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**IN THE SUPREME COURT  
STATE OF ARIZONA**

In the Matter of:

PETITION TO AMEND RULE 111,  
ARIZ. R. SUP. CT., RULE 28,  
ARCAP, AND RULE 31.24, ARIZ.  
R. CRIM. P.

Supreme Court No.

**Petition to Amend Rule 111, Ariz. R.  
Sup. Ct., Rule 28, ARCAP, and Rule  
31.24, Ariz. R. Crim. P.**

Pursuant to Rule 28, Rules of the Arizona Supreme Court, the undersigned respectfully petition this Court to amend Rule 111 of the Rules of the Arizona Supreme Court, Rule 28 of the Arizona Rules of Civil Appellate Procedure (“ARCAP”), and Rule 31.24 of the Arizona Rules of Criminal Procedure, concerning the citation of unpublished memorandum decisions, as proposed in the attached Appendix A.

**I. OVERVIEW AND SUMMARY OF PROPOSED CHANGES**

Arizona Supreme Court Rule 111, ARCAP 28, and Arizona Rule of Criminal Procedure 31.24 prohibit citation to unpublished, or memorandum, decisions in most instances. Under the current rules, unpublished decisions

generally may not be cited, even for persuasive value. Advances in electronic research technology, and consequent increases in public access to court decisions, have obviated the need for the prohibition on citations to memorandum decisions for persuasive value.

Permitting citation to unpublished memorandum decisions for persuasive value would promote consistency and certainty in the law and its application, enhance the advocacy tools available to counsel, and bring Arizona more in line with practices in the majority of other states and the federal courts. Petitioners propose to amend the rules to allow citation to unpublished decisions for their persuasive value, with appropriate notice to the court and parties. The proposed amendments to the rules, attached as Appendix A, provide for the non-precedential, non-binding nature of such decisions and specify that courts need not distinguish or discuss them and parties need not research or cite them.

## **II. THE CURRENT RULES**

Citation to unpublished, or memorandum, decisions has been generally prohibited since 1973 pursuant to Arizona Supreme Court Rule 48 (now 111), and ARCAP 28.<sup>1</sup> Arizona Supreme Court Rule 111(c), ARCAP 28(c), and Arizona Rule of Criminal Procedure 31.24 currently provide that “[m]emorandum decisions shall not be regarded as precedent nor cited in any court” except under two limited

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<sup>1</sup> See Historical Notes to Arizona Supreme Court Rule 111; Comment to ARCAP 28.

circumstances: (1) to establish the defenses of res judicata, collateral estoppel, or law of the case; and (2) to inform the court of other memorandum decisions so that the appellate court can decide whether to issue a published opinion, grant a motion for reconsideration, or grant a petition for review.

ARCAP 28(c) has been interpreted by both the Arizona Supreme Court and the Arizona Court of Appeals as “mak[ing] it improper to cite unpublished decisions as authority,” which “appl[ies] to memorandum decisions from *any* court.” *Walden Books Co. v. Ariz. Dept. of Rev.*, 198 Ariz. 584, 589, 12 P.3d 809, 814 (App. 2000) (emphasis added); *see also Kriz v. Buckeye Petroleum Co., Inc.*, 145 Ariz. 374, 377 n.3, 701 P.2d 1182, 1185 n.3 (1985). These interpretations render Arizona’s current rules among the strictest in the United States, as now all federal courts<sup>2</sup> and a growing majority of state courts permit citation to unpublished decisions for, at the very least, persuasive value.<sup>3</sup>

### **III. THE PROPOSED RULE AMENDMENTS**

The proposed rule amendments, attached as Appendix A, would better align Arizona’s practice with that of the federal courts and a majority of other states that have ended their ban on citation of unpublished decisions. Like the rules in certain

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<sup>2</sup> Federal Rule of Appellate Procedure 32.1 (prohibiting courts from barring or restricting citation to unpublished opinions issued on or after January 1, 2007). In the absence of a local rule or decision to the contrary, federal district courts commonly review and cite unpublished decisions for their persuasive value.

<sup>3</sup> *See* Appendix B, Table, Citation of Unpublished Decisions in Other State Courts.

other states, the proposed amendments contain appropriate caveats to the new permission, caveats designed to alleviate any potential attendant burdens for courts, counsel, and litigants.

First, memorandum decisions would be citable only for their persuasive value. In this sense, they would be treated in a manner similar to that of a published decision from a non-Arizona court.<sup>4</sup> Judges would still be free to evaluate the strength of the reasoning in the decision given its unpublished status. The caveats to this new permission also include that a court need not distinguish or discuss an unpublished opinion and a party has no duty to research or cite one.

Second, the proposed rule amendments require that the citing party note, in the citation in its brief or other filing, that the decision is unpublished. The amendments maintain the requirement that the citing party include a copy of the memorandum decision in the filing.

Lastly, the amendments to the rule would apply on a prospective basis only, with the applicable effective date to be determined by this Court.

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<sup>4</sup> Petitioners submit that the proposed rules need not separately address unpublished decisions from jurisdictions outside Arizona, as even published decisions from such jurisdictions are not addressed in Arizona's rules and are only accorded persuasive value under Arizona law. *See, e.g., Kotterman v. Killian*, 193 Ariz. 273, 291, 972 P.2d 606, 624 (1999) (“We alone must decide how persuasive the legal opinions of other jurisdictions will be to our holdings.”).

#### IV. RATIONALE

##### A. Permitting Citation to Unpublished Decisions for Persuasive Value Promotes Consistency, Certainty, and Equality.

As this Court has noted, our governance under “the rule of law” means “equality in the determination of the rights, responsibilities and relationships of individuals under established law, instead of by edict or the shifting whims of dictatorial authority.” *State Bar v. Ariz. Land Title & Trust Co.*, 90 Ariz. 76, 82, 366 P.2d 1, 5 (1961). Published or not, decisions of Arizona courts are official actions taken to uphold the rule of law. “[R]ules that forbid a party from calling a court’s attention to the court’s own official actions . . . are inconsistent with basic principles underlying the rule of law.” Comm. on Rules of Practice & Procedure, Report of the Judicial Conference 9 (2005).<sup>5</sup>

Prohibiting citation to memorandum decisions for at least their persuasive value prevents parties from arguing that a court should act consistently with its prior official action (if such action was unpublished) to treat parties equally with others in the same factual situations.<sup>6</sup> *See id.* At a minimum, memorandum decisions may be “a valuable source of ‘insight’ and ‘information’” for courts

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<sup>5</sup> Available at

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2005.pdf>.

<sup>6</sup> The Arizona Technology Council, in its 2014 Public Policy Guide, notes that a state court system, in providing “certainty in the adoption of court rules,” contributes to “a favorable economic climate for Arizona business by providing fair and just processes.” Available at

<http://www.aztechcouncil.org/advocacy/publicpolicyguide>.

seeking to uphold the rule of law. *See id.*

**B. Permitting Citation to Unpublished Decisions for Persuasive Value Enhances Lawyers' Advocacy Tools.**

At times, a memorandum decision may be the only available authority that advances a client's position. A lawyer is then placed in a difficult conflict between the no-citation rule and certain provisions of Arizona's civil and ethical rules. *See J. Thomas Sullivan, Unpublished Opinions and No Citation Rules in the Trial Courts*, 47 ARIZ. L. REV. 419, 433 (2005); *see also* Ariz. State Bar Ethics Op'n 87-14 (July 20, 1987) (finding it unethical, based on Rules 111(c), Ariz. R. Sup. Ct., and ARCAP 28(c), to cite a memorandum decision for persuasive value).<sup>7</sup>

Specifically, when the only case providing a basis for an attorney's legal position is unpublished, the attorney runs the risk of either being perceived as asserting a frivolous argument if he or she does not cite the case, or of being disciplined or sanctioned if he or she does cite it for persuasive value. *See id.* at 434; *see also* Shenoa L. Payne, *The Ethical Conundrums of Unpublished Opinions*, 44 WILLAMETTE L. REV. 723, 724 (2008). Under the proposed rule amendments, Arizona attorneys would not need to make such Hobson's choices and would have expanded advocacy tools allowing them to more effectively serve clients.

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<sup>7</sup> The same ethics opinion found that it would *not* be unethical to cite an unpublished decision of a trial court for its persuasive value. Ariz. State Bar Ethics Op'n 87-14 (July 20, 1987), *available at* [http://www.azbar.org/Media/\\_Ethics/87-14.pdf](http://www.azbar.org/Media/_Ethics/87-14.pdf).

**C. Similar Rule Amendments Have Proven Successful Federally and in Other States.**

Citation to unpublished federal decisions issued on or after January 1, 2007, is allowed, uniformly, in federal appellate courts pursuant to Rule 32.1 of the Federal Rules of Appellate Procedure. More than thirty other states now allow citation of unpublished decisions for at least their persuasive value. *See* Appendix B. A number of those go even further: more than ten percent of states permit citation of such decisions as precedent. *Id.*

For a more specific example, we can look to Wisconsin, which, after rejecting three previous rule change petitions on the same topic, amended its rules in 2009 to allow for citation to unpublished decisions for persuasive value. *In re Amendment of Wis. Stat. § (Rule) 809.23(3)*, 2009 WI 1, 2 (Wis. 2009).<sup>8</sup> In amending Wis. Stat. Rule 809.23(3) to allow citation of unpublished decisions for persuasive value,<sup>9</sup> the Wisconsin Supreme Court stated it would review the operation of the rule in three years. *In re Amendment of Wis. Stat. § (Rule) 809.23(3)*, at 1. In a report published in 2012, the Citation of Unpublished Opinions Committee stated, “there does not appear to be any significant difference or any negative change that could be attributed to the rule amendment.” Citation of

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<sup>8</sup> Available at <http://www.wicourts.gov/scrules/0802.htm>.

<sup>9</sup> Wisconsin’s rule permitting citation for persuasive value has similar caveats to the proposed rule amendments in Appendix A, i.e., that such decisions are not binding precedent, that a court need not distinguish or discuss them, and that a party has no duty to research or cite them.

Unpublished Opinions Comm., *Final Report to Wisconsin Supreme Court 4* (March 2012).<sup>10</sup>

In comparing the number of briefs citing unpublished decisions between the months of February and April, the number increased from four briefs in 2010 to eight briefs in 2011. *Id.* And the Committee found that “no cases were reported by court staff where ineffective assistance claims had been based on citation or research of unpublished opinions.” *Id.* at 3. Additionally, the number of motions to publish opinions decreased, the percentage of opinions published remained the same, and the number of petitions for review filed on unpublished decisions decreased by two percent. *Id.* at 4. Wisconsin’s experiment shows that the benefits to permitting citation of memorandum decisions for persuasive value significantly outweigh any potential burdens.

**D. Rationales for Prohibiting Citation to Unpublished Decisions Have Become Outmoded.**

With research technology advances enabling broad public access to unpublished decisions, many states have adopted rules allowing unpublished decisions to be cited for persuasive and even precedential value. Every lawyer in Arizona has free access to memorandum decisions through the State Bar’s Fastcase online service, and members of the public can access them on court websites or even through Google Scholar. The proposed rule amendments disclaim a duty for

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<sup>10</sup> Available at <http://wicourts.gov/publications/reports/docs/unpublishedopinionsfinal.pdf>.

parties to research or cite such decisions, even though the decisions are widely available should they choose to do so. Lack of access is no longer a reason for a no-citation rule.

The federal courts and other states’ practices have further revealed that permitting citation to memorandum decisions for persuasive value does not increase judicial workloads. An Administrative Office of the U.S. Courts survey of judges prior to the adoption of Federal Rule of Appellate Procedure 32.1 concludes that there was “little or no evidence that the adoption of a permissive citation policy impacts the median disposition time . . . [or] the number of summary dispositions.” Memorandum from John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the U.S. Courts, to Advisory Committee on Appellate Rules 1, 2 (Feb. 24, 2005). Petitioners appreciate the substantial workloads of all Arizona courts and respectfully submit—based on lessons learned from the federal courts and other states—that the proposed rule amendments, with their language designed to prevent any overburdening of courts or parties, would not increase these workloads.

## **V. CONCLUSION**

Adoption of the proposed rule amendments would allow citation of unpublished decisions for their persuasive value, with the aim of promoting consistency in the law and enhancing the advocacy tools available to counsel. The

language of the proposed amendments is designed to address any concerns regarding public access or an increased research burden or workload for courts and parties. For the foregoing reasons, the petitioners urge this Court to adopt the proposed rule amendments as submitted.

RESPECTFULLY SUBMITTED this \_\_\_\_ day of January, 2014.

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