

Alabama Rules of Appellate Procedure

Rule 28B.

Notice of Supplemental Authority.

If pertinent and significant authority comes to a party's attention after the party's brief has been filed – or after oral argument but before a decision has been rendered by the appellate court – a party may promptly advise the clerk of the appellate court in which the proceeding is pending by letter, with a copy to all other parties, setting forth the citation or citations of the supplemental authority. The letter must state the reasons for the supplemental citations, referring either to the page of the brief the supplemental authority supports or to a point argued orally. The body of the letter must not exceed 400 words (2 pages for pro se filers) and must otherwise comply with Rule 32(a)(6) and (7), Ala. R. App. P. Any response must be made promptly and shall be similarly limited.

[Adopted 9-20-2016, eff. 1-1-2017; Amended 7-24-2020, eff. 10-1-2020; Amended 11-30-2020, eff. 1-1-2021.]

Committee Comment to Amendment to Rule 28B Effective October 1, 2020

Rule 28B has been amended to provide a word limit for most supplemental authority letters consistent with the amendment to Rule 32, but to retain a page limit for persons filing supplemental authority letters filed pro se.

Committee Comment to Amendment to Rule 28B Effective January 1, 2021

By replacing the word "new" with the word "supplemental," the amendment clarifies that counsel may bring to the attention of the appellate court both previously existing authorities that were not included in a brief and authorities issued after a brief is filed. The rule is patterned after Rule 28(j), Fed. R. App. P. A leading treatise explains:

"Two commentators state that '[t]he usual times for sending in new authorities are (a) shortly before argument, when renewed research uncovers something; (b) after a reply brief is filed, when new research provides an answer to a question not theretofore asked; (c) after argument, when the argument suggests another look at the law; and (d) when regular reading of the advance sheets or browsing on Westlaw or LEXIS turns up something.' A good use for a Rule 28(j) letter is to apprise the court of authorities that were previously unavailable. But Rule 28(j) extends to any pertinent and significant authority that comes to the party's attention after briefing (or after argument but before decision); thus, a Rule 28(j) letter can

also be used to bring to the court's attention an authority that existed, but was not found by counsel, prior to briefing or argument. A court might permit the parties to use Rule 28(j) letters to address an issue raised by the court during oral argument. ...

"The usual rule that contentions not raised and argued in the party's principal brief are ordinarily deemed abandoned applies with equal force to Rule 28(j) letters, and they are thus not an appropriate vehicle for asserting new contentions. There are of course exceptions to the general rule concerning abandonment, so there are occasional circumstances in which a party may succeed in using a Rule 28(j) letter to present an issue not previously raised -- for instance, if the issue arises from a late-breaking change in the governing law. ..."

16AA Charles Alan Wright et al., *Federal Practice & Procedure* § 3974.6 (2020) (footnotes omitted).

Note from the reporter of decisions: The order amending Rule 2(c) and Rule 3(c) and adopting Rule 28A and Rule 28B, Ala. R. App. P., and the committee comments, including the comments to Rule 25, effective January 1, 2017, is published in that volume of *Alabama Reporter* that contains Alabama cases from 199 So. 3d.

Note from the reporter of decisions: The order amending Rule 5(e), Rule 21(d), Rule 27(d), Rule 28(a), Rule 28(j), Rule 28A(c), Rule 28B, Rule 32, Rule 39(d), Rule 40(f), and Rule 40(g), effective October 1, 2020, and adopting Committee Comments to those amendments is published in that volume of *Alabama Reporter* that contains Alabama cases from ___ So. 3d.

Note from the reporter of decisions: The order amending Rule 2(b), Rule 5(b)(2), Rule 21(a)(1)(F), and Rule 28B and adopting the Committee Comments to those amendments, effective January 1, 2021, is published in that volume of *Alabama Reporter* that contains Alabama cases from ___ So. 3d.