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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: PETITION TO AMEND RULE 111, ARIZ. R. S. CT.; RULE 28, ARCAP; AND RULE 31.24, ARIZ. R. CRIM. P.	Supreme Court No. R-14-0004 **Comment in Opposition to Petition**

The undersigned hereby respectfully submit their comment opposition to the above-captioned Petition to amend certain rules promulgated by the Arizona Supreme Court.

Summary of Argument

Petitioners contend that: "Permitting citation to unpublished memorandum decisions for persuasive value would promote consistency and certainty in the law and its application, enhance the advocacy tools available to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." The undersigned appreciate the petitioners' sincere motivation to improve Arizona's legal practice. We respectfully disagree,

however, that permitting citation of memorandum decisions will have the salutary effects petitioners seek.

To the contrary, the proposal would increase the cost of litigation and thereby make legal representation increasingly inaccessible to those who are not wealthy. It would cripple the ability of Arizona's appellate courts to manage and clarify the development of our state's citable jurisprudence and would thereby reduce, not improve, predictability of courtroom outcomes in Arizona. And it would burden our trial and appellate courts with analyzing and distinguishing a substantial additional layer of persuasive authority.

Other than providing a basis for additional billing, the rule change would provide scant benefits to Arizona's attorneys. The petitioners posit that allowing citation of memorandum decisions would provide counsel with more "advocacy tools." But Arizona's attorneys do not suffer from any lack of citable persuasive authorities. For that purpose, counsel may currently cite the dicta found in Arizona's published opinions, the published jurisprudence of forty-nine other states, the published jurisprudence of twelve federal circuits, and the scholarly observations found in hundreds of American law reviews and academic treatises.

Nor is a rule change required to allow practitioners to harvest any nuggets of wisdom from appellate memorandum decisions. The current rules do not

prohibit attorneys from extracting the reasoning of an unpublished decision to the extent that reasoning is persuasive. By prohibiting citation, however, the current rules prevent counsel from implying that such reasoning should carry additional weight simply because an appellate court has previously so reasoned in unpublished form. And, as articulated below, there are good reasons such decisions should not guide trial court rulings. Thus, the current rules, not the proposed changes, best facilitate petitioners' own stated goals: to allow attorneys to utilize the persuasive reasoning found in memorandum decisions but prevent those decisions from carrying the status of precedent.

1. The proposal would increase the cost of litigation.

Petitioners' proposal would dramatically increase the universe of Arizona cases available for citation. In the last calendar year, the Arizona Court of Appeals issued nearly ten memorandum decisions for every published opinion.[1] Thus, petitioners seek nothing less than a watershed expansion of the body of citable Arizona jurisprudence.

Before adopting such a massive change, the court should consider the predictable effects of that change on appellate and judicial practice in Arizona. Those attorneys striving for the highest standard of practice would be compelled

[1]In 2013, the two divisions of the Arizona Court of Appeals published 177 opinions and issued 1588 memorandum decisions.

to conduct research to identify, digest, and consider all pertinent Arizona memorandum decisions on behalf of their clients.[2] Comprehensive briefs would necessarily contain a section marshaling the most helpful memorandum decisions and distinguishing the others. In litigation, opposing counsel would be similarly compelled to respond to those cases or assume the risk that the trial court will be persuaded by them. The net effect will be more attorney time, and more billable hours, devoted to the research and consideration of memorandum decisions.

Although it may be difficult to reliably predict the extent of the resulting increases in the cost of litigation, it is not difficult to predict that those costs will indeed rise. Notably, neither of the two studies cited by petitioners as evidence that their proposal would have no negative consequences provided any data on this pivotal question. Given that legal expertise is already priced beyond the

[2]The failure of counsel to research and marshal memorandum decisions could arguably expose counsel to later criticism. *See Collins v. Miller*, 189 Ariz. 387, 393, 943 P.2d 747, 753 (App. 1006) (even with respect to unsettled area of law, attorney assumes obligation to client to undertake reasonable research to ascertain legal principles and make informed decisions); *see also* ER 1.1, Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42 (competent representation "requires . . . legal knowledge, . . . thoroughness and preparation").

means of most, we question the wisdom of any rule change which would tend to increase those costs and make legal representation even less accessible.[3]

2. The proposal would increase the workload of our courts.

Although the proposal does not require courts to treat memorandum decisions as controlling authority, we think it unlikely our trial courts will blithely overlook decisions issued by the very appellate court that will review their rulings. Aware of this fact, litigants will assuredly focus their arguments on those decisions and our trial courts will expend precious judicial time considering the lengthier briefs and arguments that result. Because memorandum decisions would only be persuasive to the extent they amplify, but do not conflict with, Arizona published opinions, both trial courts and appellate

[3]The negative impact of the rule change would be especially pronounced in those arenas of civil litigation wherein litigants struggle to afford representation even for legal matters having great importance to their lives. For example, Arizona's appellate courts issue numerous memorandum decisions resolving marriage dissolution disputes. The trial court rulings in such cases generally pivot on specific fact-findings in the context of general legal standards. The ultimate appellate decision often turns on required deference to those findings. If citable to the trial court, those memorandum decisions would provide a cornucopia of superficial factual similarities and scant legal guidance. But, counsel would need to digest those cases to properly represent their clients—adding to litigation costs most parties can scarcely afford. The ability of counsel to cite memorandum decisions would also further enhance the comparative disadvantage faced by the pro se litigant, a common feature of domestic cases. Pro se litigants generally lack the sophistication to place unpublished memorandum decisions in their proper context.

courts will be required to analyze whether and how that additional layer of persuasive authority will influence each case.[4]

Meanwhile, the Arizona Court of Appeals would carry a new burden of harmonizing or distinguishing all the reasoning found in its numerous previous memorandum decisions in resolving claims—or risk the appearance of inconsistency. The proposed change would thus require our appellate courts to likewise conduct an additional layer of analysis as to many cases before it.

3. The proposal would cripple our state's ability to manage the development of its jurisprudence.

Petitioners assert that allowing the citation of memorandum decisions will "promote consistency and certainty in the law and its application." If accurate, this advantage might justify the additional litigation costs itemized above. In practice, however, petitioners' proposal would greatly hamper the ability of our appellate courts to monitor, direct, and clarify the law by which our trial courts will resolve the cases before them.

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[4]Petitioners cite a study compiled by the Administrative Office of the U.S. Courts on whether a "permissive citation policy" impacts judicial workloads. That study, however, occurred before, not after, our federal courts modified their rules to allow citation of unpublished opinions. Petitioners also cite a Wisconsin study that comes to a similar conclusion after studying briefing habits in the first two years after the change. We submit that such studies conducted after attorney habits and strategies had more time to adjust to the new practice would be more instructive.

Given the enormous volume and variety of legal disputes presented and resolved in our state courts—and the inherently dynamic nature of the law itself in an ever-changing society—Arizona's appellate courts shoulder no small task in clarifying the controlling law of Arizona. Our two levels of state appellate courts have only a few procedural tools at their disposal to do so. First, the Arizona Court of Appeals has the ability to determine which of the numerous cases before it are worthy of publication as opinions and are therefore suitable to direct courts in future cases. Then, the Arizona Supreme Court has the ultimate authority to evaluate, affirm or reverse, and depublish some of those opinions—or, more rarely, to elevate an unpublished case to opinion status by granting review. If, as petitioners propose, every memorandum decision issued by the Arizona Court of Appeals becomes a citable authority in Arizona's trial courts, those tools will become blunt instruments at best.

Petitioners implicitly suggest that little would be lost if all memorandum decisions carried some status as citable precedent. But, as noted above, the Arizona Court of Appeals issues nearly ten memorandum decisions for every published opinion, and our trial judges will predictably give those decisions preferred status among the other "persuasive" authorities available. The result will be an enormous increase in the body of case authority that might hypothetically determine a trial court's ruling in an individual case.

Given the practical criteria currently employed by the Arizona Court of Appeals for determining whether a case is worthy of publication, any substantial reliance on unpublished memorandum decisions would be troubling. The vast majority of cases we address require non-discretionary review and disposition, regardless of the existence of meritorious issues. Many of the issues presented in those cases are repetitive and routine and have been previously resolved in published opinions. Our dispositions of those cases are intended to neither establish new law nor clarify existing law. In other cases, where more novel issues have been raised, the record might have been incomplete, inhibiting proper review. Counsel may have failed to prevail on an otherwise good claim because they failed to cogently marshal important arguments and authorities, or those arguments may have been waived by trial counsel. Sometimes, an appellate panel is reluctant to publish a case because it featured a marked asymmetry in the caliber of attorneys representing the respective parties, or may have involved often outmatched pro se litigants.

Moreover, once the appellate panel has decided to issue its ruling as a memorandum decision, litigants have a mechanism for alerting the panel that it may have overlooked good grounds for publication: they may file a motion to publish pursuant to Ariz. R. Civ. App. P. 28(c). Such motions are well-received

by this division where, historically, the majority of them have been granted when a cogent reason for publication is provided.

Thus, our state's intermediate appellate courts earnestly evaluate which of its decisions are appropriate, and inappropriate, to guide future courts. Given the above-described features of most memorandum decisions, we believe that allowing their citation would cloud, not clarify, the law of Arizona, as enterprising attorneys would predictably attempt to extract legal conclusions allegedly reached by "implication" or legal "trends" from decisions never meant to guide courts in future litigation.

Moreover, the current rule provides clarity as to the universe of authorities that could persuade our courts to reach a specific outcome. But the proposed rule, which both allows our courts to either rely upon the reasoning of memorandum decisions or disregard that reasoning entirely, *see* Ariz. R. Sup. Ct. 111 (proposed) (allowing citation of memorandum decisions but relieving courts of any duty to consider them), would create considerable uncertainty for prospective litigants as to what case authorities might ultimately guide their dispute. At minimum, allowing such citation would render the process used by our intermediate appellate courts for distinguishing publication-worthy opinions from those not meant to guide future litigation—a process specifically designed to bring clarity to the law—ineffectual in practice.

The current process also provides crucial assistance to our supreme court, which carries the ultimate responsibility for shaping the development of this state's jurisprudence. The five justices of that court do not have the resources to grant review, and generate their own opinions, as to more than a very small percentage of the several thousand decisions and opinions issued annually by the court of appeals. To fully monitor what will be citable as dispositive authority in an Arizona courtroom, they may currently focus on the narrower universe of approximately 150 opinions per year, published and deemed citable by the Arizona Court of Appeals. Under the proposed rule, however, our justices will be charged with careful consideration of some 1700 memorandum decisions and opinions generated by our court of appeals—or risk the development of a shadow body of decisional law having unforeseen, and sometimes unknown, potentially dispositive effects on courtroom outcomes. In some of those cases, neither party will file a petition for review, which would deprive the supreme court of any opportunity to evaluate those memorandum decisions before they become citable in an Arizona courtroom.

Furthermore, the supreme court's remaining tool for shaping the citable jurisprudence of Arizona, depublication of an appellate opinion, *see* Ariz. R. Sup. Ct. 111(g), would have little utility if parties could cite memorandum decisions that previously were opinions but were later depublished. Notably, a

depublication order generally signifies that the court "disapproved of 'something'" even though it is not always "clear what." *Martinez v. Indus. Comm'n,* 192 Ariz. 176, ¶ 15, 962 P.2d 903, 906 (1998). Given that the court depublishes opinions precisely because they contain reasoning of which the court presumably disapproves, there would be little logic in allowing such decisions to then be cited as persuasive authority. Thus, the proposal would eliminate the very distinction between opinions and unpublished decisions that allows depublication to function as a meaningful tool for managing the citable law of Arizona.

For the above reasons, only by preserving a clear distinction between published opinions and unpublished decisions can our appellate courts efficiently and effectively guide the development of Arizona decisional case law. Notwithstanding the claims of petitioners, the ability of our appellate courts to do so provides greater clarity and predictability to litigants who must contemplate potential trial court outcomes.

As the former chief judge of Division Two of the Arizona Court of Appeals observed when responding to a similar petition in 2007,

> Both the court of appeals and the supreme court endeavor to build a sound foundation for the "edifice" of our state's jurisprudence. The current rules allow our appellate courts to carefully choose and craft each "brick" to be used in the ongoing building and development of the law. In our view, allowing litigants

> to deliver hundreds, and, in short order, thousands, of lesser, "untested" building blocks to our courts will make choosing the strongest ones more difficult, and , over time, embed unpredictability and instability into Arizona's jurisprudence.

2007 Comment on Rule 28 Petition for Change in Rule 111, Ariz. R. Sup. Ct, Relating to Availability and Citation of Memorandum Decisions. Petitioners maintain that a core purpose of the proposal is to "promote consistency in the law." We submit that, in generating our state's controlling jurisprudence, we should aspire to consistency with prior jurisprudence of only the highest quality. Allowing the citation of memorandum decisions undermines the ability of our appellate courts to assure that our citable jurisprudence conforms to those high standards.

4. The current rules do not prevent counsel from using persuasive reasoning found in unpublished decisions.

Both the language of the proposed rule changes, and the petition in support of those changes, emphasize that citation of memorandum decisions should be allowed exclusively to present the "persuasive value" of the reasoning therein. Indeed, the proposed rules specify that the reasoning found in such decisions would be neither precedent nor binding on any court. But petitioners overlook that the current rules do not prohibit any attorney from utilizing the reasoning of our courts' memorandum decisions to the extent they find that reasoning persuasive—and attorneys need not cite a decision to incorporate such

reasoning into their briefs. Thus, any persuasive value in those decisions may already be harnessed.

Rather, the central thrust of the proposed changes, allowing citation of memorandum decisions, achieves but one purpose: to suggest that the reasoning found therein should be especially persuasive because a *prior court has adopted it*. Petitioners cannot both contend that citation of memorandum citations will "promote consistency in the law" and deny that the mechanism for achieving such consistency would be granting those decisions some implicit precedential weight. One can only achieve consistency by conforming a later decision to a prior one.[5] Thus, notwithstanding all of the disclaimers in the proposed rule itself, to allow citation of memorandum decisions is to transform those decisions into a species of precedent.

Moreover, courts would retain discretion under the proposed rule to either follow or disregard memorandum decisions. For this reason, those decisions would become a species of precedent that adds only uncertainty to the resolution of legal issues. Which trial judges will generally follow memorandum decisions? Which will disregard them? Will trial judges always clearly indicate whether and to what extent they were influenced by the memorandum decisions?

[5]As explained above, our appellate courts may have declined to publish certain memorandum decisions precisely because they have concluded that those cases are not suitable for guiding future decisions—and therefore consistency with those decisions should not be compelled.

Meanwhile, any persuasive value of the logic found in those decisions may already be extracted under the current rule, and can be easily presented without citation. Thus, the lone effect of the change would be to create a new, vast body of quasi-precedent which would carry unpredictable and varying levels of weight in each Arizona courtroom.

5. Arizona's attorneys have no shortage of materials to cite as persuasive authority.

Petitioners also maintain that the rule change would "enhance the advocacy tools available to counsel." But Arizona's attorneys may already cite as persuasive authority the published cases of Arizona, the published jurisprudence of the forty-nine other states and twelve federal circuits, and the legal scholarship published in articles, notes, and treatises by scores of American law schools. There is therefore little need to add Arizona's memorandum decisions to that universe of citable materials simply to enhance "advocacy tools." As articulated above, many of those memorandum decisions would be an especially untrustworthy basis to resolve any legal issue and, for that reason, have been determined by their own authors to be inappropriate to guide Arizona's courts in future cases. But, because those decisions have been issued by the very appellate court that will review a trial court's ruling, Arizona's litigants and some trial judges will give those decisions more weight than they merit.

6. That other states allow citation of memorandum decisions does not demonstrate that Arizona should also do so.

Petitioners observe that federal courts and over thirty states allow citation of memorandum decisions for their persuasive value. But the respective states vary considerably in the number of appellate decisions generated, their respective criteria for publishing opinions, the expected content of their memorandum decisions, and the review structure of their appellate courts. For example, six of the states who authorize citation of memorandum decisions for persuasive value have no intermediate court of appeals at all. Their supreme courts therefore have authored *all* of their appellate jurisprudence whether published or not. Meanwhile, three of Arizona's regional neighbors, California, Nevada, and Colorado, prohibit citation to memorandum decisions for persuasive value. Other states that authorize citation of memorandum decisions, such as Florida, place substantial reliance on the use of summary or per curiam decisions and prohibit their citation.

Petitioners emphasize that two studies, one conducted by the Wisconsin Supreme Court and another by the Administrative Office of the U.S. Courts, suggest that no immediately obvious negative results in judicial workload have arisen from the citation of memorandum decisions. But Petitioners have not directed the court to any studies which purport to address the more subtle question of whether that citation practice has affected litigation costs in trial

courts, or the extent to which unpublished decisions may have been influencing the outcomes in trial courts.

In his separate opposition to the petition, Judge Miller correctly observes that we should be reluctant to draw any substantial conclusions from the experience of other states in the absence of more careful study conducted by an independent committee from our own state. Although we are firmly convinced, for the reasons we have stated, that allowing the citation of memorandum decisions would create more problems than it would solve, we agree with Judge Miller that a more comprehensive study would be the minimum prerequisite to such a profound departure from our state's historical practice.

7. Petitioners have identified no problem with the current rule.

The petitioners' proposal would substantially change the volume of Arizona jurisprudence available for citation in Arizona's state courts. For the reasons we articulate above, we expect that change will have negative effects on the cost of litigation and the ability of our appellate courts to manage and direct the architecture of Arizona jurisprudence.

Yet petitioners have not identified any meaningful problem created by the current rule. They have identified no dearth of citable persuasive authority. They do not suggest that our trial courts lack adequate guidance from either our published jurisprudence or the vast reservoir of other persuasive authorities

available for their consideration and review. And, although petitioners contend that the rule change would promote clarity and consistency in the law, they make no argument, and present no evidence, that our current jurisprudence is deficient in either respect. Finally, the primary procedural goal they seek—to allow litigants and our courts to harvest the persuasive value of the reasoning of memorandum decisions—is not prohibited under the current rule.

Lastly, petitioners maintain that "the rationales for prohibiting citation to memorandum decisions have become outmoded." They observe correctly that, with contemporary legal research tools, memorandum decisions have become as readily accessible as published opinions. But they assume incorrectly that the past inaccessibility of memorandum decisions was the lone rationale for the current rule prohibiting their citation. As demonstrated above, the current rule substantially reduces the volume of Arizona case authority that litigants must digest and present -- and therefore reduces litigation costs. And, by maintaining the clear distinction between published opinions and unpublished decisions, the current rule enables our appellate courts to monitor and maintain the quality of Arizona jurisprudence that controls outcomes in Arizona courtrooms. That process, as enabled by the current rule, fosters the very clarity and consistency in the law that petitioners seek to promote.

In conclusion, the hazards of the proposed rule change are concrete and predictable. Meanwhile, the suggested benefits of the proposed change are marginal and speculative at best—and address no obvious problem with the current rule. For those reasons, we strongly recommend that the justices of the Arizona Supreme Court reject the petition.

RESPECTFULLY SUBMITTED this 14th day of May, 2014.

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