

SUPREME COURT OF PENNSYLVANIA
APPELLATE COURT PROCEDURAL RULES COMMITTEE
NOTICE OF PROPOSED RULEMAKING

Proposed Amendments to Pa.R.A.P. 126

The Appellate Court Procedural Rules Committee seeks comments on its proposal to amend generally applicable Rule of Appellate Procedure 126 to permit citation to unpublished memorandum decisions of Pennsylvania's appellate courts for persuasive value only, and to locate citation practices and conventions for citation of authorities in a single rule of general application rather than in court-specific rules or internal operating procedures, for the reasons contained in the accompanying Explanatory Comment. If adopted by the Supreme Court, the proposal would change the current practice in the Superior Court that prohibits citation to unpublished memorandum decisions and standardize practices for the citation of authorities in all three appellate courts.

The Committee invites all interested persons to submit comments, suggestions, or objections.

Comments should be provided to:

Appellate Court Procedural Rules Committee
Pennsylvania Judicial Center
601 Commonwealth Ave., Suite 6200
P.O. Box 62635
Harrisburg, Pennsylvania 17106-2635
FAX: (717) 231-9551
appellaterules@pacourts.us

All communications in reference to the proposal should be received by **February 9, 2017**. E-mail is the preferred method for submitting comments, suggestions, or objections; any emailed submission need not be reproduced and resubmitted via mail. The Committee will acknowledge receipt of all submissions.

An Explanatory Comment precedes the proposed amendments and has been inserted by this Committee for the convenience of the bench and bar. It will not constitute part of the rule nor will it be officially adopted or promulgated.

By the Appellate Court Procedural Rules Committee

Kevin J. McKeon, Chair

Explanatory Comment

The Committee is proposing to amend Pa.R.A.P. 126 to permit citation of all panel or full-court decisions after the effective date of the rule. Any decision designated as “non-precedential memorandum” or “unpublished” would, however, be citable only for the persuasive value that the court chooses to attribute to it. Commonwealth Court would continue to allow citation from 2008 forward, and would continue to restrict citation to single-judge opinions, but the Committee is proposing to integrate the Commonwealth Court’s practice, currently found at Pa.R.A.P. 3716, into Pa.R.A.P. 126, in order to have a single rule that governs the citation of authority in the appellate courts.

Prior to 2015, the only rule of appellate procedure that addressed the citation of authorities was Pa.R.A.P. 2119(b), which by its terms addressed only the argument section of briefs. The only other discussions of authority were in the internal operating procedures of the Superior and Commonwealth Courts. That year, however, Rules 126 and 3716 were adopted. Pa.R.A.P. 126 made the principles that had applied to arguments in briefing applicable whenever authority is cited to an appellate court. Pa.R.A.P. 3716 took what had been an internal operating procedure and made it a rule.

When Pa.R.A.P. 126 was adopted, there was a conscious decision not to address the differences among the appellate courts. The Committee now proposes to amend Pa.R.A.P. 126 to establish a more uniform protocol for the citation of decisions in the appellate courts. This proposal reflects several value judgments as to which the Committee desires the input of the bench and bar:

First, there is a value in being able to cite unpublished memorandum decisions. At the least, it is important to be able to draw to the attention of the appellate courts matters that have been addressed in unpublished memorandum decisions but not in published opinions, or matters that appear to have been resolved inconsistently in unpublished memorandum decisions.

Second, the value of the opportunity to cite to unpublished memorandum decisions is somewhat offset by the determination of the panel that the decision did not warrant a published opinion; accordingly, the intermediate appellate courts should be able to decide for themselves whether to give an unpublished memorandum decision no weight, some weight, or persuasive weight.

Third, given the volume of decisions and the longstanding tradition of non-citation in the Superior Court, the method that the Commonwealth Court employed – *i.e.*, making citation available going forward from the date of adoption of the rule permitting citation – is sensible.

Fourth, the bar (and the bench of the Court of Common Pleas) should be able to look to a rule and not to an internal operating procedure to understand how and when they can cite decisions.

Fifth, there should be a single rule that governs the citation of authorities.

The current proposal attempts to balance several competing values. On the one hand, the current proposal recognizes that it is important that lawyers and Courts of Common Pleas have the opportunity to raise to the appellate courts unpublished memorandum decisions that appear to answer the question presented, or that appear to have reached a conclusion contrary to another opinion of the same court. On the other, the current proposal seeks to accommodate the desire for courts to be able to write less and other panels of that court to pay correspondingly less attention to decisions that a panel thinks do not warrant published opinions.

In the draft that follows, proposed additions are bolded and underlined; proposed deletions are bolded and bracketed.

Rule 126. Citations of Authorities

(a) General Rule.—A party citing authority that is not readily available **and any unpublished non-precedential memorandum decision or unreported opinion** shall attach the authority as an appendix to its filing. When citing authority, a party should direct the court's attention to the specific part of the authority on which the party relies **and, if the authority is an unpublished non-precedential memorandum decision or unreported opinion, the party must identify it as such when citing it.**

(b) Memorandum Decisions and Unreported Opinions.—Except as provided in paragraph (d), **an unpublished non-precedential memorandum decision of the Superior Court filed after ### and an unreported opinion of the Commonwealth Court filed after January 15, 2008 may be cited to any court but only for its persuasive value.**

(c) Single judge opinions of the Commonwealth Court may be cited only for persuasive value, except that a reported opinion of a single judge filed after October 1, 2013, in an election law matter may be cited as the court's binding precedent in an election law matter only.

(d) Law of the Case and Related Doctrines.—Any unpublished non-precedential memorandum decision or unreported opinion may be cited if relevant to the doctrine of law of the case, *res judicata*, or collateral estoppel, or when the authority is relevant to a criminal action or proceeding because it recites issues raised and reasons for a decision affecting the same defendant in a prior action or proceeding.

Official Note:

Pa.R.A.P. 126 is intended to ensure that cited authority is readily available to the court and parties. **[This rule is not intended to supersede any internal operating procedure of an appellate court regarding the citation to memorandum decisions or unreported opinions. See, e.g., Superior Court Internal Operating Procedure § 37, 210 Pa. Code § 65.37; Pa.R.A.P. 3716 and Commonwealth Court Internal Operating Procedure § 414, 210 Pa. Code § 69.414.]**

The second sentence of the rule encourages parties to provide pinpoint citations for cases and section or subsection citations for statutes or rules.

Although the rule does not establish rules for citation, the following guidelines regarding the citation of Pennsylvania cases and statutes are offered for parties' benefit:

Regarding cases, the rule does not require parallel citation to the National Reporter System and the official reports of the Pennsylvania appellate courts. Parties may cite to the National Reporter System alone.

Regarding statutes, Pennsylvania has officially consolidated only some of its statutes. Parties citing a statute enacted in the Pennsylvania Consolidated Statutes may use the format “1 Pa.C.S. § 1928.” Parties citing an unconsolidated statute may refer to the Pamphlet Laws or other official collection of the Legislative Reference Bureau, with a parallel citation to *Purdon's Pennsylvania Statutes Annotated*, if available, using the format, “Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104” or “Section 3(a) of the Act of May 16, 1923, P.L. 207, *as amended*, 53 P.S. § 7106(a).” Parties are advised that *Purdon's* does not represent an official version of Pennsylvania statutes. *In re Appeal of Tenet Health Systems Bucks Cnty., LLC*, 880 A.2d 721, 725-26 (Pa. Cmwlth. 2005), appeal denied, 897 A.2d 1185 (Pa. 2006).

Prior to Pa.R.A.P. 126, the format for citation was discussed only in Pa.R.A.P. 2119(b), a rule applicable to briefs. The format guidelines above are not mandatory, and a party does not waive an argument merely by failing to follow the format. The guidelines above do, however, provide assistance to parties looking for generally acceptable citation format in Pennsylvania.