





# Persuasive Citation and the Superior Court: The Time has Come!

By Mary Jane Bowes

**O**n March 4, 2019, the Supreme Court approved a change to Pennsylvania Rule of Appellate Procedure 126 that had been hoped for by members of the bench and bar for many years.

The rule change now permits the citation of non-precedential memoranda decisions of the Superior Court for persuasive purposes. Rule 126 now states: Nonprecedential decisions ... may be cited for their persuasive value. Pa.R.A.P. 126(b)(2).

Prior to this amendment, attorneys and judges were not permitted to cite Superior Court rulings that were filed as nonprecedential decisions when addressing legal filings to that court. The Operating Procedures (OPs) of the Superior Court barred such use of memoranda. *See* OP § 65.37. Briefs, trial court opinions, motions and reargument petitions were not to include any citation or reference to memorandum decisions authored by the Superior Court of Pennsylvania.

What is a memorandum decision and why, I was asked recently at a continuing legal education seminar, did that no-citation rule even exist? And how will the rule change affect the practice before the Superior Court? Let's break it down.

## What is a memorandum decision?

The Superior Court has a significant caseload, receiving over 8,000 appeals each year from the 67 counties in Pennsylvania. The 15 commissioned judges, along with six senior judges, dispose in writing of over 5,000 appeals annually. In rendering its decisions, the Superior Court can utilize either a judgment order, which briefly decides cases usually on procedural grounds; an opinion, which is a precedential decision; or a memorandum decision, which is nonprecedential and does not serve as binding authority for subsequent decisions by the Superior Court.





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In other words, a memorandum decision applies only to the parties involved in that particular case and does not dictate how the Superior Court should reach a result in another case.

### Why did the Superior Court use them?

The use of memorandum decisions dates back to the expansion of the Superior Court in 1980 when the court grew to 15 commissioned judges. The nonprecedential decision model was utilized, in part, to address a burgeoning backlog of cases and the attendant cost to attorneys to maintain a law library. Before the advent of the internet and electronic research, the decisions of the Superior Court were published in bound volumes of legal digests, and attorneys had to purchase those books in order to access cases. As the Superior Court grew increasingly busy, the number of volumes of case books increased and, with it, the expense to attorneys. It was decided by the court that since many of the cases involved a routine application of well-established law to facts, those cases did not advance the development of the law and could be disposed of in unpublished memoranda. By not publishing those cases, the number of decisions included in the digests would

diminish, resulting in cost savings to the bench and bar.

To effectuate this, the Superior Court propounded OP § 65.37, which stated that, with limited exceptions, “An unpublished memorandum decision shall not be relied upon or cited by a court or a party in any other action or proceeding ...”

### Were there problems with the no-citation rule?

The amount of appeals has remained relatively stable for the last 20 years, as has the number of nonprecedential decisions. Currently, approximately 94% of the work product of the Superior Court is handed down in memoranda, with only 6% of the decisions being deemed precedential opinions. Often, attorneys and trial judges complained that they needed more cases with similar fact patterns upon which to decide cases. When a memorandum contained a comparable factual scenario as a case currently before the court, but could not be cited or relied upon when directing the Superior Court to relevant law, it caused consternation among the bench and bar. On occasion, despite the Superior Court’s best efforts to insure internal consistency with its outcomes, certain similar



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cases would reach inconsistent results. Such aberrations and conflicts were also troubling to attorneys and trial judges.

Moreover, if one desired to read or study the memorandum cases, they were difficult to access. Historically, they were unavailable on Lexis or Westlaw. So knowledge of the name and docket number of the case and a trip to the local Superior Court Prothonotary's Office were required in order to purchase a copy of the memorandum.



In 2013, the Superior Court began to place its cases online, with easy and free access to all. Suddenly, the bench, bar and public had ready access to the court's rich body of work, and the attorneys were itching to cite the memoranda to the court in their filings. On numerous occasions, a memo-

randum decision would analyze a fact pattern relevant to or the same as a pending case, and often it was far from a mechanical application of the law to the facts. To the growing frustration of the bench and bar (and often clients), a memorandum that closely aligned with other cases was not available for the bench and bar to rely upon or even to call to the attention of the Superior Court. In reality, although the use of memoranda decisions was barred by OP § 65.37, an increasing number of counsel would nevertheless cite such cases to the court. Despite admonishments from the court for violating 65.37, counsel continued to cite to and rely on memoranda.

## What is persuasive citation?

Persuasive citation involves arguing a case to a court just like any other case, except that the Superior Court is not bound to follow it. Any time an attorney has cited a Commonwealth Court case to the Superior Court, he or she has engaged in persuasive citation. Whenever federal cases are argued to the Superior Court (excluding, of course, the U.S. Supreme Court), the attorney is seeking to persuade the Superior Court that it should follow the lead of its federal

brethren in interpreting state law. In both those instances, the Superior Court is not bound by the Commonwealth Court decisions or federal court pronouncements of Pennsylvania law. When confronted with a persuasive cite, each judge can take it or leave it as he or she deems appropriate. A judge retains discretion to utilize the legal reasoning as he or she sees fit when a case is cited for persuasive purposes. Similarly, if a litigant cites to a case that is ill-suited to the facts or issues, then a judge simply will not be persuaded by its reasoning.

The federal courts began to use persuasive citation in 2007, and the Commonwealth Court has engaged in that practice since 2008. Attorneys have routinely cited trial court decisions to the Superior Court for persuasive purposes, as well as cases from our sister jurisdictions across the United States. They have even cited Shakespeare, Bob Dylan and literature of all kinds (the quote by Charles Dickens in *Oliver Twist* is a perennial favorite: "If the law supposes that ... the law is an ass."). Now they will be able to tell us what our fellow judges have thought about issues and how they have decided similar cases.

Of course, it's always preferable to cite to precedential decisions if at all possible, since those cases are binding on the Superior Court. Citation to numerous non-



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precedential memoranda for clearly established legal precedent is unnecessary and may be more of a hindrance than a help. But if your legal issue falls in a gap of case law and there is memoranda that may illuminate your position, the rule change permitting persuasive citation may prove very helpful to you in advancing your client's interests.

## Should all decisions be precedential?

No, not really. There are still plenty of cases that don't develop the law and just serve as a routine application of the law to the facts. There is no reason for those cases to serve in a precedential fashion since they add nothing new to the jurisprudence of Pennsylvania.

Moreover, there is sometimes good reason for a case to remain nonprecedential. A

case may have been poorly litigated and the result on appeal may be based on mistakes made in the trial court. If the correct legal arguments aren't presented to the Superior Court, it cannot correct legal error that may have occurred in the court.

But memoranda often reflect significant in-depth legal analysis of the Superior Court, and that work product can now be pointed out to another panel, which may benefit from the thinking of its fellow judges.

The addition of persuasive citation is the best of both worlds in that those cases that lend themselves to further understanding and development of legal issues can now be cited by counsel and trial courts to the Superior Court.

Remember, if a litigant or trial judge believes that the memorandum decision establishes a new rule of law, applies an existing rule of law to facts significantly different than those stated in prior decisions, resolves an apparent conflict of au-

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thority, involves a legal issue of continuing public interest or constitutes a significant contribution to the jurisprudence of Pennsylvania, the litigant can file a motion or the trial judge can request that the memorandum be converted to a precedential opinion. *See* OP § 65.37 B. Such a request must be made within 14 days after the entry of judgment.

## How will this rule change benefit the bench and bar?

There have been occasions where cases containing an issue of first impression, for whatever reason, were filed as a memorandum. Often, those decisions included a review of relevant law and a detailed legal analysis of the issue before the court. Now those cases can be used in arguments and briefs to the Superior Court to shed light on a pending matter and alleviate the need for the Superior Court to reinvent the wheel with regard to that novel issue.

The new rule will also enhance the transparency of the Superior Court and its decisions and, as described above, assist the judges of that court by highlighting similar reasoning from their colleagues in a multitude of cases. The ability of attorneys to cite memoranda back to the Superior Court will also enhance the consistency of the jurisprudence of Pennsylvania. Due to the tremendous workload of the Superior Court, with over 5,000 decisions filed each

year, inconsistent results can occur. If those cases can be cited to the court for persuasive purposes, it will enable the judges to ensure that results are consistent and to correct any anomalies that may have developed in the law.

Furthermore, the goal of judicial transparency rests upon more than convenient access to our decisions. Rather, it provides the bench and bar with the opportunity to argue to the Superior Court that all litigants are treated equally under the law by utilizing our work product in an open and transparent manner. It ensures that access to not only the court but also the public work product of the court is freely available to all. It will reduce the fear that a shadow body of law will develop where certain litigants are treated differently than the rest.

This rule change will enable the bench and bar to point out to the Superior Court when memoranda conflict with other memoranda or opinions. In doing so, it ensures heightened confidence in the law of the commonwealth and will strengthen the trust that citizens have in the judiciary at a time when negative events have on occasion tarnished the reputation and respect that should be afforded an independent court system. As Justice Anthony Kennedy said, “Liberty finds no refuge in a jurisprudence of doubt.”

## When does it become effective?

This rule change, which some describe as a sea change, became effective on May 1, 2019. That does not mean, however, that cases handed down prior to that date can be cited to the Superior Court as of that date. Rather, only memoranda decisions filed after that date will be eligible for citation to the Superior Court for persuasive purposes. Happy citing! ☞

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Mary Jane Bowes has served as a judge of the Superior Court of Pennsylvania for over 18 years, and has been a zealous advocate for online posting and persuasive citation of its decisions. She was appointed by the Supreme Court of Pennsylvania to its Appellate Courts Procedural Rules

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