Honorable John Pelander, Chief Judge
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IN THE SUPREME COURT
OF THE STATE OF ARIZONA

	)	Supreme Court
	)	No. R-06-0038
In re Coffinger Petition to modify	)	
Rule 111 of the Supreme Court	)	COMMENT ON RULE 28
	)	PETITION FOR CHANGE IN RULE 111,
	)	ARIZONA RULES OF THE SUPREME
	)	COURT, RELATING TO ISSUANCE OF
	)	PUBLISHED OPINIONS AND
	)	MEMORANDUM DECISIONS

Pursuant to the Supreme Court's Order of November 8, 2006, Division Two of the Arizona Court of Appeals submits the following comment concerning the petition to amend Rule 111, Arizona Rules of the Supreme Court, Rule 28, Arizona Rules of Civil Appellate Procedure, and Rule 31.26, Arizona Rules of Criminal Procedure.

Petitioner seeks to supplement the existing rules to require that "all memorandum decisions include a citation to a controlling published Arizona appellate court opinion dispositive of every issue presented, as well as a statement entitled, 'Basis for Memorandum Decision,' in which the [appellate] judges certify that the disposition (1) does not dispose of any issue of first impression; (2) is not subject to publication under any of the requirements of subsection b; and (3) does not include a dissent or a concurrence." Although portions of the petition minimally allude to other suggested changes as well, relating to citation of unpublished decisions and their accessibility, this comment focuses on

the actual rule changes specifically proposed. Because petitioner has failed to identify any problem with the current rules or offer any compelling reason to change them, and further because the requested changes would be detrimental to existing appellate procedures and practices, Division Two suggests that the petition be denied, as more fully discussed below.

1. The petition fails to identify any problem with the current rules or offer any other compelling reason for changing them.

At the outset, petitioner explains "[t]he proposed amendments are intended to insure that appellate court judges issue published opinions in all cases presenting issues of first impression and/or reversing a lower court or agency as currently required by the Rule." Petitioner then asserts "due to heavy workload considerations, even the most conscientious judge might be unwilling to commit the extra time and effort necessary to write a published opinion, in spite of the Rule's requirements. He or she could simply rationalize that none of the issues presented were important enough to warrant disposition by published opinion." Notable is the use of the words "might" and "could." Nowhere does petitioner allege that any of these things have actually happened in Arizona, even once, nor is any specific appellate decision identified as an example of such an occurrence. Absent any identifiable, let alone wide-spread, problem in the application of the current rules, there is no need to "fix" them, based on speculative or imagined concerns.

But even if petitioner could identify a case where he believed his fears had materialized, it would not illustrate his theory or support the rule changes he seeks.

Whether a decision involves an issue of first impression is a legal determination, over which reasonable jurists and others conceivably could differ. Moreover, as the Court knows, appellate judges do not individually determine whether to designate a decision an opinion, nor do appellate panels shy away from publishing decisions that meet the requirements of the rules. Additionally, and most importantly, "workload considerations" have no bearing on the nature of the issues presented for appellate decision. The issues are what they are, and no amount of imagined "rationalization" by an overworked judge, as petitioner posits, could transform an issue of first impression into one that was not. Thus, petitioner's principal rationale is an exceedingly flimsy ground for the rule changes he seeks.

Petitioner also seeks mandatory publication of all decisions reversing a lower court or administrative agency, arguing that "[e]very appellate court disposition that reverses the judgment, order or decision of a lower court or agency *a fortiori*, **clarifies a rule of law."** (Emphasis in original.) Building on this conclusory premise, petitioner asserts: "In spite of the clear mandate of the rule, currently many such cases are being resolved in memorandum decisions." Petitioner appears to overlook that if an appeal presents a previously decided issue in which a trial court ruled differently, it may only mean the trial court erred, for any one, or combination, of a variety of reasons that play out on a daily basis in trial courts around the state, including insufficient time to investigate controlling authorities, difficult facts, or poor lawyering by the litigants, to name only a few. That is why appellate courts

exist. That the appellate court does its job and typically reverses the lower court's ruling in such a case hardly "clarifies a rule of law," but rather, merely enforces existing law.

As for petitioner's proposal that appellate judges be required to formally certify that "all memorandum decisions include a citation to a controlling published Arizona appellate court opinion dispositive of every issue presented," that notion is not only poorly supported but is based on supposition and suspicion. Again, petitioner does not explain the need for such a rule or identify decisions that do *not* resolve dispositive issues with citations to controlling precedent. Petitioner's sole justification for such a requirement appears to be based on his assertion that attorneys are required "to file many types of certifications," and "the public [has] no assurance that the appellate courts are complying with the Rule's criteria for publication." Glaringly absent from petitioner's argument, however, is any showing, or even allegation, that Arizona citizens actually harbor such concerns, or any reasons that they should. Instead, petitioner makes a Biblical reference to sorting "wheat from chaff" and cites a Washington law review article whose author generally complains

> Judges decide which opinions become "law" based solely on their guesses as to whether a particular opinion is likely to have future "precedential value." [footnote omitted] In other words, the publication plans are "intended to serve as a sorting device, separating the wheat from the chaff." [Shuldberg, supra] However,"separating the wheat from the chaff" is not as easy as it sounds. Judges cannot always accurately predict which decisions have future importance [footnote omitted].

"*That's My Holding and I'm Not Sticking to It" Court Rules that Deprive Unpublished Opinions of Precedential Value Distort the Common Law*, 79 Wash. U.L.Q. 1253, 1264, 1270 (Jan. 2001). It is important to note that "whether a particular opinion is likely to have future 'precedential value'" is not one of the criteria of Arizona's publication rules. The criteria that Arizona appellate courts *do* follow are relatively clear and easy to apply to the great majority of the courts' work. *See* A.R.C.A.P. 28(b). Petitioner's vaguely delineated "straw man" of public concern does not constitute a reason to even question Arizona's appellate publication rules, let alone change them.

Petitioner also attempts to find support for his claims by pointing to annual statistics reflecting large numbers of memorandum decisions compared to much smaller numbers of published opinions. But in a jurisdiction where an appeal as of right is guaranteed to every losing litigant, the intermediate appellate court takes them as they come and addresses the issues raised as it is required to do. That the far greater number of those issues involve routine application of established law has nothing to do with any discretionary separating of "wheat from chaff" by the court. As noted earlier, the issues "are what they are."

Finally, petitioner points to law review articles addressing dissatisfaction and perceived problems in some federal circuit courts. Petitioner quotes from one article in particular that appears to elevate the art of speculative innuendo to a new level, with the statement:

> ... [S]ome judges have observed that a colleague might plant the seed of a new doctrine in [an unpublished decision] drawing on it later

> (without citation) in a published ruling. The frequency with which this occurs is in the eye of the beholder, but these purported judicial misdeeds seem to be based on an implicit assumption of a cabal. Nearly thirty years ago, in claiming that not-for-publication rulings were being used to bury intracircuit inconsistencies [footnote omitted] James Gardner was almost conjuring up a picture of judges sitting at post-argument conference, saying, "Let's hide this one." ....

Unpublished Court of Appeals Decisions: A Hard Look at the Process, 14 S. Cal. Interdis. L.J. 67, 72, 73, 76, 77 (2004-2005). What this has to do with any Arizona appellate decision or its courts is, of course, left to the imagination of those who might be susceptible to such an approach and who see "judicial misdeeds" lurking in every shadow, or at least in appellate rulings with which they disagree. Such arguments, while perhaps playing well to the lay public, do nothing to illustrate any problem with Arizona's rules of publication or inform the current discussion and should, accordingly, be rejected.

Petitioner lastly argues that "[i]nsuring the integrity of the retention aspect of merit selection is a sufficient reason, by itself, to change the publication rule to require that all reversals be published." It should be noted, however, that reversal rates are not one of the criteria adopted by the supreme court for judicial performance evaluation, nor for good reason should they be. *See* Rules of Procedure for Judicial Performance Review, Rule 2, Judicial Performance Standards. As discussed at past meetings of the JPR Commission, because reversals occur for a myriad of reasons that may not reflect on the competency of trial judges, it would be unfair in many, if not most, cases to make reversal rates a factor in judicial retention.

2. The proposed rule change is impracticable and would not promote good appellate procedure or practice

Requiring appellate judges to certify that a decision "does not dispose of any issue of first impression," first, assumes that all such issues are patent and readily identifiable, when such is not always the case. Some issues may interlock with others or have been so poorly briefed that their nature was obfuscated or distorted. On the other side of the coin, each year the supreme court depublishes appellate opinions, despite the obvious determinations of the authoring panels that those decisions met the criteria for publication. *See, e.g., Hamblin v. State*, 214 Ariz. 250, 151 P.3d 533 (2007); *State v. Machado*, 214 Ariz. 250, 151 P.3d 533 (2007); *Tornabene v. Bonine ex rel. Ariz. Highway Dep't*, 203 Ariz. 326, n.1, 54 P.3d 355, n.1 (App. 2002).

Second, petitioner does not explain how the new rule requirements would be monitored and enforced. If an attorney, party, or another judge disagreed with the appellate panel's certification, what would happen next? After such a certification, would the appellate panel still be able to grant a motion to publish? If not, would there be grounds for some form of application for special relief to the supreme court? Or would an ethical complaint against the panel be justified? Who would decide whether the unpublished issue was truly one of first impression? What would be the consequence? These questions and practical concerns help illustrate the superficial nature of the proposed certification

requirement, as well as serious problems surrounding its application, even if some might find it facially attractive.

In reality, petitioner's theories are, at their heart, akin to recent challenges to judicial independence around the country, brought by some who may wish to see courts "toe the line" and operate in a more circumscribed fashion as the challengers see fit. It is apparent the petition reflects a basic distrust of appellate courts, for no articulated reasons other than conjecture and suspicion. But if the court is distrusted as to its publication practices, why stop there? What about other routine determinations, such as the court's decisions to deny oral argument, decline special action jurisdiction, or its methods for assigning cases to particular judges or panels? All involve the exercise of the court's discretion after the application of certain guidelines and criteria. Would not a required certification be equally useful and assuring to the public in those situations?

Finally, petitioner's proposals, particularly the requirement of written certifications regarding each issue in each decision, and requiring publication of all decisions reversing a lower court, would be time consuming and burdensome, adding exponentially to the appellate court's workload, with no offsetting benefit to the court, the legal community, or the public.

3. Conclusion

In short, petitioner has identified no actual problems in the existing rules, nor do any of his proposals for substantive changes to the rules promote good appellate practice or even make much sense. The petition should be denied.