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IN THE ARIZONA SUPREME COURT

PETITION FOR CHANGE IN RULE 111,
ARIZONA RULES OF THE SUPREME COURT,
RELATING TO ISSUANCE OF PUBLISHED
OPINIONS AND MEMORANDUM DECISIONS
NOT FOR PUBLICATION BY THE SUPREME
COURT AND COURT OF APPEALS, AND FOR
DELETION OF REDUNDANT RULES 28,
ARIZONA RULES OF CIVIL APPELLANT
PROCEDURE, AND 31.26, ARIZONA RULES
OF CRIMINAL PROCEDURE

NO. R-06-_____

RICHARD D. COFFINGER, a member of the State Bar of Arizona, respectfully petitions this Court, pursuant to Rule 28, Arizona Rules of the Supreme Court, to amend Rule 111 of the Arizona Rules of the Supreme Court. The proposed amendments are intended to insure that appellate court judges issue published opinions in all cases presenting issues of first impression and/or reversing a lower court or agency as currently required by the Rule.

The Published Opinion Rule

In 1973, former Rule 48 was added to the Supreme Court Rules. Four years later, it was abrogated for civil appeals and replaced with Rule 28, Ariz.R.Civil App. Pro. In 1985, the Supreme Court rule was renumbered as current Rule 111. It states in part:

(b) When disposition to be by opinion. Dispositions of matters before the court requiring a written decision shall be by written opinion when a majority of the judges acting determine that it:

1. Establishes, alters, modifies or clarifies a rule of law,....¹ [Emphasis supplied]

Since an appellate court's disposition of all matters presenting an issue of first impression *a fortiori* "**establishes... a rule of law,**" all such dispositions should be by a published opinion. Every appellate court disposition that reverses the judgment, order or decision of a lower court or agency *a fortiori*, **clarifies a rule of law.** In spite of the clear mandate of the rule, currently many such cases are being resolved in memorandum decisions. The appellate judges are on the honor system to follow the rule and due to heavy workload considerations, even the most conscientious judge might be unwilling to commit the extra time and effort necessary to write a published opinion, in spite of the Rule's requirements. He or she could simply rationalize that none of the issues presented were important enough to warrant disposition by published opinion.

The proposed rule change simply requires that all memorandum decisions include a citation to a controlling published Arizona appellate court opinion dispositive of every issue presented, as well as a statement entitled, "Basis for Memorandum Decision," in which the judges certify that the disposition (1) does not dispose of any issue of first impression; (2) is not subject to publication under any of the requirements of subsection b; and (3) does not include a dissent or a concurrence. Current court rules require attorney's to file many types of certifications, including a certificate of good faith in a motion to continue required in Comment to Rule 8.5(a), Ariz.R.Crim.Pro.; a certificate of compliance with word or page limitations and type size for appellate briefs required by Rule 14(b), Ariz. Civil App Pro., Rule 31.13(b), Ariz.R.Crim.Pro., and Rule 7(e), Rules of Pro. Special Actions; a certificate of good faith in a notice of peremptory change of judge required by both Rule 42(f), Ariz. R. Civ. Pro. and Rule 10.2(b), Ariz.R.Crim.Pro.

¹Rule 28(g), Ariz.R.Civil App.Pro. and Rule 31.26, Ariz.R.Crim.Pro. include identical provisions.

The decision not to publish is not subject to public scrutiny because currently memorandum decisions are not readily available to the public. Also, the decision to not publish is not subject to review. Under the current rule, the lack of transparency in the manner in which an appellate court makes its determination of whether it will render its disposition by published opinion or memorandum decision, plus the non-availability of review of that determination gives the public no assurance that the appellate courts are complying with the Rule's criteria for publication. Publication rules, like Rule 111 and publication plans for the federal circuit courts of appeal are intended to work as an objective "sorting device."

In Kirt Shuldberg's law review article, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 Cal.L.Rev. 541, 551 (1997), he commented that the intent of court rules or plans providing for the selective publication "is to serve as a sorting device, separating the wheat from the chaff." The phrase is based on the biblical verse in Matthew 3:11, 12, in which John the Baptist, foretelling the coming of Jesus of Nazareth, preached, "I indeed baptize you with water unto repentance: but he that cometh after me... shall baptize you with... fire:... and gather his wheat into the garner; but he will burn up the chaff with unquenchable fire." (King James Version)

Suzanne O. Snowden, also cited Mr. Shuldberg's analogy in her law review article, "*That's My Holding and I'm Not Sticking to It*" *Court Rules that Deprive Unpublished Opinions of Precedential Value Distort the Common Law*, 79 Wash. U.L.Q. 1253, 1264, 1270 (Jan. 2001), stating,

[Appellate court] judges attempt to 'separate the wheat from the chaff' by following the guidelines contained in publication plans.

* * *

Judges decide which opinions become "law" based solely on their guesses as to whether a particular opinion is likely to have future "precedential value." [footnote

omitted] In other words, the publication plans are “intended to serve as a sorting device, separating the wheat from the chaff.” [Shuldberg, supra] However, “separating the wheat from the chaff” is not as easy as it sounds. Judges cannot always accurately predict which decisions have future importance [footnote omitted].

In 1975, the late James Duke Cameron, then Chief Justice, described the Arizona Supreme Court’s application of former Supreme Court Rule 48, renumbered Rule 111 in 1985 as follows:

...[T]he justices who will hear the case read the briefs.... [A] conference is held and the cases heard are discussed. A tentative vote is then taken, with the newest member of the court traditionally voting first.... A decision is usually reached at this time whether to publish a full opinion or memorandum decision.²⁶

²⁶ Two types of opinions are issued by the court. First, memorandum decisions state briefly the question presented and dispose of it with a short citation or authority. See Ariz.Sup.Ct.R. 48. Memorandum decisions are the law of the case only and are not published; they cannot be cited as authority. *Id.* 48(a)(2),(c). About one-third of the opinions are now memorandum decisions. As the workload of the court grows, it is expected that the percentage will increase. Second, full opinions contain a complete exposition of the case and are published in *Arizona Reports* and *Pacific Reporter*. *Id.* 48(a)(1), (4). These opinions establish precedent and may be cited as authority. See *id.* 48(c). [Emphasis supplied]²

The chief justice could never have imagined that from the Supreme Court’s 1975 ratio of 33% to 67% in 2005, in both divisions of the Arizona Court of Appeals, the average ratio of memorandum decisions to published opinions would increase to 88% to 12%.

The four graphs included in Exhibit 1 present a comparison of the published opinions to memorandum decisions for civil and criminal cases only in both Divisions 1 and 2.³ Since 1979, the ratio of the number of memorandum decisions to published opinions, has substantially increased.

²*Internal Operating Procedures of the Arizona Supreme Court*, 17Ariz.Law Rev. 643 (1975)

³In 1979, the Case Activity portion of the Arizona Supreme Court’s annual report of the Arizona Judicial Branch included the following under the heading, Types of Action: Civil, Criminal, Post Conviction Relief, Industrial Commission, Unemployment Insurance, Special Actions, Habeas Corpus, Delayed Appeals, and Juvenile Appeals. The court has made numerous changes in the Type of Action list. The data in the graphs only includes information regarding criminal and civil cases because these two classes of cases represent a substantial majority of the cases filed.

Also, the number of published opinions per judge has decreased significantly. In fiscal year 2005, the Arizona Court of Appeals total case activity was as follows:

Division 1 -- A total of 2630 cases were resolved consisting of 85 written opinions, 1024 memorandum decisions, 40 decision orders and 1481 other decisions or various unpublished orders. Thus, for the 16 judges, the 2005 per judge average were: 5.3, written opinion; 64, memorandum decisions; 2.5, decision orders; 92.5, other decisions or various unpublished orders.

Division 2 – A total of 1281 cases were resolved consisting of 63 written opinions, 560 memorandum decisions, 191 decision orders and 404 other decisions or various unpublished orders. Thus, for the 6 judges, the 2005 per judge average were: 10.5, written opinion; 93.3, memorandum decisions; 31.8, decision orders; 67.3, other decisions or various unpublished orders.

In Division 1 for the 20 year period beginning in 1979, the average ratio of written opinions to memorandum decisions in civil cases was **30% to 70%**. After 1999, the average ratio dropped significantly to only **15% to 85%**.

In Division 1 for the 2 year period from 1979 to 1980, the average ratio of written opinions to memorandum decisions in criminal appeals was **12% to 88%**. The graph shows a shift that began in 1981. For the next twenty-five years through 2005, this average ratio dropped to only **6% to 94%**.

In Division 2, for the fifteen year period beginning in 1979, the average ratio of written opinions to memorandum decisions in civil cases was **51% to 49%**. Beginning in 1993, through the past 12 years this average ratio dropped to only **15% to 85%**. In Division 2, for the fifteen year period from 1979 to 1993, the average ratio of written opinions to memorandum decisions in criminal cases was **43% to 57%**, however, during the past eleven years, this average has dropped to only **6% to 94%**.

For the past decade, the odds of either division issuing a published opinion in a criminal appeal is nearly as remote as the 4% odds in 2004, of the U.S. Supreme Court granting a petition for

review on its appellate docket.⁴

**Numerous Research Studies Indicate That Federal Appellate Courts
Are Not Abiding by Their Publication Plans**

All 13 circuits of the U.S. Court of Appeals have publication plans similar or identical to Arizona Supreme Court Rule 111. Legal scholars have researched and written extensively about these federal appellate court publication plans. There has been no similar research in Arizona. This may be a result of the fact that in Arizona, unlike the federal system, memorandum decisions are much less readily available to the public, since currently they are not posted on the court's website. Due to the similarity of Arizona's publication rule with the various federal circuit publication plans, the research of some of the scholars in the federal studies has a high probability of validity in evaluating the efficacy of current Rule 111.

In his law review article, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 S. Cal. Interdis. L.J. 67, 72, 73, 76, 77 (2004-2005), Professor Steven Wasby states:

... [S]ome judges have observed that a colleague might plant the seed of a new doctrine in [an unpublished decision] drawing on it later (without citation) in a published ruling. The frequency with which this occurs is in the eye of the beholder, but these purported judicial misdeeds seem to be based on an implicit assumption of a cabal. Nearly thirty years ago, in claiming that not-for-publication rulings were being used to bury intracircuit inconsistencies [footnote omitted] James Gardner was almost conjuring up a picture of judges sitting at post-argument conference, saying, "Let's hide this one." ...

This is not to say, however, that judges do not discuss the matter, as we can see in a judge's comment about not wanting to "bury[] the bones of a difficult bunch of legal questions in the unpublished landfill," and in the remark of a law clerk to a judge during a panel's consideration of whether to use an unpublished disposition in a case where lawyers had not handled important issues well: "if we were to bury the holding in a memorandum disposition it seems no less 'tidy' than the solution we proposed yesterday."...

⁴*The Supreme Court, 2004 Term*, 119 Harv.L.Rev. 415, 426 (2005) states in its Appellate Docket, for the 2004 term, the U.S. Supreme Court received 1727 petitions for review and granted 69, ie. a rate of 4%.

Whether burying is intentional, as critics imply, or results only from judges' sincere belief that the cases before them do not deserve publication, the effect can be substantial, particularly in producing a diversity of approaches to a single question which remains unresolved by a published opinion establishing circuit precedent. This was evident on an important question of what a Supreme Court ruling required of district judges in whose courts people had been convicted of illegal reentry after deportation under two different statutory provisions. By the time a panel published an opinion to set the matter straight, there were almost twenty unpublished memorandum disposition taking three different approaches [*United States v. Rivera-Sanchez*, 222 F.3d 1057, 1062-63 (9th Cir. 2000)].

* * *

Factors affecting a circuit's overall publication rate... may not be reflected equally across all subject matters. Thus it is necessary to study publication patterns both in less contentious areas of the law and in those more likely to engage the judges' ideological juices, such as criminal procedure and requests for asylum under immigration law, where one might expect more dispute over whether to publish and a greater possibility of manipulation of the criteria for publication. ...

* * *

However, there are times when members of a panel disagree over publication; when they do, it is likely to occur in the post-conference period. They may disagree because a judge does not believe an issue needs to be reached in order to decide the case and would prefer an unpublished disposition based on simpler grounds, or it may result when a judge is willing to go along and concur if the disposition is unpublished but would feel compelled to dissent were the ruling published. ... As Brudney and Ditslear put it, "the subtle interactive process among three repeat players" that characterizes within-panel interaction in the courts of appeals means that "appellate judges may occasionally agree that if an opinion remains unpublished they will forgo their inclination to dissent." [footnote omitted] Former D.C. Circuit Chief Judge Patricia Wald has said that "wily would-be dissenters go along with a result they do not like as long as it is not elevated to a precedent" [footnote omitted]. [Emphasis supplied]

Bias based on the character of the appellant is documented in the law review article, *Nonpublication in the Eleventh Circuit: an Empirical Analysis* by Donald R. Songer, Danna Smith and Reginald S. Sheehan, 16 Fla.St.U.L.Rev. 963, 981 (1988-1989), in which the authors state:

[There is] a significant difference between publication rates for appeals by "upperdogs" [government and corporations] and "underdogs" [labor unions, individuals, minorities, aliens, and convicted criminals]. Decisions in which the appellant is an upperdog are published 58.3% of the time, in contrast to a 33.5% rate of publication for decisions in which the appellant is an underdog... This finding suggests the presence of subtle biases in the judicial decision making processes in that certain litigants and their concerns are considered more important than other

litigants. [Emphasis supplied]

All Reversals Warrant Publication

If the rules and criteria for publication are being followed strictly and consistently by the appeals court judges, it becomes difficult to explain the significant number of reversals that are found in the unpublished decisions. This finding therefore suggests that the criteria are not being applied in all instances and concomitantly there are many controversial cases that are ending up in unpublished decisions. When a reversal occurs in a case it is almost inevitable that there has been a question of law and that the court has had to address a legal mistake from below. It would seem that in any case where the court of appeals felt it necessary to overturn a decision from below, one might assume that existing law was unclear. Otherwise, the district judge would not have made an erroneous decision. Therefore, a reversal should be taken as an objective indicator that at least for the district judge (and presumably for others) the law is in need of clarification. Moreover, if another judge reached a conclusion contrary to the position taken by a particular panel of the courts of appeals, it might also be assumed that there was a strong enough case on each side that any judge sitting on the case would have some discretion over how to decide the case. This finding may therefore be seen as supporting the claim that many non-trivial cases and cases with precedential value are ending up with unpublished decisions.⁵

William L. Reynolds and William M. Richman reached the same conclusion in their law review article, *An Evaluation of Limited Publication in the United States Courts of Appeals: the Price of Reform*, 48 U.Chi.L.Rev. 618, 619 (1981), in which they state:

With few exceptions, when one court reverses another, it means that the system has not worked properly. Almost by definition, the opinion on appeal is of sufficient interest to warrant publication.

Some reversals reflect mistakes in routine matters on the part of district judges. The inability of judges to apply commonplace law correctly should be a matter of concern to all [footnote omitted]. Including such reversals among the unpublished opinions conceals the problem....

⁵*Criteria for Publication of Opinions of the U.S. Courts of Appeals; Formal Rules versus Empirical Reality in Judicature*, by Donald R. Songer, The Journal of the American Judicature Society, Vol. 73/ No. 6, p. 311 (April-May, 1990). The author further states:

...[A] large proportion of all of the reversals in each of the circuits was unpublished. Specifically, in the Fourth Circuit, 47 percent of all reversals announced during 1986 were unpublished, in the Eleventh Circuit 36.3 percent of the reversals were unpublished and in the District of Columbia the judges concluded that more than half (56.8 percent) of all decisions to reverse the decision below were not worth of an explanation in a published opinion.

Reversal on routine matters may signify more than poor craftsmanship by the trial judge. It may, for example, point to uncertainty about the content of governing law. The court of appeals may not publish a reversal because, to it, the governing law was clear; such may not be the perception of others. Put differently, the unpublished opinion may clarify precedent to such a degree that the opinion should be published....

Reversals in routine cases may also reflect a continuing battle over the correct legal standard to apply....

Finally, for all the reasons discussed above, reversals are quite likely to create law. Many of the decisions discussed in the analysis of separate opinions and suppressed precedent also were reversals. That observation should come as no surprise; where the reversal does not turn on correction of plain error, it is likely that the court below could not possibly have known the “true” state of the law, because it had never been declared. Thus the circuit court is forced to make law. If it does not publish its opinion, it creates a suppressed precedent.

All of the phenomena just discussed weigh strongly in favor of publication of all reversals. They tell us interesting things about the workings of our legal system, they provide helpful discussion of legal concepts, and they sometimes create– or at least clarify– precedent. Furthermore, reversal is an easy criterion to apply. Unlike most of the criteria used to select opinions for publication, reversal requires no subjective evaluation.

Professor Wasby observed another problem with non-publication on reversals, stating:

There may, however, also be a public relations problem when reversals are released as unpublished dispositions. Use of a memorandum disposition to reverse a lower court or to refuse enforcement of an agency ruling might lead one to ask why a reviewing court that finds it necessary, despite deferential standards of review, to overturn a lower tribunal will not put the disposition out in more open view, counter to an unstated presumption that an explanation for disagreeing with lower court colleagues should be made public. Even if reversal is seen as only error-correction, the reviewing court needs to explain what is error and why the lower court’s action was error.⁶

The Impact of Publication on Judicial Accountability and Merit Selection of Judges

In the law review article, *Caseload and Judging: Judicial Adaptations to Caseload* by Lauren K. Robel, *BYU L. Rev.* 3, 52 (1990), the author states:

⁶Wasby, *supra*, at 98

Non-publication also reduces judicial accountability, making evaluation of judges' work more difficult. Indeed, it can make their work invisible. Non-publication is especially disturbing in that percentage of cases— in some circuits, an alarming percentage [In 1984, the Third Circuit decided 52% of its cases without either oral argument or a published opinion]... In these cases, parties have little assurance that the judges have paid attention to their case.

Besides diminishing the judges' accountability to the parties, non-publication can diminish the judges' responsibility to the development of law and to fully explicate intra-court disagreements concerning the application of law... Unpublished decisions... can make it more difficult for the traditional critics (the bar and the scholarly community) to discern trends in a number of areas, for the effect of agency decision making on the implementation of a statute [footnote omitted], for example, to the way in which legal principles play out in application [footnote omitted].

...Justice Stevens has even argued that the use of unpublished opinions encourages “decision making without the discipline and accountability that the preparation of [published] opinions requires [*County of Los Angeles v. Kling*, 474 U.S. 936, 940 (1985) (Stevens, J., dissenting)].

In Kirt Shuldberg's law review article, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 Cal.L.Rev. at 553, he similarly observes:

When a circuit court completely denies public access to judicial opinions, it removes an important check on judicial activity from the legal system. Public availability of judicial opinions helps to hold judges accountable to society for the decisions they reach. [footnote omitted] Public scrutiny helps to maintain the integrity of the judicial system and assure that individual cases are fairly decided.

Forcing judicial decision making into the light of day helps not only to assure fairness in fact, but, perhaps as importantly, to promote the appearance of fairness. When a judge's reasoning in a particular case is open to public scrutiny, litigants may be less likely to believe that the decision was arbitrary or unfair. Therefore, the public availability of unpublished opinions promotes judicial accountability, which may also enhance public confidence in the legal system.

Support of merit selection of judges in Arizona must acknowledge that a memorandum decision from the court of appeals that reverses a superior court judge from Maricopa or Pima County, deprives the public of evaluating the performance of four merit selected/retained judges—the superior court judge that was reversed and the three court of appeals judges that participated in

the appellate court review. Insuring the integrity of the retention aspect of merit selection is a sufficient reason, by itself, to change the publication rule to require that all reversals be published.

Finally, the proposed amendments provide for the deletion of redundant Rules 28, Arizona Rules of Civil Appellate Procedure, and 31.26, Arizona Rules of Criminal Procedure. These changes are not intended to be substantive, but are proposed solely for clarity, and to avoid confusion.

Petitioner respectfully requests that the Supreme Court amend Rule 111, Arizona Rules of the Supreme Court, Rule 28, Arizona Rules of Civil Appellate Procedure, and Rule 31.26, Arizona Rules of Criminal Procedure, as set forth in the attached exhibit.

RESPECTFULLY SUBMITTED this _____ day of November, 2006.

RICHARD D. COFFINGER

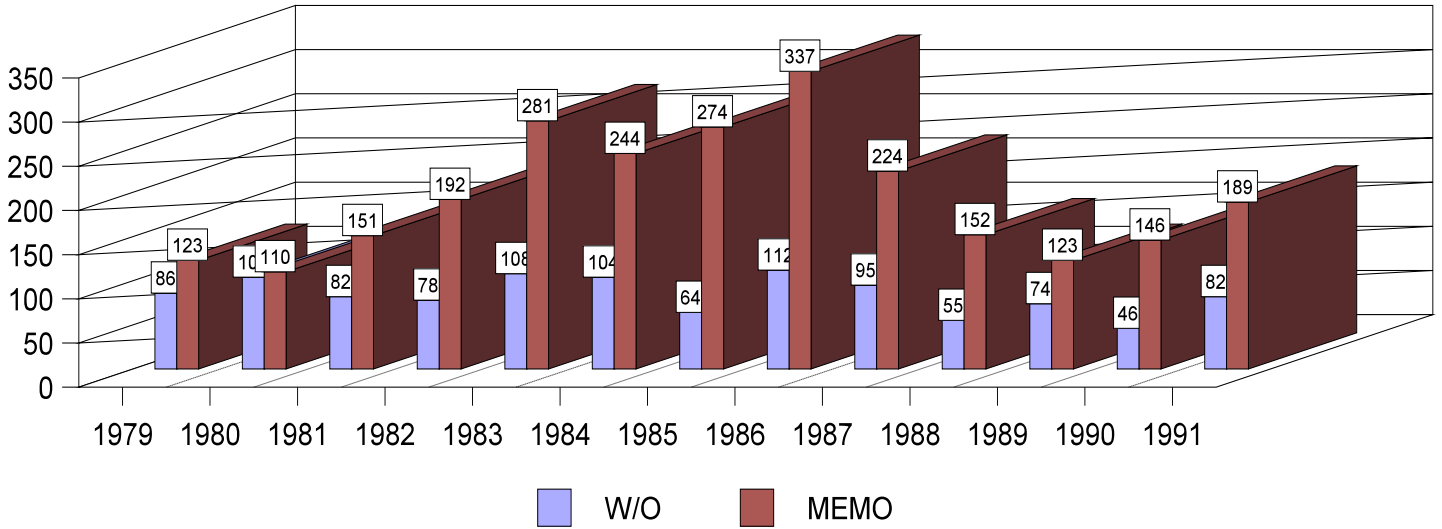
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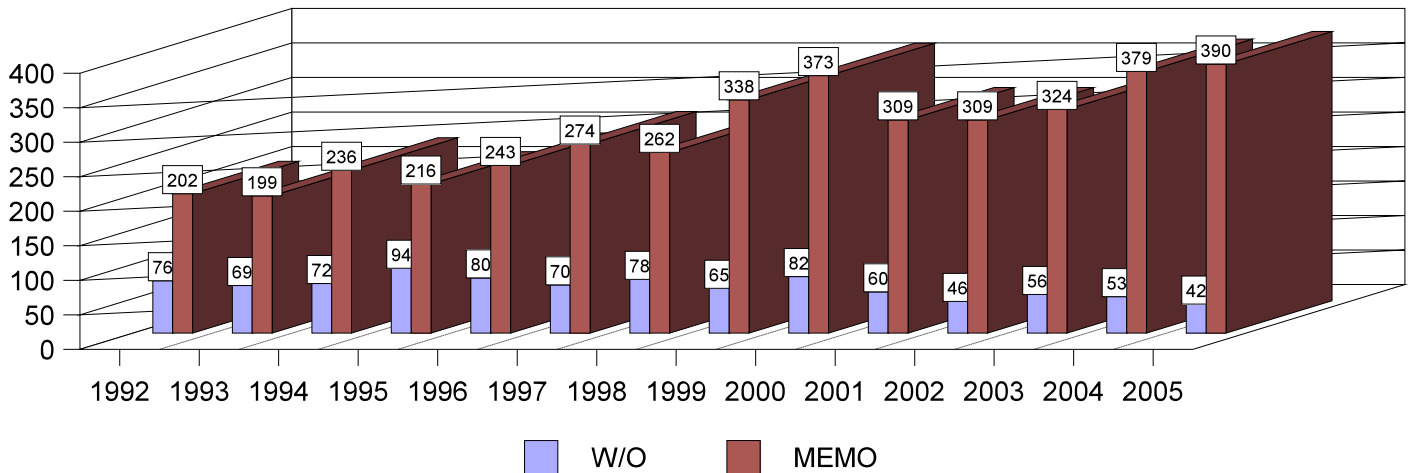
Noel K. Dessaint
Clerk of the Court
1501 W. Washington St.
Phoenix, AZ 85007

ARIZONA COURT OF APPEALS, DIV. 1
 COMPARISON OF NUMBER OF WRITTEN OPINIONS TO MEMORANDUM DECISIONS
 FISCAL YEARS 1979-2005

Div. 1, Civil Cases (1979-1991)

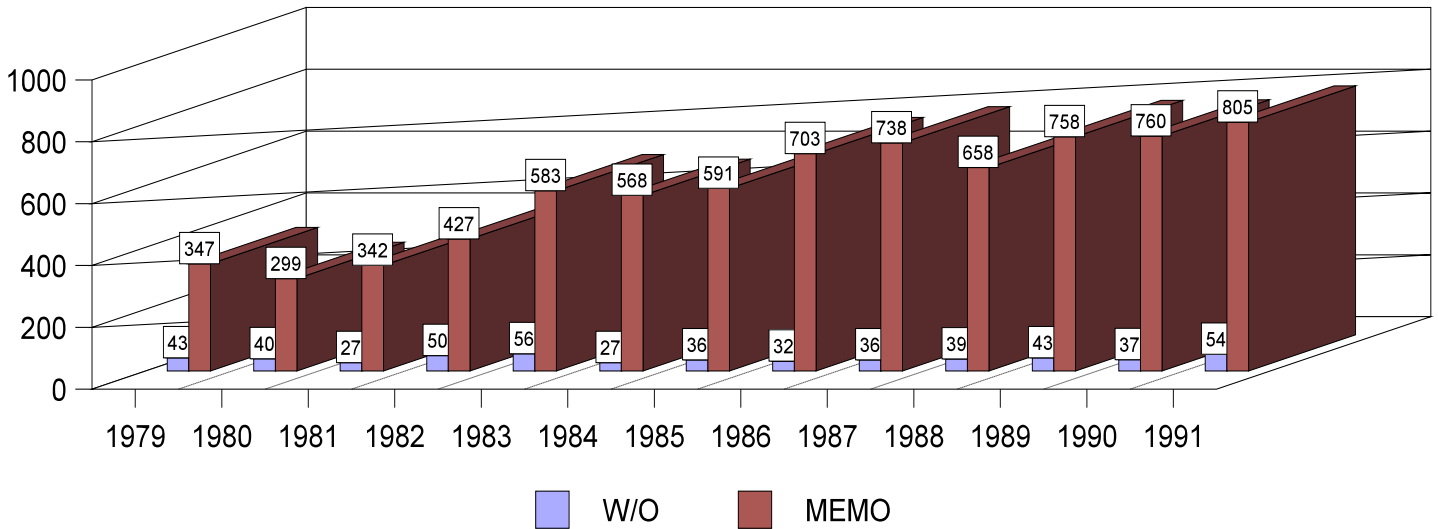


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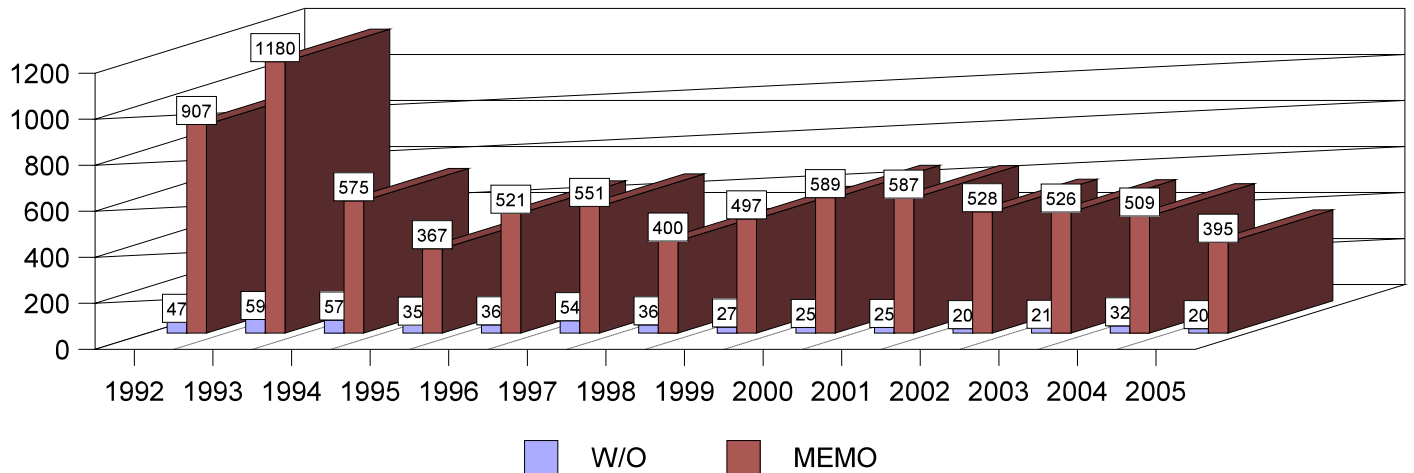


ARIZONA COURT OF APPEALS, DIV. 1
 COMPARISON OF NUMBER OF WRITTEN OPINIONS TO MEMORANDUM DECISIONS
 FISCAL YEARS 1979-2005

Div. 1, Criminal Cases (1979-1991)

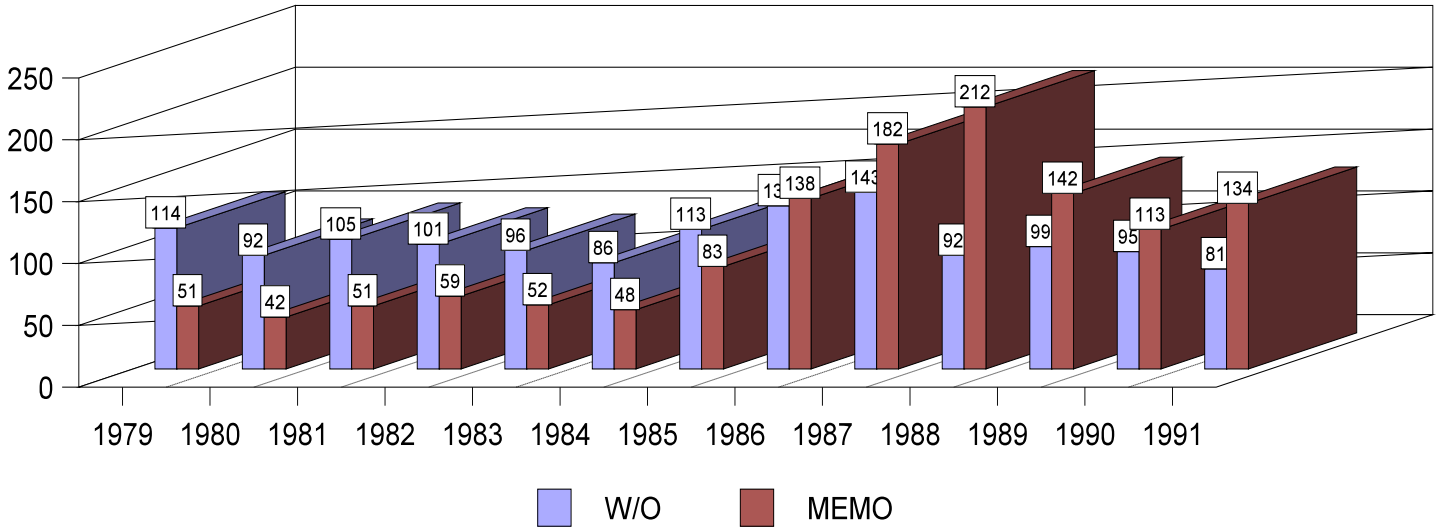


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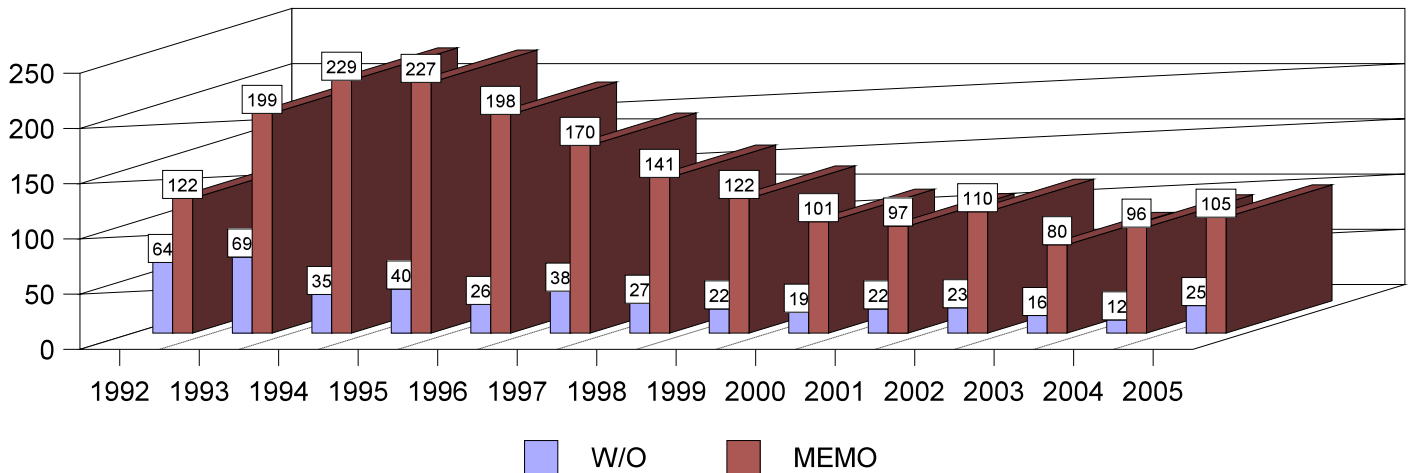


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 COMPARISON OF NUMBER OF WRITTEN OPINIONS TO MEMORANDUM DECISIONS
 FISCAL YEARS 1979-2005

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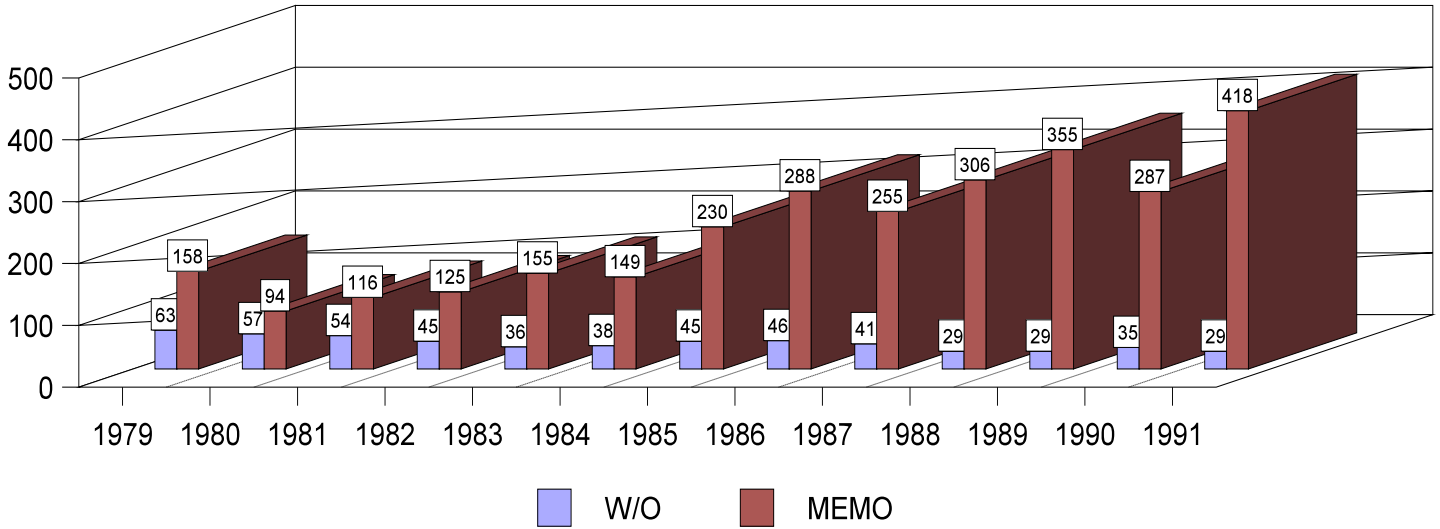


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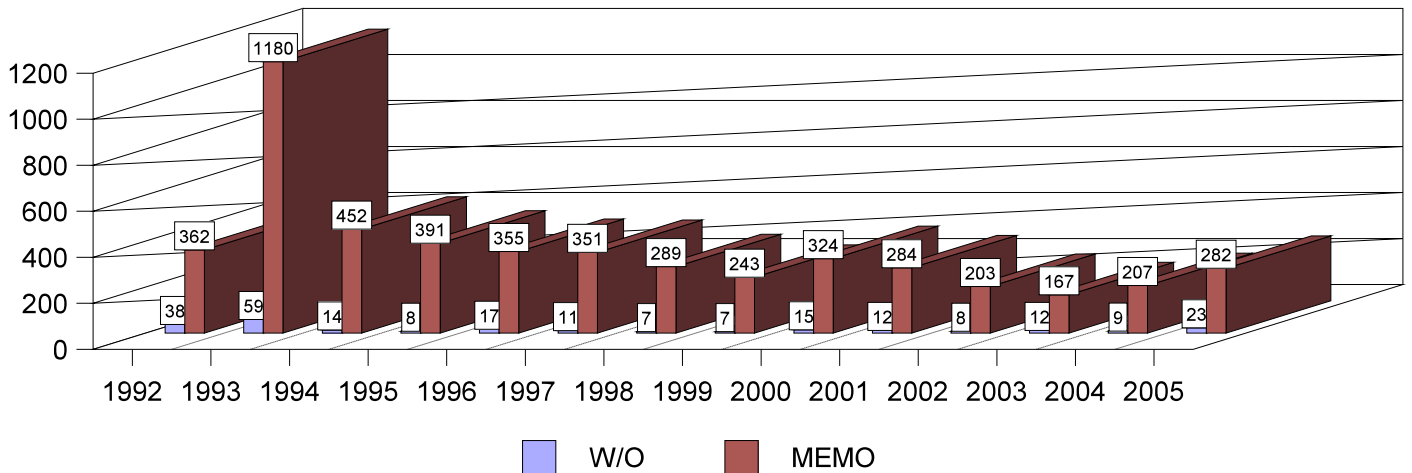


ARIZONA COURT OF APPEALS, DIV. 2
 COMPARISON OF NUMBER OF WRITTEN OPINIONS TO MEMORANDUM DECISIONS
 FISCAL YEARS 1979-2005

Div. 2, Criminal Cases (1979-1991)



Div. 2, Criminal Cases (1992-2005)



**Appendix A: Red-lined version showing proposed amendments to
Rule 111, *Arizona Rules of the Supreme Court*, Rule 28, *Arizona Rules of Civil
Appellate Procedure*, and Rule 31.26, *Arizona Rules of Criminal Procedure***

Proposed amendment to Rule 111, *Arizona Rules of the Supreme Court*.

(a) Definitions.

1. An opinion is a written disposition of a matter which is intended for publication under (4) below.
2. A memorandum decision is a written disposition of a matter not intended for publication.
3. An order is any disposition of a matter before the court other than by opinion or memorandum decision.
4. Publication is the distribution of opinions for reporting by publishing companies in compliance with the provisions of A.R.S. §§12-107, 12-108, and 12-120.07.

(b) When disposition to be by opinion. Dispositions of matters before the court requiring a written decision shall be by written opinion IF THE DISPOSITION OF THE MATTER IS ACCOMPANIED BY A SEPARATE CONCURRING OR DISSENTING EXPRESSION, OR IF THE APPELLATE COURT REVERSES IN WHOLE OR IN PART, THE JUDGMENT, RULING OR DECISION PRESENTED ON APPEAL, OR ACCEPTS JURISDICTION OF A PETITION FOR SPECIAL ACTION, REGARDLESS OF WHETHER OR NOT IT GRANTS RELIEF, OR when a majority of the judges acting determine that it:

1. Establishes, alters, modifies or clarifies a rule of law, or
2. Calls attention to a rule of law which appears to have been generally overlooked, or
3. Criticizes existing law, or
4. Involves a legal or factual issues of unique interest or substantial public importance. or

~~if the disposition of matter is accompanied by a separate concurring or dissenting expression, and the author of such separate expression desires that it be published, then the decision shall be by opinion.~~

(c) Dispositions as Precedent. Memorandum decisions shall not be regarded as precedent nor cited in any court except for (1) the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case or (2) informing the appellate court of other memorandum decisions so that the court can decide whether to issue a published opinion, grant a motion for reconsideration, or grant a petition for review. Any party citing a memorandum decision pursuant to this rule must attach a copy of it to the motion or petition in which such decision is cited.

(d) Designation of written disposition. The written disposition of the case shall contain in the

caption thereof the designation “Opinion”, “Memorandum Decision”, or “Order.”

(e) This rule shall be effective as of 1 September 1973.

(f) **Publication of dissenting vote on denial of petition for review.** If a Petition for Review is denied and a justice of the Supreme Court voted to grant review, such justice’s dissenting vote shall be reported in the caption of the decision of the Court of Appeals, if such decision is published in accordance with these rules.

(g) **Depublication.** Notwithstanding the provisions of Rule 111(b) above, an opinion which has been certified for publication by the Appeals Court shall not be published, on an order to that effect by the Supreme Court entered in a case which is before the Supreme Court on a petition for review, cross-petition for review, or petition for special action and which is entered before such opinion becomes final.

(h) **Memorandum Decision.**¹ When the Court issuing a decision concludes that only a portion of that decision meets the criteria for publication as an opinion, the Court shall issue that portion of the decision as a published opinion and shall issue the remainder of the decision as a separate memorandum decision not intended for publication. ALL MEMORANDUM DECISIONS SHALL INCLUDE (1) A CITATION TO A CONTROLLING PUBLISHED ARIZONA APPELLATE COURT OPINION DISPOSITIVE OF EVERY ISSUE PRESENTED; AND (2) A STATEMENT ENTITLED, “BASIS FOR MEMORANDUM DECISION” IN WHICH THE JUDGES CERTIFY THAT (a) THE DECISION DOES NOT DISPOSE OF ANY ISSUE OF FIRST IMPRESSION, (b) IS NOT SUBJECT TO PUBLICATION UNDER THE REQUIREMENTS IN SUBSECTION (B), AND (c) IT DOES NOT INCLUDE A DISSENT OR A CONCURRENCE.

¹Subrule heading editorially supplied.

Proposed deletion of Rule 28, *Arizona Rules of Civil Appellate Procedure*

(a) ~~Opinion; Memorandum Decision; Order; Publication.~~

~~1. An opinion is a written disposition of a matter which is intended for publication under subdivision (4) below.~~

~~2. A memorandum decision is a written disposition of a matter not intended for publication.~~

~~3. An order is any disposition of a matter before the court other than by opinion or memorandum decision.~~

~~4. Publication is the distribution of opinions for reporting by publishing companies in compliance with the provisions of A.R.S. §12-107, §12-108, and §12-120.07.~~

(b) ~~When Disposition to be by Opinion.~~ Dispositions of matters before the court requiring a written decision shall be by written opinion when a majority of the judges acting determine that it:

~~1. establishes, alters, modifies or clarifies a rule of law, or~~

~~2. calls attention to a rule of law which appears to have been generally overlooked, or~~

~~3. criticizes existing law, or~~

~~4. involves a legal or factual issues of unique interest or substantial public importance, or~~

~~5. if the disposition of matter is accompanied by a separate concurring or dissenting expression, and the author of such separate expression desires that it be published, then the decision shall be by opinion.~~

(e) ~~Dispositions as Precedent.~~ Memorandum decisions shall not be regarded as precedent nor cited in any court except for (1) the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case or (2) informing the appellate court of other memorandum decisions so that the court can decide whether to publish an opinion, grant a motion for reconsideration, or grant a petition for review. Any party citing a memorandum decision pursuant to this rule must attach a copy of it to the motion or petition in which such decision is cited.

(d) ~~Designation of Written Disposition.~~ The written disposition of the case shall contain in the caption thereof the designation “Opinion”, “Memorandum Decision”, or “Order.”

(e) ~~Publication of Dissenting Vote on Denial of Petition for Review.~~ If a Petition for Review is denied and a justice of the Supreme Court voted to grant review, such justice’s dissenting vote shall be reported in the caption of the decision of the Court of Appeals, if such decision is published in accordance with these rules.

(f) ~~Depublication.~~ Notwithstanding the provisions of Rule 28(b) above, an opinion which has been certified for publication by the Appeals Court shall not be published, on an order to that effect by

~~the Supreme Court entered in a case which is before the Supreme Court on a petition for review, cross-petition for review, or petition for special action and which is entered before such opinion becomes final.~~

~~(g) **Partial Publication of Decisions.** When the court issuing a decision concludes that only a portion of that decision meets the criteria for publication as an opinion, the court shall issue that portion of the decision as a published opinion and shall issue the remainder of the decision as a separate memorandum decision not intended for publication.~~

Proposed deletion of Rule 31.26, *Arizona Rules of Criminal Procedure*

~~When the court issuing a decision concludes that only a portion of that decision meets the criteria for publication as an opinion, the court shall issue that portion of the decision as a published opinion and shall issue the remainder of the decision as a separate memorandum decision not intended for publication.~~