RICHARD D. COFFINGER
ATTORNEY AT LAW
6838 N. 58TH DRIVE
GLENDALE, AZ 85301
STATE BAR ID #03040
623-937-9214
623-937-7072 (FAX)

Member State Bar of Arizona

IN THE ARIZONA SUPREME COURT

PETITION FOR CHANGE IN RULE 111, ARIZONA RULES OF THE SUPREME COURT, RELATING TO ISSUANCE OF PUBLISHED OPINIONS AND MEMORANDUM DECISIONS NOT FOR PUBLICATION BY THE SUPREME COURT AND COURT OF APPEALS, AND FOR DELETION OF REDUNDANT RULES 28, ARIZONA RULES OF CIVIL APPELLANT PROCEDURE, AND 31.26, ARIZONA RULES OF CRIMINAL PROCEDURE	NO. R-06-0038 PETITIONER'S REPLY TO COMMENTS

Introduction

RICHARD D. COFFINGER, a member of the State Bar of Arizona, submits this reply to the comments to his petition to amend Rule 111 of the Arizona Rules of the Supreme Court. Petitioner has received 5 comments to the petition. John A. Furlong, Gen. Counsel for the State Bar of Arizona (SBA) filed a comment including the Board of Governor's (BOG) partial approval and recommendation for adoption. Judges of the Arizona Court of Appeals– from Div. 1, the Hon. John Gemmill, Chief Judge, the Hon. Ann A. Scott Timmer, Vice-Chief Judge, and the Hon. Patricia K. Norris, Judge, and from Div. 2, the Hon. John Pelander, Chief Judge-- all filed comments in opposition to the petition. The Arizona Supreme Court's website, www.supreme.state.az.us/rules/, includes access to the Court Rules Forum which refers to the Arizona Supreme Court's Strategic Agenda and its theme, "Good to Great." This strategic agenda theme is particularly appropriate for public access to this petition, because if it is adopted, the change will, in fact, help Arizona's appellate courts move from

"good to great."

The Recommendation from State Bar of Arizona Entitled to Great Weight

The SBA's comment by its BOG, approves and recommends a partial adoption of the petition. The SBA's comment is based on (1) the recommendation of its Rules Committee and (2) its consideration of the petition by its BOG in open session on May 18, 2007. The comment states that the SBA

> approves and recommends that the Supreme Court adopt the Coffinger Petition to the extend that it requires appellate decisions to be made by written opinion in those cases involving reversals, concurrences and dissents, and the acceptance of special actions." However, it opposed the issue requiring judges to certify their "Basis for Memorandum Decision. [Emphasis supplied]

Rule 32, Rules of the Supreme Court, entitled "Organization of the State Bar of Arizona," states in part:

> 1. *Establishment of state bar.* In order to advance the administration of justice according to law, to aid the courts in carrying on the administration of justice.... to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence, and law reform; to carry on a continuing program of legal research in technical fields of substantive law, practice and procedure, and to make reports and recommendations thereon... the Supreme Court of Arizona does hereby perpetuate, create and continue under the direction and control of this court an organization known as the State Bar of Arizona..... The State Bar of Arizona may... promote and further the aims as set forth herein and hereinafter in these rules.
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> * * *
>
> (d) Powers of Board. The state bar shall be governed by the Board of Governors, which shall have the powers and duties prescribed by this court. The board shall:
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> * * *
>
> 2. Promote and aid in the advancement of the science of jurisprudence and improvement of the administration of justice. [Emphasis supplied]

The BOG's procedure for consideration of a proposal for a Supreme Court Rule change includes submission of all petitions to interested and affected SBA committees and sections. Ms. Nedra Brown is the SBA staff employee in charge of its committees and sections. She distributes all proposed rule changes to the appropriate committees and sections after consultation with BOG Rules Committee Chairperson, currently Foster Robberson of Lewis and Roca LLP, who is a District 6

(Maricopa County) elected BOG member.

Each SBA committee and section chairperson then prepares an agenda for an upcoming meeting that includes consideration of rule change proposals. Pro and con advocates are invited to attend the meeting in person or telephonically to present arguments. After discussion at the meeting, members of committees and sections vote whether to support, oppose or take no position on the petition. The committee or section chairperson then files a report including the numerical vote on each proposal. These reports are then distributed by Ms. Brown, initially only to the BOG members on the BOG Rules Committee. The BOG Rules Committee then meets and, after discussion and consideration, the members vote on each proposal. Reports from the committees and sections and Rules Committee are then distributed to the full Board with the agenda for the meeting when the proposal will be considered. It is customary for the BOG to consider rule change petitions at an initial meeting for "information only," with a vote being taken at a subsequent meeting. This procedure allows members to receive input from constituents prior to voting.

The court should place great weight on the comment of the SBA's BOG in light of the fact that it represents nearly 20,000 Arizona attorneys.[1]

The Opposition Arguments Made by Some State Appellate Judges are Identical to Those Against Recently Adopted F.R.A.P. 32.1 Made by Some Federal Appellate Judges

Since the filing of this petition, the United States Supreme Court has adopted Rule 32.1, Fed. R.App. P., which became effective January 1, 2007, and provides:

> (a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:
>
> > (I) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and
> > (ii) issued on or after January 1, 2007.

1As of June 20, 2007, the State Bar of Arizona consisted of 19,604 members comprised of:

Active (1-2 years) 1,180; Active (more than 3 years), 12,917; Inactive, 3,456; Judiciary, 497; Over 70, 1,001; Retired 553

> (b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited. [Emphasis supplied]

In a recent law review article from the Sandra Day O'Connor College of Law at Arizona State University, entitled, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law,* by Penelope Pether, 39 Ariz. State L.J. 1, 2-5, 7-10 (2007), the author passionately expresses her concern that a significant number of the unpublished memorandum decisions issued by judges of the federal circuit courts of appeal (sorcerers) are actually written by their judicial clerks and staff attorneys (apprentices) over which the judges fail to exercise adequate supervision. In footnote 1, Ms. Pether states:

> ...[T]his article, which focuses on the lower U.S. federal courts... deals with institutions and practices that also characterize contemporary state courts in the U.S. [Emphasis supplied]

Ms. Pether reviews the recent strong opposition voiced by some federal appellate judges to the elimination of the federal rule banning citation of federal memorandum decisions, stating:

> The period since 2002 has seen a bitter dispute over the apparently trivial [footnote omitted] issue of a proposed and eventually enacted uniform citation rule [footnote omitted] splitting the ranks of the federal judiciary, a dispute that eventually pitted Judge (later Chief Justice) John G. Roberts, Jr. [footnote omitted] and Judge (later Justice) Samuel A. Alito Jr. [footnote omitted] against another powerful circuit judge, the Ninth Circuit's Alex Kozinski [footnote omitted], himself frequently mentioned as a potential candidate for the Supreme Court [footnote omitted] vacancies eventually filled by Roberts and Alito [footnote omitted]. The disinterested observer might find the subject of the dispute puzzling. The apparent triviality of its articulated subject made the rhetorical heat generated by those on the eventual [footnote omitted] losing side of the argument difficult to fathom. Predictions of an "impairment of the... *corpus juris*" [12Robert Timothy Reagan et al., Fed. Judicial Ctr., *Citing Unpublished Opinions in Federal Appeals* 66 app. (2005)(quoting Judge J2-1)[hereinafter FJC Report] and egregious threats to do the judicial equivalent of "working to rule" by withholding reasons for judgment from litigants [13*See*, *e.g., id.* at 66, 69 app. (quoting Judges J2-2, J2-3, J7-2)], accompanied by doomsaying about unmanageably increased workload [14*Id*. at 67 app. (quoting Judges J2-7, J2-8)] and other problems, such as ending citation bans "would probably greatly interfere with our screening program and cripple

our productivity,"[15*Id.* at 72 app. (quoting Judge J9-14)] seem disproportionate to the substance of..F.R.A.P. 32.1....

* * *

Some brief background is necessary to attempt to explain the intensity of the controversy over the rule. Rule 32.1 is a late, grudging, and extremely modest response to sharp academic and legal professional [footnote omitted] criticism of what I have called "institutionalized unpublication of opinions" [footnote omitted] in the U.S. federal courts. [footnote omitted]

* * *

...[T]he charges leveled at institutionalized unpublication are multiplicitous and damning. They include the identifying of damaging "rule of law effects" of the practice, such as enabling powerful and repeat player litigants to rig the system of precedent so it operates in their favor [footnote omitted]; unconstitutionality [footnote omitted]; lack of transparency and judicial accountability [footnote omitted], the enabling of judicial corruption [footnote omitted] or the engendering of public suspicion that it is occurring [footnote omitted] and the producing of public and practitioner disrespect for the judicial system [footnote omitted].

* * *

...[Rule 32.1] does nothing to solve the major problems of institutionalized unpublication: it will not dismantle the U.S. courts' binary system of "precedential"and "unprecedential" judicial opinions, with the various problems this system produces, nor will it address the logical problem of designating opinions precedential or non-precedential in advance [footnote omitted]....

So why, given the nature of scholarly, practitioner, and occasional judicial criticisms of the various aspects of institutionalized unpublication, together with the powerful judicial and practitioner support for the rule, was its most visible opponent, the Ninth Circuit's Judge Alex Kozinski, so trenchant and vigorous in his opposition? Why does a survey of federal judges conducted by the Federal Judicial Center [43*FJC Report* [*Robert Timothy Reagan et al., Fed. Judicial Ctr., Citing Unpublished Opinions in Federal Appeals* 66 app. (2005)(quoting Judge J2-1)] note 12] contain so much extreme and, as this article will go on to note, troubling evidence of judicial attitudes revealed in responses to the proposed rule change? In significant part because, in Judge Kozinski's own telling phrase, at least some circuit judges believe that unpublished opinions are metaphorically "not safe for human consumption" [44Tony Mauro, *Court Opinions No Longer Cites Unseen: Judicial Conference Approves Use of Unpublished Opinions in all Circuits: Also Declines to Split up 9th Circuit*, Legal Times, (9/26/2005) note 8, at 10]. That is, according to the Federal Rules Decisions, [footnote omitted] the judges are afraid that they are "*wrong*" [46William T. Hangley, *Opinions Hidden, Citations Forbidden: A Report and Recommendations of the American College of Trial Lawyers on the Publication & Citation of Nonbinding Federal Circuit Court Opinions*, 208 F.R.D. 645, note 17, 651 (2002)]. They are alleged to have another major shortcoming, too. According to (one of) Judge Kozinski's accounts, unpublished opinions are drafted in "loose, sloppy language" [47 (David S. Caudill, *Parades of Horribles, Circles of Hell: Ethical Dimensions of the Publication Controversy*, 62 Wash. & Lee L.Rev. 1653,

1660 (2005)) Kozinski Letter, *supra* note 3, at 21 (explaining Judge Kozinski's opposition to proposed FRAP 32.1)] that has the effect of undermining his manifest desire for "binding precedent"....

> Why is it that the texts which make up 80 percent of the opinions produced by the U.S. Courts of Appeals are perceived to suffer from what are two different but likely related defects: fears that they may be "wrong"[footnote omitted]; and assertions that they are sloppily drafted? How could these flaws come to characterize the vast majority of federal appellate court opinions, given the rigorous appointment process to circuit judgeships? In part because, as I have indicated *supra*, they are not written by federal appellate judges, but rather by the predominantly recently-graduated corps of judicial clerks and staff attorneys, to whom the federal appellate bench *de facto* delegates a significant majority of its Article III judicial power, and over whom it does not exercise meaningful supervision. [Emphasis supplied]

Some of the opposition comments from judges on the Arizona Court of Appeals include similar predictions relating to unnecessary court work load increases and interference with the court's existing screening procedures if the proposed changes in Supreme Court Rule 111 are adopted. Chief Judge Pelander's comment concludes:

> ...[P]etitioner'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. [Emphasis supplied]

Judge Scott Timmer's comment similarly states:

> ...[T]he attempt to force more publication of decisions could adversely tax the process currently employed by Division One of the Court of Appeals in publishing opinions. [Emphasis supplied]
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> * * *
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> Due to the volume of cases the court decides each year, if the majority of these cases were published, it goes without saying that the court would be hard-pressed to provide this type of quality input to every case slated for publication. [Emphasis supplied]

It is unclear from Judge Scott Timmer's comment whether she is referring to all memorandum decisions currently issued by Div. 1 when she refers to "the majority of these cases." However, if adoption of the petition would require Div. 1 to change its procedures to issue a *majority* of its current memorandum decisions as published opinions, then indeed there exists a serious problem with that

court's non-compliance with Rule 111's publication criteria. If Arizona's appellate courts require additional resources to insure their compliance with the publication rules criteria, such as increasing the number of judges and law clerks in each division, if properly educated about the problem, the public would surely accept the required additional expense as preferable to the continued issuance of an unknown number of appellate dispositions including (1) issues of first impression, and (2) reversals and non-unanimous affirmances in unpublished memorandum decisions.

Judge Norris' comment states:

> The particular outcome of a decision– reversal or affirmance– has no value in determining whether a decision should become precedent.

Superior Court Rule 111(b) currently provides:

> Disposition of matters before the court requiring a written decision shall be by written opinion when a majority of the judges acting determine that it:
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> 1. ... clarifies a rule of law. [Emphasis supplied]

Judge Norris' comment includes, on page 3, two references to Judge Benjamin N. Cardozo's book published in 1921, entitled, "The Nature of the Judicial Process," (Yale University Press) in support of her argument that an appellate court's resolution of all issues of first impression are not necessarily worthy of becoming precedent, and therefore not worthy of being published. Judge Cardozo's quotes were not made in support of an appellate court issuance of unpublished memorandum decisions in cases presenting an issue of first impression–whether or not the case was fact specific– because the first limited publication rules were not adopted in the U.S. until five decades after he gave the lectures that were reprinted in his book.

Judge Cardozo certainly was not advocating unpublished memorandum decisions for reversals and non-unanimous affirmances. In his discussion about appellate court's written dispositions that are non-precedential, because they do not "count for the future [and] advance or retard... the development of the law" *id* at 165, he describes two groups of cases meeting this criteria. The first group, which he

believed to be a majority of the appellate cases he had ruled upon, are cases in which "[t]he law and application alike are plain [which] are predestined... to affirmance without opinion." The second group of non-precedential cases which he describes as being a "considerable percentage of appellate cases," are cases in which the rule of law is certain and the application alone is doubtful." Rule 111's requirement for publication of an appellate court's disposition that "clarifies" a rule of law is, however, still mandated in this latter group of cases even though they may be non-precedential.

According to Judge Pelander's comment, unlike Div. 1, Div. 2 is currently publishing all cases presenting an issue of first impression, including fact specific cases that are not according to Judge Norris' comment currently being published by Div. 1. Judge Pelander's comment states on page 3-5,

> ...[W]orkload considerations have no bearing on the nature of the issues presented for appellate review. The issues are what they are and no amount of imagined "rationalization" by an overworked judge, as petitioner posits could transformed an issue of first impression into one that was not.
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> * * *
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> The criteria that Arizona appellate courts *do* follow are relatively clear to the great majority of the court's work. *See A.R.C.A.P.* 28(b) That the far greater number of those issues involve routine application of established law has nothing to do with any discretionary separation of "wheat from chaff" by the court, as noted earlier, the issues are what they are. [Emphasis supplied]

In 1993 former Div. 1 Chief Judge Noel Fidel wrote the first Arizona appellate court opinion that resolved some issues presented in a published opinion, and the remaining issues that were not deemed worthy of publication, in a companion memorandum decision. *Fenn v. Fenn*, 847 P.2d 129 (Ariz. 1993). Since then, Arizona publication rules have been amended to expressly authorize this procedure. Supr.Ct.R. 111(h); Ariz.R.Cvl.App.Pro. 28(g); Ariz. R.Crim.Pro. 31.26. The publication plans of several of the federal circuit courts of appeal contain similar provisions. The commentators have generally praised the issuance of split rulings when appropriate. As of April, 2006, both divisions of the Arizona Court of Appeals have issued only a total of 78 split rulings during the 13 years since

the procedure was implemented . Such split rulings are one method by which the court can satisfy its requirements of the publication rule, and at the same time exclude its resolution of issues "which merely applies settled law to facts that concern the parties alone." *Id.* Expanded use of "split" decisions is one way the court of appeals could minimize additional workload that might result from the adoption of the petition. The judge of the court of appeals could actually lessen their work load if they issued published opinions for all dispositions required by Rule 111 and issued separate memorandum decisions disposing of all issues that did not satisfy the publication rules criteria.

All Reversals and Non-Unanimous Decisions Warrant Publication

The petition and this reply include citations to numerous law review articles in which many legal scholars have commented that all appellate reversals and non-unanimous affirmances should be issued in a published opinion. The basis for requiring publication of this group of appellate dispositions is the "clarification" provision of the publication rule rather than the "establishment" provision, which is the basis for requiring publication of cases presenting an issue of first impressions.

Judge Norris further argues,

> ... [A]n appellate court's reversal of a trial court does not invariably clarify a rule of law. Cases are reversed for all sorts of routine reasons. An appellate court may reverse a summary judgment because of the existence of an issue of material fact; or because a trial court overlooked an existing precedent or misapplied existing authority; or because the evidence failed to support the verdict.

If an appellate court reverses a summary judgment because of the existence of an issue of material fact then it clarifies the applicable law that the trial court incorrectly applied when the trial judge erroneously granted summary judgment. An appellate court's reversal of a trial court judgment based on "overlook[ing] an existing precedent" essentially means that the adversary system "broke-down" in the trial court but was "revived" in the appellate court. Under this scenario, the party whofailed to bring to the attention of the trial court the "overlooked existing precedent" could still prevail on appeal, if the party had preserved the issue in the trial court and on appeal. The published

opinions of the Arizona Supreme Court and the Arizona Court of Appeals include a total of only two such cases in which the appellate court reversed the trial court based upon an overlooked precedent.[2] Therefore, this concern of Judge Norris is unwarranted.

In the American University Law Review article entitled *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Post a Greater Threat?* by Martha J. Dragich 44 Am.U.L. Rev. 757, 790, 791, 801 (1994-1995), the author writes:

> ...[C]ases in which the appellate court reverses the court below, or in which the appellate panel's decision is not unanimous, would seem to require publication as "law-making" decisions.... If the district court erred in its application of the law, the law is probably unclear. Similarly, the presence of concurring or dissenting opinions usually indicates disagreement or uncertainty about the applicable law [footnote omitted]....

In the "Conclusion" of the law review article, Ms. Dragich states:

> ...Published opinions should accompany all cases reversing the district court and all cases in which the panel's decision is not unanimous. [Emphasis supplied]

In the Florida State University law review article entitled, *Nonpublication in the Eleventh Circuit: an Empirical Analysis* by Donald R. Songer, Danna Smith and Reginald S. Sheehan, 16 Fla.St.U.L.Rev. 963, 975, 976 (1988-1989), the authors state:

> Since unpublished opinions supposedly are of a trivial nature and have no precedential value, one might expect that all unpublished decisions would be unanimous affirmances of the decisions of the lower courts. This hypothesis was tested by examining the number of cases that ended in a reversal of the lower court decision. The results of the analysis indicated a rate of reversal in the unpublished opinions of 12%. Upon first appearance this may not seem to be a significant number of reversals, but according to the rules of publication and non-publication there should be essentially no reversals in unpublished opinions. Furthermore, the significance of the finding is enhanced by examination of the raw data revealing a total of 121 reversals in the unpublished opinions in one year. If the entire output of the circuit is examined (published and unpublished opinions combined), only 333 cases were reversed. Thus, more than a third of all of the reversals (36.3%) of the entire court for the year were unpublished. [Emphasis supplied]

2*Karp v. Speizer*, 132 Ariz. 599, 647 P.2d 1197 (App. Div. 1 1982) and *Retzke v. Larson*, 166 Ariz. 446, 803 P.2d 439 (App. Div. 1, 1990) rev. den. Of course *Karp*, supra, was probably issued in a published opinion based on the establishment provision of Rule 111, because this legal principle was an issue of first impression in an Arizona and appellate court.

In Kirt Shuldberg's law review article, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 Cal.L.Rev. 541, 551, 552 (1997), he first used the biblical analogy that the purpose of selective publication rules was to serve as a sorting device, "separating the wheat from the chaff."[3] Mr. Shuldberg's law review states:

> ... a problem does, in fact, exist: many unpublished opinions do contain legal analyses that are important to future litigants and to the public at large.
>
> Limited publication plans generally seek to publish only cases of general precedential value [footnote omitted]. Accordingly, it may be widely assumed that unpublished decisions are of little value because they are largely frivolous cases or little more than a mechanical application of existing law to a set of facts [footnote omitted]. In many cases this assumption is undoubtedly true [footnote omitted]. In many other instances, however, this is not the case. As Judge Posner has noted: "[M]any appeals that formerly would have been decided with a full opinion... are now decided with an unpublished opinion. These are not frivolous appeals; one-line treatment ["affirmed," for example] would be inappropriate. They call for an opinion and they get it, but it is not published [[43] Richard A. Posner, *The Federal Courts: Crisis and Reform* viii, (1985) note 23, at 122]." If what Judge Posner says is true, then it cannot fairly be assumed that unpublished opinions are, by definition, unimportant [footnote omitted].
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> ... A survey of court behavior readily refutes the assumption that unpublished opinions are without value to future litigants. One illustration of this fact is that unpublished opinions are sometimes accompanied by a dissent [[45] *See, e.g.*, Donna Stienstra [*Federal Judicial Center, Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals* 5-14 (1985)] note 16, at 34-45]. If two judges, both ruling from the same trial court record, disagree about the correct application of the law, it would seem quite doubtful that the opinion was such a mechanical application of law that it is of no value to future litigants...[Emphasis supplied]

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3 Judge Pelander's comment, on page 3, is critical of the petition's Biblical reference to sorting "wheat from chaff." In the recent James E. Rogers College of Law, University of Arizona Law Review article, *Literature as Legal Authority*, 49 U.Ariz.L.R. 521, 552, John M. DeSefano, III, the author, disagrees with Judge Richard A. Posner of the U.S. Court of Appeals for the 7th Circuit, who expresses similar criticism of citation to literature in legal arguments and opinions in his book, *Law and Literature*, Harvard University Press (1988). Mr. DeSefano concludes:

> ...There are those who would separate literature from the state like oil and water, but the inevitable mixing of these two is hard to deny. ... this mixing is not just inevitable, but useful and desirable.
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> ...Most fundamentally [literature] articulates what other disciplines cannot; it conveys reality when reality cannot be scientifically proven, and it illustrates complexity in human terms. In one swoop, literature helps courts appraise the subjectivity of the law with the subjectivity of human experience. Judge Posner suggests that the substance of literature cannot help judges judge [citation omitted] but nevertheless, many times, it does. [Emphasis supplied]

The Petitions Certification Requirement Would Provide Needed Objective Assurance That Appellate Court Judges are Complying with the Publication Criteria of Rule 111

In the Washburn Law Journal article, *Restoring the Common in the Law: A Proposal for the Elimination of Rules Prohibiting the Citation of Unpublished Decisions in Kansas and the Tenth Circuit* ,by Mark D. Hinderks and Steve A. Leben, 31 Washburn L.J. 155, 188-190 (1991-1992), the authors state:

> ...[T]he vast majority of the appellate decisions in Kansas are unpublished and, therefore, subject to the no-citation rule. We hypothesized that the Kansas appellate courts could not render nine hundred unpublished decisions per year containing not a nugget of precedential material. ...
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> ...[W]e sampled a recent cross section of unpublished Kansas authority subject to the no-citation rule to ascertain whether, as we suspected, the courts were designating material as non-precedential inconsistent with the apparent strict standards of the rule [footnote omitted]. ...
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> ... The proportion of cases affirmed as opposed to those reversed is actually higher in the unpublished cases for 1990 than in the published cases for that year. [Emphasis supplied]

The petition included data for the past 25 years comparing the ratio of published opinions to memorandum decisions by Div. 1 and Div. 2 of the Arizona Court of Appeals for civil and criminal appeals. None of the judges from those courts disputed any of this data in their opposition comments. This data indicates that for the past 10 years, 90% of the civil appeals and 94% of the criminal appeals in both Div. 1 and Div. 2 requiring a written disposition have been resolved in unpublished memorandum decisions.

...

...

Comparison of All Published Opinions (PO) to All Memorandum Decisions (MD)

1995-2005
DIVISION 1

	1995	**1996**	**1997**	**1998**	**1999**	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**
PO	204 (18%)	192 (15%)	188 (14%)	179 (15%)	153 (12%)	145 (10%)	116 (9%)	99 (8%)	105 (9%)	120 (9%)	85 (8%)
MD	906 (82%)	1088 (85%)	1183 (86%)	1046 (85%)	1164 (88%)	1273 (90%)	1194 (91%)	1101 (92%)	1084 (91%)	1137 (91%)	1024 (92%)

DIVISION 2

	1995	**1996**	**1997**	**1998**	**1999**	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**
PO	55 (6%)	51 (6%)	57 (7%)	44 (6%)	37 (5%)	47 (6%)	45 (6%)	45 (7%)	41 (8%)	27 (5%)	63 (10%)
MD	810 (94%)	830 (94%)	794 (93%)	736 (94%)	674 (95%)	796 (94%)	685 (94%)	622 (93%)	453 (92%)	484 (95%)	560 (90%)

Since 1995, in Div. 1, the total number of published opinions has steadily dropped from **204** in 1995 to **85** in 2005– a decline of more than **240**%. The 92% average for all appellate dispositions in Div. 1 since 2000, and the 94% average for Div. 2 for appellate disposition from 1995 through 2005, is considerably higher than the 80% average for memorandum decisions issued by federal circuit courts of appeal, according to Ms. Pether's recent ASU law review article, at page 10, *supra*. The data also indicates that on average, the 16 judges of Div. 1 and the 6 judges of Div. 2 each issue six published opinions per year, or on average, one every two months.

Judge Pelander's comment on page 7 also posits numerous questions about how the petition's certification provision would be monitored and enforced. Obviously, as with all other claims of error, only a party would have standing to challenge the appellate court's determination that its memorandum decision disposed of an issue of first impression. A party could argue this error in either a motion to publish, pursuant to Rule 111(b), and/or a motion for reconsideration (in civil cases, pursuant to Rule 22, Rules of Civ.App.Pro, and in criminal cases, pursuant to Rule 31.18, R.Crim.Pro.). A party could also raise this issue in a petition for review by the supreme court. Judge Pelander also expresses concerns that the certification provision could unreasonably subject appellate judges to having

complaints filed against them with the Judicial Qualification Commission for making a false certification. Absent a wilful, false certification[4], judicial discipline would not be permitted, pursuant to Rules 6 and 7[5], Ariz.R.Com.Jud.Cond.

With respect to each rule change adopted by the Arizona Supreme Court that included the addition of a requirement for attorneys to issue a written certification in connection with a pleading or brief, the justices undoubtedly consider similar concerns about exposing members of the bar to bar complaints for alleged false certifications. However, as to each of the numerous rule changes that have been adopted, the justices apparently determined that the attorneys' additional exposure for false certification was outweighed by the public benefit that was anticipated to be gained by the adoption of the rule. Petitioner submits that the justices should apply the same analysis as to the certification provision in the petition.

Some of the law review articles cited in the petition and in this reply include compilation of data relating to studies of published opinions and unpublished memorandum decisions issued by a specific federal or state appellate court or courts for a specific year, e.g. Robel, *Caseload and Judging" Judicial Adaptations to Caseload*, BYU L.Rev. 3, (1990) (3rd Fed.Cir.Ct.); Songer, Smith and Sheehan, *supra* (11th Fed.Cir.Ct.) and Hendicks and Leban (10th Fed.Cir.Ct. and Kansas Supreme Court and Court of Appeals). The authors of these law review articles were only able to compile the data for these studies because the appellate courts they were researching made their memorandum decisions available online. Such a study of both decisions of the Arizona Court of Appeals has not been possible because the

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4Since there are currently a total of 22 judges on the court of appeals and over 14,000 active attorneys, the statistical probability that such a complaint would be filed against one of these judges is .0016 of the probability that such a complaint would be filed against an Arizona attorney.

5Rule 7. *Misconduct Distinguished from Error*.

> The commission shall not take action against a judge for making erroneous findings of fact or conclusions of law in the absence of fraud, corrupt motive, or bad faith on the judge's part, unless such findings or conclusions constitute such an abuse of discretion as to otherwise violate one of the grounds for discipline described in these rules or the code. [Emphasis supplied]

memorandum decisions have not been currently readily available online or otherwise.

In light of this fact, Judge Pelander's argument that "the petition fails to identify any problem with the current rules or offer any other compelling reasons for changing them" takes the concept of the Yiddish word "chutzpah" to a new level.[6] Judge Pelander's opposition to the provision in the petition that would require the issuance of a published opinion in all reversals or non-unanimous affirmances is, in part, based on his argument that as to Arizona appellate court reversals and non-unanimous affirmances, the public does not have a right to know the answer to the five "w" questions all reporters are taught to answer in a news story– Who? What? Where? When? and Why? Judge Pelander cites Rule 2, entitled, "Judicial Performance Standards," Rules of Procedure of Judiciary Performance Review, effective January 26, 1994, amended December 1, 1998, in support of this argument that the number of reversals is not a proper factor by which a judge should be evaluated by the public. However, the Performance Standards for Trial and Appellate Judges provides in part,

> The judge...shall decide cases based on proper application of law and procedure to the facts and shall issue prompt, clear rulings and decisions that demonstrate competent legal analysis... [Emphasis supplied]

To insure the integrity of the retention aspect of merit selection of judges, the public should have access to all appellate court dispositions that reverse or non-unanimously affirm a lower court or administrative agency. This access would allow the members of the public to decide for themselves whether or not the trial court and appellate court judges on the case had issued a decision that was "based on proper application of law and procedure to the facts [and if the judges issued] prompt, clear

6On January 19, 2007, petitioner and the Hon. Philip Espinosa, Judge of the Arizona Court of Appeals, Div. 2, presented "pro" and "con" arguments regarding the petition, to the SBA Criminal Practice and Procedure Committee. At that meeting, Judge Espinosa presented the same argument presented by Chief Judge Pelander in his comment that petitioner had not presented any data indicating that in a substantial number of memorandum decisions, the court of appeals had failed to comply with the publication requirement of Rule 111. Petitioner responded that, while he did not represent very many clients with cases in the courts of appeal, that within the past five years, he personally had been counsel on four cases that resolved issues of first impression in unpublished memorandum decisions. Judge Espinosa responded that he would like to see those cases. On March 8, 2007, petitioner sent Judge Espinosa an email attaching these four memorandum decisions. A copy of the email without attachments is attached as Exhibit 1. These cases are: *State v. Michael Allen Minnigerode*, case 1CA-CR05-0543; *State v. Paul Ryan Orscheln*, case 1CA-CR04-0113; *State v. Dean Allen Metcalfe*, case 1CA-CR04-0811; and *State v. Armando Preston Parker*, case 1CA-04-0181.

rulings and decisions that demonstrate competent legal analysis." It would also provide the public with an objective criteria of a judge's rulings. In other words, as in the law of evidence, Judge Pelander's objection should be overruled, because his argument against the relevance of reversals in judicial evaluation "goes to the weight, not to the admissibility." The members of the public could use this information by giving it such weight as they deemed appropriate to make a more informed decision when casting their ballot "for" or "against" retention of judges.

In the Fordham Urban Law Journal in an article entitled, *On the Validity and Vitality of Arizona's Judicial Merit Selection System"Past, Present, and Future* by Mark I. Harrison, Sara S. Greene, Keith Swisher, and Meghan H. Gravel, 34 Ford Urb L.J.239, 255, the authors review Arizona's Judicial Merit Selection system. Under the heading "Some Fresh Answers to Accountability Concerns," the authors state:

> ...[J]udicial performance review and retention elections assure that judges are more accountable than most public officials. Judges are accountable to the Commission on Judicial Conduct, a public body that investigates and disciplines judges for conduct prohibited by the code of Judicial Conduct [footnote omitted]. In addition, judges are further constrained because most of their decisions are subject to appellate review. Finally, the merit selection system, including judicial performance review, places judges among the most highly accountable public officials in the State of Arizona. [Emphasis supplied]

Petitioner submits that his petition's requirement that Arizona's appellate courts issue a published opinion in all written dispositions resulting in a reversal or non-unanimous affirmance is another "fresh answer to [judicial] accountability concerns."

Div. 1 Chief Judge Gemmill's comment states:

> ...[B]oth Divisions of the Court of Appeals are (as noted by Judge Norris) planning later this year to begin posting new Memorandum Decisions on their respective websites for a limited period of time. ...[I]f the Supreme Court perceives a need for litigants to cite our Memorandum Decisions, that issue will reportedly be raised by a Petition for rules changes to be filed in the near future by the State Bar, and the Supreme Court may consider the issue of "cite-ability" at that time.

The SBA's Civil Practice and Procedure Committee (CPPC) has submitted to the BOG an, as

yet, unfiled proposed petition to amend Rule 111 to (1) require the Court of Appeals to post all memorandum discussions on-line and (2) allowing citation of them as persuasive rather than controlling.

Judge Gemmill argues against the petition based upon this, as yet, unfiled draft petition. The BOG's Rules Committee, which voted to support the provision in the current proposal requiringpublication of all reversals and non-unanimous affirmance, has also voted to support the CPPC petition. The BOG has scheduled this proposal for consideration at its September, 2007, meeting. Petitioner is one of the 8 elected members of the BOG representing District 6 (Maricopa County) which includes more than 12,000 SBA members. Even if the BOG votes to submit the CPPC's proposal as an SBA petition and it is adopted by the Supreme Court, it would not address the problems with Rule 111 targeted by the current petition. In Ms. Pether's recent law review article on page 9, she notes the same fact-- that the U.S. Supreme Court's adoption of F.R.A.P. 31.1 does not address the problems of federal appellate courts' binary system of "precedential" and "non-precedential" judicial decisions stating:

> [Rule 32.1] does nothing to solve the major problems of institutionalized unpublication; it will not dismantle the U.S. court's binary system of "precedential" and "nonprecedential" judicial opinions with the various problems this sytem produces...

There Were No Comments in Opposition to the Petition to Repeal Redundant Provisions in the Rules of Civil Appellate Procedure and in the Rules of Criminal Procedure

There were no comments against repeal of the redundant rules in Rule 28(g), Ariz.R.Civ.App.P., and Rule 31.26, Ariz.R.Crim.P., and therefore that portion of the petition should be adopted.

Conclusion

If the supreme court fails to reasonable resolve the issues presented in the petition and reply,

then the legislature could enact legislation to address the problem that might cause greater impact on the court of appeals than the modest provisions of the petition.[73]

RESPECTFULLY SUBMITTED this _____ day of June, 2007.

_____
RICHARD D. COFFINGER

ORIGINAL and SIX COPIES filed
with the Clerk of the Supreme Court of
Arizona, this ____ day of June, 2007.

COPY delivered this ___ day of
June, 2007, to:

Noel K. Dessaint
Clerk of the Court
1501 W. Washington St.
Phoenix, AZ 85007

_____

[73] A.R.S. Sec. 12-128.01 requires superior court judges to file an affidavit that no case is under advisement more than 60 days in order to receive his or her salary. The Supreme Court's rule-making power is provided in Art. 6, Sec. 5(5) of the Arizona Constitution. However, it has held in *State ex rel. Collins v. Hon. Seidel & Deason (RPI)*, 142 Ariz. 587, 591, 691 P.2d 678 (1984):

> That we possess the rule-making power does not imply that we will never recognize a statutory rule. We will recognize "statutory arrangements which seem reasonable and workable" and which supplement the rules we have promulgated... However, when a conflict arises, or a statutory rule tends to engulf a general rule... *we must draw the line*. [Emphasis supplied]

EXHIBIT 1

FROM: Richard Coffinger

TO: espinosa@appeals2.az.gov

CC: jrmcgregor@courts.az.gov; jgemmill@appeals.az.gov; pelander@appeals2.az.gov

DATE: 3/8/2007 1:15:16 PM

SUBJECT: Pet for Rule Change of Supreme Court Rule 111

Dear Justice Espinosa,

1. On 11/8/06, I filed in the Arizona Supreme Court a petition to change its Rule 111, relating to memorandum decisions (R-06-0038). The deadline for public comment on this petition is 5/21/07.

At the 1/19/07, meeting of the State Bar of Arizona (SBA), Criminal Practice and Procedure Committee meeting, the members considered my petition. You spoke to the committee telephonically in opposition to the proposal. During the meeting you stated that you did not believe there was any need of the proposed rule change, because you were unaware of any memorandum decisions that either "established," i.e. resolved an issue of first impression, or "clarified" a rule of law that had been decided in a memorandum decision. I advised you that I was a criminal defense attorney that did not do much appellate work, but that I personally had 4 cases in the past 5 years, each of which presented at least one issue of first impression that had been decided by Div. 1 in memorandum decisions. You stated you would be very interested in seeing those memorandum decisions. They are attached herewith.

The following issues of first impressions were resolved in these cases:

Parker: The superior court adult criminal division acquires jurisdiction over a juvenile, pursuant to A.R.S. Sec. 13-501(B), without the county attorney filing a formal notice of discretionary direct filing of adult criminal prosecution as is required if the juvenile is alleged to be a "chronic felony offender." (Note the State's motion to issue published opinion was denied)

Orscheln: A DUI offense is not completed until the expiration of the time limit for charging enhancement as an agg DUI for 3rd offense, pursuant to A.R.S. Sect. 28-1383(A)(2) (formerly 5 years, extended to 7 years effective 2/1/06), because DUI is a "continuing offense" like engaging in a scheme or artifice to defraud (*Barber*), possession of contraband, conspiracy, non-support of child, and wife and child abandonment.

Metcalfe: Agg DUI defendant is not entitled to suppression of blood samples obtained pursuant to telefax search warrant based on officer's failure to ever file a return of the warrant with the issuing court (formerly required "within 5 days," pursuant to A.R.S. Sec. 13-3918(A)) because a failure to ever file is the same as a late filing.

Minnegerode: The trial court did not err in denying defendant's suppression motion, because an anonymous informant's tip is sufficiently reliable to justify a warrantless seizure even though (1) the state failed to preserve informant's reliability raised *sua sponte* by the trial judge, and (2) the tip, that defendant had previously driven from a specific bar in a specific vehicle while impaired was made on

an unknown date more than 3 weeks before the seizure, rejecting defendant's claim of staleness.

We do indeed have a different view as to whether or not there is a need to modify Supreme Court Rule 111. Thank you for your presentation to the SBA Criminal Practice and Procedure Committee on this important issue.

Richard Coffinger

--- Richard Coffinger

--- rdc4@mindspring.com

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