

**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:

PETITION TO AMEND RULE 111, ARIZ.
R. SUP. CT., RULE 28, ARIZ. R. CIV.
APP. P., AND RULE 31.24, ARIZ. R.
CRIM. P.

Supreme Court No. R-14-0004

**Comment in Support of Petition to
Amend Rule 111, Ariz. R. Sup. Ct.,
Rule 28, Ariz. R. Civ. App. P., and
Rule 31.24, Ariz. R. Crim. P.**

**AMERICAN ACADEMY OF APPELLATE LAWYERS' COMMENT ON
PETITION TO AMEND RULE 111, ARIZ. R. SUP. CT., RULE 28, ARCAP,
AND RULE 31.24, ARIZ. R. CRIM. P.**

The American Academy of Appellate Lawyers submits the following comment in support of the Petition to Amend Rule 111, Ariz. R. Sup. Ct., Rule 28, ARCAP, and Rule 31.24, Ariz. R. Crim. P., all dealing with the citation of unpublished or memorandum decisions ("memorandum decisions").

Statement of Interest

The Academy is an invitation-only professional association of lawyers skilled and experienced in appellate practice, and dedicated to the improvement and enhancement of the standards of appellate practice and the ethics of the profession as they relate to appellate practice. The Academy periodically comments on proposed adoption of or amendments to state and federal rules that may affect the quality of appellate practice and the fair and effective administration of justice.

Reasons the Court Should Adopt the Petition

The appropriate use of memorandum decisions in support of legal arguments has been a difficult issue for judges and attorneys for decades, notably prompting a panel of the United States Court of Appeals for the Eighth Circuit to declare unconstitutional its own rule prohibiting

the citation of unpublished opinions. *Anastoff v. United States*, 223 F.3d 898 (8th Cir. 2000), vacated as moot on rehearing, 235 F.3d 1054 (8th Cir.) (*en banc*).

The justifications given for limiting citation of memorandum decisions include the recognition that such cases may have limited or no precedential value or may involve troublesome fact patterns likely to confuse rather than clarify the law or facilitate its consistent application, and the reluctance of judges to issue decisions of precedential value when a case has been inadequately briefed and argued. Commentators have also cited heavy judicial workload as justification for giving courts discretion to decide whether a case warrants the time and attention necessary to craft an opinion that may be cited as precedent.

Reasons often given for allowing citation to memorandum decisions include the desire for consistency and certainty in the law, the inappropriate use of memorandum decisions to limit further discretionary review of difficult decisions, and the potentially adverse impact of extensive use of memorandum decisions on public perception of the integrity of the judicial process.

While recognizing the legitimacy of the arguments supporting some limitations on the use of memorandum decisions, the Academy believes that the current Arizona rules prohibiting the citation of memorandum decisions in any court (except for narrowly limited purposes) are unduly restrictive and inconsistent with the fair and effective administration of justice, and reflect a shrinking minority view. Rule 32.1 of the Federal Rules of Appellate Procedure bars a court from prohibiting the citation of unpublished opinions issued on or after January 1, 2007 and a growing majority of state jurisdictions allow the citation of unpublished or memorandum opinions as persuasive authority. The proposed amendments to the Arizona rules would bring

Arizona courts in line with these jurisdictions, which have not been shown to have experienced an adverse impact as a result of allowing limited citation to memorandum decisions.

The proposed amendments to the Arizona rules appropriately take into account the concerns expressed about citation to memorandum decisions. Any concerns a court might have that a particular case does not warrant an opinion of precedential value -- because of difficult facts or inadequate briefing -- is adequately addressed by limiting citation of a memorandum decision for its persuasive value only and by imposing no obligation on the court or parties to research or distinguish the decision. The requirement that a party provide the court and all parties with a copy of any cited memorandum decision eliminates any remaining concern about limited access to those decisions. Because the amendments will apply only on a prospective basis, courts also need not be concerned about citation of past decisions written with the expectation that they would never be cited for persuasive value.

Moreover, adoption of the proposed amendments to the Arizona rules will promote the administration of justice and enhance the public perception of the administration of justice by our courts. Decisions of any kind are official activities of the court, and are perceived as such by the public and the bar. A party should not be prevented from arguing in favor of consistent action by the courts in performing those official activities. Allowing citation of memorandum decisions for persuasive purposes may reduce the risk of courts taking inconsistent positions on similar facts, which has an adverse effect not only on lawyers but also on public perception of the integrity of the judicial process. If a memorandum decision is the only authority supporting a party's position, counsel should not be forced to choose between violating a rule or leaving a court with the false impression that no court has ever agreed with the position being advocated.

And there is no material justification for prohibiting the citation of memorandum decisions from state and federal courts that themselves allow citation of such decisions.

The proposed amendments to the Arizona rules regarding the citation of unpublished decisions achieve the appropriate balance between the historical concerns about citation of memorandum decisions and the fair and consistent resolution of civil and criminal litigation. For these reasons, the American Academy of Appellate Lawyers recommends adoption of the changes proposed in the Petition to Amend Rule 111, Ariz. R. Sup. Ct., Rule 28, ARCAP, and Rule 31.24, Ariz. R. Crim. P.

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