

1 John A. Furlong, Bar No. 018356
2 General Counsel
3 STATE BAR OF ARIZONA
4 4201 N. 24th Street, Suite 200
5 Phoenix, Arizona 85016-6288
6 Telephone: (602) 252-4804
7 John.Furlong@staff.azbar.org

8
9 **IN THE SUPREME COURT**
10 **STATE OF ARIZONA**
11

12 PETITION TO AMEND RULE 111,
13 ARIZONA RULES OF THE SUPREME
14 COURT, AND RULE 28, ARIZONA
15 RULES OF CIVIL APPELLATE
16 PROCEDURE

Supreme Court No. R-10-0032

**Comment of the State Bar of
Arizona Regarding Petition to
Amend Rule 111 of the Arizona
Rules of the Supreme Court and
Rule 28 of the Arizona Rules of
Civil Appellate Procedure**

17 The State Bar of Arizona supports the petitioner's proposal to amend
18 Rule 111 of the Arizona Rules of the Supreme Court and Rule 28 of the Arizona
19 Rules of Civil Appellate Procedure. These proposed amendments would permit
20 parties appearing before the Arizona state courts to cite unpublished decisions from
21 federal and other non-Arizona jurisdictions as persuasive authority, to the extent
22 that such citation is not prohibited by the issuing jurisdiction. As the primary
23 counterarguments asserted in opposition to a prior, unsuccessful petition seeking
24 amendment of Rule 111 and Rule 28 to permit citation to *all* unpublished decisions
25 (including those issued by Arizona state courts) are either not implicated by the
26 instant petition or outweighed by the benefits to be realized through the requested
amendments, the State Bar recommends adoption of petitioner's proposed
amendments.

1 **RATIONALE SUPPORTING ADOPTION OF THE PROPOSED**
2 **AMENDMENTS**

3 **I. Unpublished Decisions from Federal or Other Non-Arizona**
4 **Jurisdictions May Be Helpful in Deciding Issues Involving**
5 **Developing Areas of the Law.**

6 Significant bodies of law exist that evolve rapidly through unpublished
7 decisions, particularly in the federal courts. Those decisions are readily accessible
8 through electronic research databases, such as Westlaw, Lexis, PACER, and
9 Google. One example cited in the petition is Arizona’s economic loss rule, for
10 which over a dozen decisions – many of which were unpublished and therefore
11 could not be cited to or discussed before the Arizona state courts – were issued by
12 the District of Arizona before the Arizona Supreme Court addressed the rule in
13 *Flagstaff Affordable Housing, Ltd. v. Design Alliance, Inc.*, 223 Ariz. 320, 223 P.3d
14 664 (2010). See petition at 4 (citing Eddward P. Ballinger and Samuel A. Thumma,
15 *The Continuing Evolution of Arizona’s Economic Loss Rule*, 39 ARIZ. ST. L.J. 535
16 (2007)). Prohibiting litigants from relying on, and courts from considering, such
17 significant bodies of authority, especially in newly- or rapidly-developing areas of
18 the law, deprives each of the benefit of the reasoning and analysis of courts that
19 have already addressed similar issues, potentially creating an unnecessary and
20 artificial void in the law for no sound policy reason.

21 By way of additional example, the substantial and ever-growing volume of
22 unpublished district court decisions interpreting the Federal Rules of Civil
23 Procedure may be helpful to Arizona state court litigants in arguing the application
24 of, and members of the Arizona judiciary in applying, the Arizona Rules of Civil
25 Procedure. See *Orme School v. Reeves*, 166 Ariz. 301, 304, 802 P.2d 1000, 1003
26 (1990) (“Federal cases dealing with the federal counterpart [to Rule 56] are
instructive, persuasive, but not binding in the construction of our rule.”). Similarly,

1 Arizona courts generally follow the Restatement of the Law in the absence of
2 conflicting, controlling authority (*see Ft. Lowell-NSS Ltd. Partnership v. Kelly*, 166
3 Ariz. 96, 102, 800 P.2d 962, 968 (1990)); and various areas of Arizona's common
4 and statutory law have their roots in the laws of other jurisdictions. Eliminating the
5 prohibition against citing to unpublished federal and other non-Arizona decisions
6 would enable the Arizona courts to consider how the Restatement of the Law or
7 other bodies of law have been applied by other courts that have dealt with matters
8 similar to those before Arizona courts.

9 To protect against the misuse or improper reliance upon unpublished
10 decisions, the petitioner's proposed amendments contain several significant
11 limitations and safeguards. First, the proposed amendments do not alter the
12 prohibition against citation to depublished decisions. Second, these amendments
13 limit the use of unpublished federal and other non-Arizona decisions to those
14 circumstances where the issuing court could have anticipated the citation of its
15 decision in its own jurisdiction and, therefore, presumably expended additional
16 efforts to review the precise scope and possible consequences of its decision.
17 Third, the proposed amendments expressly provide that unpublished federal and
18 other non-Arizona decisions may be cited only as persuasive authority.

19 **II. Permitting Citation to Unpublished Decisions from Federal and Other**
20 **Non-Arizona Jurisdictions Would Not Overburden Arizona Courts or**
21 **Attorneys.**

22 Traditionally, it has been argued that citation to unpublished decisions should
23 be prohibited in the Arizona state courts because the practice would (1) drastically
24 increase the workload of the Arizona appellate courts and (2) overwhelm the
25 Arizona courts and litigants with citable authority. *See generally* Thomas L.
26

1 Hudson & Donn Kessler, *The "Secret" History of Memoranda Decisions*, ARIZONA
2 ATTORNEY, June 2006, at 10.

3 The concerns underlying the first argument are not implicated by the
4 proposed amendments. Because the proposed amendments provide for the citation
5 of unpublished decisions only if issued by federal or other non-Arizona
6 jurisdictions, the procedures and processes of the Arizona appellate courts would be
7 wholly unaffected. The proposed amendments create neither a need for the Arizona
8 Court of Appeals to reconsider its method of preparing unpublished decisions nor a
9 need for the Arizona Supreme Court to consider whether to grant review in more
10 cases.

11 With respect to the second argument, the proposed amendments should not
12 unduly burden the Arizona courts with additional authorities to review. Citation to
13 unpublished federal and other non-Arizona decisions is useful or necessary only in
14 circumstances where citation to other authorities would not be as helpful to the
15 resolution of a case. Further, the Arizona courts are experienced in determining the
16 appropriate weight to give persuasive authorities (such as when interpreting the
17 Arizona Rules of Civil Procedure by reference to persuasive federal decisions
18 interpreting the federal rules), and are well-accustomed to assessing the
19 applicability and utility of a broad and largely unrestricted universe of such
20 authorities. Any additional burden on the courts by permitting Arizona attorneys to
21 cite to the additional category of authority described by the proposed amendments
22 is likely to be minimal and would be outweighed by the benefit of seeing how other
23 courts have addressed similar issues. To the extent that an unscrupulous litigant
24 might attempt to exploit the proposed amendments by citing unpublished federal or
25 other non-Arizona decisions in the face of controlling published Arizona authority
26 or by misrepresenting the weight of such decisions, the Arizona courts are well able

1 to identify and deal with such abuses. The proposed amendments also include an
2 additional safeguard requiring that when unpublished federal or other non-Arizona
3 decisions are cited but are not available in a publicly accessible electronic database,
4 the citing party must provide copies of such decisions to the court.

5 Likewise, the State Bar does not anticipate that the proposed amended rules
6 would unduly burden litigants in the Arizona courts. First, attorneys are already
7 subject to a similar rule when practicing in the federal courts. *See Fed. R.*
8 *App. P. 32.1* (permitting citation to unpublished federal decisions issued after
9 January 1, 2007). Second, given how legal research is typically conducted,
10 allowing citation to unpublished decisions would not dramatically increase attorney
11 workloads. Many attorneys already review unpublished decisions that are available
12 on electronic research databases simply because they come up with other search
13 results and because, even if unpublished, they give attorneys insight about the
14 courts' receptivity to particular applications of the established law and can serve as
15 sources for published decisions.

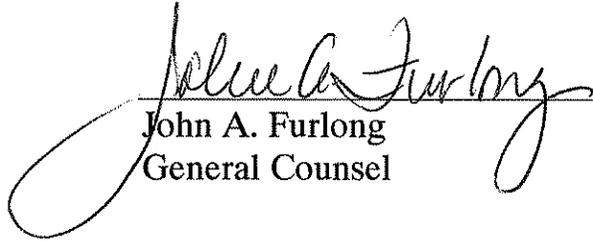
16 Finally, at least some empirical research suggests that where more permissive
17 citation rules are allowed, concerns that the increased burden on courts and
18 attorneys would overwhelm the system have not been realized. *See Thomas L.*
19 *Hudson, Make Memoranda Decisions Available Online and Allow Them to Be*
20 *Cited as Persuasive Authority*, ARIZONA ATTORNEY, June 2006, at 14, 20
21 (summarizing the results of a research study conducted by the Federal Judicial
22 Center).

23 CONCLUSION

24
25 The State Bar of Arizona respectfully requests that the Court adopt the
26 petitioner's proposed rule amendments.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

RESPECTFULLY SUBMITTED this 31ST day of March, 2011.


John A. Furlong
General Counsel

Electronic copy filed with the Clerk
of the Supreme Court of Arizona
this 31ST day of March, 2011.

By: Kathleen A. Lundgren

A copy was mailed to:
Thomas L. Hudson, Bar No. 014485
Osborn Maledon PA
2929 North Central Avenue, Suite 2100
Phoenix, AZ 85012

this 31ST day of March, 2011.

By: Kathleen A. Lundgren