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IN THE SUPREME COURT
OF THE STATE OF ARIZONA

	)	Supreme Court
	)	No. R-07-0021
In re State Bar 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 AVAILABILITY
	)	AND CITATION OF
	)	MEMORANDUM DECISIONS

Division Two of the Arizona Court of Appeals submits the following comment concerning the petition filed by the State Bar of Arizona to amend Rule 111, Arizona Rules of the Supreme Court and Rule 28, Arizona Rules of Civil Appellate Procedure.[1] The Bar has submitted a proposed rule change petition contemplating alternative amendments to Rule 111, Ariz. R. Sup. Ct. and Rule 28, Ariz. R. Civ. App. P. The proposals relate to increasing accessibility to unpublished decisions issued by Arizona appellate courts and permitting citation of unpublished decisions issued by our courts and those of other jurisdictions. The six judges of Division Two object to the proposed changes in part as unnecessary and detrimental to the administration of justice, and in part as moot, as more fully set forth below. Furthermore, although the judges of Division

[1]Although the State Bar's petition does not mention Rule 31.24, Ariz. R. Crim. P., the changes it proposes would also implicate that rule.

Two speak only for themselves, it is our understanding that a majority of the judges of Division One concur with our views.

1. Accessibility of Memorandum Decisions

First, both of the State Bar's alternative proposals recommend making unpublished memorandum decisions more accessible to the public and lawyers through an online database. Noting correctly that the court of appeals decides the vast majority of its cases in unpublished decisions, the Bar maintains in its petition that "[p]ublished decisions provide a very narrow window into the Court of Appeals' current decisions." The Bar asserts that by providing attorneys with electronic access to the unpublished decisions on the more routine cases, counsel will have "a better means to provide real-world advice to clients." Although that proposition is debatable, in July 2007, both divisions of the Arizona Court of Appeals expanded their respective web sites to include the automatic posting of unpublished decisions. Not only are the court's memorandum decisions posted on the web sites for one year, but those decisions also will be posted and easily accessible on Westlaw in its Arizona case database. Thus, the memorandum decisions of both divisions are now readily available to those attorneys who believe reviewing such decisions might be useful to their practice. And, the fact that the court has fully addressed any accessibility issues should "eliminat[e] any public perception that courts 'hide' decisions," an alleged concern expressed in the State Bar's petition.

2. Citation of Unpublished Decisions

This court, however, opposes expanding the purposes for which unpublished decisions may be cited beyond those that the rules currently allow: to establish "the defense of res judicata, collateral estoppel, or the law of the case or . . . [to inform] the appellate court of other memorandum decisions so that the court can decide whether to publish an opinion, grant a motion for reconsideration, or grant a petition for review." Ariz. R. Civ. App. P. 28(c); *see also* Ariz. R. Sup. Ct. 111(c). In seeking expansions of the rule, the State Bar observes that with the adoption by the United States Supreme Court of Rule 32.1, Fed. R. App. P., the federal courts and a number of states permit citation of unpublished opinions for either persuasive value, precedential authority, or both. The Bar acknowledges that this topic is controversial and has been vigorously debated for quite some time in seminars, law review articles, and legal periodicals. *See, e.g.*, Hon. Donn G. Kessler and Thomas L. Hudson, *The "Secret" History of Memoranda Decisions*, Arizona Attorney (June 2006); *see also* Alex Kozinski and Stephen Reinhardt, *Please Don't Cite This*, The California Lawyer (2000).

Significantly, however, the Bar has not identified any actual problem with the current rules, nor has it identified any other compelling reason to amend them. We submit that compelling reasons counsel against amending the rules to broaden the circumstances in which a party may cite unpublished decisions. And, 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.

The State Bar's first proposal (Proposal 1) seeks to amend the rules to permit, in relevant part, citation to unpublished Arizona appellate court decisions for the purposes currently provided and if a "party believes that the decision persuasively addresses a material issue in the case; and . . . there is no published opinion from the [Arizona] Supreme Court or Court of Appeals that adequately addresses the issue." Proposal 1, amending Ariz. R. Sup. Ct. 111(e)(2). The proposed rule as amended further provides that a court may consider such decisions "for their persuasive value only, and not as binding precedent." *Id*. The proposed rule also allows a party to cite unpublished decisions by other courts, "as defined or understood by those courts," Proposed Rule 111(f), Ariz. R. Sup. Ct., in the circumstances permitted for the citation of Arizona's unpublished decisions.

These proposed guidelines are inherently subjective. Whether a decision is "persuasive" and whether or not an existing opinion "adequately addresses [an] issue" will depend on how it is viewed by a party or lawyer. These proposed changes will not be easy to put into practice or enforce. Indeed, enterprising litigants can easily contend they have met these requirements for citing any unpublished decision – as long as the factual scenario in the memorandum decision is even slightly distinguishable from that presented in a published opinion. And we believe the proposed changes will increase appellate court judges' already substantial workloads by compelling them to routinely

analyze whether an unpublished decision meets the vague citation criteria contemplated by the amendments. Thus, we do not view the proposed rule as a modest change that will have little effect in practice. Rather, it could substantially transform the volume and nature of the authority competent litigants may be responsible for marshaling and that our appellate courts must consider.

Given that our current rules allow litigants to cite published opinions from the appellate courts of fifty states, twelve federal circuits, and the federal district courts, proponents of the rule change have a difficult task in demonstrating that the current rules somehow leave litigants with insufficient legal authority to construct or support their arguments. The State Bar's petition offers little evidence of that. And to the extent the proposed changes might be motivated by a perception that important nuggets of novel legal reasoning are embedded in unpublished decisions, litigants have an existing mechanism for addressing that concern – the filing of a motion to publish a memorandum decision. *See* Ariz. R. Civ. App. P. 28(c). Such motions are well-received by this division where, historically, the majority of them have been granted when a cogent reason for publication is given. Against that backdrop, the following reasons for not expanding citation of unpublished decisions as provided in Proposal 1 should be carefully considered.

Although the benefits of expanding citation to unpublished decisions are nonspecific and debatable, the resulting costs to the court of appeals, the profession, and the public are likely to be concrete and substantial. The bulk of the decisions issued by

the court of appeals are not published for a variety of reasons. The vast majority of cases this court addresses require our non-discretionary review and disposition regardless of the existence of meritorious issues. Many of the issues presented in court of appeals' cases have been decided in published opinions and are typically repetitive, routine, and neither establish new law nor clarify existing law. In other cases, the record might have been incomplete, inhibiting proper review of issues raised. Similarly, the arguments might have been poorly made and issues or authorities overlooked.

Nonetheless, assuming subject matter jurisdiction exists, it is this court's duty to decide all appeals in writing, and as expeditiously as possible, giving many preference for that purpose as prescribed by statutes and rules. *See, e.g.*, A.R.S. § 8-235(C) (requiring juvenile appeals be given "precedence over all other actions except extraordinary writs or special actions"); A.R.S. § 36-546.01 (stating mental health appeals "shall be entitled to preference"); A.R.S. § 40-255 (requiring corporation commission appeals to which commission or state is a party, or in which attorney general has intervened, be given "preference to other civil matters except election actions"); *see also* Ariz. R. P. Juv. Ct. 88(C) (giving juvenile appeals preference); Ariz. R. P. Spec. Actions 10(a) (giving preference to industrial commission special actions); Ariz. R. Crim. P. 31.14(b) (providing criminal appeals "shall have precedence over all other appeals except those from juvenile actions or where otherwise provided by law").

In view of the large volume of cases processed by the court of appeals and the need to prioritize and expedite their disposition, the current rules properly allow the court

to draft memorandum decisions in a more summary fashion and, consequently, more efficiently and quickly. Although the court is always focused on producing quality work, and substantial time and effort are invested in memorandum decisions, the preparation of a published opinion necessarily is more extensive. The drafting of opinions and the process of circulating drafts for review by, approval from, and input of other judges take time. If parties are permitted to cite unpublished decisions, even as "persuasive" authority rather than as precedent, many appellate court judges might feel compelled to spend more time and resources on such decisions, which would necessarily delay the appellate process, impede efficiency, and frustrate the prompt administration of justice. In addition, faced with heavy case loads and the specter of returning backlogs, some judges might resort to issuing summary-type decisions, as several states already do, with abbreviated reasoning and minimal explanation, lest such decisions be misinterpreted and misapplied to other cases. We doubt the parties, practicing attorneys, trial courts, or the supreme court would welcome such a change.

Additionally, lawyers as well as trial court judges and their staff might feel compelled to research unpublished decisions in Arizona and other jurisdictions that conceivably could be considered "persuasive authority." As previously noted, discerning whether a published opinion "adequately addresses the issue" will entail additional time, effort, and delay all around. And the impact does not stop there. Presumably, counsel would be responsible for knowing what authority (whether published or unpublished) exists on material issues, increasing the burden on them, passing the cost of additional

research responsibility on to clients, and possibly exposing attorneys to later criticism.[2] *See Collins v. Miller & Miller, Ltd.*, 189 Ariz. 387, 393, 943 P.2d 747, 753 (App. 1996) (even with respect to unsettled area of law, attorney assumes obligation to client to undertake reasonable research to ascertain relevant legal principles and make informed decisions); *Baird v. Pace*, 156 Ariz. 418, 419-20, 422, 752 P.2d 507, 508-09, 511 (App. 1987) (affirming judgment against attorney after bench trial and sustaining trial court's finding that attorney had obligation to conduct adequate research in order to exercise judgment properly and provide client with advice); *see also* ER 1.1, Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42 ("lawyer shall provide competent representation," which "requires . . . legal knowledge, skill, thoroughness and preparation"); ER 1.3 (requiring lawyer to "act with reasonable diligence").

Should the Bar's proposed changes to the rules be adopted and should our appellate courts attempt to limit the flood of citations to unpublished cases by strictly enforcing the few prerequisites for citation, judges and litigants would find themselves mired in debates over whether or not a published opinion is "adequate" or an unpublished decision is "persuasive." In short, we believe the proposed changes would burden the

[2]In 2006 alone, Division Two issued 540 memorandum decisions and 89 substantive decision orders while Division One produced 1,014 memorandum decisions and 56 decision orders, for a total of 1,699 potentially citeable unpublished decisions. In 2007, Division Two again issued over 500 memorandum decisions and increased its number of published opinions by over 20 percent compared to 2006. And, the number of unpublished decisions counsel and the courts would need to search for and examine will obviously increase exponentially over time.

court's case processing and the administration of justice while offering little, if any, clear benefit to the parties, legal community, or courts.

We also note that permitting citation of unpublished Arizona decisions could impose special burdens on the supreme court as well. Currently, that court has two tools to monitor and direct the development of Arizona's common law – when requested it can grant review of a court of appeals' opinion or memorandum decision, vacate it in whole or in part, overrule or modify any prior opinions if necessary, and issue its own opinion, thereby altering the reasoning and/or result on the relevant legal issues. But the supreme court does not have the resources to grant review, and issue its own opinions, as to more than a very small percentage of the several thousand decisions and opinions issued each year by the courts of appeals. The supreme court's other tool for shaping the development of this state's jurisprudence – depublication of a court of appeals' opinion, *see* Ariz. R. Sup. Ct. 111(g) – would have little utility if parties could cite memorandum decisions that previously were opinions but were later depublished.

In its petition, the State Bar "do[es] not recommend substantive changes to the 'depublication' rule." But the supreme court has noted that its depublication order generally signifies that the court "disapproved of 'something,'" even though it is not always "clear what." *Martinez v. Indus. Comm'n*, 192 Ariz. 176, ¶ 15, 962 P.2d 903, 906 (1998). Given that the court depublishes opinions precisely because they contain reasoning of which the court presumably disapproves, there would be little logic in allowing such decisions to then be cited as persuasive authority. That would seem to

undermine the supreme court's intent and the purpose of the depublication option. Most importantly, the clear distinction between published opinions and unpublished decisions maintained by our current rules, which generally permit only citation of opinions in our courts, allows our highest court to efficiently supervise and guide the development of Arizona decisional case law.

Both of the State Bar's alternative proposals also would permit citation of unpublished decisions from other jurisdictions "for persuasive value only," "unless prohibited by the rules of the issuing court." Proposal 1, Amended Rule 111(e)(2), (f); *see also* Proposal 2, Amended Rule 111(c). This proposal is problematic for several reasons. First, if the Bar's second alternative (Proposal 2) were adopted, it would permit citation of unpublished decisions from other jurisdictions, but not Arizona. We question why such decisions – that are presumably unpublished based on criteria similar to our own – would be accorded precedential or persuasive value when they may not be so regarded in their own jurisdiction. Second, we do not know the reasoning or process behind the rules and policies in other jurisdictions for determining which decisions should be published and which should not – and it would be unduly burdensome for litigants and courts to research and keep track of that criteria. Third, unpublished decisions from other jurisdictions do not fully explain every local rule or law upon which the holdings are based, making their utility in deciding Arizona cases even more suspect. Thus, what reasoned rationale would permit such decisions to be cited carte blanche in

Arizona? The proposed amendments permitting citation to other courts' unpublished decisions appear fraught with uncertainty and inconsistency.

Both the court of appeals and the supreme court endeavor to build a sound foundation for the "edifice" of our state's jurisprudence. The current rules allow our appellate courts to carefully choose and craft each "brick" to be used in the ongoing building and development of the law. In our view, allowing litigants to deliver hundreds, and in short order, thousands, of lesser, "untested" building blocks to our courts will make choosing the strongest ones more difficult, and, over time, embed unpredictability and instability into Arizona's jurisprudence.

3. Conclusion

In sum, the rules pertaining to publication of decisions and citation of unpublished decisions are, to put it simply, not "broken" and therefore do not need to be "fixed." The court of appeals has already taken significant steps to make its unpublished decisions electronically accessible to lawyers and the public, both on the court's web site and on Westlaw, rendering that portion of the State Bar's petition moot. In all other respects, we recommend that the alternative proposals in the Bar's petition be rejected.

We note that a recent comment suggests that the State Bar's proposal should be given special weight because it represents the views of its 20,000 members. Although we do not question the importance of our State Bar organization and its salutary role in improving our profession, and hold in high regard those who actively participate in its mission, we do not believe all 20,000 members have considered, or necessarily support,

this particular proposal. Indeed, each of the Division Two judges is a longstanding member of that excellent organization who does not support it, and we know collectively of many others who either do not support the proposal or are indifferent to it.

Finally, we applaud and appreciate the time, effort, and thoughtful consideration the State Bar invested in crafting and submitting its well-intentioned proposals. We simply disagree with the recommendations, and their underlying premises, for changing the citation rules in Arizona. Should the supreme court adopt the Bar's proposals, however, this court will, of course, fully cooperate in facilitating and implementing any approved changes.

Respectfully submitted,

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Arizona Court of Appeals, Division Two