LETTERS

Judge Agrees with Judge

My distinguished colleague, Judge Mary Jane Bowes, and Megan Bode [in their article titled "Private Justice or Public Right?"; November/December 2008 issue] cite a case I wrote, *Schaaf v. Kaufman*, 850 A.2d 655 (Pa. Super. 2004), saying that I "claimed" that allowing citation of unpublished opinions would place an unfair burden on those with limited funds. In *Schaaf*, the issue was whether the Supreme Court had *constitutional authority* to ban citation to non-published opinions, not whether or not it was a good idea. I was merely referring to the arguments made in support of the rule. In fact, as usual, I agree with Judge Bowes. I agree that a "non-precedential" memorandum should not become precedential for the reasons the authors stated. However, in the Internet age I believe lawyers should be able to cite to them as persuasive just as they can cite to cases from other jurisdictions. Judge Bowes and Ms. Bode got it right.

Judge Richard B. Klein
Superior Court of Pennsylvania
Philadelphia

Allow Memorandum Decisions to Be Published and Cited

I was delighted to read Judge Bowes' and Ms. Bode's article on the Superior Court's "no citation rule," relating to that court's memorandum decisions. I have long maintained that the rule should be done away with. I, however, would go one step further than apparently either Judge Bowes or Ms. Bode were willing to go. I believe that memorandum decisions should be allowed to be published by whoever might wish to publish them, and one ought to be able to cite them not just as persuasive but as precedent because that is, in fact, what they are or, in a legal system truly based on common law, precedent and the doctrine of stare decisis, as ours is supposed to be, that is what they ought to be. The very purpose of a common law system is to bring consistency, predictability and accountability to the law and to the courts. The "no citation rule" surely does not promote any of those goals.

John C. Mott
Williamsport

Agrees Private Rulings in Non-precedential Decisions Should Be Eliminated

I couldn't agree more with the sentiments espoused by Superior Court Judge Mary Jane Bowes and Megan Bode in their *Pennsylvania Lawyer* article "Private Justice or Public Right?" Private law rulings in non-precedential decisions should not exist. Consistency in the law and consistency of procedure in 345 trial courtrooms across Pennsylvania require that our appellate courts give clear and consistent guidance on all issues that are significant enough for the busiest appellate court in America to address in a written opinion. It is a sad commentary that the Supreme Court regularly accepts non-precedential decisions for review.

Cases of first impression have been decided as non-precedential opinions. In one case a new trial was granted because the trial judge refused to give an "Increased Risk of Harm" jury instruction because the expert had testified to a reasonable degree of medical certainty that the alleged malpractice had actually caused the injury. Of course, whenever malpractice actually causes an injury it also necessarily increases the risk of causing that injury. But the "Increased Risk of Harm" jury charge is only appropriate where an opinion about actual causation is impossible because the malpractice, such as a failure to timely diagnose, precludes any definitive opinion.

Even though this was a decision of "first impression," because that Superior Court decision is non-precedential, only the judge in the retrial of that case must give that charge. Nine other judges in different courtrooms that same day are

under no obligation to give that instruction in comparable cases. No guidance has even been given to that individual trial judge when she next confronts the same issue. The non-precedential nature of that opinion invites the trial judge to make the same "error" in every other case that judge hears in her career. The non-precedential nature of a first impression decision invites the parties to speculate whether the decision was so result oriented that the opinion was intentionally given as non-precedential to avoid general applicability of a questionable rule.

The unpublished, non-precedential decisions rendered on my cases have generally adopted my analysis, sometimes rewriting the procedural and factual histories before outlining boilerplate law in affirmance. Nonetheless, these non-precedential opinions can be nine, 10, 15 or 16 pages. It is a waste of judicial resources to reanalyze the law and regurgitate the facts in 4,912 opinions a year that say nothing more than that the trial judge got it right and wrote an opinion that explained her correct judgment.

Surely not every appeal requires a fully formed, newly minted Superior Court opinion. Non-precedential decision should simply read, "After thorough review of the record and the opinion of the trial judge, the Superior Court concludes that the trial judge permissibly analyzed the facts and correctly applied the law. On the basis of that opinion, a copy of which is attached hereto and incorporated herein, the judgment below is affirmed."

As Judge Bowes and Ms. Bode eloquently explained, elimination of the non-precedential decision, which has occurred in many state and federal appellate courts, increases public confidence in the public nature and the equality of the law.

Judge Mark I. Bernstein
Philadelphia

Rare Outburst at the Desk

Hello S. Sponte:

I wrote to you several years ago to tell you how much I enjoy your column. Well, "Reflections of a Blind Pig" [July/August 2008 issue] had me laughing out loud at my desk. I rarely do that at my desk. Particularly your reference to "experimental civil procedure." That is funny!

Thanks for making me laugh!

Sandra B. Worthington
Jenkintown

Fan Mail for S. Sponte

Many years ago I cajoled your identity out of someone at the PBA and whilst on a trip west I stopped in to say hello — I loved your columns then and still it is the first page I turn to when I get my … mailing from the PBA. I must congratulate you on "Ask Me No Questions" [in the November/December 2008 issue]. It was hilarious, one of your best. Are you also a Lynyrd Skynyrd fan? If you are, you know the next line.

Gregory H. Knight
Carlisle

PBA Dates at a Glance

Family Law Section Winter Meeting
Jan. 16-18, Pittsburgh

Board of Governors Meeting
Feb. 4, St. Thomas, U.S. Virgin Islands

Midyear Meeting
Feb. 4-8, St. Thomas, U.S. Virgin Islands

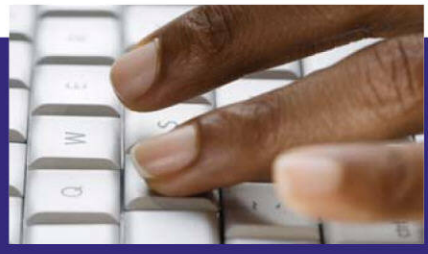
Conference of County Bar Leaders
Feb. 26-28, State College

Board of Governors Meeting
March 25, State College

Statewide Mock Trial Competition Finals
March 27-28, Harrisburg

21st Annual Minority Attorney Conference
April 2-3, Harrisburg

For more information on these and other PBA meetings, check the PBA Web site EVENTS CALENDAR at www.pabar.org.



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