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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. R-14-0004 **Petitioners' Reply to Comments and Proposed Supplemental Rule Language**

Pursuant to Rule 28(D)(2), Rules of the Arizona Supreme Court, Petitioners reply in support of their Petition 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 memorandum decisions. In carefully reviewing all comments to the Petition and after discussion with practitioners in the community, Petitioners note the emerging consensus on this issue.

Eleven of the fourteen[1] comments filed support the proposed change, or do

[1] Commenter Lincoln Combs commented twice in support of the proposed change; his comments are thus only counted as one in support for purposes of this analysis.

not oppose it, at least with respect to the civil rules (Rule 111, Ariz. R. Supreme Ct., and ARCAP 28). Ten of the fourteen support the change for both the civil and criminal appellate rules. Perhaps most tellingly, of the only four comments that oppose the Petition in some form, only one does not express the potential for future support, contingent upon further study. Petitioners respectfully suggest, as noted by the Honorable Judges Eckerstrom, Howard, Espinosa, Vásquez, and Howe, that "such studies conducted after attorney habits and strategies had more time to adjust to the new practice would be more instructive."[2] Thus, Petitioners urge the Court to adopt the proposed change and provide for further study post-adoption if the Court determines it would be helpful.

Given the solidifying consensus, Petitioners herein reply to comments where necessary.[3] Petitioners also submit proposed supplemental rule language for the Court's consideration.[4] Petitioners sincerely appreciate the consideration and

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Many comments were filed jointly or on behalf of others, so the consensus has evolved from the views of well more than fourteen practitioners and judges. Of note, the State Bar Board of Governors unanimously (with one abstention) approved its Comment.

[2] Comment of Honorable Judges Eckerstrom, Howard, Espinosa, Vásquez, and Howe, at 6 n.4.

[3] As in any constructive conversation, many comments discussed similar themes and built on each other. Petitioners do not repeat their arguments in response to each comment but instead file this comprehensive Reply in support of the Petition.

[4] The proposed supplemental language is attached as Appendix A and was developed in keeping with the suggestions of commenters, including the State Bar, the Honorable Judges Gemmill, Norris, and Swann, and Geoffrey M. Trachtenberg. (Appendix A contains a slight revision to the language proposed by

analyses of all commenters and address the following comments in turn:

I. REPLY TO COMMENT OF DAVID L. ABNEY, ESQ.

Petitioners appreciate the Commenter's likening of their proposal to the Model T. After all, the Model T has been deemed as influential as the teaching methods of Harvard Law School's Dean Langdell[5] and as revolutionary as managed health care.[6] Petitioners likewise appreciate the Commenter's thoughtful collection of authorities on the federal experience. We agree that Arizona can look to federal studies in this area for guidance. Wholesale adoption of the federal language, however, might prove less efficacious than rule language crafted especially for Arizona through this Court's designated rulemaking process. The gravamen of even comments opposed to the Petition in one way or another was that an individualized solution was needed for Arizona. That said, should the Court find components of the federal language to be a good fit for Arizona, Petitioners would not object to their adoption.

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the State Bar, to incorporate the suggestion by the Honorable Judges Gemmill, Norris, and Swann that "the amended rules confirm that there is no intention to extend the standard of care for attorneys to reviewing, analyzing, and citing memorandum decisions of this court or other unpublished decisions.")

[5] Carlo A. Pedrioli, *Constructing Modern-Day U.S. Legal Education with Rhetoric: Langdell, Ames, and the Scholar Model of the Law Professor Persona*, 66 RUTGERS L. REV. 55, 62-63 (Fall 2013).

[6] Charles D. Weller, *The Secret Life of the Dominant Form of Managed Care: Self-Insured ERISA Networks*, 6 HEALTH MATRIX 305, 307 (Summer 1996) ("Like the Model T, it has unleashed a private revolution.").

II. REPLY TO COMMENT OF THE HON. JUDGES MILLER, KELLY, AND HARRINGTON.

The Comment initially concerns itself with citation to trial court decisions. Petitioners focus only on the appellate rules the Petition seeks to amend and do not seek a rule change regarding citation of trial court dispositions. The Petition and Appendix A to this Reply propose modest amendments to the current rules to permit citation to memorandum decisions for their persuasive value, prospectively, with a date to be set by the Court. The proposed amendments resulted from examination of similar amendments in other jurisdictions, and Petitioners intentionally structured the proposed amendments to accommodate the issues that hobbled past Arizona rule petitions on this issue.

In his 2007 comment on a past petition, Justice Pelander stated, "at a minimum, we believe that before making drastic changes to Arizona's rules, 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*, as well as *gain from the experience of other states* that permit citation to unpublished decisions." (Emphasis added). That has now been done. The experience of similar rule amendments, at both federal and state levels, has convincingly demonstrated that permitting citation to memorandum decisions for persuasive value does not result in the apparition of the dire predictions of those who oppose the change.

The Comment suggests that the policy rationale included in the Petition is incorrect "if it equates equal treatment with equal results."[7] That is not the foundation of Petitioners' rationale. The current citation rules in Arizona forbid a party from calling courts' attention to Arizona appellate courts' own official actions. This is inconsistent with basic principles underlying the rule of law and arguably lacks candor to the tribunal.[8]

Again, the proposed amendments in the Petition and this Reply are narrow. Petitioners do not seek to change the circumstances under which courts choose to issue a "memorandum decision" or an "opinion." The proposed amendments address only the citation of memorandum decisions for persuasive value and the citation of dispositions of tribunals in other jurisdictions as permitted in those jurisdictions.

The Comment posits, "presumably, memorandum decisions should not make or criticize law, signal an overlooked law, or involve important facts or laws."[9] Petitioners agree that this is the presumption under the current rule. However, this is not always the case. As commenters detailed, sometimes legal issues are only

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[7] Comment of the Hon. Judges Miller, Kelly, and Harrington, at 6.
[8] *See*, *e.g.*, Comment of Hon. Carmine Cornelio to the Petition in which the honorable Pima County Superior Court judge notes that counsel in a recent trial did not alert the court to a memorandum decision that was directly on point to a central issue in the case, probably due to the current rule prohibiting citation.
[9] Comment of the Hon. Judges Miller, Kelly, and Harrington, at 7.

addressed in memorandum decisions.[10] More often, published opinions exist but few may be on point.[11] Attorneys are likely to cite a memorandum decision not because of its statement of the law, but because the facts of the case are very similar to the facts involved in the case before the court. Further, judges are unlikely to know the true importance of the facts or laws in a case at the time the decision is made to issue either a memorandum decision or a written opinion. Only later, when a case comes along with comparable facts, does the precedential relevance of an earlier decision become known.[12]

As the Comment states, "there has been 'sufficient time' to examine the effects and experiences" of other jurisdictions who have modified or ended their bans on citations to unpublished decisions.[13] More than thirty states have eliminated or relaxed their no-citation rules,[14] and there is no evidence that any court has experienced the consequences claimed by opponents of the rule change.

The Comment suggests that the studies from the Wisconsin Supreme Court

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[10] Comment of the Hon. Pima County Superior Court Judge Carmine Cornelio at 1 n.1.

[11] "Despite the vast number of published opinions, most federal circuit judges will confess that a surprising fraction of federal appeals, at least in civil cases, are difficult to decide not because there are too many precedents but because there are too few on point." RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 166 (1996).

[12] Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 773 (May 2003).

[13] Comment of the Hon. Judges Miller, Kelly, and Harrington, at 10.

[14] *See* Appendix B to Petition.

and the Administrative Office of the United States Courts are insufficient to support a rule change in Arizona.[15] Context is important here: The Wisconsin report declined to address factors such as the experience of trial courts and changes in workload of appellate judges *because of a lack of interest from judges*, indicating a lack of need. The Wisconsin report states, "due to a lack of sufficient interest, the committee did not develop a survey or schedule a breakout session at the Judicial Conference to seek feedback on the rule amendment."[16] The committee sent a draft of its final report to all trial court judges and appellate court judges asking for comments on the rule change.[17] Only two judges responded; those responses indicated that the rule change was valuable.[18] This lack of negative feedback suggests the rule change in Wisconsin had little, if any, negative effect on trial and appellate court judges.

To Petitioners' knowledge, Wisconsin is one of the only states to have published its findings. One could surmise, though, if the harm of allowing citation to unpublished dispositions truly outweighed the benefit, then state courts would not have nearly overwhelmingly liberalized their citation rules. Similarly, federal court management statistics for the U.S. District Court for the District of Arizona

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[15] Comment of the Hon. Judges Miller, Kelly, and Harrington, at 10-11.
[16] CITATION OF UNPUBLISHED OPINIONS COMMITTEE FINAL REPORT TO WISCONSIN SUPREME COURT 3 (2012) *available at* http://wicourts.gov/publications/reports/docs/unpublishedopinionsfinal.pdf.
[17] *Id.* at 3.
[18] *Id.* at 3.

tend to negate any claim that allowing citation to unpublished opinions negatively affected federal trial court judges. The judicial caseload profile statistics show an increase in the number of filings between 2009 and 2013, but a decrease in the number of pending cases, as well as a decrease in the median time between filing and disposition.[19] These statistics show that busy federal trial courts manage their caseloads, with only a few law clerks,[20] despite the implementation of permissive citation.

As the Comment notes, this Court has, in the past, appointed committees to study rule changes.[21] These committees "conducted a substantive review of the law, drafted Arizona-specific language, and submitted the proposed changes to the legal community for comment."[22] This work has already been done and is currently before the Court in the form of the Petition, Comments, and this Reply.

The Comment states it would also be important for a committee to "document the nature and scope of access to unpublished decisions." Again, this

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[19] U.S. COURTS, ARIZONA, U.S. DISTRICT COURT JUDICIAL CASELOAD PROFILE, *available at*, http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2013/district-fcms-profiles-december-2013.pdf&page=65.

[20] Under current Judicial Conference policy, federal district court judges may employ up to three people as law clerks or judicial assistants. FEDERAL JUDICIAL CENTER, INSIDE THE FEDERAL COURTS, WHO DOES WHAT, *available at* http://www.fjc.gov/federal/courts.nsf/autoframe!openform&nav=menu1&page=/federal/courts.nsf/page/352/.

[21] Comment of the Hon. Judges Miller, Kelly, and Harrington, at 11.

[22] *Id.* at 11-12.

can be determined without the use of a committee. Arizona Court of Appeals decisions are available to the public through each division's website. However, the search parameters on these websites are very limited and a full text search is not available.[23] Google Scholar[24] allows a full text search of Arizona case law, including memorandum decisions. Through Google Scholar, the user is able to see how other opinions or decisions have cited a particular case. Google Scholar even provides a list of cases related to the topic of the case the user is viewing.[25] This search-and-sort capability should eliminate any fear of a self-represented litigant "placing too much weight on a single case," as expressed in the Comment.

Finally, Petitioners acknowledge the thoughtful questions posed at the end of the Comment. Adoption of the proposed change, with post-adoption study as deemed necessary, would provide optimal, empirical answers.

III. REPLY TO COMMENT OF THE HON. JUDGES ECKERSTROM, HOWARD, ESPINOSA, VÁSQUEZ, AND HOWE.

It is not Petitioners' intent to create a "basis for additional billing," and they respectfully submit that the proposed rule amendments, under any ethical interpretation, would not have that effect. The Petition and proposed rule language

[23] For example, a search of Division I decisions is limited to sorting for decision type, range, court, case type, judge, and case title/party. *See*, COURT OF APPEALS, DIVISION I, SEARCH DECISIONS, http://azcourts.gov/coa1/SearchDecisions.aspx.
[24] http://scholar.google.com/
[25] A search on Google Scholar for the term "A.R.S. § 13-901.01" in Arizona case law returned 132 results in 0.03 seconds. The user is able to sort the cases by relevance and date.

were formulated with the best interests of Arizona's legal profession and justice system in mind. The Comment was one of a few to suggest that Arizona attorneys mine memorandum decisions for persuasive arguments without informing the tribunal where the reasoning and authorities borrowed were actually obtained. That approach could arguably lack candor to the tribunal and parties. As the Comment of the Hon. Carmine Cornelio shows, a tribunal is likely to be informed of an on-point memorandum decision one way or another and is then left wondering whether counsel for the parties would have raised it but-for the no-citation rule.[26] Under Arizona's current rule, there is no appropriate method for the tribunal to determine whether counsel would have raised it or, if they would have, what they would have argued with respect to it. For the sake of candor, consistency, and clarity, counsel and parties should be able to alert the courts to memorandum decisions they find to be of persuasive value.[27] Moreover, counsel who borrows the reasoning and authorities laid out in a memorandum decision without attributing his or her source runs the real risk that the argument will be summarily rejected as unsupported or deemed waived.[28]

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[26] Comment of the Hon. Pima County Superior Court Judge Carmine Cornelio at 1 n.1.

[27] Arizona's regional neighbors New Mexico and Utah both permit citation of memorandum decisions. Utah allows their citation as precedent.

[28] *See State v. Nirschel*, 155 Ariz. 206, 208, 745 P.2d 953, 955 (1987) ("In Arizona, opening briefs must present significant arguments, *supported by authority*, which set forth an appellant's position on the issues raised.") (emphasis

On the suggestion in the Comment of the Honorable Judges Gemmill, Norris, and Swann, Petitioners have proposed expanded language disclaiming additional duties of parties and counsel related to memorandum decisions. This alleviates this Comment's concern that "[c]omprehensive briefs would necessarily contain a section marshaling the most helpful memorandum decisions and distinguishing the others."[29] There is no intent to impose additional duties on parties, counsel, or courts, and the experience in other states and the federal system shows they have not arisen unbidden.

With respect to the Comment's discussion of pro se litigants, one can easily imagine a pro se litigant being 'gotcha-ed' by the current no-citation rule, should they use Google Scholar or another available resource to find a memorandum decision on point to his or her case. Both Arizona's litigants and trial court judges must be trusted to "distinguish between helpful, not helpful, persuasive or not, binding, non-binding, et cetera."[30] After all, citizens "should understand that not

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added); *Benson v. McMahon*, 127 U.S. 457, 468 (1888) ("While the views of counsel for the prisoner are unsupported by any well-considered judicial decision, there is high authority for holding the contrary."); *see also Miller UK Ltd. v. Caterpillar, Inc.*, 292 F.R.D. 590, 591 (N.D. Ill. 2013) (Mem. Op'n and Order) (". . . I invoked the familiar principle that skeletal, perfunctory, or unsupported arguments are waived.").

[29] Comment of Honorable Judges Eckerstrom, Howard, Espinosa, Vásquez, and Howe, at 4.

[30] Comment of the Hon. Pima County Superior Court Judge Carmine Cornelio, posted June 4, 2014, at 2.

every case comes out right, whether decided by a lay jury or a learned judge."[31] Given that, Petitioners submit that the hazards of the current rule to consistency, clarity and certainty in the justice system are greater than the potential negative impacts of the proposed change.

IV. REPLY TO COMMENT OF FREDERICK CURTIS BERRY, JR.

Petitioners respectfully submit that the Commenter's concern regarding existing unpublished decisions that are "just plain goofy" may be remedied by Petitioners' proposal to make the amended rule prospective only, with the starting date to be determined by the Court.

Moreover, the supplemental language proposed for the Court's consideration again confirms that attorneys have no duties to research, review, analyze or cite memorandum decisions or other unpublished dispositions. Those provisions are specifically intended to obviate any expanded costs of litigation and duties of counsel.

V. REPLY TO COMMENT OF THE MARICOPA COUNTY ATTORNEY.

Petitioners appreciate the Maricopa County Attorney's careful consideration of the proposed amendments, especially with regard to criminal cases. Petitioners do respectfully submit, however, that since the current citation rule is uniform in its

[31] Hon. Andrew D. Hurwitz, *When Judges Err: Is Confession Good for the Soul?*, 56 ARIZ. L. REV. 343, 351 (2014).

application to civil and criminal matters, amendments to it should also be uniform. *See* Appendix A. Arizona's appellate courts address both types of cases, and the interests of justice may be even greater served by expanding the universe of authorities citable for persuasive value by practitioners and parties in criminal cases.

Under the proposed rule language, Arizona appellate courts and parties would still understand that memorandum decisions cannot be cited as precedent. Thus, there is no need to distinguish them factually from a case at hand.

Regarding claims of ineffective assistance of counsel: Nothing now stops criminal defendants from trying to challenge the effectiveness of their counsel based on the reasoning employed by memorandum decisions or from trying to shoehorn such decisions in as 'information' for the Court under Ariz. R. Supreme Ct. 111(c)(2), ARCAP 28(c)(2), and Ariz. R. Crim. P. 31.24(2).

Memorandum decisions citable for persuasive value cannot be deemed dispositive of issues or cases—their import is persuasive only, not precedential. And Petitioners have proposed no change to this Court's depublication power; Rule 111(g) would remain intact. Similarly, this Court's review would remain discretionary; the Court can "wait"—to the extent it wishes to—to address an issue "until it is presented in the best possible way for resolution[.]"[32]

[32] *See* Comment of Maricopa County Attorney, at 6.

Petitioners defer to the Court's judgment as to whether a change to the civil appellate rules should precede one to the criminal appellate rules. As noted above, however, the interests of justice may be even greater served by expanding the universe of citable authorities available to practitioners and parties in criminal cases.

VI. REPLY TO COMMENT OF THE PIMA COUNTY PUBLIC DEFENDER.

As with the Comment of the Maricopa County Attorney, Petitioners appreciate the Pima County Public Defender's careful consideration of the proposed amendments' import in criminal cases. In this Reply, Petitioners have previously addressed the inconsistencies and injustices that may arise when counsel can borrow the reasoning from a memorandum decision but is forbidden from attributing the source by citing that decision for persuasive value. The Arizona justice system should not be a "gotcha" system. Especially in criminal cases, the parties should not be expected to essentially lie in wait for an appellate court to inconsistently apply the law and then cite a memorandum decision in a motion to reconsider or petition for review. The interests of judicial economy are better served by permitting citation to memorandum decisions for persuasive value, thus promoting consistency and candor from the outset.

If it's true, as the Comment states, that "[u]npublished dispositions apply

regularly-followed and well-understood rules of law,"[33] then there is no harm in permitting their citation for their persuasive value. Similarly, in an *Anders* setting, if the "merits of an issue can be evaluated differently by different attorneys and by different courts,"[34] then that itself is a persuasive argument for permissive citation. "While an issue may be reasonably considered frivolous at one point in time, legal developments may open the issue for question."[35] Courts and parties should not be expected to divine when that may occur without the beneficial tool of being able to cite memorandum decisions for persuasive value when it does occur. Further, a party would certainly better be able to "fully address an opponent's [use of] unpublished decisions" if the opponent were permitted to cite to the decision used for its persuasive value, alerting the court and parties to its use, rather than just surreptitiously mining it for arguments.[36]

Regarding the appellate forum discussed on page 11 of the Comment: The practitioners who "voiced unanimous opposition" to the Petition apparently did not feel strongly enough to voice that opposition in this Court's Rules Forum. Likewise, Petitioners heard from practitioners in support of the Petition who simply did not feel strongly enough about the issue to comment. Petitioners respectfully submit that the Commenter's proposal of "a committee where different

[33] Comment of Pima County Public Defender, at 4.
[34] *Id.* at 5.
[35] *Id.*
[36] *See id.*

voices can air differing opinions and public hearings can be held" has been met through the use of the Court Rules Forum and the petition vetting process set forth in this Court's rules. Indeed, Rule 28(E), Ariz. R. Supreme Ct., permits the Court to order, and petitioners or any interested party to request, a public hearing on a proposed rule change. Any study of this proposed change would be significantly more valuable once the change is adopted. As other commenters put it, "studies conducted after attorney habits and strategies had more time to adjust to the new practice w[ill] be more instructive."[37] A study without adoption of the change would merely examine the status quo.

VII. CONCLUSION

The conversation on permissive citation of memorandum decisions has been carried out publicly in the Court's Rules Forum for nearly a decade.[38] Petitioners appreciate the past efforts and discussions on this issue and appreciate the multitude of thoughtful comments on this Petition. Quite simply, Petitioners' efforts would be "useless without the conversation."[39] Given that the tenor of that

[37] Comment of Honorable Judges Eckerstrom, Howard, Espinosa, Vásquez, and Howe, at 6 n.4.
[38] *See* past petitions R-06-0038, R-07-0021, R-10-0032.
[39] David Brooks, *Tree of Failure*, N.Y. TIMES, January 14, 2011, at A27 ("But every sensible person in public life also feels redeemed by others. You may write a mediocre column or make a mediocre speech or propose a mediocre piece of legislation, but others argue with you, correct you and introduce elements you never thought of. Each of these efforts may also be flawed, but together, if the system is working well, they move things gradually forward.")

conversation has shifted to near-consensus that the time may have come for this change—or at least that the time may have come for Court-ordered study with eventual adoption of the change—Petitioners request that the Court adopt rule language permitting citation of memorandum decisions for their persuasive value.

For the foregoing reasons, the reasons stated in their Petition, and given the coalescing consensus on this issue, Petitioners respectfully request that the Court adopt the rule amendments as supplemented in Appendix A.

RESPECTFULLY SUBMITTED this 30th day of June, 2014.

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