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IN THE SUPREME COURT OF THE STATE OF ARIZONA

IN THE MATTER OF: PETITION TO AMEND RULE 111 OF THE ARIZONA SUPREME COURT AND RULE 28 OF THE ARIZONA RULES OF CIVIL APPELLATE PROCEDURE	R-07-0021 MARICOPA COUNTY ATTORNEY'S COMMENTS TO PETITION TO AMEND RULE 111 OF THE ARIZONA SUPREME COURT AND RULE 28 OF THE ARIZONA RULES OF CIVIL APPELLATE PROCEDURE

The Maricopa County Attorney hereby comments on the Petition to Amend Rule 111 of the Arizona Supreme Court and Rule 28 of the Arizona Rules of Civil Appellate Procedure.

Respectfully submitted this 20th day of May, 2008.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

The State Bar of Arizona has petitioned this Court to amend Rule 111 of the Arizona Supreme Court and Rule 28 of the Arizona Rules of Civil Appellate Procedure. Those rules address publication of opinions of the Supreme Court and Court of Appeals. The petition submits two rule proposals. Proposal 1 incorporates three changes: 1) unpublished memorandum decisions would be publicly available in an online, searchable database; 2) parties could cite non-Arizona unpublished decisions for persuasive value, unless the issuing court prohibits citation; and 3) although "disfavored," parties could cite Arizona memorandum decisions for persuasive value if the party believes the decision addresses a material issue in the case, and there is no published opinion from the Supreme Court or Court of Appeals that adequately addresses the issue. Proposal 2 does not incorporate the third change, and the State Bar takes no official position on that change, noting that it is "more controversial."

The petition states that the Court of Appeals currently decides approximately 90% of its cases by way of memorandum decision.

This Comment takes the point of view that the Supreme Court should not amend the current rules to create a new category of "disfavored" but sometimes "persuasive" law. Instead, the Court should address the severe problems created by the current system of "unpublished" opinions and require most opinions to be published. The current system is based on the notion of space and cost limitations imposed by paper-based libraries. Today's computer-based legal precedent no longer has these limitations.

II. LAW AND ARGUMENT

Rule 111(a) currently distinguishes between an "opinion," which is a written disposition intended for publication by a publishing company, and a "memorandum decision," which is not intended for publication. Rule 111(b) specifies when disposition is to be by opinion:

Dispositions of matters before the court requiring a written decision shall be by written opinion when a majority of the judges acting determine that it:

1. Establishes, alters, modifies or clarifies a rule of law, or
2. Calls attention to a rule of law which appears to have been generally overlooked, or
3. Criticizes existing law, or
4. Involves a legal or factual issue of unique interest or substantial public importance, or
5. If the disposition of matter is accompanied by a separate concurring or dissenting expression, and the author of such separate expression desires that it be published, then the decision shall be by opinion.

Rule 111(c) states that memorandum decisions "shall not be regarded as precedent in any court," with certain limited exceptions. Ariz. R. Crim. P. Rule 28, contains substantially similar provisions.

Many memorandum decisions address important and unresolved issues, raising the question as to why they were not published. For example, on April 10, 2008, Division One issued a memorandum decision in *State v. Wagner*, 1 CA-CR 06-0167, which concluded that use of an ignition interlock device constituted a "restriction" on a defendant's privilege to drive for purposes of the aggravated DUI statute. The decision appeared to address a new issue, included comprehensive statutory interpretation, and might prove helpful in future cases. Someone, however, concluded that it should have no precedential value. Mr. Wagner's convictions were affirmed, but this leads to uncertainty as to how cases involving similarly-situated defendants will be handled.

In *State v. Summers*, 1 CA-CR 07-0323, Division One decided on March 27, 2008, that a trial court in Yavapai County abused its discretion when it refused to grant the State's request for a probation violation hearing. The Court analyzed Rule 27.8, Ariz.R.Crim.P., and concluded that the trial court could not allow a defendant to admit to one violation allegation and dismiss the other allegations over the State's objection. The Maricopa County Attorney's Office had a probation violation matter with similar facts shortly after that decision, and the issues addressed are likely to recur. Yet the State may not cite the *Summers* decision, and cannot be certain that similar cases will be decided the same way. It is unclear why the *Summers* decision was not published.

These are just two examples of memorandum decisions deciding unresolved legal issues. Many other examples could be readily gathered.

One commentator has suggested that Rhode Island publish all of its criminal case decisions.[1] The rationale included: criminal cases are different from civil cases in that loss of rights and imprisonment may occur; a stigma is attached to conviction of a crime; all cases have precedential value, because they may be factually comparable to another case even if no new law is made; lower court judges may be adhering to unpublished decisions as if they were precedent; and appellate judges will take more personal responsibility for their opinions if they are published. Although Rhode Island has yet to adopt the proposal, the reasoning is sound.

Another commentator has suggested that all opinions in the federal courts be published because publication promotes stability, ensures accountability, and increases transparency.[2] If unpublished opinions are truly used only in the most straightforward of cases, publishing them need not increase the demands on judges because the opinions could simply be published in their current form. If opinions are unpublished because the wording can be less precise, "it actually harms the judiciary to have a body of imprecise and less carefully worded unpublished opinions in existence. It would better serve the judiciary to spend the time to ensure that all of its decisions are carefully worded and well-reasoned."[3] Allowing poorly-worded unpublished decisions to be used for their "persuasive value" merely compounds the problem.

The petition includes a summary of arguments both for and against permitting citation, and dozens of law review articles address the issue. Some of the arguments likewise would support more extensive publication, rather than simply allowing citation of unpublished decisions. For example, promoting

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[1] Jonathan E. Pincince, *Inviting Injustice: Why the Rhode Island Supreme Court Should Publish Opinions for all Criminal Case Decisions*, 8 Roger Williams U. L. Rev. 353 (Spring 2003).
[2] Johanna S. Schiavoni, *Comment: Who's Afraid of Precedent?: The Debate Over the Precedential Value of Unpublished Opinions*, 49 UCLA L. Rev. 1859 (2002).
[3] *Id.*

"consistent judicial decision making" would be better accomplished by having more published opinions. In fact, judges who choose not to publish can only guess what will have future precedential value, which affects our common-law system of relying on earlier holdings.

> The decision not to publish an opinion that otherwise would have significant value to future litigants artificially distorts our common law system. Distortion occurs whether the judge inadvertently predicts that the case has no future precedential value or intentionally sweeps a controversial issue under the rug. Either way, publication plans that deprive unpublished opinions of precedential authority create substantial disadvantages for future litigants. Every litigant who finds an unpublished opinion on-point cannot ask the court to honor the doctrines of precedent and stare decisis that would otherwise compel the court to follow the decision.[4]

Another commentator has reasoned that selective publication practices and noncitation rules "make for very uncertain precedent and complicate legal research. In at least two circuits, citation of unpublished dispositions is 'disfavored' but allowed, an unacceptably ambiguous statement of precedential effect."[5] Although federal courts may no longer prohibit citation under Rule 32.1, Fed. R. App. P., the "disfavored but allowed" approach has been proposed for Arizona in the Petition by the State Bar. Lawyers and trial courts alike will be forced to guess as to how to treat such "precedent".

It also has been suggested that issues are unnecessarily relitigated when decisions are unpublished and cannot be cited as precedent.

> The current appellate practice of hiding precedents may have an adverse effect on the courts' workload. The greater the number of precedents, the greater the volume of law, the greater the number of solutions to legal issues, and the easier it would be to determine whether the authoritative answer to a legal issue has been judicially sanctioned. Assuming that most lawyers would not raise issues on appeal that an appellate court would consider already decided, an increased volume of law would serve to lower the number of appeals and the number of issues raised in those cases that are appealed. . . .[6]

The literature generally acknowledges that the reason courts began writing "unpublished" decisions

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[4] Suzanne O. Snowden, *Note: "That's My Holding and I'm Not Sticking to It!" Court Rules that Deprive Unpublished Opinions of Precedential Authority Distort the Common Law*, 79 Wash. U. L. Q. 1253 (2001).

[5] Martha J. Dragich, *Will the Federal Courts of Appeals Perish if they Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?* 44 Am. U. L. Rev. 757, 791 (Feb. 1995).

[6] Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. Cal. L. Rev. 755 (2003).

was due to the fear that libraries would be overwhelmed with books containing an increasing number of court opinions.[7] That rationale is no longer applicable. "Currently, virtually all decisions are 'published' in that they are available via the Internet. 'Unpublished' refers to decisions the judges themselves designate not to be published in official reports. There is little significance to the 'unpublished' designation other than the fact that no-citation rules make these decisions unmentionable."[8] The petition proposes that "unpublished" memorandum decisions be made publicly available in an online, searchable database, which in reality is a form of publication. Therefore, the only distinction between the types of decisions will be that some are given precedential value and others are not.

Certain decisions in criminal cases should appropriately remain "unpublished," such as those in which the appellate court searches the record for reversible error pursuant to *Anders v. California*, 386 U.S. 738 (1967). That type of opinion generally contains little or no analysis and truly applies only to the defendant appealing. In criminal cases where the court addresses factual or legal issues likely to occur again, however, a published opinion should be the rule rather than the exception. This should not require any more writing or analysis than is currently done in memorandum decisions, if cases are properly reasoned. If any additional time is required, it likely would be offset by not having to re-address a future issue resolved in a published opinion. Arizona should move toward a greater body of law with precedential value rather than more memorandum decisions.

III. CONCLUSION

The proposal to allow the citation of memorandum decisions when there are no published opinions that address a particular legal issue merely compounds the severe problems in the current system of

[7] *See, e.g.*, Snowden, *id.*; Cappalli, *id.*; Donn G. Kessler and Thomas L. Hudson, "Losing Cite: A Rule's Evolution," *Arizona Attorney* (June 2006).

[8] Kenneth J. Schmier and Michael K. Schmier, *Has Anyone Noticed the Judiciary's Abandonment of Stare Decisis?* 7 J. Law and Social Challenges 233 (Fall 2005).

excessive unpublished opinions. Appellate judges will still be allowed to decide which decisions are precedential and which are not, although some of the latter may have "persuasive value." Instead of that confusing and arbitrary approach, appellate judges should decide most matters with well-reasoned published opinions, particularly in criminal cases. Attorneys, litigants, and lower courts will then have a larger and more consistent body of law on which to rely. The Maricopa County Attorney's Office therefore opposes the Petition to Amend Rule 111 of the Arizona Supreme Court and Rule 28 of the Arizona Rules of Civil Appellate Procedure and urges the Court to require more published opinions.

Respectfully submitted this 20th of May, 2008.

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