

ARIZONA SUPREME COURT

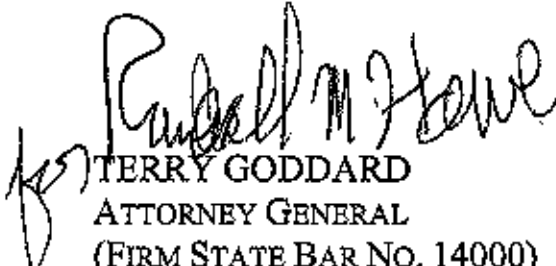
IN RE: PETITION TO AMEND
RULE 111 OF THE ARIZONA
SUPREME COURT AND RULE 28
OF THE ARIZONA RULES OF
CIVIL APPELLATE PROCEDURE

SUPREME COURT NO. R. _____

COMMENT ON PROPOSED
AMENDMENT TO RULE 13.4,
ARIZONA RULES OF CRIMINAL
PROCEDURE

The Arizona Attorney General's Office files this comment in opposition to the State Bar of Arizona's Petition to Amend Rule 111 of the Arizona Supreme Court and Rule 28 of the Arizona Rules of Civil Appellate Procedure. The Attorney General's Office opposes both Proposals suggested by the State Bar, with the caveats that it has no objection to making unpublished memorandum decisions electronically available to the public and lawyers, and to amending ARCAP 28 to simply reference Supreme Court Rule 111, rather than reiterating the Rule. The reasons for this opposition are set forth in the following memorandum.

Respectfully submitted this 20th day of May, 2008.


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MEMORANDUM

Under current Rule 111(b) a written decision of this Court, or the court of appeals, is to be published if a majority of the judges on the panel determine that the decision satisfies *any* of the following:

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*

if the disposition of the 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.

(Emphasis added.) Memorandum decisions – which necessarily satisfy *none* of the myriad of circumstances set forth above – are *only* to be cited: (1) for the purpose of establishing the defense of res judicata, collateral estoppel, or law of the case, or (2) to inform the appellate court of other memorandum decisions for the purpose of deciding whether to issue a published opinion, grant a motion for reconsideration, or grant a petition for review. Rule 111(c), R. Ariz. S. Ct.

Opinions are carefully written by the appellate courts, contain a detailed discussion of the relevant facts, and a thorough legal analysis. Memorandum decisions, on the other hand, are generally very succinct and contain minimum

legal analysis. And, because they are addressed solely to the parties, the facts underlying the legal issues—often crucial to attempting to apply the rule of law at issue—are generally discussed minimally, if at all. As noted by the State Bar, approximately 90% of all written court decisions are issued by way of memorandum decision (more in criminal cases). The sheer volume of memorandum decisions results in unavoidable inconsistencies, particularly because of the omission of often crucial facts and an abbreviated legal analysis. While the individual cases may well have been correctly decided under the particular facts of those cases, attempting to apply the “holdings” of those cases to different factual scenarios may well result in incorrect decisions.

Moreover, opinions are circulated to all members of the appellate court (either Division One or Division Two of the court of appeals) for comments and suggestions before filing. This greatly reduces the risk that a particular opinion will conflict with prior opinions of the court, and affords the authoring judge the opportunity to refine the opinion to avoid possible tension with existing law. Memorandum decisions, on the other hand, are seen by only the three judges on the court of appeals panel.

As noted in the petition, if the Rules are changed to permit citation to memorandum decisions as “persuasive” authority, “attorneys would now have to find and analyze nine times as many cases overall if they were to *adequately*

represent their clients.” (Petition at 11, emphasis added.) This means that criminal defense counsel—at trial and on appeal—will be expected to research at least 90% more case law to “adequately represent their clients.” This will doubtless result in additional claims of ineffective assistance of counsel at both the trial and appellate level, frustrating crime victims’ constitutional rights to “prompt and final conclusion of the case after the conviction and sentence.” Art. 2, § 2.1(A)(10), Ariz. Const. At a minimum, should this Court elect to adopt either of the State Bar’s Proposals, the rule change should *not* apply to criminal cases.

Furthermore, the First Proposal is hopelessly vague and confusing regarding when a memorandum decision may be cited as “persuasive” authority. It only allows citation if the party believes the decision persuasively 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 1, Rule 111(e)(2) (emphasis added.) Given that we have an adversary system of justice, any criminal defense attorney that finds a favorable memorandum decision will claim that no published opinion “adequately addresses the issue.” Is a party’s assertion that no published opinion “adequately addresses the issue” subject to a motion to strike reference to the memorandum decision in a brief or pleading? Will trial and appellate courts have to resolve the issue of whether a published opinion “adequately addresses the issue” as a preliminary matter? Whatever minimal value

might flow from allowing citation of memorandum decisions for “persuasive value,” such is simply outweighed by the additional litigation and confusion it would cause.

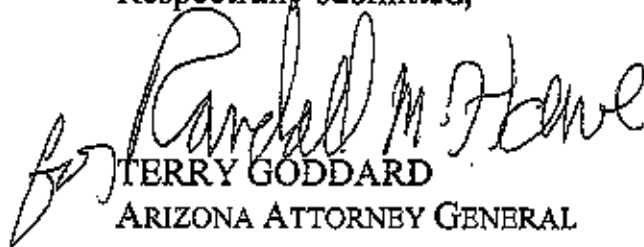
Moreover, given the fact that memorandum decisions often do not contain a sufficient factual discussion and legal analysis, it will be difficult to determine how “persuasive” a particular memorandum decision should be when applied to other factual situations. This is exacerbated by the fact that memorandum decisions are sometimes inconsistent.

Finally, given the broad sweep of Rule 111(b), which requires that a decision be published if it establishes, alters, modifies *or* clarifies a rule of law, calls attention to a rule of law which appears to have been overlooked, criticizes existing law, *or* involves a legal *or* factual issue of unique interest *or* substantial public importance, it is difficult to imagine a situation where there is no published opinion “that adequately addresses [an] issue,” yet there is a memorandum decision that does. If appellate courts are not following Rule 111(b), that is an administrative matter for this Court to police. The Court should not simply authorize citation of unpublished memorandum decisions.

The Attorney General’s Office has no objection to making memorandum decisions accessible to the public and lawyers electronically. This may well be a useful research tool. Additionally, the Attorney General’s Office has no objection

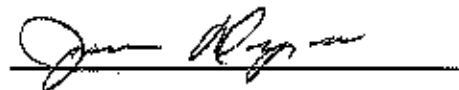
to amending ARCAP 28 to simply reference Supreme Court Rule 111, rather than reiterating it. However, for the reasons set forth above, the Attorney General's Office opposes both State Bar Proposals because they permit citation of unpublished memorandum decisions for "persuasive value." Whatever minimum value might conceivably flow from allowing such citation is substantially outweighed by the concerns voiced above. At a minimum, criminal cases should be exempted, should this Court elect to adopt either Proposal.

Respectfully submitted,


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Copies of the foregoing Comment have been delivered this 20th day of May, 2008 to:

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