

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.



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Re: Comments on Proposals Concerning Commercial Division Rules 9-a, 11-e, and 17

Dear Mr. McConnell:

The New York City Bar Association (the “City Bar”) has reviewed the proposals of the Commercial Division Advisory Council to amend the following Commercial Division Rules:

- Rule 9-a, encouraging use of CPLR provisions permitting immediate trial or pretrial evidentiary hearings on material issues of fact;
- Rule 11-e, regarding technology-assisted review in discovery;
- Rule 17, regarding word limits in briefs, affidavits, and affirmations.

The City Bar generally supports the objectives of these revisions, subject to two observations and some more specific comments and suggestions, on two of the proposals, which are detailed below. First, we believe that the proposed new Rule 9-a, and the additions to Rule 11-e, are better viewed as best practices or guidelines rather than rules. It would be our preference to have these and other best practices and guidelines set forth in an appendix to the Commercial Division Rules or other resource for judges and practitioners, rather than as formal Commercial Division Rules. Second, the City Bar believes that these proposed amendments, subject to the comments below, would benefit courts beyond the Commercial Division and encourages the Office of Court Administration to consider promulgating similar rules or best practices for the other State trial courts. We offer the following additional comments concerning the proposed amendments to Rules 11-e and 17.¹

¹ These comments reflect the input of the City Bar’s Council on Judicial Administration, Committee on State Courts of Superior Jurisdiction and Committee on Litigation.

Proposed Amendment to Rule 11-e

The City Bar supports the proposed amendment of Rule 11-e to address technology assisted review in discovery. The technological tools described in the Commercial Division Advisory Council’s supporting memorandum, including predictive coding, cannot and should not completely replace human judgment in the document review process (at least not yet), but they can make discovery more manageable and efficient in an increasing number of cases. The Advisory Council’s memorandum notes that it is important for parties to “confer and agree on an appropriate approach to document review,” and we believe that the rule should more explicitly encourage such cooperation. Accordingly, we suggest that the following sentence be added to the proposed rule: “The parties are encouraged to confer, at the outset of discovery and as needed throughout the discovery period, about technology-assisted review mechanisms they intend to use in document review and production.”

Proposed Amendment to Rule 17

The City Bar supports the proposed amendment of Commercial Division Rule 17 to the extent that it replaces the current Rule’s page limits with word limits. We also support the word count certification requirement for briefs. However, we believe that a requirement to certify a word count on the signature page of affirmations and affidavits would be unnecessary, unduly burdensome, and impractical.

The concerns expressed by the Commercial Division Advisory Council about attorneys’ formatting contortions, such as narrowing margins and squeezing arguments into footnotes, seem more pertinent to legal briefs than to affidavits or affirmations. Further, affiants may sometimes sign affirmations or affidavits without having themselves prepared the document on a word processing program. Counsel routinely draft and edit such documents in consultation with the affiant. Moreover, it is not uncommon in practice, after an affiant signs an affidavit or affirmation, for changes to be made to pages preceding the signature page with the affiant’s permission, without executing a new signature page. This is particularly the case when an affiant is geographically distant from counsel. Requiring a word count on affirmations and affidavits on the signature page therefore would needlessly complicate finalization of these documents. Given the relatively low risk of creative use of margins or footnotes to evade the word limit in such documents, we do not believe the benefit of the proposed certification requirement would outweigh the complications and inconvenience it is likely to cause.

For these reasons, the City Bar recommends revising the third sentence of the proposed revised rule to read: “The signature block of every brief, and memorandum shall include the phrase ‘Words’ followed by the number of words in the document.”

Very truly yours,

Hon. Carolyn E. Demarest (Ret.)
Chair
Council on Judicial
Administration

Michael P. Regan
Chair
Committee on State
Courts of Superior
Jurisdiction

Barbara Seniawski
Chair
Committee on Litigation

MEMORANDUM

TO: Office of Court Administration

FROM: Commercial Division Advisory Council

DATE: May 25, 2018

RE: **Response to Public Comments Concerning Proposed Rule Regarding the Length of Papers**

EXECUTIVE SUMMARY

On March 14, 2018, 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 rule (to be incorporated as an amendment to Rule 17 of the Commercial Division Rules), which addresses the length of briefs, memoranda, affirmations, and affidavits. In response, OCA received two comments, one from the Commercial and Federal Litigation Section of the New York State Bar Association (the “State Bar”) and one from the New York City Bar Association (the “City Bar”).

The State Bar expressed support for the proposed amendment to Rule 17, commenting that it “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 City Bar expressed support for the amendment as it applies to briefs and memoranda but objected to the request as applied to affirmations and affidavits, writing that it “supports the proposed amendment of Commercial Division Rule 17 to the extent that it replaces the current Rule’s page limits with word limits. We also support the word count certification requirement for briefs. However, we believe that a requirement to certify a word count on the signature page

of affirmation and affidavits would be unnecessary, unduly burdensome, and impractical.” The Council understands the City Bar’s concerns about applying the proposed amendment to affirmations and affidavits but believes it can address that concern while still achieving the purpose of the proposed amendment by making a further revision to the proposed amendment as described below.

DISCUSSION AND ANALYSIS

The proposed amendment to Rule 17 includes, in addition to a word count limitation, a requirement that every brief, memorandum, affirmation, and affidavit disclose, in the signature block, the number of words in the document. This portion of the proposed rule, which is based upon a similar rule in the Delaware Court of Chancery, enables the Court and other readers easily to verify the document’s compliance with the word-length limitation.

The City Bar has recommended that the proposed rule be amended so that affirmations and affidavits (as distinct from briefs and memoranda) not be required to include a word-count disclosure in the signature block. The City Bar contends that the risk of creative use of margins, fonts, and footnotes to circumvent content limitations is less acute for affirmations and affidavits than it is for briefs and memoranda. For this reason, the City Bar believes that there is no need for a mechanism by which compliance can be verified for affirmations and affidavits.

We respectfully disagree. Although the practice is increasingly disfavored, we believe many attorneys still file so-called “briefadavits,” i.e., memoranda of law structured as attorney “affirmations.” As long as attorneys continue to file such documents, courts will need a way to verify compliance with content limitations. In addition, while the risk of creative noncompliance with content limitations may be less acute for factual affidavits, to remove the certification requirement entirely would make it effectively impossible to verify compliance.

The City Bar next argues that affiants often sign a separate “signature page,” while the content of the affidavit is still being finalized, and the signature page is affixed once the content has been finalized. To require the signature block to include the word count would therefore needlessly complicate the process. This point is well-taken, but, as described above, the City Bar’s proposal would effectively nullify the court’s ability to verify compliance with the word count limitation. We do not think this to be appropriate.

We believe that the need to have a mechanism by which to verify compliance can be reconciled with the practical concern identified by the City Bar; the solution is simply to remove the requirement that the word count disclosure appear in the signature block. More specifically, we would propose addressing the City Bar’s concern by amending the proposed rule 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 e~~**Every brief, memorandum, affirmation, and affidavit shall include, on a page attached to the end of the applicable document, a certification by the counsel who has filed the document describing the number of words in the document.** That certification by **counsel** certifies that the document complies with the word count limit. The **counsel certifying compliance** may rely on the word count of the word-processing system used to prepare the document.