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Page printed from: [The Legal Intelligencer](#)

[Back to Article](#)

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# Superior Court to Begin Posting Unpublished Memorandums

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The state Superior Court will begin posting all unpublished memorandum decisions on its website in the "very near future," according to President Judge Correale F. Stevens.

Stevens told the *Law Weekly* last week that the court's technology department is working on the matter and the goal is to start posting opinions "definitely by the end of the year, but it may even be sooner than that."

The announcement comes a little more than a year after the court began identifying the authors of its memorandum decisions.

At the time, a number of practitioners expressed a desire to the *Law Weekly* to see those opinions become more easily accessible.

Stevens, speaking to the *Law Weekly* last week, said the court has been discussing the idea since as far back as four or five years ago, but several judges were concerned about its viability from a technological aspect because the Superior Court generates so many memorandum opinions.

Beyond that, however, Stevens said he couldn't find a reason why the opinions were not being posted before.

Eventually, the demand from Pennsylvania lawyers and members of the public to post the decisions led to a consensus of the court's judges, according to Stevens.

And while the court will need to be careful with regard to decisions related to the Family Fast Track Program to ensure that victims' and minors' names are not identified, Stevens said it is prepared to take the necessary precautions. "We're trying to be as open and responsive to the bar and public as we can be," Stevens said. "I just hope the bar understands there are going to be a lot of memorandums."

In 2011 alone, according to caseload statistics on the Superior Court's website, the court issued 4,879 unpublished

memorandum decisions versus only 278 published opinions.

In other words, nearly 95 percent of the decisions the court generated last year were unpublished.

Stevens said memorandum decisions will continue to have no precedential or persuasive value, though he added that the court plans to revisit that issue sometime in the next six months to a year.

"I don't anticipate that in the near future they're going to be precedential," Stevens said, but noted that some other courts do allow memorandum decisions to be cited for persuasive authority.

In fact, last year, the Commonwealth Court amended its internal operating procedure to permit parties to cite unreported panel decisions issued after January 15, 2008, for persuasive, but not precedential, value.

Judge David N. Wecht, who was elected to the Superior Court last November and had been a strong supporter of increasing the accessibility of unpublished memorandums during his campaign for the bench, commended his colleagues on the decision to begin posting them online and told the Law Weekly he's hopeful it marks a step toward eventually allowing memorandums to be cited for persuasive value.

"Speaking only for myself, I believe we will ultimately head in that direction," Wecht said.

Howard J. Bashman, a solo appellate lawyer in Willow Grove, Pa., who writes a regular column for The Legal, said he would support that move if it happens in the future, but added that he's happy just to hear that those decisions will now be more accessible.

"The necessary first step is to make them available," Bashman said, calling it a "wonderful development."

Carl A. Solano, co-chair of Schnader Harrison Segal & Lewis' appellate practice group in Philadelphia, had a similar take. "It sounds as though [the court has] listened to the bar and the pleas of the bar to make this information available and they have responded, even though I gather that it is going take some work technologically to accomplish it," Solano said. "I believe that's a very significant decision on their part and one that should be applauded."

Solano said access to memorandum decisions is important to his practice, in part because it provides increased transparency to his clients.

"A lot of times you represent a client and then the court decides the case in an unpublished, nonprecedential opinion," Solano explained. "The opinion is never published anywhere and the client looks at that and says, 'What is this? They issued a special decision but nobody's allowed to cite it, nobody's allowed to even see it. It's like some secret law that just applies to my case and nobody else,' and they feel as though they were treated unfairly or in some discriminatory way."

While that's not necessarily accurate, because memorandum decisions have always been available, if not easily accessible, Solano said posting them online will go a long way toward silencing that misconception altogether.

Solano added that making memorandums more accessible will also aid him in advocating on behalf of his clients.

"When I'm representing a client, I want to have all the information that I can about how the court views the issues that I am arguing and by having available an additional database of material in which the court talks about those issues, I can gain additional insights and additional arguments," he said.

Bashman noted that in addition to aiding attorneys and the public, increasing access to memorandum opinions will benefit the media as well.

"There are certainly a lot of newsworthy cases that are decided by unpublished decisions," Bashman said, adding that news outlets will now have instant access to these decisions without having to go through a prothonotary's office.

Wecht said he views the Superior Court's decision to post the memorandums as recognition that "electronic access is a requirement in this day and age and that mere availability in prothonotary's offices in the three cities of Philadelphia, Pittsburgh and Harrisburg is not adequate."

Kevin J. McKeon, an appellate lawyer with Hawke, McKeon & Sniscak in Harrisburg, said he thinks it's "great" that the Superior Court is making memorandum decisions more accessible because it opens up new possibilities for attorneys hoping to find unpublished decisions pertinent to their own cases.

However, McKeon noted that the flipside is that doing so could create a "mountain of potential additional work" for those attorneys.

"It presents a logistical problem for the zealous advocate and a time and cost issue," McKeon said, adding that the question may eventually become, "Should you or must you do that research?"

But Bashman said technology has made this less of an issue.

"The days when somebody could reasonably be expected to read every opinion of a court are in the past now," he said, adding that research today is done almost exclusively electronically.

And while broader access to unpublished memorandums may exponentially increase the number of available decisions dealing with more common areas of law, Bashman said he believes it will prove very helpful in cases that require lawyers to research more obscure or complicated legal issues.

Stevens acknowledged that some in the legal community have questioned whether making memorandum decisions more available would disadvantage smaller legal practices that don't have the research capacity that larger firms do.

"Does this put the solo practitioner at a disadvantage? The lawyers are going to have to decide that on their own," Stevens said.

Solano did wonder whether legal research services like LexisNexis and Westlaw would begin carrying Superior Court memorandum decisions, but Stevens told the Law Weekly that the court has no say in that matter.

"We have to leave that to Westlaw and Lexis to decide what they want to do," Stevens said.

Initially, at least, the decisions will be available on the Superior Court's official website, to which the Administrative Office of Pennsylvania Courts' website will link, according to Stevens.

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