

Keeping the court informed of new authority while your appeal is pending

Rules, procedure and practical advice for updating the court on significant decisions that impact your brief

By Gary Simms

As appellate practitioners know all too well, after the principal briefs (Appellant's Opening Brief, Respondent's Brief, and Appellant's Reply Brief) have been filed, an appeal will almost certainly remain pending in a California Court of Appeal or in the California Supreme Court for at least several months, perhaps as long as two years or more, before oral argument. The Supreme Court's website acknowledges that oral argument is usually held "several months to a year after all briefs on the merits have been filed." And the United States Court of Appeals for the Ninth Circuit's website states that oral argument is usually held between nine months and one year after briefing is completed.

These estimates are often optimistic. Indeed, some cases remain pending much longer than a few months to one year. For example, on the Supreme Court's November 2019 oral-argument calendar, one case had been pending two years and two months after the principal briefing, and another case had been pending for two years and seven months.

Because of the time lapse between the end of principal briefing and oral argument, it is important to frequently update your legal research to determine if any relevant new appellate decisions have been filed or if any relevant new statutes or regulations have been enacted. California appellate courts and the Ninth Circuit have procedures for doing so.

California Courts of Appeal

The Courts of Appeal and the Supreme Court have different rules for bringing new authority to the court's attention. In the Courts of Appeal, California

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Rule of Court 8.254 governs the submission of new authority.
The rule states:

a) Letter to court

If a party learns of significant new authority, including new legislation, that was not available in time to be included in the last brief that the party filed or could have filed, the party may inform the Court of Appeal of this authority by letter.

(b) Form and content

The letter may provide only a citation to the new authority and identify, by citation to a page or pages in a brief on file, the issue on appeal to which the new authority is relevant. No argument or other discussion of the authority is permitted in the letter.

(c) Service and filing

The letter must be served and filed before the court files its opinion and as soon as possible after the party learns of the new authority. If the letter is served and filed after oral argument is heard, it may address only new authority that was not available in time to be addressed at oral argument.

Although Rule 8.254 seems straightforward, a few points merit note.

What is significant?

The rule requires that the new authority must be "significant." (Rule 8.254(a).) Of course, whether new authority is significant can be somewhat subjective, but common sense suggests that, with one exception, you should not use Rule 8.254 to submit new authority that is merely cumulative of authority cited in your principal briefing.

The exception is when the Supreme Court has issued a new opinion that clearly supports Court of Appeal authority cited in your principal briefing. The obvious reason for this exception is that a Court of Appeal in which an appeal is pending is free to disagree with other Court of Appeal authority but is bound to follow Supreme Court authority. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.) So, if you have cited one or more Court of Appeal decisions to support an argument, a new Supreme Court opinion that makes the same point should be deemed to be "significant."

Another circumstance in which new authority should be deemed to be significant is when it supports an argument for which there was no clear authority when you filed your principal briefing. And, of course, new authority is significant if it clearly refutes an argument by your opponent.

What's new?

Rule 8.254(a) defines "new authority" as authority "that was not available in time to be included in the last brief that the party filed or could have filed." Obviously, this includes court decisions and statutes or regulations that were issued or enacted after your last brief was filed, i.e., either your Respondent's Brief or your Appellant's Reply Brief. But it is possible that a new decision was issued a week or two before you filed your last brief, but you were not then aware of that new decision. This presents a judgment call, but you will likely not incur your court's displeasure if you comply with the requirements of Rule 8.254, with perhaps a notation that you were not aware of the new authority when you filed your last brief.

Whether authority is "new" can arise in another regard, although an uncommon one: when a court of appeal issues an unpublished opinion that either the issuing court or the Supreme Court later decides to publish. California Rule of Court 8.1115(a) prohibits the citation of unpublished opinions. So, in this situation, you could not have cited the opinion when it was filed. But when the Court of Appeal later certified its opinion for publication, the opinion only then became citable, and it should be deemed to be new authority.

Supreme Court Review

Rule 8.254's requirement for significance raises a question about Supreme Court orders granting review. Such an order is not "new authority" by any common understanding of the term because a grant of review is not a decision on the merits. But, of course, absent a subsequent dismissal of review, a grant of review will lead to a decision on the merits, which will result in a published, binding Supreme Court decision.

So, if the Supreme Court grants review in a case that raises an issue of importance in your case, there should be no problem submitting a letter to your court to notify it of the grant of review. Even though this technically may not be a notice of "new authority" under Rule 8.254, it does abide by the rule's mandate not to argue. Just tell your court the case in which review was granted, the Supreme Court docket number, the date on which review was granted, and the pages of your briefing where the issue is discussed.

In rare cases, you or your opponent may have cited a Court of Appeal decision that was very new when you cited it, and the Supreme Court later grants review of that decision. The grant would certainly seem significant enough to note it for the court in which your appeal is pending. And again, in keeping with the spirit of Rule 8.254, you should not make any arguments regarding the grant of review, but again, simply note the case in which review was granted, the Supreme Court docket number, and the date review was granted.

A Supreme Court grant of review may be significant in another regard. As we all know, California Rule of Court 8.1115(a) prohibits the citation of unpublished Court of Appeal opinions. The Supreme Court, though, grants review of unpublished as well as published decisions. Again, a grant of review will lead to a decision on the merits, which will result in a published, binding Supreme Court decision. Thus, even though Rule 8.1115(a) prohibits citation of an unpublished opinion, the rule does not prohibit citation of a Supreme Court grant of review of an unpublished decision. So, there should be no problem with bringing a new Supreme Court grant of review to your court's attention. Again, though,

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abide by Rule 8.254's mandate not to argue the case.

Timing

Rule 8.254 does not set forth any deadline for submitting a notice of new authority. Rather, the rule states that the notice must be submitted "as soon as possible after the party learns of the new authority." It might be tempting to wait for a notice of oral argument before updating the legal research in your briefing. If you only then learn of the new authority and bring it to your court's attention, you will be in compliance with the rule's requirement to notify the court as soon as possible after you have learned of the new authority.

But as a practical matter, do not wait that long. Rather, frequently check for new authority after the principal briefing and, if you find any, bring it to your court's attention as soon as possible. This is because of the way in which the Court of Appeal and the Supreme Court process appeals. California's 90-day rule requires courts to issue their decisions within 90 days after a matter is submitted. (Cal. Const., Art. VI, § 19; Gov. Code, § 68210.) As appellate practitioners know, because of the 90-day rule, appellate courts begin work well before they issue a notice of oral argument and, except in very rare cases, they have a proposed opinion ready to file even before oral argument.

Thus, waiting to update your legal research until your court issues a notice of oral argument may cause your court to pay less heed to the new authority than they otherwise would have, especially if your new authority is not squarely controlling Supreme Court authority. This need for promptness is shown by the First District Court of Appeal's Local Rule 16 that "Parties submitting a letter of new authorities prior to oral argument under California Rules of Court, rule 8.254 must submit the letter when the authorities become available and as far in advance of any scheduled oral argument as possible."

A question of timing can arise after oral argument. Rule 8.254 states that, "If the letter is served and filed after oral argument is heard, it may address only new authority that was not available in time to be addressed at oral argument." Presumably, this means that, after oral argument, you should not cite authority that was decided before oral argument. But it is possible that a new decision was issued only a few days before oral argument, and you were not then aware of it. In that situation, you will probably not irritate your court if you submit a notice of the new authority after oral argument.

Another timing issue can arise, although very infrequently, when a new authority is issued after your court has issued its decision. You have 15 days after a decision in which to file a petition for rehearing. If a new authority is issued during that 15-day period and if that authority supports your petition for rehearing, you can, of course, cite and discuss the new authority in your petition. You are not constrained by Rule 8.254.

What if the new authority is issued after the 15-day deadline to file a petition for rehearing but before the Court of Appeal decision becomes final, i.e., 30 days after it is issued? The court can grant an extension of time to file the petition. (Rules 8.60(b) & 8.268(b)(4).) But the court cannot grant rehearing after its decision becomes final. (Rule 8.268(c).)

It is also possible that helpful new authority will be issued after a Court of Appeal decision becomes final but before the deadline for filing a Petition for Review in the Supreme Court. In that situation, you need only to cite and to discuss the new authority in your Petition for Review.

Procedure

The procedures for bringing new authority to an appellate court's attention depend on whether you are in the Court of Appeal or the Supreme Court. As discussed above, in the Court of Appeal, the procedure is governed by Rule 8.254, which limits you to merely citing the new authority and the pages of the briefing to which the new authority relates. Any argument is prohibited.[1]

Likewise, Rule 8.200(a)(4) prohibits the filing of a supplemental brief without the permission of the Court of Appeal's presiding justice. This gives rise to the question of whether you should request such permission. This, of course, is a judgment call. If it is very clear what the new authority means for your case, you probably don't need supplemental briefing. If it is not altogether clear how the new authority helps you or hurts your opponent, it probably is not even worth bringing to your court's attention.

A party who is hurt, though, by the new authority may have a different perspective. Rule 8.254 does not provide for any response to a notice of new authority. But if your opponent submits such a notice, you may want to attempt to distinguish the authority or to explain why your court should not follow it. In that situation, you must request permission to file a supplemental brief responding to the new authority. Of course, though, an argument not to follow new authority cannot be made to a Court of Appeal if the new authority is by the Supreme Court because the Court of Appeal must follow Supreme Court authority. (*Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d 450.)

California Supreme Court

California Rule of Court 8.520(b) governs the submission of new authority to the Supreme Court. Unlike in the Court of Appeal, supplemental briefing is allowed as a matter of right under Rule 8.520(d). You are allowed to file a supplemental brief that does not exceed 2,800 words. (Rule 8.520(d)(2).) Also, unlike in the Court of Appeal, there is a deadline, i.e., 10 days before oral argument. (*Ibid*.) But as a practical matter, for the reasons discussed above, waiting until then will almost certainly be too late for the new authority to have any effect on the Supreme Court's decision because

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their opinion will have been written well before oral argument.

Perhaps you could submit new authority to the Supreme Court under Rule 8.254, i.e., follow its bare-bones procedure of merely citing the new authority without argument. But note that Rule 8.254 is in Title 8, Chapter 2, Article 4 of the California Rules of Court. That chapter deals only with appeals in the Courts of Appeal. Moreover, because the Supreme Court rule, i.e., Rule 8.520(b), permits supplemental briefing, there would not seem to be a good reason to forego that opportunity.

Multiple new authorities

Because of the often-lengthy delay between the close of principal briefing and oral argument, it is possible that more than one significant new authority, e.g., a new court decision, may be issued during that time. Assume, for example, that shortly after the close of briefing, you learn of a significant new authority. Should you bring it to your court's attention right away, or should you wait a few months to determine whether there are any additional new authorities so that you can include all new authorities in one letter?

In the Court of Appeal, the answer is in Rule 8.254, which, as noted above, states that a party must notify the court of the new authority "as soon as possible after the party learns of the new authority." In the Supreme Court, though, a party has until 10 days before oral argument to notify the Court of the new authority. (Rule 8.520(d)(2).) So, you can perhaps wait a while to determine if there are any additional new authorities to bring to the Supreme Court's attention. But doing so presents a bit of a problem. That is because you will have no way of knowing whether the Supreme Court has already begun working on your appeal. So, if you wait too long, you may be too late.

Adverse new authority

The rules for bringing new authority to a court's attention are commonly and understandably thought of as being a way to inform the court of new authority that supports your position in the appeal. But of course, there can be new authority that is adverse to your position. If you know of such new authority, should you bring it to your court's attention?

Yes, because California Rule of Professional Conduct 3.3 states that "(a) A lawyer shall not . . . (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be *directly adverse* to the position of the client and not disclosed by opposing counsel." (Emphasis added.) So, if you become aware when updating your legal research of a new authority that is directly adverse to your position, you should disclose that authority if your opponent has not already done so. Of course, though, what is "directly adverse" can be arguable.

Also keep in mind that Rule 3.3's reference to the "controlling jurisdiction" is not limited to California. As the official comments to Rule 3.3 make clear, "Legal authority in the controlling jurisdiction may include legal authority outside the jurisdiction in which the tribunal sits, such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a lower court." (Comment 3 to California Rule of Professional Conduct 3.3.)

Federal Courts

Bringing new authority to a federal appellate court's attention is governed by Federal Rule of Appellate Procedure 28(j). It states:

> "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 must be similarly limited."

In some respects, Rule 28(j) is the same as or similar to California Rule of Court 8.254. For example, Rule 28(j) requires that the new authority be "pertinent and significant." Rule 28(j) also requires that notice of the new authority must be made "promptly." And the Advisory Committee for the Ninth Circuit further explains 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. 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."

(Advisory Committee Comment to Ninth Circuit Rule 28.6.)

The California and federal rules differ, though, in two important respects. *First*, unlike California Rule 8.254, which requires the authority to be new, i.e., "not available in time to be included" in your last principal brief, Rule 28(j) is broader, referring to authorities that "come to a party's attention after the party's brief has been filed." So, under Rule 28(j), if you somehow overlooked a "pertinent and significant" authority when you submitted your principal briefing, but later learn of that authority, you can submit it even if it is not new. But Rule 28(j) requires you to state the reasons for your supplemental citation. So, offer a brief explanation of why you were not aware of any significant authority that was not new when you filed your brief.

Second, unlike the California Rule 8.254, federal Rule 28(j) permits discussion of the new authority, subject to a limit of 350 words in the body of the letter. Also unlike the California rule, the last sentence of Rule 28(j) makes clear that your opponent is permitted to file a responsive letter of the same length (350 words) without first seeking leave of court.

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Conclusion

On appeal, it behooves practitioners to periodically update their legal research between the close of principal briefing and oral argument and to notify their court of any significant new authority and, in federal court, also any overlooked significant authority. Such authority may tip the scales in your favor. Conversely, if the new authority is adverse to your case, you need to be aware of it and to request supplemental briefing to deal with it.


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Endnotes:

[1] If you submit a notice of a new court decision very shortly after it is issued, it may not yet have a volume and page number in the Official Reports. Thus, as a convenience for your court, include a citation to LEXIS, or Westlaw, or both of them.

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