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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, ARIZ. R. CIV. APP. P., AND RULE 31.24, ARIZ. R. CRIM. P.	Supreme Court No. R-14-0004 **Comment in Opposition to Petition to Amend Rule 111, Ariz. R. Sup. Ct., Rule 28, Ariz. R. Civ. App. P., and Rule 31.24, Ariz. R. Crim. P.**

The undersigned appellate and trial court judges submit their comment concerning the petition to permit citation of unpublished memorandum decisions for persuasive value.[1] For the reasons that follow, we urge the court to reject the proposed rule amendments and instead appoint an ad hoc committee to: (1) solicit feedback from trial attorneys and judges, as well as other interested persons; (2) confirm the scope and nature of access to unpublished decisions; (3) examine the empirical claims of the proponents and opponents of the proposed rule; and, (4) report to the court in six months whether and how the rules governing unpublished decisions should be amended. If committee rule changes are recommended and accepted, the committee also could be delegated a one-time review of intended and any unanticipated effects of the rule changes.

[1] Amending Rule 111, Arizona Rules of the Supreme Court, Rule 28, Arizona Rules of Civil Appellate Procedure, and Rule 31.24, Arizona Rules of Criminal Procedure.

I. OMISSIONS HOBBLE THE PETITION AND PROPOSED AMENDMENTS.

Petitioners are distinguished attorneys who urge the court to "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practice with that of the federal courts and a majority of other states that have ended their ban on citation of unpublished decisions." They contend that permitting citation to unpublished decisions promotes consistency in law and supplements lawyers' advocacy tools. They may be right.

By taking a minimalist approach to the rule amendments, however, their proposal overlooks new problems likely to be created by the amendments. Equally important, the failure to address appellate judges' substantive objections[2] to similar petitions in 2006 and 2007 hides alternative amendments that could achieve the stated objectives without risking deleterious effects. We turn to the specific problems[3] the proposed amendments may cause.

A. The extant definition of "Memorandum Decision" is insufficient to control unfettered citation to unpublished decisions, especially trial court decisions.

The prohibition against citation to unpublished decisions applies to "memorandum decisions." Ariz. R. Sup. Ct. 111(a)(2); Ariz. R. Civ. App. P. 28(a)(2); Ariz. R. Crim.

[2]The most significant filed objection in 2007 was authored by Justice John Pelander. *See* Comment on Rule 28 Petition for Change in Rule 111, Arizona Rules of the Supreme Court, Relating to Availability and Citation of Memorandum Decisions, http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/1520515011871.pdf; *see also* Judge Donn Kessler's opinion, *Citation and Access are a Dangerous Precedent*, Arizona Attorney at 15 (June 2006).

[3]Several of our colleagues on the court of appeals will file an objection to any change in the pertinent rules. Although we do not agree that petitioners' general position is a remedy searching for a problem, we agree with many of our colleagues' comments as applied to the specific rule proposal.

P. 31.24. Memorandum decision is defined in two rules as a "written disposition of a matter not intended for publication." Ariz. R. Sup. Ct. 111(a)(2); Ariz. R. Civ. App. P. 28(a)(2). Publication refers to the "distribution of opinions by publishing companies." Ariz. R. Sup. Ct. 111(a)(4); Ariz. R. Civ. App. P. 28(a)(4).[4] Petitioners focus only on Rule 111(c) dispositions by the court of appeals, but the application of the existing rule is not so limited.

Without resorting to statutory interpretation principles, the plain text of the rule broadly applies to any decisional order by any court. The practice of lawyers and courts supports a plain text reading: Most observe the ban by foregoing citation to a decision that cannot be found in the written pages of West.[5] Therefore, if the amendments are adopted as-is, they likely will be interpreted to mean that the unpublished decision citation ban has ended. This understanding will encourage citation to trial court written dispositions. Even under the current rules, it is not unusual for a trial court judge to hear

[4]The reference to publishing companies reflects the discretionary authority of the supreme court to "contract with the person who agrees to publish and sell the report of decisions on terms most advantageous to the state." A.R.S. § 12-108(A). The court could publish its own opinions, although they must be compiled into volumes that "contain appropriate headnotes, tables of cases reported, and tables of statutes cited and construed," as well as "a digest of the law in the reported cases and the words and phrases construed." A.R.S. § 12-107.

[5]West Publishing Company, now West, a unit of Thomson Reuters, through its National Reporter System, has had a near monopoly on published decisions. Peter W. Martin, *Abandoning Law Reports for Official Digital Case Law*, 12 J. App. Prac. & Process 25, 31-32 & n.19 (2011). Although West's exclusive status has been diminished by the efforts of courts and legislatures to broaden access to decisional law, the presence in a West reporter volume remains the de facto standard for whether a decision has been "published." *Id.* at 42-43, 52-63; see also Ellie Margolis, *Authority Without Borders: The World Wide Web and the Delegalization of Law*, 41 Seton Hall L. Rev. 909, 915 n.34 (2011).

in argument about the practice or predilection of other judges confronting a particular motion or set of facts. Failing to make clear the appropriate purpose and permissible scope of citation to unpublished decisions will exacerbate a now-limited, unfortunate practice.[6] Whatever the merits of citation to unpublished court of appeals decisions, the arguments are much weaker when considering whether a written trial court decision should be cited to a trial judge considering an arguably similar matter, even when the reference is limited to its persuasive reasoning.

Finally, we note that citation to trial court decisions carries many of the problems associated with citation to unpublished court of appeals decisions before they were placed on the courts' websites. First, trial court rulings are not generally available through a database search unless the person has access to a paid subscription, such as WestlawNext.™ Second, the cost to download a single trial court ruling is high unless the subscriber has a premium account. For instance, a basic WestlawNext subscription could require an additional fee of $69 to download one ruling. The disparity in accessibility and costs between trial and appellate decisions suggests that a citation rule should consider those differences.

[6]Though generally an issue in oral argument, it is not uncommon for attorneys to attach as exhibits to motions written orders from other trial court judges to bolster their argument. If the amendments are approved as-is, the practice likely would become more prevalent. The problem is worse with self-represented litigants who expect to achieve the same result as litigants in other courtrooms.

B. Non-Arizona unpublished decisions must be addressed specifically.

Petitioners contend that "the proposed rules need not separately address unpublished decisions from jurisdictions outside Arizona . . . [because] published decisions from such jurisdictions are not addressed in Arizona's rules and are only accorded persuasive value under Arizona law." On this issue, simplicity is grounded in unstated assumptions of questionable merit.

First, there should be no expectation that an appellate court in another jurisdiction prepares its unpublished decisions anticipating citation for its reasoning. To the contrary, it likely expects the reader to have a working knowledge of its laws, such that detailed explanations with appropriate reservations or caveats are unnecessary. Second, the perils of citations to trial court decisions in non-Arizona jurisdictions are the same and likely worse than citation of one Arizona trial court judge to another. Finally, any solution, except for an outright ban, is complex. For instance, limiting citation to unpublished cases from jurisdictions where there is no ban places an additional burden on the parties and the court to know the law of that jurisdiction. More substantively, the value of reasoning from another jurisdiction is greatly affected by the general laws and policies of that jurisdiction. It would be a misguided assumption for appellate and trial courts to assume that the persuasive value of unpublished decisions outside Arizona can be regarded in the same manner as their published cases.

II. THE PETITION MISSES THE OPPORTUNITY TO CONSIDER THE CITATION BAN WITHIN THE CONTEXT OF RULES 111(B) AND 28(B).

The principal thrust of Petitioner's policy rationale is that "decisions of Arizona courts are official actions taken to uphold the rule of law," which principle should permit parties to cite those decisions so that a court will "act consistently with its prior official action . . . [and thereby] treat parties equally with others in the same factual situations." Although this rationale is incorrect if it equates equal treatment with equal results,[7] the more significant problem is the absence of any mention of the functional difference between an opinion and a memorandum decision. An appellate decision must be a written opinion if a majority of the judges determine that the decision fits in one of five categories:

1. Establishes, alters, modifies or clarifies a rule of law;
2. Calls attention to a rule of law which appears to have been generally overlooked;
3. Criticizes existing law;
4. Involves a legal or factual issue of unique interest or substantial public importance; or,
5. There is a separate concurring or dissenting expression, and the author of such separate expression desires that it be published.

[7] *See, e.g.*, *State v. Maloney*, 105 Ariz. 348, 354, 464 P.2d 793, 799 (1970) ("Equality of treatment does not destroy individualization of sentencing to fit the crime and the individual. Persons convicted of the same crime can constitutionally be given different sentences."); *cf. Rose v. Clark*, 478 U.S. 570, 579 (1986) (in context of reviewing trial court error, the Supreme Court has "repeatedly stated, 'the Constitution entitles a criminal defendant to a fair trial, not a perfect one.'"), *quoting Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

Ariz. R. Sup. Ct. 111(b); Ariz. R. Civ. App. P. 28(b). Presumably, memorandum decisions[8] should not make or criticize law, signal an overlooked law, or involve important facts or law. Petitioners essentially disagree with this description because they contend "a memorandum decision may be the only available authority that advances a client's position." What is missing—both from Petitioners' argument and the rules—is a description of case-specific factors that lead an appellate court to conclude a particular written decision should have precedential weight, whereas another decision that arguably fits into one of the enumerated categories should be limited to deciding the issues presented. Consideration of those types of factors might lead to a more nuanced citation rule.

For instance, incomplete records or minimal briefing could weaken the court's confidence in the legal discussion outside the confines of the particular case. It is

[8]The distinction between a published opinion and an unpublished decision is relatively recent. The 1912 Code required publication of all supreme court decisions. Laws 1912, 1st S.S., ch. 21, § 1. The statutory authority limiting publication to opinions did not occur until 1973, which coincided with the first citation ban by the supreme court. *See* 1973 Ariz. Sess. Laws, ch. 147, § 1 and, Ariz. R. Sup. Ct. 48(c), 17A A.R.S. (1973), respectively. It appears that the distinction was driven, in part, by increasing court workloads. James Duke Cameron, *Internal Operating Procedures of the Arizona Supreme Court*, 17 Ariz. L. Rev. 643, 646-47 n.26 (1975) ("As the workload of the court grows, it is expected that the percentage [of memorandum decisions] will increase.").

Moreover, the distinction between opinion and decision is starting to fade. The recent amendment to A.R.S. § 12-120.07, which addresses appellate opinions, provided that the commission on judicial performance review publish on its website a "list of the decisions" of appellate judges standing for retention. Laws 2011, ch. 210 § 1. As implemented, it includes memorandum decisions. Even recent appellate decisions use the term "decision" interchangeably with opinion. *See e.g., State v. Patterson*, 222 Ariz. 574, 580 ¶ 20, 218 P.3d 1031, 1037 (App. 2009) ("The superior court is bound by our ***decisions***, regardless of the division out of which they arise.") (emphasis added).

important to recall that parties are entitled to full judicial review of a trial court judgment, but it is their responsibility to provide the necessary portions of the record, pertinent argument, and supporting authority.[9] Appellate cases missing some or all of these mandatory components can compromise the value of a written decision beyond deciding whether the specific judgment should be affirmed or vacated. Under the proposed amendments, the court has limited ways to signal that a memorandum decision should not be used, even for its persuasive reasoning.

In other cases, the parties overlook or choose not to raise issues that could affect the application of dispositive law. Although a court generally might be aware that assertion of a different argument or inclusion of particular facts could result in the opposite outcome, it cannot make the record or arguments for a party.[10] Similarly, it is not efficient to catalogue in a memorandum decision the reasons a case on similar facts might require a different disposition.

These limited examples demonstrate that it may be prudent for a citation rule to have a method by which an appellate court could designate that a particular memorandum

[9]Ariz. R. Civ. App. P. 11(b), 13(a)(6); Ariz. R. Crim. P. 31.9(d), 31.13(c)(1)(vi); *see also In re Aubuchon*, 233 Ariz. 62, ¶ 6, 309 P.3d 886, 888 (2013) (considering waived arguments not supported by explanation, citations to record, or citations to authority); *State v. Lindner*, 227 Ariz. 69, n.1, 252 P.3d 1033, 1034 n.1 (App. 2010) (summary explanation of argument insufficient for review).

[10]*See, e.g.*, *Zeagler v. Buckley*, 223 Ariz. 37, n.6, 219 P.3d 247, 250 n.6 (App. 2009) (appellant's failure to develop facts or authority forfeited argument on appeal, and court would not "comb the record to make for her an argument she could have made for herself").

decision should not be cited even for its persuasive value.[11] Such a provision also might ameliorate the concern that over time citation for persuasive value will become a subcategory of cases with precedential value.

We emphasize that we do not make a specific proposal for such a rule. Rather, we submit that full consideration of the citation rule must consider why a limited number of decisions are designated as opinions.

III. THIS IS AN IDEAL TIME TO STUDY THE CITATION BAN AND MAKE COMPREHENSIVE RECOMMENDATIONS.

The last significant petition to end or modify the citation ban on unpublished decisions was in 2007.[12] It was coupled with a proposal to make unpublished decisions of the Arizona Court of Appeals available on the Internet. The proposal came on the heels of an amendment by the United States Supreme Court to Rule 32.1, Fed. R. App. P., and changes in several state court citation rules. As Justice Pelander observed in his comment, "it would be prudent for the supreme court to take a wait-and-see approach by allowing sufficient time to examine whatever effects the federal initiative might have,

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[11]This is not a novel idea. In an early critique of stare decisis, University of Arizona Law Professor Aigler speculated about the beneficial effect of requiring judges to state that a decision shall or shall not "stand as a precedent." Ralph W. Aigler, *Law Reform by Rejection of Stare Decisis*, 5 Ariz. L. Rev. 155, 157 (1964).

[12]*See* Rule Petition R-07-0021, filed Dec. 11, 2007, *available at* http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/11211454653171.pdf. A 2010 proposal sought to amend the rules to allow the citation of non-Arizona unpublished decisions. *See* Rule Petition R-10-0032, filed Aug. 13, 2010, http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/1813284845371.pdf; Minutes of the Arizona Supreme Court, Sept. 1, 2011, at 5, *available at* https://www.azcourts.gov/Portals/21/MinutesArchive/Minutes_September%201,%20201 1%20Rules%20Agenda.pdf.

as well as gain from the experience of other states that permit citation to unpublished decisions."

In the past seven years, memorandum decisions became available at the Arizona appellate courts' websites, as well major legal databases such as Westlaw.com and LexisNexis.com. Eleven states modified or ended their bans on citations to unpublished decisions.[13] Federal courts largely ended the ban on citation. Thus, there has been "sufficient time" to examine the effects and experiences in those jurisdictions.

Examination means more than noting an absence of catastrophic results. Petitioners rely on a report to the Wisconsin Supreme Court created three years after it ended its citation ban.[14] The report was limited to a general set of appellate statistics and citation issues. Significantly, it did not address potentially important factors, such as the experience of trial courts, changes in the workload of appellate judges, and claims in post-conviction relief petitions that trial counsel failed to research unpublished decisions. We submit that the Wisconsin report cannot substitute for a detailed examination of the experiences in other states.

Petitioners also rely on an Administrative Office of the U.S. Courts survey of judges prior to the adoption of Rule 32.1, Fed. R. App. P., suggesting that the federal experience supports their contention that workloads of the courts would not be overburdened. Federal courts do not necessarily provide a good comparison to the state

[13]Thirty-one states in total allow some sort of citation to unpublished state court decisions.

[14] http://wicourts.gov/publications/reports/docs/unpublishedopinionsfinal.pdf.

court experience. For instance, federal appellate courts frequently have four full-time law clerks and several legal interns, which is twice the number of staff utilized by a state appellate court. The situation is similar for federal trial courts.[15]

Finally, even a cursory review of the rules cited in petitioners' Appendix B shows significant differences in how the citation rule has been modified. A thorough examination of the rules would show subtle, but important changes that Arizona could consider. Similarly, there may be unpublished studies that would provide a broader, more relevant sample of experiences in other states than the sample utilized in the Wisconsin study.

IV. THE ARIZONA SUPREME COURT HAS UTILIZED AD HOC COMMITTEES TO EXAMINE RULE CHANGES WHERE THE PRINCIPAL IMPETUS LIES OUTSIDE ARIZONA.

In the past decade, the Arizona Supreme Court has appointed committees at least twice to study and to recommend changes to our rules based on a change in rules outside Arizona. The first involved changes to the code of judicial conduct and the more recent concerned the rules of evidence.[16] In both instances, the committees conducted a

[15]It is also significant that federal trial courts are the only system with the ability to publish their decisions. On its face, this would seem to be an anomaly in the citation ban. Specifically, why permit citation to the decision of a single judge in a different jurisdiction, but prohibit citation to decisions by three Arizona appellate judges? Part of the answer may be resources. In any event, this is an admittedly minor issue that should be reviewed.

[16]*See* Rule Petition R-10-0035, filed December 2010, *available at* http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/112201924671.pdf; Arizona Supreme Court Administrative Order No. 2010-42 (March 24, 2010), https://www.azcourts.gov/LinkClick.aspx?fileticket=kPEbHxxwVZs%3d&tabid=1438 (establishing Ad Hoc Committee on Rules of Evidence); *see also* Rule Petition R-09-007,

substantive review of the law, drafted Arizona-specific language, and submitted the proposed changes to the legal community for comment. After this comprehensive process, the committees presented their work, recommendations, and feedback to the supreme court. A report from a court-appointed ad hoc committee provides a more thorough, objective accounting than is typical for a rules petition.[17] On a closely-divided issue as this appears to be, we submit that Justice Pelander's admonishment for careful consideration still rings true.

V. AN AD HOC COMMITTEE SHOULD SEEK INPUT FROM THE LEGAL COMMUNITY, CONFIRM THE NATURE AND SCOPE OF ACCESS TO UNPUBLISHED DECISIONS, AND EXAMINE THE EMPIRICAL CLAIMS OF THE PROPONENTS AND OPPONENTS OF THE CITATION BAN.

Although the citation ban seems to be of primary interest to appellate judges and lawyers, the actual objective is to provide trial attorneys and judges another source of law for its persuasive value. They should be asked how a particular rule actually affects them. They also will be the best source of feedback for the potential effect on self-represented litigants. It is important to consider whether there could be modifications to the rule to make unpublished decisions more useable for persons representing themselves. For similar reasons, it will be important to document the nature and scope of access to unpublished decisions. Access to decisions via the Internet is important, but access

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filed January 2009, *available at* http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/1 19221147671.pdf; Arizona Supreme Court Administrative Order No. 2007-36 (April 26, 2007), *available at* https://www.azcourts.gov/portals/22/admorder/orders07/2007-36.pdf (establishing Task Force on the Code of Judicial Conduct).

[17] Although we have specific concerns with the proposed amendments, we also wish to note the petition and review of law are well-drafted and well-researched. We commend the attorneys for their work product.

without the ability to search and sort frequently means the difference between persuasive use of multiple citations versus placing too much weight on a single case. Thus, it likely will be important to document and encourage more robust sources of unpublished decisions, such as Google Scholar or Findlaw.com.

The past opponents of citation to unpublished decisions pointed to a possible increase in the workload of appellate judges. They suggested appellate judges might feel compelled to spend more time ensuring that decisions are not misused in different contexts. Additionally, judges might feel compelled to respond to citations for unpublished decisions, as well as to research unpublished decisions not discussed by the parties. Finally, the opponents questioned whether the depublication rule[18] will have any effect and, if it is rendered impotent, how the supreme court will be able to monitor and direct the development of Arizona's common law. Petitioners acknowledge the heavy workload of judges, but only express a hope that their minimalist amendments will avoid increasing the judicial workload and attendant delays. We submit these are substantial issues that could benefit from empirical information from other jurisdictions.

Even if there are no empirical studies more detailed than Wisconsin, asking the questions on a blank slate will provide alternative rule amendments. For instance, the concern that judges will feel compelled to address unpublished decisions might be addressed in the rule by the following mechanism: Allow parties to cite to unpublished

[18] *See* Ariz. R. Sup. Ct. 111(g). It should be noted, however, that the 1989 rule has not been without its critics. *See* Michael A. Berch, *Analysis of Arizona's Depublication Rule and Practice*, 32 Ariz. St. L. J. 175, 201 (2000) (the disadvantages of the rule outweigh its benefits).

decisions but prohibit courts from citing such decisions. For a variety of policy reasons, it may be better for parties to have a simple mechanism to present prior judicial reasoning, but nonetheless require judges in a pending case to present their own reasoning without undue reliance on a decision lacking precedential value. Such a rule also could militate against the creation of two classes of precedence—one formal and published, and a second creeping, subcategory of unpublished citations.

VI. QUESTIONS AN AD HOC COMMITTEE SHOULD ADDRESS

Our concerns about the proposed rule amendments are best expressed in questions we believe an ad hoc committee could address before making a comprehensive report to this court. This list is not meant to be exhaustive or exclusive, but represents the beginning of an inquiry and a dialogue on an important subject. We believe that if the court receives a comprehensive report and accompanying recommendations on even this limited set of questions, it will be in a far better position to evaluate if and how citations to unpublished decisions should be governed.

- Should the proponent of an unpublished decision be required to state there is no controlling Arizona law?
- Should parties be permitted to cite unpublished trial court decisions?
    - Unpublished agency or Administrative Law Judge decisions?
    - Should there be a different rule for trial decisions outside Arizona?
- Should a party be permitted to cite to unpublished appellate decisions outside of Arizona?

- Should courts be prohibited from citing unpublished decisions? Alternatively, should trial courts be permitted to cite unpublished decisions but appellate courts be prohibited from citing to them?
- Should an appellate court be permitted to designate that a particular unpublished decision cannot be cited even for persuasive value?
- Should courts provide information about resources to facilitate review of unpublished decisions?
- Should rule changes be reviewed several years after implementation?
- Should corollary rules be amended, such as whether and why to designate a decision as an opinion?

CONCLUSION

Petitioners address an important topic that is ripe for comprehensive examination. The proposed rule amendments likely will cause unnecessary problems; further, there was not sufficient consideration of past objections and there was no effort to obtain a current perspective. Although the supreme court itself could attempt a rule modification using petitioners' proposal, it would be more efficient and comprehensive to appoint an ad hoc committee to study the topic and make specific recommendations that can be considered by the court for implementation in 2016.

RESPECTFULLY SUBMITTED this 8th day of May, 2014.

By: /s/ Michael Miller

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