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It's a New Day for Openness in the Pa. Appellate Courts

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Howard Bashman

Today, for the first time in its long history, which dates back to before the United States even existed as a nation, the Supreme Court of Pennsylvania is scheduled to allow television cameras to record its oral argument sessions. Thus, if you tune in tonight to the Pennsylvania Cable Network at 7 p.m., you can watch the video of six oral arguments that are taking place this morning in Philadelphia. And, if you tune in an hour earlier, at 6 p.m., you can watch an interview with Chief Justice Ronald D. Castille.

This marks a commendable new level of openness at the very top of Pennsylvania's judicial system. Although it may be true that PCN is a channel that most people watch only by accident, now appellate lawyers and other law geeks will have reason to search out where among the 999+ cable and satellite channels PCN can be found. Indeed, I would be among those tuning in to watch tonight's historic telecast were I not already observing today's proceedings in person because I am scheduled to present oral argument in two of the six cases that are on today's calendar before Pennsylvania's highest court.

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Although the attorneys arguing the cases will no doubt have more to say than the justices, unquestionably it will be the justices who will be the stars of the proceedings. Will the justices now feel more compelled to ask questions in order to get their fair share of the camera time? Will justices, especially those who may need to stand for retention elections in the not too distant future, work toward appearing likeable and engaged? Will the short-tempered, brusque, curmudgeonly justice of the past remain consigned to the dustbin of history? And will video excerpts from oral arguments eventually become a central focus of television commercials in favor of or opposing the retention of existing Pennsylvania Supreme Court justices? Only time will tell.

Of course, putting appellate oral arguments on television does present some actual dangers. No one would want Pennsylvania's highest court to base its decisions whether or not to grant review on the likely amount of public interest in a case in order to obtain higher television ratings. And attorneys arguing before Pennsylvania's highest court must resist any temptation to grandstand for the cameras or alter their presentation to the court in any manner based on the fact that television is involved.

An equally notable step toward increased openness recently occurred in the Superior Court of Pennsylvania, which ranks as one of the nation's hardest working intermediate appellate courts. In recent months, that court has begun to identify by name which judge on a three-judge panel has written the memorandum opinion in cases that have

been disposed of by means of an unpublished, nonprecedential ruling. Because the Superior Court uses unpublished, nonprecedential rulings to dispose of the vast bulk of all appeals, this means that many more opinions will now be identified by authoring judge that in the past were merely issued "per curiam," without any acknowledgement of which judge wrote the decision.

Why is this change significant? To begin with, most judges have a notable degree of pride of authorship, and thus putting one's name on an opinion as its author may increase the quality of unpublished opinions. Even more importantly, identifying the author of a memorandum opinion would seem to be an important step in the logical progression toward making nonprecedential memorandum opinions widely available to everyone over the Internet and through Westlaw and Lexis. Why should only the lawyers representing the parties in a given case have the benefit of knowing what a particular Superior Court judge has to say in the context of a given unpublished opinion about issues that may be relevant to a large number of other cases?

I thus anticipate that issuing nonprecedential memorandum opinions as signed opinions will represent an important step in the journey toward eliminating the Superior Court's reluctance to make memorandum opinions freely available to all and toward eliminating the prohibition against citing to nonprecedential memorandum opinions in briefs. Since December of 2006, federal appellate courts have allowed their own unpublished, nonprecedential rulings to be cited in briefs, and nothing untoward or harmful has resulted. If the policies embodied in Federal Rule of Appellate Procedure 32.1 can be enacted without complaint or disruption at the federal appellate level, surely those same policies — which allow the citation to any opinion, even those designated as unpublished and nonprecedential — can be adopted by the Superior Court.

Courts have the potential to be the most open and accessible of the three branches of government. What happens in the courtroom is ordinarily open to the public and the news media. When appellate courts announce rulings that decide the merits of a case, they typically issue opinions containing an explanation of the court's reasoning and the grounds on which the decision is based. Indeed, the only aspect of an appellate court's decision-making process that takes place in private are the discussions among the judges that occur during the process of reaching a decision and agreeing on an opinion. Yet those necessarily confidential discussions are ultimately rendered irrelevant by the court's later issuance of a decision that sets forth an explanation of the court's reasoning in reaching a particular outcome.

Finally, Pennsylvania's appellate courts have recently begun to embark on efforts to implement electronic filing. Perhaps someday those efforts will result in a system that will allow public access to the briefs and other court filings in cases that are pending on appeal.

On this historic day, we should take a moment to applaud the important steps toward openness that Pennsylvania's appellate courts have taken, while hoping that additional, important steps down that path will continue to be taken in the future.

Howard J. Bashman *operates his own appellate litigation boutique in Willow Grove, Pa., and can be reached by telephone at 215-830-1458 and via e-mail at hjb@hjbashman.com. You can access his appellate Web log at* ***http://howappealing.law.com.***

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