnecessary administrative burden on practitioners.

Conclusion

The proposed amendment moves from page limits to word limits in order to more directly regulate the maximum amount of content in briefs, memoranda, affirmations, and affidavits. This amendment will increase fairness and readability of briefs, while not imposing undue burdens on practitioners.