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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:) No. R-23-0026
)
) COMMENT OF DAVID EUCHNER
Petition to Amend ARCAP 4(b)(9),) IN PARTIAL OPPOSITION TO
13(a), 13(i); Ariz. R. Crim. P. 31.6(d),) PETITION TO AMEND VARIOUS
31.10(a), 31.10(j); Ariz R. P. Juv. Ct.) RULES RELATED TO TABLES OF
607(b)(3), 609(d)(5).) CITATIONS
_____)

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, David J. Euchner hereby submits the following comment on the petition to amend various rules of procedure related to the required inclusion of a table of citations in appellate briefs. ARCAP 4(b)(9), 13(a), 13(i); Ariz. R. Crim. P. 31.6(d), 31.10(a), 31.10(j); Ariz. R. P. Juv. Ct. 607(b)(3), 609(d)(5).

Introduction

I have been a full-time appellate practitioner for over 15 years. For more than 10 years, I have supervised the appellate unit of the Pima County Public Defender’s Office. For the last 12 years, I have served as a chair or co-chair of the amicus and rules committee of Arizona Attorneys for Criminal Justice, and in that capacity I have filed numerous *amicus curiae* briefs in state and federal appellate courts. I am

open to new ideas that improve appellate practice, and I welcomed Petitioners’ article in the April 2022 issue of ARIZONA ATTORNEY because it put forth an idea that is worthy of discussion. I also appreciate the fact that Petitioners incorporated the feedback they received from that article and modified their position in the Petition. In shaping my view on the Petition, I endeavored to distinguish my subjective personal preferences from what I believe to be objective best practices. Ultimately, while I am interested in continuing the conversation, I oppose the change—except possibly for handwritten briefs.

The Table of Authorities is Valuable to Practitioners

At the outset, it is important to note that if the Petition is adopted and the table of authorities becomes optional, the result will be the same as if the requirement was entirely deleted from the rule. The “frequent flyers” of appellate practice will stop using it entirely, and the only briefs that will include it are from prisoners who do not have access to updated rules or lawyers who do an occasional appeal and did not notice the rule change. It is important to recognize when deciding on this issue that “optional” versus “repealed” will produce the same outcome.

My practice is to build the table of authorities manually, and I use it as an integral part of the brief-writing process. I have described my process to many people over the years and the looks on their faces reveal that they think it is weird—and sometimes they come right out and call it weird. There is no question that I

developed my system based on a requirement in the rules, and that a change in that requirement would allow attorneys (including myself) the opportunity to adapt. However, I know that eliminating the table of authorities will not save me time.

Not including other attorneys who have adopted my unusual methodology, I am not aware of many attorneys who spend time on building tables. Instead, if they do not have a Word macro or other software, attorneys usually assign staff to manage those tasks. Of course, staff time equals money, but a firm is not billing \$500 per hour for a legal secretary to build and review the table of authorities.

It is true that the table of authorities requires attention to detail. Petition at 5. But this is no less true of pinpoint citations within the brief. Petitioners candidly admit that the best calculations that could possibly be made of the amount of time spent on this task are on the “back of the envelope.” Petition at 3, 5. Better data would help in understanding the economic value of this proposal.

Petitioners’ Identified Non-Navigational Uses for Table of Authorities

Petitioners cite four non-navigational uses for the table of authorities. I employ all of these uses to some extent, in addition to my earlier description of my practice. Petitioners’ refutation of those uses may have surface appeal, but I find them unconvincing.

First, very early in my appellate career, I developed the ability to read a table of authorities and get a good sense of the direction of opposing counsel’s brief.

Petitioners note that the table of contents could serve this purpose, but that is only true if the table of contents provides sufficient level of detail, including subheadings. In the world of criminal appeals, I have seen briefs from the Attorney General's Office that provides only an argument title in the table of contents with no subheadings, even when a legal argument spans thirty pages. I have also seen many defense attorneys have a table of contents that says only "Arguments," no matter how many arguments there are. Petitioners also suggest that the Introduction or Summary of Argument would provide a better feel, but those are optional sections and rarely used in criminal practice (and, in my experience, never used by the Attorney General's Office). In any event, for criminal appellate practitioners on both sides who work in the same area of law for many years, a table of authorities provides a lot of insight into the approach taken by the other side.

The second reason as described applies to the appellate court judges and staff, but attorneys can use this technique for answering briefs and reply briefs. When a litigant seeks to rebut the opponent's claims, the brief should address not only the legal points made in the answering brief but also the authorities relied upon. This is an important use that should not be underestimated.

As to the third and fourth uses, I agree that these reasons standing alone would not be sufficient to justify requiring a table of authorities. It is true that most cases do not have oral argument and that the table of authorities usually does not solve a

citation problem that is presented in the body of the brief. I would point out, however, that hyperlinking legal authorities is only useful to large firms that use Westlaw. Most small firms and solo practitioners cannot afford Westlaw, so these links are useless to them. (I also find them annoying, because it is not that hard to type a citation into Westlaw.) Ironically, Petitioners celebrate the onerous task of hyperlinking of citations in the same breath as their denigration of the table of authorities.

Exception for Handwritten or Pro Se Briefs

One point that is worth further consideration is whether handwritten briefs should be allowed to forgo the table of authorities. Two of the cases cited in the Petition to justify abandoning the table of authorities come from cases involving self-represented litigants, including one from a criminal case. Petition at 8 (citing *Lvov v. Goltsman*, 1 CA-CV 13- 0345, 2014 WL 458147, at *1, ¶ 6 & n.2 (Ariz. App. Feb. 4, 2014) (mem. decision)); *id.* at 10 (citing *State v. Haggard*, 2 CA-CR 2010-0307-PR, 2011 WL 315537, at *2, ¶ 8 (Ariz. App. Feb. 1, 2011) (mem. decision)). In *Haggard* a prisoner filed a handwritten petition for review from denial of post-conviction relief, even though a table of authorities is not required under Rules 32.16 or 33.16. Perhaps out of frustration, Mr. Haggard included a page that contains the following language, and nothing more on that page:

Table of Cases and Authorities

Pro Se. AzDOC has removed all law libraries and made it illegal even to share case law papers.

AzDOC has said to file appeals in plain English with-out [sic] case law.

State v. Haggard, 2 CA-CR 2010-0307-PR, [petition for review](#) (filed October 18, 2010). In both *Haggard* and *Lvov*, the parties' deficiencies went far beyond merely failing to include a table of authorities, and yet the court of appeals did its best to reach the merits of the claims. Prisoners might have additional difficulties with compliance with technical rules, so I believe that allowing prisoners flexibility in form requirements is a worthwhile consideration.

The Petition cites other cases where courts were dissatisfied with the form of the table of authorities. However, while the court of appeals might chide the occasional litigant for noncompliance with the procedural rules, there does not appear to be an example of a case where a litigant was denied substantial justice based on the failure to include a table of authorities.

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Conclusion

I thank the Petitioners for challenging the orthodoxy of appellate practice. I look forward to continued conversations on this topic, and I hold open the possibility that in a few years I will change my mind. Nevertheless, for the reasons in my comment, I request this Court deny the petition, with a possible exception for handwritten briefs.

DATED (electronically filed): April 28, 2023.

By: /s/ David J. Euchner
David J. Euchner

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