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Arizona Supreme Court
1501 West Washington Street
Phoenix, AZ 85007

Re: ***Petition R-14-0004,*** **Petition to Amend Rule 111, Ariz. R. Sup. Ct., Rule 28, ARCAP, & Rule 31.24, Ariz. R. Crim. P.**

Dear Justices:

I was pleased to see Petition R-14-0004. It should enhance our justice system and bring our courts in line with other courts. That said, while I support the adoption of Petitioners' proposed changes, there should be clarification regarding the scope of the rules, the issue of "unpublished" or "memorandum" decisions, and elimination of unnecessary language in the proposed changes. Indeed, since the Petition conflates the terms "memorandum" and "unpublished," the need for clarification is heightened.

Attached hereto as Appendix A are proposed modifications, consistent with the following concerns.

First, the only decisions that should apply to Arizona rules are decisions of Arizona courts—not federal courts or other state courts. There are, as the Court is aware, countless rules in other jurisdictions that permit or prohibit citation to various forms of opinions (published or not) depending upon when they were decided, *e.g.*, Federal Rule of Appellate Procedure 32.1 (allowing the citation to any decision after January 1, 2007), or whether an appeal is pending or review is granted, *e.g.,* Cal. Rules. Ct. Rule 8.1105(e) (prohibiting citation to published opinions after the Supreme Court grants review). Moreover, there are some jurisdictions that expressly permit citation to unpublished opinions. *E.g.* Tenn. Ct. App. Rule 12 (permitting the citation of unpublished opinions provided a copy is provided to the court and opposing parties).

Second, this Court should not prohibit the citation of opinions where citation is permitted by the rules of the issuing court. That may seem obvious perhaps, but this is already a significant problem in Arizona courts as acutely demonstrated by citation to so-called "unpublished" federal district court opinions. Our state courts, for example, disapprove of citation to such opinions whereas there is no prohibition on citing them in federal court—*i.e.*, "unpublished" district court opinions are treated no differently from "published" district court opinions in federal court.

This issue warrants a little more detail, but at the outset, please note that the current rules under consideration speak only to "memorandum" decisions, not "unpublished" decisions. Despite this, our rules are routinely applied to prohibit citation to "unpublished" federal district court opinions. *E.g., Tucson Unified Sch. Dist. v. Borek*, 2014 WL 949114, ___ P.3d ___, ¶13 (App. 2014) ("TUSD relies primarily on unpublished decisions by federal trial courts. Citation to such decisions is prohibited by our rules . . . .") (citing Rule 28(c), ARCAP); *Hourani v. Benson Hosp.*, 211 Ariz. 427, ¶27 (App. 2005) ("Hourani's second supplemental citation of authority is an unpublished district court opinion from Louisiana . . . . unpublished decisions 'shall not be regarded as precedent nor cited in any court.' Ariz. R. Civ.App. P. 28(c).").

The problem, however, is there is no such thing as an "unpublished" federal district court decision—or at least there's no difference between one that appears in the Federal Supplement and one that does not. Unlike the United States Court of Appeals, there are no rules for the publication or non-publication of federal district court opinions. So who decides which cases make it into the Federal Supplement? The answer is Thomson Reuters, the current publisher of the Federal Supplement.

In fact, most people are surprised to learn that *anyone* can submit federal district court opinions to Thomson Reuters for "publication." Attached as Appendix B is an example of a district court decision that yours truly recently submitted to Thomson Reuters which was accepted for publication over a year after the initial decision came out. While it shouldn't matter that a decision appears in the Federal Supplement or not, *infra*, especially where the only control over "publication" is a publicly held corporation and not a judge, obtaining

"publication" of a federal district court decision seems to result in an unintentional tactical advantage in Arizona state courts.

The confusion over this issue is fueled, in part, by a footnote in this Court's opinion in *Kriz v. Buckeye Petroleum Co.,* 145 Ariz. 374, 377 n. 3, 701 P.2d 1182, 1185 n. 3 (1985), which declined to consider a "memorandum decision" of the District Court of the District of Arizona. In *Kris*, the Court stated: "We will treat memorandum decisions from the federal district court the same as memorandum decisions of our state courts." *Id.* Respectfully, this was a mistake.[1]

As the court explained in *Carmichael Lodge No. 2103, Benevolent and Protective Order of Elks of the United States of Am. v. Leonard*, 2009 WL 1118896 (E.D. Cal. Apr. 23, 2009):

> [T]here is no prohibition in citing "unpublished" district court opinions (unless a local rule so provides). They are either persuasive to the issue at bar, or they are not. District court opinions, published or not, do not set binding precedent for other cases . . . Circuit court cases are, of course, differently viewed.

District Court opinions all carry the same "persuasive" weight—whether or not they are chosen for publication by Thomson Reuters, and there is no distinction between published versus unpublished district court opinions. E.g., *Lebron v. Sanders*, 557 F.3d 76 n.7 (2nd Cir. 2009) ("We do not suggest that published district court opinions are more persuasive than unpublished district court opinions; nor do we discourage . . . citing to an unpublished opinion that is, for any reason, more appropriate than a published one.").

Accordingly, since there is no prohibition to citation of "unpublished" versus "published" district court opinions in the federal courts, where they carry equal persuasive weight, shouldn't this Court's rules permit their citation under the same standard? The same should be true of any issuing court's opinion—if it is citable in the issuing jurisdiction, it should be citable here.

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[1] Among other things, there is no such thing as a "memorandum decision" in the federal district courts.

Third, the Petitioners' proposed language, referencing citation to a decision that is "unpublished," should be changed to "memorandum decision." As discussed above, Arizona rules do not generally reference "publication" or "non-publication." Arizona rules generally reference "opinions" and "memorandum decisions," and publication is only briefly referenced to define the terms. Rule 111(a), Rules of the Arizona Supreme Court.

And finally, the Petitioners' proposed language concerning whether the decision is binding or whether a court must distinguish the case is, in the view of this Commentator, superfluous and unnecessary. The phrase "persuasive value" clearly means the case is "not binding" and there is never a requirement for a court to "distinguish or otherwise discuss" a case.

Respectfully, the Petition should be granted as modified herein.

Sincerely,

LEVENBAUM TRACHTENBERG, PLC

Geoffrey M. Trachtenberg