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8 **IN THE SUPREME COURT**
9 **STATE OF ARIZONA**

10 In the Matter of:

11 **PETITION TO AMEND RULE 111,**
12 **ARIZ. R. SUP. CT., RULE 28,**
13 **ARCAP, AND RULE 31.24, ARIZ.**
14 **R. CRIM. P.**

Supreme Court No. R-14-0004

COMMENT OF
THE STATE BAR OF ARIZONA

15 The State Bar of Arizona supports the Petition to amend Rule 111 of the
16 Arizona Rules of the Supreme Court, Rule 28 of the Arizona Rules of Civil Appellate
17 Procedure, and Rule 31.24 of the Arizona Rules of Criminal Procedure concerning
18 the citation of unpublished memorandum decisions.

19 The State Bar suggests, however, four minor modifications to the proposed
20 amendments: (1) set forth the full rule in Rule 111 with the other rules referencing
21 Rule 111 (rather than duplicating its pertinent text); (2) permit parties to either attach
22 a copy of the unpublished decision, or include a hyperlink to the unpublished
23 decision if it may be accessed without charge; (3) reference “memorandum
24 decisions” instead of “unpublished decisions” and (4) allow citations to federal and
25 to non-Arizona decisions to the same extent that citation is allowed in the issuing

1 jurisdiction. These suggestions are also intended to incorporate the substance of the
2 comments filed by Mr. Geoffrey Trachtenberg.
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4 **Introduction and Background.**

5 The Rules of the Arizona Supreme Court prohibit citation of unpublished
6 (memorandum) decisions, except in very limited circumstances. Rule 111, Ariz. R.
7 Supreme Court. That prohibition has remained static for over forty years. Yet in that
8 same time period, there have been significant advances in legal research technology,
9 and memorandum decisions are now far more readily available than they were in the
10 1970s. For example, the Arizona appellate court websites now provide easy access
11 to memorandum decisions, and every member of the State Bar of Arizona has free
12 access to electronic legal research, including memorandum decisions, through
13 Fastcase. Attorneys and members of the public alike can access decisions through
14 Google Scholar.

15 The Petition would permit citation to unpublished decisions only for
16 persuasive value. The proposal specifically states that those decisions are not
17 precedential. It also requires that any party citing to an unpublished decision provide
18 copies of that decision to the court and opposing parties, or a hyperlink that permits
19 access to the decision free of charge. Because of these limitations, concerns about
20 the potential negative impact that the citation of unpublished decisions may have
21 upon the adversary process and the judiciary will be minimized. The State Bar
22 therefore supports the substance of the Petition, as more fully explained below, with
23 four minor changes.
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1 citation to a memorandum decision after a court decides a case in connection with a
2 motion for reconsideration).

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4 *Third*, because memorandum decisions are so readily available, attorneys are
5 often required to conduct many more hours of legal research simply to obtain
6 authority from a published source. This causes unnecessary expense to parties, and
7 is a waste of resources. By permitting citation of unpublished decisions with the
8 limitations set forth in the Petition, the proposed rule change would address all of
9 these issues with minimal adverse impact.

10 **The Structure of the Proposed Amendments Should Be Modified and an
Option for Hyperlinking in Lieu of Attaching a Copy Included.**

11 Currently, there are three Arizona court rules that discuss citation of
12 unpublished decisions: Rule 111, Arizona Rules of the Supreme Court, Rule 28,
13 Arizona Rules of Civil Appellate Procedure, and Rule 31.24, Arizona Rule of
14 Criminal Procedure. The State Bar believes that repetition of the rule in three places
15 is unnecessary and needlessly duplicative. To eliminate needless repetition, the State
16 Bar suggests that the Supreme Court adopt the amendment to Rule 111, and that
17 Rule 28 of the Arizona Rules of Civil Appellate Procedure and Rule 31.24 of the
18 Arizona Rules of Criminal Procedure provide as follows: "Arizona Supreme Court
19 Rule 111 governs the citation of decisions."

20 The Petition proposes requiring parties to attach a copy of any cited
21 unpublished decision to "the motion or petition in which such decision is cited."
22 With many unpublished decisions available electronically, the State Bar proposes
23 that parties be permitted to instead cite a hyperlink to the decision if it is available
24 free of charge. The State Bar further notes that "motion or petition" may be too
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1 narrow as it excludes a wide variety of other filings, including responses, replies,
2 and appellate court briefs. The State Bar therefore proposes the following language:
3 “A party citing a memorandum decision must provide either a copy of the decision
4 or a hyperlink to the decision where it may be obtained without charge.”

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6 Mr. Trachtenberg’s comment suggests that “this Court should not prohibit the
7 citation of opinions where citation is permitted by the rules of the issuing court,”
8 noting that current Arizona case law prohibits citation to “unpublished” decisions of
9 federal district courts. *See, e.g., Kriz v. Buckeye Petroleum Co.*, 145 Ariz. 374, 377
10 n.3, 701 P.2d 1182, 1185 n.3 (1985). The State Bar agrees, and proposes the
11 following language be added to Rule 111: “A party may cite a decision of another
12 jurisdiction as permitted by that jurisdiction.” The State Bar also agrees with the
13 Association’s comment that the term “unpublished” should be avoided as it is not a
14 term used to describe Arizona appellate decisions.

15 Finally, the State Bar believes that Rule 111 would benefit from stylistic
16 changes to increase clarity and readability. Attached hereto as Exhibit A is the State
17 Bar’s proposed amendments to Rule 111 the two appellate rules (listed above)
18 relating to citation of memorandum decisions. Among other changes, the State Bar
19 recommends deleting Rule 111(e), which provides: “This rule shall be effective as
20 of 1 September 1973.”

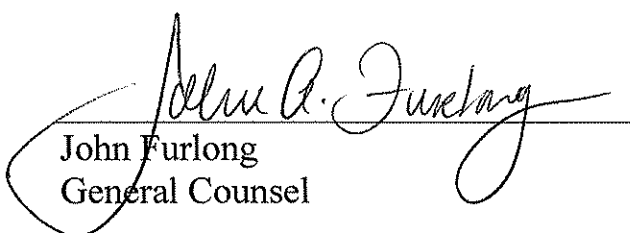
22 CONCLUSION

23 For the reasons stated above, the State Bar of Arizona supports the Petition
24 and urges the Court to adopt it with the minor modifications set forth in this
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Comment, as set forth in the proposed amendments attached hereto as Exhibits A (clean copy) and B (redline comparison to existing rules).

RESPECTFULLY SUBMITTED this 8th day of May, 2014.


John Furlong
General Counsel

Electronic copy filed with the Clerk of the Arizona Supreme Court this 9th day of May, 2014.

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Appendix A

Proposed Rule Amendments (clean copy)

Arizona Supreme Court Rule 111(c) and (d)

(c) Dispositions as Precedent.

(1) Memorandum decisions of Arizona state courts are not precedential and may only be cited

(A) to establish claim preclusion, issue preclusion, or law of the case;

(B) to assist the appellate court in deciding whether to issue a published opinion, grant a motion for reconsideration, or grant a petition for review; or

(C) for persuasive value if issued on or after _____.

(2) A citation to a decision must indicate if the decision is a memorandum decision.

(3) A party citing a memorandum decision must provide either a copy of the decision or a hyperlink to the decision where it may be obtained without charge.

(4) A party has no duty to cite a memorandum decision.

(d) Dispositions of tribunals in other jurisdictions. A party may cite a decision of a tribunal in another jurisdiction, including the United States District Court for

1 the District of Arizona, as permitted in that jurisdiction.

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3 *[Renumber existing Rule 111(d) as 111(e) and delete existing Rule 111(e).]*

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Arizona Rule of Civil Appellate Procedure 28

(c) Dispositions as Precedent. Arizona Supreme Court Rule 111 governs the citation of decisions.

Arizona Rule of Criminal Procedure 31.24

Arizona Supreme Court Rule 111 governs the citation of decisions.

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Appendix B

Proposed Rule Amendments (redline copy)

Arizona Supreme Court Rule 111(c)

(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.~~

(1) Memorandum decisions of Arizona state courts are not precedential and may only be cited

(A) to establish claim preclusion, issue preclusion, or law of the case;

(B) to assist the appellate court in deciding whether to issue a published opinion, grant a motion for reconsideration, or grant a petition for review; or

(C) for persuasive value if issued on or after _____.

(2) A citation to a decision must indicate if the decision is a memorandum decision.

(3) A party citing a memorandum decision must provide either a copy of the decision or a hyperlink to the decision where it may be obtained without charge.

1 (4) A party has no duty to cite a memorandum decision.

2 (d) Dispositions of tribunals in other jurisdictions. A party may cite a decision
3 of a tribunal in another jurisdiction, including the United States District Court for
4 the District of Arizona, as permitted in that jurisdiction.

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6 **(de) Designation of written disposition.** The written disposition of the case shall
7 contain in the caption thereof the designation “Opinion”, “Memorandum
8 Decision”, or “Order.”

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

10 **[remainder of Rule 111 is unchanged]**

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12
13 **Arizona Rule of Civil Appellate Procedure 28**

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

21 Arizona Supreme Court Rule 111 governs the citation of decisions.

1 **Arizona Rule of Criminal Procedure 31.24. Citation of memorandum**
2 **decisions.**

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4 ~~Memorandum decisions shall not be regarded as precedent nor cited in any court~~
5 ~~except for (1) the purpose of establishing the defense of res judicata, collateral~~
6 ~~estoppel, or the law of the case or (2) informing the appellate court of other~~
7 ~~memorandum decisions so that the court can decide whether to publish an opinion,~~
8 ~~grant a motion for reconsideration, or grant a petition for review. Any party citing~~
9 ~~a memorandum decision pursuant to this rule must attach a copy of it to the motion~~
10 ~~or petition in which such decision is cited. Arizona Supreme Court Rule 111~~
11 ~~governs the citation of decisions.~~