PRACTICE COLUMNS

Bringing Newly Issued Rulings to an Appellate Court's Attention

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Upon Further Review

Often, after an appeal has been fully briefed or orally argued, but before it has been decided, a court will issue a ruling that may materially affect the appeal's outcome. What's an appellate advocate to do once that has happened?

Fortunately, answers to that question can be found in both the Federal Rules of Appellate Procedure and the Pennsylvania Rules of Appellate Procedure. If your appeal is pending in federal court, you should consult Federal Rule of Appellate Procedure 28(j), which is titled "Citation of Supplemental Authority." And if your appeal is pending before a Pennsylvania state appellate court, you should consider Pennsylvania Rule of Appellate Procedure 2501, titled "Post-submission Communications."

Federal Appeals

In federal court, under FRAP 28(j), counsel is authorized to send a letter to the clerk of the appellate court "promptly" advising the court of a "pertinent and significant" authority that came to the party's attention after the party's brief was filed or after the case was orally argued. The rule limits the body of the letter to no more than 350 words. Before FRAP 28(j) was revised to add a word limit, the rule had prohibited including any argument in the letter. Now, Rule 28(j) allows argument but requires that whatever argument is included be short, sweet and to the point.

FRAP 28(j) does not require that a copy of the new authority be attached, but the letter must contain citations to the new authority so that the appellate judges who have the case under consideration can easily find the new authority. Of course, a FRAP 28(j) letter must be served on counsel for the other parties. The rule allows the other parties to file their own FRAP 28(j) letters in response, so long as any response is made promptly and likewise limited in length to no more than 350 words.

Pennsylvania State Court Appeals

If your case is pending before a Pennsylvania state appellate court, the process for advising the court of pertinent new authority is somewhat more complicated.

Pennsylvania Rule of Appellate Procedure 2501(b) is titled "Change in status of authorities." It states, in full: "If any case or other authority relied upon in the brief of a party is expressly reversed, modified, overruled or otherwise affected so as to materially affect its status as an authoritative statement of the law for which originally cited in the jurisdiction in which it was decided, enacted or promulgated, any counsel having knowledge thereof shall file a letter, which shall not contain any argument, transmitting a copy of the slip opinion or other document wherein the authority relied upon was affected."

Thus, PRAP 2501(b) only seems to apply if a decision relied on in a party's appellate briefs is overturned or undermined, although a good argument can be made that if a decision relied on is affirmed by the precedential ruling of a higher court, that too would "materially affect" the decision's "status as an authoritative statement of the law." In contrast to FRAP 28(j), PRAP 2501(b) does prohibit argument, and the Pennsylvania rule also requires that the newly issued ruling be attached to the letter being filed.

If the new development does not qualify for treatment by means of the letter described in PRAP 2501(b), then it is necessary to consider the "general rule" governing post-submission communications as set forth in Pennsylvania Rule of Appellate Procedure 2501(a). That general rule states: "After the argument of a case has been concluded or the case has been submitted, no brief, memorandum or letter relating to the case shall be presented or submitted, either directly or indirectly, to the court or any judge thereof, except upon application or when expressly allowed at bar at the time of the argument."

Thus, under Rule 2501(a), it is necessary to file an application (meaning a motion) for permission to file a supplemental brief, memorandum or letter addressing the matter to be drawn to the appellate court's attention. The best practice is to attach the proposed communication as an exhibit to the application, in the hope that the judges assigned to the case will read the attachment regardless of whether they ultimately grant formal permission to file the communication. Of course, opposing counsel is permitted to respond to the application and may likewise attach as an exhibit whatever substantive response to the proposed filing that the opposing party wishes to offer.

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Let me emphasize, lest there be any doubt, that the appellate court rules authorizing post-submission communications are not designed to allow counsel in pending cases to become pen pals with the judges assigned to decide their clients' appeals. If there is even the slightest doubt about whether filing such a post-submission communication will be helpful to the court and to the client, I strongly suggest not filing the communication if that option is otherwise available.

In particular, it would seem to be a waste of time and potentially a rule-breaking annoyance to file a post-briefing or post-submission communication intended to draw an appellate tribunal's attention to the fact that a non-precedential appellate court ruling has issued in another case involving related questions of law. If a decision is non-precedential, then by definition the decision cannot control the outcome of any other case.

The Superior Court of Pennsylvania is particularly unforgiving about the limitations it imposes on citing to any of its unpublished memoranda decisions. Pennsylvania Superior Court Internal Operating Procedure 65.37(A) states, at its outset: "An unpublished memorandum decision shall not be relied upon or cited by a Court or a party in any other action or proceeding, except that such a memorandum decision may be relied upon or cited (1) when it is relevant under the doctrine of law of the case, res judicata, or collateral estoppel."

Thus, if you represent a party on appeal in Case B, and you relied on a trial court's ruling in Case A in your appellate briefs, the better practice is to avoid citing the Pennsylvania Superior Court's affirmance of Case A by means of an unpublished memorandum decision to the panel that's considering the appeal in Case B in the absence of any demonstration that the affirmance in Case A is relevant under the doctrines of law of the case, res judicata or collateral estoppel.

Those lawyers who handle appeals should know and understand the rules of procedure that are in effect in the courts where their clients' appeals are pending. As explained above, when pertinent new authority issues that may affect a pending appeal, both the Federal Rules of Appellate Procedure and the Pennsylvania Rules of Appellate Procedure provide guidance on what, if anything, a lawyer may do to bring that new authority to the appellate court's attention. •

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