

1 WILLIAM G. MONTGOMERY
2 MARICOPA COUNTY ATTORNEY
(FIRM STATE BAR NO. 00032000)

3 MARK C. FAULL
4 CHIEF DEPUTY
301 WEST JEFFERSON STREET, SUITE 800
5 PHOENIX, ARIZONA 85003
TELEPHONE: (602) 506-3800
(STATE BAR NUMBER 011474)

6 IN THE SUPREME COURT OF THE STATE OF ARIZONA

7 IN THE MATTER OF:

R-10-0032

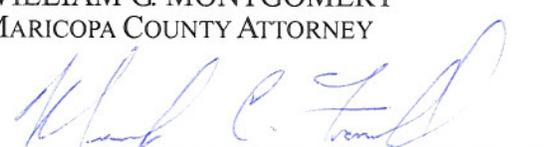
8 PETITION TO AMEND RULE 111 OF THE
9 ARIZONA RULES OF THE SUPREME
COURT AND RULE 28 OF THE ARIZONA
10 RULES OF CIVIL APPELLATE
PROCEDURE.

MARICOPA COUNTY ATTORNEY'S
COMMENT TO PETITION TO AMEND
RULE 111 OF THE ARIZONA RULES OF
THE SUPREME COURT AND RULE 28 OF
THE ARIZONA RULES OF CIVIL
APPELLATE PROCEDURE

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

13 Respectfully submitted this 20th day of May, 2011.

14 WILLIAM G. MONTGOMERY
15 MARICOPA COUNTY ATTORNEY

16 BY: 

17 Mark C. Faull
18 Chief Deputy
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1 **I. BACKGROUND.**

2 Thomas L. Hudson, Osborn Maledon PA, has petitioned this Court to amend Rule 111 of
3 the Arizona Rules of the Supreme Court and Rule 28 of the Arizona Rules of Civil Appellate
4 Procedure.¹ These Rules govern the publication and use of written dispositions made by the
5 Supreme Court and Court of Appeals.

6 Both Rules define an “opinion” as a “written disposition of a matter which is intended for
7 publication.” Rule 111(a)(1), Rule 28(a)(1). Both Rules define a “memorandum decision” as a
8 written disposition “not intended for publication.” Rule 111(a)(2), Rule 28(a)(2). Both Rules
9 provide that “publication” is the “distribution of *opinions*” to publishing companies for inclusion
10 in printed and bound volumes. Rule 111(a)(4); Rule 28(a)(4): A.R.S. § 12–107 (“[t]he opinions
11 shall be published in suitable volumes which shall. . . be printed and bound.”) Thus,
12 memorandum decisions available on electronic databases are not “published” dispositions under
13 the express terms of the Rules and related statutes.

14 Rule 111(c) and Rule 28(c) expressly provide that “[m]emorandum decisions shall not be
15 regarded as precedent nor cited in any court” except under two limited circumstance, neither of
16 which is relevant to the proposed amendments. Arizona courts have held that this citation
17 prohibition applies equally to memorandum decisions issued by Arizona courts and courts in
18 other jurisdictions, including all federal courts. *Kriz v. Buckeye Petroleum Co.*, 145 Ariz. 374,
377 n. 3, 701 P.2d 1182, 1185 n. 3 (1985) (treating memorandum decisions from the District
Court of the District of Arizona the same as memorandum decisions of our state courts); *Walden*

19 ¹ The Petition does not seek to amend Rule 31.24 of the Arizona Rules of Criminal Procedure, the language of
20 which is identical to that contained in Rule 111(c) of the Rules of the Supreme Court.

1 *Books Co. v. Department of Revenue*, 198 Ariz. 584, 589, ¶ 23, 12 P.3d 809, 814 (App. 2000)
2 (treating memorandum decisions issued by other state courts the same as memorandum decisions
3 issued by Arizona courts).

4 **II. SUMMARY OF PROPOSED CHANGES.**

5 The Petition seeks to amend Rule 111 and Rule 28 to allow litigants to cite to *non-*
6 *Arizona* memorandum decisions for persuasive value, unless such citation is prohibited by the
7 issuing jurisdiction. Notably, the Petition does not seek to lift the prohibition on citations to
8 memorandum decisions issued by Arizona courts.

9 **III. ARGUMENTS IN OPPOSITION.**

10 The Maricopa County Attorney’s Office opposes the proposed amendments for the
11 following reasons.

12 First, it would indeed be an anomaly to permit litigants in Arizona to cite memorandum
13 decisions issued by courts in other jurisdictions as persuasive authority on issues impacting
14 Arizona law, while those very same litigants are prohibited from citing memorandum decisions
15 issued by Arizona courts directly addressing Arizona law. The Petition offers no valid reason to
16 implement such a dichotomous citation policy.

17 Second, Arizona courts are the sole arbiters of Arizona law and, thus, Arizona state law
18 does not develop in federal court. *Pool v. Superior Court (Fahringer)*, 139 Ariz. 98, 108, 677
19 P.2d 261, 271 (1984) (Arizona courts interpret our own state law and do not necessarily follow
20 federal precedent). Permitting citation to “unpublished” decisions issued by the Ninth Circuit
21 Court of Appeals—the circuit with the highest rate of reversal on matters of federal law²—for

2 ² Diarmuid F. O’Scannlain, *A Decade of Reversal: The Ninth Circuit’s Record in the Supreme Court Since October Term 2000*, 14:4 LEWIS & CLARK L.REV. 1557, 1564 (2010).

1 persuasive value on matters of Arizona state law is more apt to muddy the waters rather than to
2 provide clarity and direction.

3 Third, permitting litigants to rely on unpublished opinions issued by courts in other
4 jurisdictions would compound the burdens and costs of legal research necessary for effective
5 representation. Counsel will have to be hyper-vigilant to ensure that he or she, as well as
6 opposing counsel, are correctly following the citation policies in effect in issuing jurisdictions.
7 For example, the Iowa rule permits citation to unpublished decisions but requires counsel to
8 search for and disclose any “subsequent disposition of the unpublished opinion.” Iowa Ct. R.
9 App. P. 6.14(5)(b). In addition, civil attorneys could risk malpractice claims, and criminal
10 attorneys ineffective assistance claims, if they fail to search for and cite every possible
11 “unpublished” disposition in all jurisdictions that permit such citation.

12 Fourth, the potential prejudice caused by disparate access to unpublished opinions
13 warrants a complete prohibition on citation to any memorandum decision for any purpose. *Pro*
14 *se* litigants—particularly defendants in criminal cases—have limited access to legal research
15 materials and no access to computerized databases where memorandum decisions are
16 “published.” Large firms and government agencies, on the other hand, have considerably more
17 resources at their disposal. Principles of fundamental fairness call for a more level playing field
18 where no litigant is permitted to cite any memorandum decision for any purpose.

19 There is no meritorious reason to amend the Rules when there is a simple alternative—
20 that is, litigants are free to advance the reasoning and supporting authorities contained in the
21 “unpublished” memorandum decision without attributing it to its source.

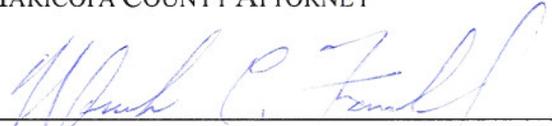
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1 **IV. CONCLUSION.**

2 For all the foregoing reasons, the Maricopa County Attorney's Office opposes the
3 Petition to Amend Rule 111 of the Rules of the Supreme Court and Rule 28 of the Arizona Rules
4 of Civil Appellate Procedure.

5 Respectfully submitted this 20th of May, 2011.

6 WILLIAM G. MONTGOMERY
7 MARICOPA COUNTY ATTORNEY

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