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Some Thoughts on Supplemental Authorities Under Federal Rule of Appellate Procedure 28(j) and Related Musings

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Introduction

I teach a mini-class for my students in Georgetown Law’s Appellate Courts Immersion Clinic (@ImmersionClinic) titled the “natural history of a federal appeal.” It’s a two-hour mad rush, taught in the first week of the semester, in which I survey the Federal Rules of Appellate Procedure (FRAP) from soup to nuts and discuss the key attributes of a federal appeal. My hope is that our student-lawyers will get a basic understanding of the Rules and how the appellate process runs from the notice of appeal to a rehearing petition and beyond—right as they are starting their first brief-writing projects. In this class, I quickly touch on what are known as FRAP “28(j) letters”—the Rules’ principal mechanism for bringing supplemental authorities to the appellate court’s attention.

Our clinic has filed a couple 28(j) letters lately. And we have a bunch of oral arguments soon, and whether to file a 28(j) letter often comes up when prepping for oral argument.

So, nerd that I am, I’ve been spending a chunk of my spare time thinking about 28(j) letters. I decided to tell my students a bit more about Rule 28(j) letters, and I’ve converted that discussion into this essay.

What is a Rule 28(j) letter?

A 28(j) letter is authorized, as you’d expect, by Federal Rule of Appellate Procedure 28(j). A 28(j) letter is filed with a federal court of appeals when the
briefing is done, and a party wants to tell the court about what the Rule terms a “pertinent and significant” authority. Usually, a 28(j) letter informs the court about a new judicial decision, but other authorities—such as a new statute or regulation—may be the subject of a 28(j) letter. The Rule says that the “body” of the letter may not exceed 350 words.

**Can a 28(j) letter be argumentative?**

Back in the day, the Rule required the letter to state “the reasons for the supplemental citations” “without argument.” The Rule’s ban on argument was difficult to police, as you might imagine. So, under a [2002 amendment](https://ssrn.com/abstract=4205886), the letter may now include argument. But, given the tight word limit, there’s a premium on getting to the point. That makes things fun. It’s always a challenge for the appellate lawyer to be brief and incisive. Judges like that kind of writing too!

**Do the authorities cited in a 28(j) letter have to be brand-spanking new?**

Some courts and judges interpret Rule 28(j) as limited to *new* authorities—that is, limited to decisions, regulations, statutes, etc. issued after the filing of your last brief. But that’s not what the Rule actually says:

> 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.

So, under the Rule’s terms, you can use a 28(j) letter to notify the court about any authority that you didn’t know about when you filed your final brief.

But just because you have the authority to do something doesn’t mean you should use it. You don’t want to annoy the court by citing a bunch of old authorities, and you should consider the extent to which citing old stuff would make your lawyering appear negligent.
There are times, however, when an “old” authority comes to your attention after the case has been briefed, perhaps prompted by something that you hadn’t anticipated (like a discussion about the case with an astute friend!). So, you should know that the Rule does not by its terms prevent you from bringing an old authority to the court’s attention when you view it as “pertinent and significant.”

Note that the Supreme Court appears to take a different view: The Court says that “supplemental briefs” may include only stuff that was “not available” for use in your brief. S. Ct. Rule 25.6.

**Take “pertinent and significant” seriously.**

Regardless of the authority’s age, you should take seriously the Rule’s requirement that the authority be “pertinent and significant.” I’ve heard from various sources that judges don’t like it when 28(j) letters are used to cite any old unreported authority from the district court of whatever on a topic that has already been briefed. The judge I clerked for looked seriously at 28(j) letters only when they made a new point or were from important sources. So, don’t use 28(j) letters just to pile on or to cite non-controlling authorities on minor points, even when the authorities are new.

I’m attaching two recent Appellate Courts Immersion Clinic (@ImmersionClinic) Rule 28(j) letters. (They are also linked in the body of this essay.)

**One of these letters** was filed in *Sartori v. Schrodt*, No. 19-15411 (11th Cir.), to tell the Eleventh Circuit about the Supreme Court’s new ruling in *Van Buren v. United States*, 141 S. Ct. 1648 (2021), which concerned the meaning of “exceeds authorized access” under the Computer Fraud and Abuse Act. We had noted the pendency of *Van Buren* in our brief in *Schrodt*, so it made sense to bring *Van Buren* promptly to the Eleventh Circuit’s attention for that reason alone (among others). I think you’ll agree that our letter meets the “pertinent and significant” standard.
The other Rule 28(j) letter was filed in our Title VII appeal in *Hamilton v. Dallas County*, No. 21-10133 (5th Cir.). *Hamilton* is fully briefed in the Fifth Circuit, and our letter referred the court to a close-on-point precedent from the Sixth Circuit, *Threat v. City of Cleveland*, 6 F.4th 672 (6th Cir. 2021), another appeal of ours. *Threat* is not controlling (of course), but it’s a major, reported appellate decision (authored by a prominent judge), so it easily met the “pertinent and significant” standard.

**When should you file a Rule 28(j) letter?**

A few words about the timing of 28(j) letters. First, generally speaking, don’t use a 28(j) letter if you have another brief coming in the case. So, in a Title VII appeal we have pending in the D.C. Circuit, on an issue that we view as related to *Threat* (the Sixth Circuit decision cited above), we didn’t file a 28(j) letter because we had a reply coming (in which we could discuss *Threat*).

Second, Rule 28(j) says that the letter should be filed “promptly” after the authorities come to the party’s attention. Of course, the court won’t know for sure exactly when the authorities came to your attention, but the promptness requirement means that, when new authorities do come to your attention, you should act quickly. So, in the *Sartori* case discussed earlier, the Supreme Court issued its decision in *Van Buren* on a Thursday, and we filed our 28(j) letter the following Sunday evening—though we wouldn’t have been disbarred if we had waited until Monday morning! In *Hamilton*, the Fifth Circuit Title VII appeal, we filed our 28(j) letter the day after *Threat* came down.

**How many 28(j) letters?**

The Rule doesn’t limit the number of 28(j) letters that a litigant may file. And for good reason. After a case is fully briefed, a pertinent authority may come down a month later, and another pertinent authority may come down a month after that—necessitating two 28(j) letters.
But don’t use multiple 28(j) letters to screw around with the 350-word limit. If you’ve got two new, pertinent authorities, tell the court about them in one 350-word letter. Two separate letters spaced, say, a week apart will be seen as the ploy that it is. As suggested earlier, I like the 350-word limit because it forces me to be concise and focus on what matters.

**Responses to 28(j) letters**

Rule 28(j) says that any “response” to a 28(j) letter is “similarly limited” to 350 words and should be filed "promptly." One of my students observed that given the “pertinent and significant” standard, a party might “risk annoying a judge by filing a response 28(j) letter.” So, the student wondered, “how frequently do opponents file response letters, and in what circumstances?”

Nice questions. There are no clear answers, but here’s my best shot based on experience and occasional discussions with judges: Responses to Rule 28(j) letters are filed often, probably too often. I tend not to file them if my opponent’s initial 28(j) letter is reasonably accurate and focuses mainly on what the new authority held. And I don’t file a response when the initial 28(j) letter is of the piling-on or not-terribly-important variety. But when the authority is reasonably important, and my opponent’s 28(j) letter is adversarial, I will generally file a response, which I will try to keep as short and sweet as possible.

On a related note, if a new authority comes down that I believe the court will view as “pertinent and significant” and may be seen by the court as favorable to my opponent, I try to file a 28(j) letter as soon as possible—before my opponent files. It’s better to be viewed as forthcoming—that is, as the opposite of someone who tries to hide the ball. And, besides, why not have the first crack at explaining the new authority?

This point is simply a variant on a more general point of good brief writing: Don’t wait for your opponent’s brief to explain a “bad” authority or argument that you know darn well is relevant and that the judges will be
thinking about. Be the first one to address the issue, putting your mark on it, so by the time your opponent deals with it, you’ve preempted some or all of the impact that your opponent may have had. Any element of surprise that the other side may have achieved is gone, and no one can accuse you of a cover-up.

**Sometimes a Rule 28(j) letter just won’t cut it.**

Finally, rarely, a 350-word letter won’t suffice to tell the court about an important new authority—or a new statute, policy, regulation, or even a pertinent factual development. In that situation, you’ll want to file a supplemental brief. You’ll need to get the court of appeals’ permission to file it. As with all motions, pay close attention to the local rules for the circuit you’re in. Local rules vary greatly (unfortunately) on many things, including on motion practice. Usually, you’ll want to attach a copy of the proposed supplemental brief to the motion asking for permission.

Note that, again, the Supreme Court takes a different approach. Supplemental briefs are freely allowed, requiring the Court’s blessing only when oral argument has already occurred. **S. Ct. R. 25.6.**