

IN PRACTICE

CIVIL PROCEDURE

Hyperlinking in Briefs: Strategic and Practical Considerations

BY RONALD L. ISRAEL AND ERIC I. YUN

Over the past few years, more and more practitioners have realized the benefits of filing electronic briefs containing hyperlinks — text in a Word document that, when clicked on, will automatically direct the user to another document (e.g., pertinent text of a cited legal authority) on the screen. Hyperlink briefs, in other words, allow authors to “link” to other electronic documents in much the same way that, on the Internet, web page authors can link to other websites. Furthermore, given the versatility of digital media, hyperlink briefs allow one to link not only to other documents containing text, such as case law citations, but also to various multimedia files, such as video recordings of depositions, PowerPoint presentations and computer-generated simulations, as well as websites. This increased functionality, and the ability to present a judge with evidence beyond what is written on paper, presents the practitioner with strategic considerations from the outset of a case as to how evidence should be gathered and presented, among other things — considerations

Israel is a member of and Yun is an associate at Wolff & Samson in West Orange.

that may be easily overlooked by litigants. This article examines the advantages of and the challenges presented by hyperlink briefs.

Procedural and Case Management Issues With Hyperlink Briefing

As an initial matter, courts vary on the extent to which they allow hyperlink briefs, if they have even addressed the issue. The New Jersey State Court Rules do not refer to hyperlink briefs at all and generally assume that paper is the default medium of filing. See, e.g., R. 1:4-1 (setting general requirements for “paper[s] to be filed” with reference to physical formatting). However, by the same token, the New Jersey Rules do not expressly prohibit hyperlink briefs.

Accordingly, the New Jersey litigant should not simply assume that a hyperlink brief would be rejected by a judge or that one’s objections to a hyperlink brief based on its relative novelty in New Jersey will prevail. Indeed, if a New Jersey court were to look to other jurisdictions for guidance, it would find a general acceptance of hyperlink briefs, particularly among the federal courts. See, e.g., *In re Berg*, 43 U.S.P.Q. 1703, 1703 (Fed. Cir. 1997) (rejecting “procedural symmetry” as a reason to prevent one party from filing a hyperlink brief, where the

opposing party lacked the resources to file its own hyperlink brief). Similarly, although some courts’ rules may restrict the filing of hyperlink briefs in various ways, many nonetheless permit them. Compare 3d. Cir. L.A.R. 113.13 (subsection (a)(2) of this Third Circuit rule requires that “[h]yperlinks to testimony must be to a transcript” and that a motion be filed before an audio or video file is hyperlinked, but the rule otherwise contemplates linking to websites) with 1st Cir. Administrative Order Regarding Case Management/Electronic Case Files System (“CM/ECF”), entered Sept. 14, 2009, Rule 13 (First Circuit does not explicitly prohibit hyperlinks to video recordings of testimony and contemplates linking to websites).

Given these factors, it would be prudent for the New Jersey litigant to anticipate timing issues that may arise when a party attempts to file a hyperlink brief. For example, if at a certain point in the litigation the court sets a date for trial to commence in 60 days or shortly thereafter, a litigant may have only a few days to submit a summary judgment brief — most likely not enough time to submit an effective hyperlink brief that utilizes the medium’s full potential. Where hyperlink briefs are anticipated, then, counsel in a New Jersey matter should bring this issue to the court’s attention early in the litigation, whether at a case management conference or otherwise, so that the court can provide clear guidance on briefing schedules for hyperlink briefs as well as other pertinent issues (e.g., any limitations to the type of materials that may be included in a

hyperlink brief). Outside of New Jersey State courts, these same considerations should also apply, subject to the jurisdiction's particular rules, if any, governing hyperlink briefs.

Strategic Ramifications of Hyperlink Briefing

In tandem with establishing the ground rules for filing hyperlink briefs, there are several strategic issues to consider, both in favor of and against filing a hyperlink brief.

Although the costs associated with creating a hyperlink brief have been coming down over the years, it is still a relatively significant undertaking that, even for firms with sophisticated information technology departments, may often be best outsourced to vendors. Accordingly, the practitioner (and litigant) is immediately confronted with practical considerations such as the time and effort required to create a hyperlink brief, and whether the advantages of a hyperlink brief justify its expense.

Among other advantages, hyperlink briefs allow litigants to use evidentiary materials that would be impractical or logistically cumbersome to include on a paper record. For instance, on a summary judgment motion or an appeal relating thereto, a party could hyperlink in the brief not only to excerpts from a deposition transcript but also to portions of a video-recorded deposition. The availability of video recordings of depositions and other materials that are usually presented as plain text transcriptions is no mere novelty but, in some cases, can help determine outcomes. In a recent example, the Appellate Division of the New Jersey Superior Court ruled on the admissibility of evidence (a diagram) based in part on the video-recorded deposition of a witness, where the court noted that although the "cold transcript of the deposition" may have given the impression

that the witness was inconsistent in his testimony, the video gave a different impression that supported the admissibility of the evidence in question. See *Navarro v. Louder*, 2009 WL 3078805 (N.J. Super. App. Div. Sept. 28, 2009) (unpublished).

By the same token, however, the litigant should be cautious about the potential for abuse of video recordings and other multimedia materials in hyperlink briefs. As the Third Circuit Court of Appeals appeared to implicitly recognize in promulgating its rule restricting the use of video testimony in hyperlink briefs (see *supra*, citing and quoting 3d Cir. L.A.R. 113.13), video testimony has the potential to unduly sway the viewer based on extraneous considerations. Thus, just as one should evaluate potential video testimony for its persuasive power, one should also be wary of the inclusion of video testimony and other multimedia material that does not drive home a particular evidentiary or legal point but, instead, appeals to factors that are not legally cognizable.

In light of both the significant advantages and potential dangers of multimedia formats for presenting evidence, identifying and developing from the outset the kind of evidence that would benefit from audio/video presentation can be critical. For instance, one should try to identify early on those witnesses whose demeanor and conduct would work in one's favor, whether it be a key witness for a client who comes across as particularly confident and credible, or a witness for the adversary who is likely to convey an unfavorable impression undermining his or her credibility. Having identified the pertinent witness, one can then prepare to have that witness's deposition videotaped for use in a hyperlink brief. Certain types of expert testimony may also lend themselves to the use of animated simulations or reconstructions. For example, in litigation involving vehicular accidents, computer-generated simulations

of the accident, based on expert testimony, may be particularly effective in concisely conveying the substance of highly technical testimony involving physics, automotive engineering and biomechanical concepts and data. A video recording of the accident, of course, would also be an excellent candidate for inclusion in a hyperlink brief. As another example, in business torts cases, charts, graphs, PowerPoint presentations and other similar graphical representations may make financial data and arguments much more intuitive to grasp.

Another tactical consideration that hyperlink briefs bring into play is ease of reference and reading. Particularly where the record is voluminous, adding hyperlinks to citations can be advantageous, enabling a judge to refer immediately to the cited material without having to search for it and become distracted from the main body of the argument in the process. Hyperlinks, in other words, may enable a litigant to more easily keep a judge's focus on the flow of the argument presented. Indeed, in one case the Supreme Court of Washington state expressed its "sincere appreciation to the parties" for submitting hyperlink briefs, as that format "greatly enhanced [the court's] ability to handle this case." *Aluminum Co. of America v. Aetna Casualty & Surety Co.*, 998 P.2d 856, 861 n.1 (Wash. 2000).

Although hyperlink briefs have yet to obtain as much prevalence as other technical advances such as electronic filing, their use is bound to increase in both appellate and trial-level practices. Litigants are therefore well-advised to keep in mind the benefits and drawbacks that hyperlinking can introduce, and accordingly develop a strategy from the outset of a case to blunt the effectiveness of an adversary's use of hyperlink briefs, or to best leverage one's own use of this technology. ■