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The Importance Of Submitting Supplemental Authorities

Appeals can be won or lost based on new case law that emerges long after the appellate briefing is complete. Yet, often a practitioner may think that the vast majority of the appellate work is done when the last appellate brief is filed in a case. This article discusses the importance of submitting supplemental case authorities to the appellate court in a timely manner.

The Ninth Circuit Rule

In the Ninth Circuit Court of Appeals, the court rules expressly provide a procedure for updating authorities. Federal Rule of Appellate Procedure, Rule 28(j) provides as follows: "If pertinent and significant authorities come to a party's attention after the party's brief has been filed – or after oral argument – but before decision – a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and similarly limited."

Prior to 2002, rule 28(j) required that counsel provide supplemental authorities "without argument." In 2002, the rule was amended to remove that express restriction. The Advisory Committee Notes explain that Rule 28(j) "no longer forbids 'argument.' Rather, Rule 28(j) permits parties to decide for themselves what they wish to say about supplemental authorities. The only restriction upon parties is that the body of a 28(j) letter – that is, the part of the letter that begins with the first word after the salutation and ends with the last word before the complimentary close – cannot exceed 350 words. All words in footnotes will count toward the 350 word limit."

Ninth Circuit Rule 28-6 reaffirms Rule 28(j)'s 350 word limit for the body of the letter. The Circuit Advisory Committee Note makes two important recommendations. First, it states that "in the interests of promoting full consideration by the court and fairness to all sides, the parties should file all FRAP 28(j) letters as soon as possible." Second, it advises that "when practical, the parties are particularly urged to file FRAP 28(j) letters at least 7 days in advance of any scheduled oral argument or within 7 days after notification that the case will be submitted on the briefs."

Thus, at any time after briefing while an appeal is still pending a party may notify the clerk by letter of the citations to new authorities that are relevant to the appeal. A proper FRAP 28(j) is not meant to serve as a supplemental brief. Also, the letter is not a chance to provide the court with old cases that were missed in the briefing. Its limited purpose is to inform the appellate court of new cases and statutes that may impact the outcome of the appeal.

There is good reason to follow the advice of the Ninth Circuit Advisory Committee and submit the 28(j) letter as soon as possible. In the weeks immediately preceding oral argument, law clerks at the Ninth Circuit prepare bench memoranda or memorandum dispositions in chambers to be used by the panel at oral argument. These bench memoranda and memorandum dispositions are exchanged with the chambers of the other two judges on the panel. In other words, the law clerks are researching and working on the appeal in the three or four weeks prior to oral argument. If possible, it is best to submit the new authorities while the law clerks are in the process of drafting the bench memoranda and memorandum dispositions. That way the new cases and other authorities will be given due consideration while the law clerks are actively engaged in working up the case.

It is not difficult to submit the 28(j) letter in a timely fashion. In the Ninth Circuit, notice of oral argument is usually sent at least one month in advance of argument. When the notice of oral argument arrives, it is time to update the research and immediately prepare the 28(j) letter, if necessary. Although preparing the letter this early may, in rare circumstances, mean that a second letter will be necessary, the updated research is most useful if it is provided to the court (and the law clerks) in a timely manner.

California State Appellate Courts

In California state appellate courts, there is no specific rule directed at submitting supplemental authorities while an appeal is pending, but the submission of such authorities is clearly permitted. Several of the California appellate courts invite the submission of supplemental case authorities in the letter from the court that provides notice of oral argument.

For example, included in the Third Appellate District's notice of oral argument is a statement that parties may submit additional authorities not cited within their briefs. The Third Appellate District even allows the list of supplemental authorities to be presented as late as at the time of oral argument. The letter from the court advises that counsel may submit citations for any decisions that were rendered after preparation of the briefs and which will be cited by counsel at oral argument.

In the Third Appellate District, the notice of oral argument is usually sent out at least one month in advance of the oral argument date. Although the tendency might be to wait until a couple of days before oral argument to prepare the list of supplemental citations, that is a bad idea. The court and its staff need time to read and digest the citations prior to oral argument. Waiting until the last minute to submit the supplemental citations means that the court may not have had time to consider these new citations prior to oral argument. As in a federal appeal, the best practice is to update the authorities in the appellate briefs immediately upon receiving the notice of oral argument and then to again update the research a day or two before oral argument.

It is also important to continue to track the issues in the appeal after oral argument. In the California appellate courts, the appellate court must render its decision within 90 days from the

date of submission of the case to the appellate court. A case is submitted for decision when the court has heard oral argument or approved its waiver and the time has expired to file all briefs and papers, including any supplemental brief permitted by the court. Thus, if new case law is issued in that 90 day period that could influence the outcome of the case, appellate counsel should bring those new cases to the appellate court's attention.

Conclusion

An appeal should not be considered to just have two components – briefing and oral argument. Rather, an appeal should be viewed as a process that may span several months or even years. During the time the appeal is pending the law can change. The need to update research and inform the court of changes in the law relevant to the appeal is of critical importance and can be the key to winning on appeal.

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