Appeals

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Superior Court to Identify Authors of Memorandums

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Pennsylvania Superior Court Judge Correale Stevens

In an effort to increase transparency and respond to concerned lawyers, the state Superior Court will now identify the author on all of its memorandum decisions but will continue not to publish the non-precedential opinions.

President Judge Correale F. Stevens said there was a strong consensus among the court's judges to make the change, which has been in effect since July 1. He said lawyers have a right to know who authored memos in their cases, but cautioned that such non-precedential decisions — the majority of the Superior Court's work — are still not for citation in legal briefs.

"We want the bar to know that we are responding to things they've expressed concern about," Stevens said in an interview with *The Legal* . "It's more of an openness issue."

In a press release, Stevens said he asked Court Executive Administrator Dave Szewczak to research why the court traditionally did not identify the author of memos and said Szewczak didn't find much in favor of the old policy.

"Quite frankly there was no particular reason for which the practice was instituted," Stevens said in the release. He said three-judge panels will still have the right to occasionally file a per curiam decision, "but that will be the exception, not the rule."

Pennsylvania joins 10 other intermediate appellate courts that identify the authors of unpublished memorandum decisions, including Texas, Virginia and California.

Appellate attorney Howard J. Bashman, who writes a column on appellate law for *The Legal,* welcomed the change but said the state's legal system is equipped with the requisite technology to make the decisions available to lawyers on the Internet without burying the legal research process in a slew of conflicting opinions.

Among the positives of the policy change, Bashman said, are benefits for practitioners looking to prepare for certain judges as well as judges providing more analysis in memorandum decisions.

"By having to identify the author, it may cause the judges to take a little more time to give a full and complete analysis of the issues presented in the case," Bashman said. "Pride of authorship may begin to kick in more."

Cases up for Supreme Court review will also be impacted, Bashman said.

"If review is going to be sought in the Supreme Court and you're opposing that review, it probably would be helpful to show the Supreme Court that a thoughtful judge was responsible for the decision that's being challenged," he said.

Stevens said the court has discussed the idea of making all of its decisions researchable online but is holding off for now.

"That may happen in the future," he said.

Generally, if a case doesn't examine a new issue, the authoring judge decides to issue a memorandum decision, Stevens said. Lawyers can request a written, paneled opinion, he added, which the court takes into consideration but does not have to grant. Otherwise, the case joins thousands of other memorandums available only through a trip to the courthouse, an inconvenience some lawyers have long lamented.

But appellate lawyer Carl Solano, of Schnader Harrison Segal & Lewis, said the memos often do contain new legal issues, adding he has been in the position where citing a memorandum opinion would affect his case.

"Lawyers are not going to cite memorandum opinions unless there's absolutely nothing else available to cite," Solano said. "It's a matter of last resort."

How often does that happen?

"More than it should," Solano said. "The theory behind memorandum opinions is that they are supposed to be issued only when they don't deal with new law. Unfortunately, it often happens that those opinions do deal with legal issues that have not been decisions in published opinions and fact patterns that have not been addressed in published opinions."

"I have found in my own practice that there have been many times I have wished I could cite one of those opinions because there was nothing else available," he said.

Pittsburgh appellate attorney Rob Byer, of Duane Morris, called the policy change a "step sideways," adding attorneys should be able to cite memorandum opinions but, at the very least, should be able to access them.

"The court wants to have them as non-precedential; I don't have a problem with that," Byer said. "But these are public records. The technology is there. Let's post them."

Although Stevens lauded the idea of an open court system, he said publishing every decision brings its own set of encumbering facets to the legal research process. Such a database could overburden trial lawyers "with a ridiculous amount of research," he said.

"The contrast with the Commonwealth Court is very telling," Byer said. The state Commonwealth Court posts memorandum opinions on its website.

"I think the Superior Court should use that as a model," he said.

Other lawyers agreed, saying transparency takes precedent. Several on the bench and bar converged on the notion that technology would allow legal researchers to quickly work through volumes of work without having to scan endless pages.

"Now that we're in a situation where pulling the book off the shelf isn't the principal way research is being performed, that concern is outmoded and anachronistic," Bashman said, adding that, at the least, litigants could draw from the court's reasoning or a list of precedential case citations in memorandums.

Superior Court candidate and Allegheny County Common Pleas Court Judge David N. Wecht also pointed to technology as a useful solution to an issue he said has many lawyers across the state concerned.

"Lawyers are not inspired to great confidence when they see non-precedential, unpublished, not-for-publication works," Wecht said.

With the "wonderfully robust" technology the court has at its disposal, Wecht said, there is a balance to be struck between enhancing transparency and overburdening lawyers with tomes of research.

"If the problem is that the workload is just so heavy to ensure that every case has been vetted for possible conflicts, the effort should be made by the court to implement a system by which conflicts are checked," Wecht said.

For familiar issues, Wecht added, the court could also examine the idea of shortening its decisions for lawyers doing research.

"With the technology and the central legal staff that the entire Superior Court has available, I'm confident that the shift to a publicly available body of case law can be made," Wecht said.

Wecht's opponent in the Superior Court judicial race, Dilworth Paxson managing partner Vic Stabile, also called for greater transparency in the court system.

"I feel strongly that transparency should be evident in every branch of government," Stabile said. "Litigants should see how cases are decided." •