

Important Note Regarding FRAP 28(j) Filings

FRAP 28(j) provides that, when a party learns of pertinent and significant authorities after the party's brief has been filed—or after oral argument but before decision—the party may promptly advise the clerk by letter, with a copy to all other parties, setting forth the citations. As this provision is subject to abuse, we remind counsel considering a FRAP 28(j) filing to comply with the requirements of FRAP 28(j) and 5th Cir. R. 28.4, which governs supplemental briefing.

The court has recently rejected 28(j) filings when counsel cited authority that was available when they submitted their brief or made oral argument. The court concluded the matters cited were not significant or pertinent and the inclusion of argument made it appear that counsel filed the 28(j) letters as a vehicle to justify additional argument, rather than inform the court of recently discovered authority. The court warned counsel in one case to avoid such abuse of filings.

Counsel sometimes file a FRAP 28(j) letter after oral argument, ostensibly to provide information requested by the court, but make supplemental argument in the filing. As an initial matter, unless a panel member specifically requests information, counsel should not present additional matters. Naturally, if a panel member requests record citations or other information, counsel should provide the information in a letter to the clerk, copying the other parties. The letter should clearly state that the information is provided at the request of the panel. However, unless authorized or requested by the panel, it is improper to make supplemental argument in the letter.

The court will reject any FRAP 28(j) submission that does not comply with requirements.