

# PERSUADING THE COURT WITH PERSUASIVE AUTHORITY: LIFTING ARIZONA’S BAN ON CITATIONS TO MEMORANDUM DECISIONS

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*Before January 1, 2015, Arizona prohibited attorneys and judges from citing memorandum decisions. A change to the Arizona Supreme Court Rules, the Arizona Civil Appellate Procedure Rules, and the Arizona Criminal Rules allows citations to memorandum decisions as persuasive authority. This rule change will ultimately benefit the Arizona legal community because citing memorandum decisions will create consistent case law, assist attorneys and trial judges in close cases, and align Arizona with the national trend favoring citations to memorandum decisions.*

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## INTRODUCTION

At some point, nearly every Arizona attorney has discovered a judicial opinion that is directly on point to a case, only to realize it is a memorandum (or

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unpublished) decision and, therefore, unusable in court. Before January 1, 2015, Arizona Supreme Court Rule 111(c) (the “Former Rule”) prohibited attorneys from citing memorandum decisions.<sup>1</sup> Under the Former Rule, Arizona judges issued memorandum decisions in a number of circumstances, including when cases contained convoluted facts or when attorneys appearing before the court inadequately argued cases.<sup>2</sup> This regime allowed judges to resolve matters quickly without going into the level of analysis required for published opinions.<sup>3</sup> While judges widely agree that memorandum decisions should not be binding authority, many judges now believe that it would be beneficial to cite memorandum decisions as persuasive authority.<sup>4</sup>

A recent change to Arizona Supreme Court Rule 111, Arizona Civil Appellate Procedure Rule 28, and Arizona Criminal Rule 31.24 (collectively, the “New Rule”) allows attorneys “to cite to memorandum decisions in a considered and meaningful way.”<sup>5</sup> Specifically, the New Rule allows memorandum decisions to be cited “for persuasive value, but only if [the decision] was issued on or after January 1, 2015; no opinion adequately addresses the issue before the court; and the citation is not to a depublished opinion or a depublished portion of an opinion.”<sup>6</sup> Attorneys who cite memorandum decisions must indicate that the

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1. “Memorandum decisions shall not be regarded as precedent nor cited in any court except for (1) the purpose of establishing the defense of *res judicata*, collateral estoppel, or the law of the case, or (2) informing the appellate court of other memorandum decisions so that the court can decide whether to issue a published opinion, grant a motion for reconsideration, or grant a petition for review.” ARIZ. R. SUP. CT. 111(C) (amended 2015).

2. Am. Acad. of Appellate Lawyers, Comment to *R-14-0004 Rule 111 Rules of Arizona Supreme Court, Rule 28 AZ Rules of Civil Appellate Procedure, Rule 31.24 AZ Rules of Criminal Procedure*, at 2, CT. RULES FS. (May 19, 2014, 7:24 PM), <http://www.azcourts.gov/Rules-Forum/aft/446> (arguing that judges may have chosen to designate an opinion as a memorandum decision due to confusing facts or poor arguments).

3. Mark Faull, Chief Deputy Maricopa County Attorney, Comment to *R-14-0004 Rule 111 Rules of Arizona Supreme Court, Rule 28 AZ Rules of Civil Appellate Procedure, Rule 31.24 AZ Rules of Criminal Procedure*, at 3, CT. RULES FS. (May 20, 2014, 7:09 PM), <http://www.azcourts.gov/Rules-Forum/aft/446> (“Knowing that the memorandum decision is not creating precedent and it cannot be cited, the court can resolve cases without historical analysis or lengthy explanation regarding the development of the law which might be needed in a precedent creating opinion.”).

4. Hon. John C. Gemmill et al., Comment to *R-14-0004 Rule 111 Rules of Arizona Supreme Court, Rule 28 AZ Rules of Civil Appellate Procedure, Rule 31.24 AZ Rules of Criminal Procedure*, CT. RULES FS. (May 14, 2014, 5:38 PM), <http://www.azcourts.gov/Rules-Forum/aft/446> (“[T]he time has come for the [Former Rule] to be amended. Arizona should allow limited citation of memorandum decisions when there is no published opinion on point.”).

5. E-mail from Sara Agne, Petitioner for Amendment to ARIZ. R. SUP. CT. 111(c), ARIZ. R. CIV. APP. P. 28(f), and ARIZ. R. CRIM. P. 31.24, to author (July 17, 2015, 11:46 AM) (on file with author).

6. ARIZ. R. SUP. CT. 111(c)(1)(C). The New Rule also allows for citations to unpublished decisions from other jurisdictions. *Id.* 111(d). Attorneys can cite to memorandum decisions from foreign jurisdictions if the foreign jurisdiction allows citations to unpublished decisions and if those unpublished decisions were issued after January 1, 2015. *Id.*

decision is a memorandum decision and provide a web link or copy of the decision to the court.<sup>7</sup> Although the New Rule allows attorneys to cite memorandum decisions, it does not create a new duty requiring attorneys to do so.<sup>8</sup> These rule changes “align Arizona with federal courts and other state courts that have ended their bans on citation to unpublished decisions.”<sup>9</sup>

Before the Arizona Supreme Court implemented these changes, it provided legal professionals with an opportunity to comment on the proposed New Rule.<sup>10</sup> Among those parties who filed comments in opposition to the New Rule was a group of five Arizona Court of Appeals judges: Judges Eckerstrom (Div. II), Howard (Div. II), Espinosa (Div. II), Vásquez (Div. II), and Howe (Div. I) (collectively, the “Opponent Judges”).<sup>11</sup> The Opponent Judges argued that the New Rule would: (1) increase the cost of litigation;<sup>12</sup> (2) increase the workload of Arizona courts;<sup>13</sup> (3) cripple the appellate courts’ ability to develop case law;<sup>14</sup> (4) add little to the advocacy toolkit of attorneys;<sup>15</sup> (5) impact Arizona courts differently than courts in other jurisdictions;<sup>16</sup> and (6) provide a remedy for a

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7. *Id.* 111(c)(2)–(3).

8. *Id.* 111(c)(4) (“A party has no duty to cite a memorandum decision.”).

9. *Impacts Report 2014 Table of Contents*, ARIZ. JUD. BRANCH, <http://www.azcourts.gov/rulesimpactreport/2014-Table-of-Contents/Supreme-Court> (last visited Sept. 20, 2015).

10. ARIZ. R. SUP. CT. 28 (“It is the policy of the Arizona Supreme Court to establish an effective process for the adoption, amendment, and repeal of rules of procedure for the courts of this state which will provide for public notice and opportunity for comment . . . on proposals to adopt, amend, or repeal rules.”).

11. Hon. Peter J. Eckerstrom et al., Comment to *R-14-0004 Rule 111 Rules of Arizona Supreme Court, Rule 28 AZ Rules of Civil Appellate Procedure, Rule 31.24 AZ Rules of Criminal Procedure*, CT. RULES FS. (May 14, 2014, 5:01 PM), <http://www.azcourts.gov/Rules-Forum/aft/446>. Additional parties opposed the rule as proposed by the Petitioners, including the Maricopa County Attorney’s Office, which suggested that the New Rule should be applied and observed in civil proceedings before its introduction to criminal cases. Faull, *supra* note 3, at 2.

12. Eckerstrom, *supra* note 11, at 3–5 (“Comprehensive briefs would necessarily contain a section marshaling the most helpful memorandum decisions and distinguishing the others. In litigation, opposing counsel would be similarly compelled to respond to those cases or assume the risk that the trial court will be persuaded by them. The net effect will be more attorney time, and more billable hours, devoted to the research and consideration of memorandum decisions.”).

13. *Id.* at 5–6 (“Because memorandum decisions would only be persuasive to the extent they amplify, but do not conflict with, Arizona published opinions, both trial courts and appellate courts will be required to analyze whether and how that additional layer of persuasive authority will influence each case.”).

14. *Id.* at 6–12 (“[P]etitioners’ proposal would greatly hamper the ability of our appellate courts to monitor, direct, and clarify the law by which our trial courts will resolve the cases before them.”).

15. *Id.* at 12–14 (“[N]otwithstanding all of the disclaimers in the proposed rule itself, to allow citation of memorandum decisions is to transform those decisions into a species of precedent.”).

16. *Id.* at 15–16 (“[W]e should be reluctant to draw any substantial conclusions from the experience of other states in the absence of more careful study conducted by an independent committee from our own state.”).

problem that did not exist under the Former Rule.<sup>17</sup> While these concerns are legitimate, the benefits of the New Rule outweigh the potential costs.

The New Rule will benefit the legal community in three ways. First, the New Rule will result in a more defined and consistent application of Arizona case law.<sup>18</sup> Second, the New Rule will provide attorneys with more resources to use when advocating for their clients. And third, the New Rule will align Arizona with other jurisdictions, thereby following the national trend favoring the citation of memorandum decisions.

Part I of this Note provides a brief history of Arizona's rule on citations to memorandum decisions. Part II describes how the New Rule encourages consistent case law in Arizona. Part III examines the ways in which Arizona attorneys will utilize memorandum decisions to their clients'—and judges'—benefit. Part IV looks at the New Rule's effect on judicial economy. And Part V briefly examines the growing national acceptance of citations to memorandum decisions and the trend's application to the Arizona judicial system.

## I. A BRIEF HISTORY OF MEMORANDUM DECISIONS IN ARIZONA

In 1973, the Arizona Supreme Court banned citations to memorandum decisions.<sup>19</sup> This prohibition came shortly after the Judicial Conference of the United States recommended each federal district rewrite its rules to discourage citations to unpublished decisions.<sup>20</sup> In 2000, the Eighth Circuit Court of Appeals issued an opinion that brought the debate over unpublished decisions back to the forefront of the legal community; *Anastasoff v. United States* held that it is not within the judiciary's power to designate an opinion as nonprecedential.<sup>21</sup>

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17. *Id.* at 16–17 (“[P]etitioners have not identified any meaningful problem created by the current rule. . . . And, although petitioners contend that the rule change would promote clarity and consistency in the law, they make no argument, and present no evidence, that our current jurisprudence is deficient in either respect.”).

18. *See* Hon. Carmine Cornelio, Comment to *R-14-0004 Rule 111 Rules of Arizona Supreme Court, Rule 28 AZ Rules of Civil Appellate Procedure, Rule 31.24 AZ Rules of Criminal Procedure*, at 1 n.1, CT. RULES FS. (June 4, 2014, 5:22 PM), <http://www.azcourts.gov/Rules-Forum/aft/446> (describing how relevant case law for a trial could only be found in a memorandum decision, not in published opinions); Thomas L. Hudson, Attorney at Osborn Maledon PA, Comment to *R-14-0004 Rule 111 Rules of Arizona Supreme Court, Rule 28 AZ Rules of Civil Appellate Procedure, Rule 31.24 AZ Rules of Criminal Procedure*, CT. RULES FS. (May 15, 2014, 2:58 PM), <http://www.azcourts.gov/Rules-Forum/aft/446> (noting that some legal issues can only be found in memorandum decisions); Patrick J. Schiltz, *The Citation of Unpublished Decisions in the Federal Courts of Appeals*, 74 *FORDHAM L. REV.* 23, 43 (2005) (“The evidence is overwhelming that unpublished opinions are indeed a valuable source of ‘insight and information.’”) (internal citation omitted).

19. Donn G. Kessler & Thomas L. Hudson, *Losing Cite: A Rule's Evolution*, 42 *ARIZ. ATT'Y* 10, 11 (2006).

20. *Id.* at 10.

21. 223 F.3d 898 (8th Cir.), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc); *see also* Kessler, *supra* note 19, at 10.

Although the decision was later vacated as moot,<sup>22</sup> it rekindled a debate that resulted in jurisdictions across the United States changing their citation rules. Groups, such as the American Bar Association, encouraged federal appellate courts to make unpublished decisions more accessible and to allow attorneys to cite to unpublished decisions.<sup>23</sup> Then, in 2006, after the Federal Judicial Center provided empirical research on the impact of allowing citations to unpublished decisions,<sup>24</sup> the Supreme Court adopted Federal Rule of Appellate Procedure 32.1. This rule prevents any federal appellate court from prohibiting citations to unpublished decisions issued after January 1, 2007.<sup>25</sup> Since then, over 30 states have adopted similar rules allowing citations to unpublished decisions.<sup>26</sup>

In 2004, the Arizona legal community began contemplating a change to the Arizona Supreme Court Rules that would allow attorneys to cite memorandum decisions.<sup>27</sup> The Civil Practice and Procedure Committee of the Arizona State Bar formed a subcommittee to examine the issue, and the subcommittee ultimately recommended that the Arizona Supreme Court change its rules regarding citation to memorandum decisions.<sup>28</sup>

However, it took over ten years to implement the subcommittee's recommendation. Three attempts to change the publication rule were presented to the Arizona Supreme Court before a successful petition resulted in the New Rule.<sup>29</sup> The first petition, submitted in 2006, advocated for a change that would require the Arizona Appellate Court to issue a published opinion in any case of first

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22. *Anastasoff*, 235 F.3d at 1056 (“The constitutionality of that portion of Rule 28A(i) which says that unpublished decisions have no precedential effect remains an open question in this Circuit.”).

23. David L. Abney, Attorney at Knapp & Roberts, P.C., Comment to *R-14-0004 Rule 111 Rules of Arizona Supreme Court, Rule 28 AZ Rules of Civil Appellate Procedure, Rule 31.24 AZ Rules of Criminal Procedure*, at 1 n.1, CT. RULES FS. (Apr. 1, 2014, 7:21 PM), <http://www.azcourts.gov/Rules-Forum/aft/446> (citing ABA Secs. of Litig., Crim. Justice, Tort and Ins. Practice & Senior Lawyers Div., Report to the House of Delegates: Res. No. 01A115 (2001)) (“[T]he American Bar Association’s House of Delegates urged federal appellate courts to ‘make their unpublished opinions available through print or electronic publications [and] publicly accessible media sites,’ as well as to ‘permit citation to relevant unpublished opinions.’”).

24. TIM REAGAN ET AL., FED. JUDICIAL CTR., CITATIONS TO UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS: PRELIMINARY REPORT (2005), [http://www.fjc.gov/public/pdf.nsf/lookup/citatio1.pdf/\\$file/citatio1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/citatio1.pdf/$file/citatio1.pdf).

25. FED. R. APP. P. 32.1(a) (“A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like; and (ii) issued on or after January 1, 2007.”).

26. See Barry D. Halpern et al., Attorneys at Snell & Wilmer L.L.P., *Petition to Amend Rule 111 Rules of Arizona Supreme Court, Rule 28 AZ Rules of Civil Appellate Procedure, Rule 31.24 AZ Rules of Criminal Procedure*, at 7, app. b, CT. RULES FS. (Jan. 9, 2014, 4:55 PM), <http://www.azcourts.gov/Rules-Forum/aft/446>.

27. Kessler, *supra* note 19, at 11.

28. *Id.* at 11–12.

29. Sara J. Agne, *A People’s History of the Citation of Memorandum Decisions in Arizona*, 51 ARIZ. ATT’Y 48, 48 (2015).

impression.<sup>30</sup> The second petition, submitted a year later,<sup>31</sup> argued that: (1) memorandum decisions should be made more accessible; (2) attorneys should be allowed to cite unpublished decisions issued by other jurisdictions; and (3) attorneys should be able to cite memorandum decisions as persuasive authority if there is no published opinion on point, though such citations should be discouraged.<sup>32</sup> The third petition, submitted in 2010, took a narrower focus.<sup>33</sup> It simply argued for an amendment that would allow attorneys to cite unpublished decisions from other jurisdictions as long as the other jurisdiction allowed citations to those same unpublished decisions.<sup>34</sup> The successful petition of Barry Halpern, Sara Agne, and Joy Isaacs (collectively, the “Petitioners”) included elements of the earlier petitions, such as the use of memorandum decisions as persuasive authority<sup>35</sup> and the ability to cite unpublished decisions from other jurisdictions.<sup>36</sup> Despite the opposition of various groups, in September 2014, the Arizona Supreme Court adopted the New Rule because of the benefits they believed it would provide to Arizona’s legal community.<sup>37</sup>

## II. THE NEW RULE ADDS CONSISTENCY AND DEFINITION TO ARIZONA CASE LAW

The Petitioners began their argument by explaining how the New Rule promotes consistency.<sup>38</sup> Permitting citations to memorandum decisions addresses concerns that judges may apply laws differently to similar fact patterns without an explanation.<sup>39</sup> Under the Former Rule, judges may have used memorandum decisions to deal with cases contaminated by bad facts or poor advocacy because the Former Rule prohibited citation to memorandum decisions.<sup>40</sup> Now, the New

30. *Id.* at 50 n.5.

31. *Id.*

32. Robert Van Wyck, Chief Bar Counsel, *Petition to Amend Rule 111 of the Arizona Supreme Court, Rule 28 AZ Rules of Civil Appellate Procedure, Rule 31.24 AZ Rules of Criminal Procedure*, at 4–7, CT. RULES FS. (Dec. 11, 2007, 12:28 PM), <http://www.azcourts.gov/Rules-Forum/aft/148>.

33. Thomas L. Hudson, Attorney at Osborn Maledon PA, *Petition to Amend Rule 111 Arizona Rules of the Supreme Court and Rule 28 of the Arizona Rules of Civil Appellate Procedure, Rule 31.24 AZ Rules of Criminal Procedure*, at 1 n.1, CT. RULES FS. (Aug. 13, 2010, 1:45 PM), <http://www.azcourts.gov/Rules-Forum/aft/283>.

34. *Id.* at 4.

35. ARIZ. R. SUP. CT. 111(c)(1)(C); *see generally* Halpern, *supra* note 26.

36. ARIZ. R. SUP. CT. 111(d).

37. Order Amending Rule 111, Rules of the Arizona Supreme Court and Rule 31.24, Arizona Rules of Criminal Procedure (Sept. 2, 2014), <http://www.azcourts.gov/Portals/20/2014%20August%20Rules/R140004.pdf>.

38. *See* Halpern, *supra* note 26, at 5.

39. *See id.* (“Prohibiting citation to memorandum decisions for at least their persuasive value prevents parties from arguing that a court should act consistently with its prior official action.”); Schiltz, *supra* note 18, at 44 (quoting Letter from Kenneth F. Ripple, Circuit Judge, U.S. Court of Appeals for the Seventh Circuit, to Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules 1–2 (Feb. 12, 2004)) (“[U]npublished orders often address recurring issues of adjective law rarely covered in published opinions.”).

40. Eckerstrom, *supra* note 11, at 8 (“In [some] cases . . . the record might have been incomplete, inhibiting proper review. Counsel may have failed to prevail on an

Rule encourages judges to consider an audience beyond the parties of the case when writing a memorandum decision. This consideration should lead judges to include an explanation of how the law applied to that particular set of facts, and why it should not apply to other situations. Over time, this should result in a more consistent and defined body of case law.

There are many reasons judges choose to resolve a case with a memorandum decision rather than a published opinion.<sup>41</sup> For example, it is possible that the deciding court believed the legal representation was inadequate<sup>42</sup> and did not want the case to result in binding precedent for that reason. Similarly, several commenters on the New Rule—including the American Academy of Appellate Lawyers, Division II, Arizona Court of Appeals Judges Miller and Kelly, and Pima County Superior Court Judge Herrington—suggested that judges might not publish an opinion because the case had confusing or incomplete facts, or because the issues of law were not well argued.<sup>43</sup> Opponents to the New Rule feared that the New Rule would lead to the inappropriate citation and application of outlier cases.<sup>44</sup> However, the contents of newly written memorandum decisions and the structure of the New Rule itself should prevent this.

In order to prevent a decision from being applied incorrectly in the future, judges can explain why the result is appropriate only in the present case and highlight the case's unique facts or difficulties.<sup>45</sup> This should have two effects. First, it will better explain to a reader how the judge arrived at the result in that particular case. Second, divergent results in the application of law will help define

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otherwise good claim because they failed to cogently marshal important arguments and authorities, or those arguments may have been waived by trial counsel.”).

41. See Thomas L. Hudson, *Make Memoranda Decisions Available Online and Allow Them To Be Cited as Persuasive Authority*, 42 ARIZ. ATT'Y 14, 16 (2006) (arguing that memorandum decisions “give the Court of Appeals the power, in effect, to ‘hide’ a decision by deeming it a memorandum decision”).

42. See Hon. Michael Miller et al., Comment to *R-14-0004 Rule 111 Rules of Arizona Supreme Court, Rule 28 AZ Rules of Civil Appellate Procedure, Rule 31.24 AZ Rules of Criminal Procedure*, at 7–8, CT. RULES FS. (May 9, 2014, 12:04 PM), <http://www.azcourts.gov/Rules-Forum/aft/446> (internal citations omitted) (“[I]ncomplete records or minimal briefing could weaken the court’s confidence in the legal discussion outside the confines of the particular case. It is important to recall that parties are entitled to full judicial review of a trial court judgment, but it is their responsibility to provide the necessary portions of the record, pertinent argument, and supporting authority.”).

43. Am. Acad. of Appellate Lawyers, *supra* note 2, at 3 (observing that judges may choose to issue a memorandum decision because a case “involve[s] troublesome fact patterns likely to confuse rather than clarify” or “has been inadequately briefed and argued”); see also Miller, *supra* note 42, at 7–8.

44. Miller, *supra* note 42, at 7–8.

45. Am. Acad. of Appellate Lawyers, *supra* note 2, at 3 (“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.”); Hudson, *supra* note 41, at 16 (quoting JOHN RAWLS, *A THEORY OF JUSTICE* 235, 237 (1971)) (“[T]he precept that like decisions be given in like cases’ imposes an important check on ‘the discretion of judges’ by ‘forcing them to justify the distinctions that they make between persons by reference to the relevant legal rules and principles.’”).

the law by explaining how a certain legal issue applies to different fact patterns.<sup>46</sup> Over time, the New Rule will help better define Arizona case law and explain how the law applies to a wide range of factual scenarios.

The second answer to the Opponents' concern that memorandum decisions will be misused lies in the New Rule's structure. The New Rule has three features to ensure memorandum decisions are not given more weight than they deserve. First, the New Rule only allows attorneys to use memorandum decisions as persuasive authority.<sup>47</sup> Judges can use their discretion to determine whether a memorandum decision is relevant to a certain case because judges do not have to follow, or even discuss, persuasive authority.<sup>48</sup> Thus, when a memorandum decision contains weak legal arguments or confusing facts, judges can choose to assign minimal persuasive value to that decision.<sup>49</sup>

Some opponents expressed concern that citing memorandum decisions would be tantamount to making memorandum decisions binding precedential authority.<sup>50</sup> However, the judiciary holds the solution to this problem. As discussed above, judges will have the discretion to determine how much weight to give a memorandum decision.<sup>51</sup> Ultimately, the actions of the appellate judges will

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46. Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 768 (2003) ("In areas of law where factual settings are diverse—due care, bad faith, unconscionability, reasonableness, duress, and proximate cause—which is perhaps the bulk of law, the true content of law is known not by the verbal rule formulations but by the application of those verbal formulations to specific settings."); *see also* Hudson, *supra* note 41, at 16 ("[I]t is one thing to know that there is a single published decision on point, and quite another to know that the Court of Appeals in 15 memoranda decisions has consistently applied that same rule.").

47. *See* ARIZ. R. SUP. CT. 111(c)(1)(C).

48. Geoffrey M. Trachtenberg, Attorney at Levenbaum Trachtenbaum, PLC, Comment to *R-14-0004 Rule 111 Rules of Arizona Supreme Court, Rule 28 AZ Rules of Civil Appellate Procedure, Rule 31.24 AZ Rules of Criminal Procedure*, at 2, CT. RULES FS. (Apr. 2, 2014, 4:30 PM), <http://www.azcourts.gov/Rules-Forum/aft/446> ("The phrase 'persuasive value' clearly means the case is 'not binding' and there is *never* a requirement for a court to 'distinguish or otherwise discuss' a case.") (emphasis added); *see also* Lincoln Combs, Attorney at Gallagher & Kennedy, P.A., Comment to *R-14-0004 Rule 111 Rules of Arizona Supreme Court, Rule 28 AZ Rules of Civil Appellate Procedure, Rule 31.24 AZ Rules of Criminal Procedure*, CT. RULES FS. (Mar. 31, 2014, 6:08 PM), <http://www.azcourts.gov/Rules-Forum/aft/446> ("The [New Rule] change strikes the correct balance between allowing reasonable use of helpful, persuasive legal analysis while ensuring that it does not become conflated with binding or precedential authority.").

49. *See* Am. Acad. of Appellate Lawyers, *supra* note 2, at 3 ("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.").

50. Faull, *supra*, note 3, at 5. ("It is difficult to imagine a judge reaching a different conclusion in the face of a memorandum decision from a higher court that is directly on point.")

51. Hudson, *supra* note 41, at 18 ("[T]he label 'memorandum decision' will serve to notify judges and litigants that they should view the decision cautiously and for persuasive value only on the basis of its reasoning and analysis.").



determine the weight that trial judges afford memorandum decisions. If appellate judges disregard memorandum decisions in their rulings, then trial judges are less likely to treat those decisions as quasi-precedential.

Second, the structure of the New Rule limits the risk of inappropriate citation by requiring that attorneys notify opposing counsel of their use of memorandum decisions. Under the New Rule attorneys must provide a copy of, or link to, the memorandum decisions to the court.<sup>52</sup> Opposing counsel could then argue why that decision should not influence the judge's ruling and that the appellate court explicitly designated the decision as nonbinding on lower courts.<sup>53</sup>

Third, the New Rule's prospective limitation prevents citations to old memorandum decisions.<sup>54</sup> Attorneys cannot cite memorandum decisions issued before January 1, 2015. Going forward, judges will know that attorneys can cite their memorandum decisions to the court as persuasive authority. With this knowledge, judges will be careful to explain why and how the law applied to a specific fact pattern. Because judges know that their memorandum decisions are citable under the New Rule, they will have the ability to write the decision so that there is no question as to whether a decision should apply to a particular set of facts in the future.

Opponents also expressed concern that the New Rule will negatively impact the development of Arizona's jurisprudence. Instead of a slow and steady development of case law, the Opponent Judges feared an influx of memorandum decisions would make Arizona case law unclear.<sup>55</sup> However, judges will still control the development of Arizona case law. All authority adds to the development of case law, whether the authority comes from a published opinion or a memorandum decision.<sup>56</sup> Applying the same law to a wide variety of factual scenarios will better explain the contours of the law's application.<sup>57</sup> Judges will still be responsible for the development of Arizona's case law; the difference is that attorneys will now have access to the full spectrum of the law's application.

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52. ARIZ. R. SUP. CT. 111(c)(3).

53. See Hudson, *supra* note 41, at 18; Trachtenberg, *supra* note 48, at 3.

54. ARIZ. R. CIV. APP. P. 111(c)(1)(C); Barry D. Halpern et al., Attorneys at Snell & Wilmer L.L.P., Reply Comment to R-14-0004 Rule 111 Rules of Arizona Supreme Court, Rule 28 AZ Rules of Civil Appellate Procedure, Rule 31.24 AZ Rules of Criminal Procedure, at 12, CT. RULES FS. (June 30, 2014, 5:32 PM), <http://www.azcourts.gov/Rules-Forum/aft/446> (“[C]oncern regarding existing unpublished decisions that are ‘just plain goofy’ may be remedied by Petitioners’ proposal to make the amended rule prospective only.”).

55. Eckerstrom, *supra* note 11, at 9.

56. See Cappalli, *supra* note 46, at 768 (“Even if resolution of the new case is easy, the new decision has precedential value because the rule has been applied to a fact variation.”).

57. See *id.* at 769 (citing RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 165–166 (1996)) (“The greater the number of precedents, the greater the volume of law, the greater the number of solutions to legal issues, and the easier it would be to determine whether an authoritative answer to a legal issue has been judicially sanctioned.”).

The New Rule will force judges to write more detailed memorandum decisions that attorneys can use to distinguish between similar cases.<sup>58</sup> Though this will probably increase the workload of judges, the benefits of more defined case law outweigh this drawback.<sup>59</sup> Even if judges are initially reluctant to write detailed decisions, the citation of memorandum decisions with similar facts and different holdings will encourage appellate courts to explain the differences.<sup>60</sup> As a consequence, the New Rule will result in a more consistent and defined body of case law.

### III. BENEFITS TO LEGAL PROFESSIONALS

In addition to creating more consistent and defined case law, the New Rule will benefit Arizona legal professionals. First, the New Rule will allow attorneys and judges to cite memorandum decisions that fill gaps in Arizona case law left by published opinions. Second, despite fears regarding the implementation of the New Rule, its structure and the courts will ensure that it does not negatively affect attorneys.

#### A. *Guidance in the Gap*

The New Rule allows attorneys to cite memorandum decisions when there is no controlling authority on point.<sup>61</sup> Often, published opinions do not address a given issue. Sometimes, the analysis of an issue is tucked in a memorandum decision. The Former Rule's restriction often left attorneys and judges frustrated because attorneys could not use memorandum decisions to persuade the court.<sup>62</sup> The lack of precedential authority could be attributed to anything from bad facts, as some proponents of the New Rule suggest, to an appellate court testing out a new legal theory before making it binding on the lower courts.<sup>63</sup>

Proponents of the New Rule can readily point to gaps left in case law by precedential authority. For example, Pima County Superior Court Judge Cornelio experienced just such a gap in a trial over which he presided.<sup>64</sup> A party in the case

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58. See Eckerstrom, *supra* note 11, at 6 (“[T]he Arizona Court of Appeals would carry a new burden of harmonizing or distinguishing all the reasoning found in its numerous previous memorandum decisions in resolving claims—or risk the appearance of inconsistency.”).

59. See *infra* Part V.

60. See Hudson, *supra* note 41, at 18 (“[I]f the superior court reaches an incorrect result on the basis of a memorandum decision, that will serve to inform the Court of Appeals that the law is in need of clarification.”).

61. ARIZ. R. CIV. APP. P. 111(c)(1)(C).

62. See Hudson, *supra* note 18 (“The reality is, sometimes an issue is only addressed in a memorandum decision . . . There is no sound reason why [such a] decision should not be cited the next time this same issue arises.”); David R. Cleveland, *Draining the Morass: Ending the Jurisprudentially Unsound Unpublication System*, 92 MARQ. L. REV. 685, 737 (2009) (noting that Chief Justice Roberts has expressed frustration over being unable to cite to an unpublished decision).

63. Agne, *supra* note 29, at 49.

64. Cornelio, *supra* note 18, at 1 n.1.

found an on-point memorandum decision addressing a specific issue.<sup>65</sup> The Former Rule, however, prohibited the parties from bringing the decision to Judge Cornelio's attention.<sup>66</sup> The memorandum decision could have filled that gap in case law. Judge Cornelio's experience was not a one-off event, but rather representative of the experiences of many Arizona legal professionals.<sup>67</sup>

With the New Rule, attorneys can direct judges' attention to memorandum decisions that fill in gaps in Arizona case law. As a result, memorandum decisions will assist trial judges in making difficult rulings because the decisions will provide additional guidance on the application of the law in close cases.<sup>68</sup>

The New Rule will also benefit appellate judges because attorneys will cite contradicting memorandum decisions and thus draw appellate judges' attention to inconsistent rulings. As John Furlong, general counsel for the Arizona State Bar, argued, judges want to be aware of conflicting decisions before ruling on a case.<sup>69</sup> Because of the New Rule, appellate judges will now have a chance to reconcile conflicting case law.

The New Rule results in memorandum decisions filling in gaps left by precedential authority. In other words, the New Rule addresses the absence of law, which is a genuine concern of Arizona attorneys and judges who do not want to operate without guidance from higher courts.

#### ***B. The New Rule as a New Tool***

The first issue facing Arizona attorneys following the New Rule's implementation is the dilemma of how to incorporate the new authority into arguments to the court. Some opponents seized upon this possible confusion in their comments against the New Rule. The Maricopa County Attorney's Office suggested that the Former Rule was superior to the New Rule because of its clear

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65. *Id.*

66. *Id.*

67. For example, in his comment to the proposed New Rule, Thomas Hudson cited a memorandum decision that addresses "whether a party is entitled to post-judgment interest on an award of prejudgment interest." Hudson, *supra* note 18. Although the appellate court noted that "no reported Arizona case expressly resolves the issue," it did not issue a ruling in the form of a published opinion. *Id.* (citing Markham Contracting Co. v. First Am. Title Ins., No. 1 CA-CV 12-0195, 2013 WL 3828690, at \*14 (Ariz. Ct. App. 2013)).

68. See Hudson, *supra* note 41, at 42; Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 746-47 (2001) (addressing the same issue multiple times results in "contextual richness for the evolution of circuit precedent").

69. John Furlong, Arizona State Bar General Counsel, Comment to *R-14-0004 Rule 111 Rules of Arizona Supreme Court, Rule 28 AZ Rules of Civil Appellate Procedure, Rule 31.24 AZ Rules of Criminal Procedure*, at 3-4, CT. RULES FS. (May 9, 2014, 12:33 PM), <http://www.azcourts.gov/Rules-Forum/aft/446> ("[W]here trial and appellate courts have issued conflicting unpublished decisions – which often occurs in newly developing areas of law – judges want to be apprised of the conflicting decisions *before* they decide a case.") (emphasis in original).

division between what types of Arizona decisions attorneys could cite.<sup>70</sup> In its view, the New Rule makes the use of persuasive authority unclear.<sup>71</sup>

However, this argument is without merit. Arizona attorneys have always had a huge source of persuasive authority available to cite to the court. In their comment opposing the New Rule, the Opponent Judges noted:

Arizona's attorneys do not suffer from any lack of citable persuasive authorities. For that purpose, counsel may currently cite the dicta found in Arizona's published opinions, the published jurisprudence of forty-nine other states, the published jurisprudence of twelve federal circuits, and the scholarly observations found in hundreds of American law reviews and academic treatises.<sup>72</sup>

The New Rule will create more clear and persuasive authority. Instead of confusing attempts to persuade a court with case law from another jurisdiction, Arizona attorneys can now cite authority from the state's own case law, even if that authority is only a persuasive memorandum decision. Ultimately, it will be more beneficial for Arizona courts to consider Arizona case law, rather than case law from other jurisdictions, when deciding a case.<sup>73</sup>

Additionally, the New Rule protects attorneys who do not cite memorandum decisions. As Division I, Arizona Court of Appeals Judges Gemmill, Norris, and Swann explained, the New Rule does not create a new duty requiring attorneys to cite memorandum decisions.<sup>74</sup>

The New Rule's potential impact on criminal law attorneys led many to express concern in their comments to the petition. The Maricopa County Attorney's Office was worried criminal attorneys' workloads would increase if they were required to address post-conviction relief petitions that claim counsel was ineffective because of the lack of citations to memorandum decisions and to conduct additional research into memorandum decisions.<sup>75</sup>

However, the New Rule accounts for this problem because it is prospective.<sup>76</sup> Therefore, individuals who were convicted before January 1, 2015

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70. Faull, *supra* note 3, at 6.

71. *See id.* (arguing that the Former Rule "provide[d] clarity and consistency by narrowly defining the cases that serve as precedent").

72. Eckerstrom, *supra* note 11, at 2.

73. *See* Trachtenberg, *supra* note 48, at 1 ("[T]he only decisions that should apply to Arizona rules are decisions of Arizona courts. . . . There are . . . countless rules in other jurisdictions that permit or prohibit citation to various forms of opinions (published or not) depending upon when they were decided . . . or whether an appeal is pending or review is granted . . . . Moreover, there are some jurisdictions that expressly permit citation to unpublished opinions.").

74. Gemmill, *supra* note 4 ("It is important that the amended rules confirm that there is no intention to extend the standard of care for attorneys to reviewing, analyzing, and citing memorandum decisions of this court or other unpublished decisions."); *see also* ARIZ. R. SUP. CT. 111(c)(1)(C).

75. Faull, *supra* note 3, at 2.

76. ARIZ. R. SUP. CT. 111(c)(4).

should not be able to file post-conviction relief petitions arguing their attorney did not cite memorandum decisions. In the future, convicted individuals may try to argue that they should be granted post-conviction relief because their attorney did not cite to memorandum decisions; however, even if criminal attorneys miss a memorandum decision in their arguments to the court, there are still no grounds for post-conviction relief because the New Rule does not create a duty requiring attorneys to cite memorandum decisions. Further, criminal attorneys will probably cite to precedential authority,<sup>77</sup> and petitions for post-conviction relief will have no basis for relief.

To ease opponents' worries, the Arizona Supreme Court could consider an addition or comment to the New Rule that explicitly states that failure to cite memorandum decisions is not grounds for post-conviction relief. Similarly, appellate courts could create case law stating that failure to cite memorandum decisions does not create a basis for post-conviction relief. Although it would take time and effort to implement this addition, doing so would minimize frivolous petitions for post-conviction relief.

Finally, the New Rule will allow attorneys to use unpublished decisions to advocate efficiently for their clients. For example, the Pima County Public Defender's Office and the Opponent Judges suggested that, under the Former Rule, attorneys could draw reasoning from memorandum decisions and use that reasoning in an argument to the court without citing to the decisions.<sup>78</sup> This "mining" method reduces efficiency because attorneys have to reframe the arguments taken from the memorandum decisions to fit their case. However, as the Petitioners explained, there is no guarantee that the court will find the mined reasoning persuasive.<sup>79</sup> Now, under the New Rule, the mined argument becomes much more persuasive because the attorney is able to cite to the memorandum decision; the court will recognize that the reasoning comes from a higher court that has ruled on a similar issue. Instead of explaining an entire "new" legal theory, an attorney can explain why the court should adopt the memorandum decision's holding. Further, by allowing citations to the memorandum decision, opposing counsel will have a chance to address the decision itself rather than just the mined argument, and distinguish the facts of the decision.<sup>80</sup> Thus, the New Rule saves

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77. See Schiltz, *supra* note 18, at 57 ("If a point is well-covered by published opinions, an attorney will not read unpublished opinions at all.")

78. See David J. Euchner, Pima County Deputy Public Defender, Comment to *R-14-0004 Rule 111 Rules of Arizona Supreme Court, Rule 28 AZ Rules of Civil Appellate Procedure, Rule 31.24 AZ Rules of Criminal Procedure*, at 6-7, CT. RULES FS. (May 20, 2014, 7:25 PM), <http://www.azcourts.gov/Rules-Forum/aft/446> ("An advocate who has found an unpublished disposition is free to model his or her argument after the unpublished disposition."); Eckerstrom, *supra* note 11, at 2-3 (noting that the Former Rule "[did] not prohibit attorneys from extracting the reasoning of an unpublished decision").

79. Halpern, *supra* note 54, at 10 ("[C]ounsel who borrows the reasoning and authorities laid out in a memorandum decision without attributing his or her source runs the real risk that the argument will be summarily rejected as unsupported or deemed waived.")

80. See *id.* at 14-15 (citing Euchner, *supra* note 78, at 9) ("[A] party would certainly better be able to 'fully address an opponent's [use of] unpublished decisions' if the opponent were permitted to cite to the decision used for its persuasive value, alerting the court and parties to its use, rather than just surreptitiously mining it for arguments.")

attorneys time, instead of adding to their workload, because attorneys can direct judges' attention to decisions from a higher court and do not have to create a new argument.

#### IV. JUDICIAL ECONOMY

Opponents suggested that the New Rule would be an unnecessary strain on judicial economy because it would force judges to write every decision as if it is precedential authority.<sup>81</sup> As the Opponent Judges pointed out, the Arizona appellate courts in 2013 published 177 opinions, but decided a total of 1,588 cases.<sup>82</sup>

There is little doubt that the New Rule will alter how Arizona appellate judges write their memorandum decisions. The New Rule acknowledges this with its prospective nature; it allows citation to memorandum decisions written only after January 1, 2015. Thus, memorandum decisions issued before the New Rule that may have been written poorly<sup>83</sup> cannot be cited.

Opponents feared the New Rule would reduce judicial economy because each memorandum decision would need to match the quality level of published opinions.<sup>84</sup> However, this argument relies on at least one faulty assumption. New decisions that would have previously been uncitable memorandum decisions will require the same amount of effort to write now that they can be cited as persuasive authority.<sup>85</sup> For example, opinions regarding settled matters of law can still be summarily analyzed and dealt with briefly. Thus, it is incorrect to assume that all opinions will require an increased effort on the part of judges.

While it is necessary to acknowledge that the New Rule will probably lead to an increased burden on the judiciary, it will also result in significant benefits to the Arizona legal community. The benefits of more defined and consistent case law and better advocacy tools outweigh the potential costs the New Rule could have. If the costs do reach the levels opponents fear, the proper remedy sits with the state legislature. Greater funding to support an increased number of judges and staff is the proper solution to fears of an overburdened judiciary.

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(alteration in the original); Hon. K.C. Stanford, *Title Seen on Bumper Sticker: My Memorandum Decision Is Smarter than Your Opinion*, FAM. L. NEWS (Family Law Section of the State Bar of Ariz.), Mar. 2015, at 5 (“I would think attorneys being strong advocates will go full speed ahead in arguing the wisdom or ignorance displayed in various memorandum decisions.”).

81. Eckerstrom, *supra* note 11, at 5–6.

82. *See id.* at 3 n.1.

83. Faull, *supra* note 3, at 3

84. *Id.* at 6.

85. Eckerstrom, *supra* note 11, at 8 (“The vast majority of cases we address require non-discretionary review and disposition, regardless of the existence of meritorious issues. Many of the issues presented in those cases are repetitive and routine and have been previously resolved in published opinions.”); Hudson, *supra* note 41, at 18 (“[N]othing in the proposed rule requires judges to work any differently than they do now.”).

### V. FOLLOWING THE NATIONAL TREND

The New Rule benefits the Arizona legal community by aligning the state's citation practices with the national trend. As discussed above,<sup>86</sup> the movement to cite unpublished and memorandum decisions has built momentum over the last decade. More than 30 states now permit citation to unpublished decisions as persuasive authority.<sup>87</sup>

Though the Opponent Judges correctly argued that the experiences of other states (such as the Wisconsin study relied upon by the Petitioners) cannot directly be applied to Arizona,<sup>88</sup> it is important to note that no study can perfectly predict how the New Rule will affect the Arizona legal community or Arizona case law. However, the experience of the federal system and other states suggests that the New Rule will benefit Arizona.

The success of the federal system and other states has led those who previously opposed citations to memorandum decisions to change their view about the New Rule. For example, Vice Chief Justice Pelander of the Arizona Supreme Court opposed earlier petitions to allow citation to memorandum decisions.<sup>89</sup> However, eight years of "citation to 'unpublished' memo decisions" without significant problems in the federal courts caused the Vice Chief Justice to reevaluate his position, and he now supports the New Rule.<sup>90</sup>

The Opponent Judges argued that the New Rule sets Arizona apart from its neighboring states, which do not allow citations to unpublished decisions.<sup>91</sup> While it is true that Colorado and Nevada do not have rules similar to the New Rule,<sup>92</sup> Arizona is not alone in allowing citations to memorandum decisions. As the Petitioners noted, both New Mexico and Utah have similar, if not stronger, provisions that allow attorneys to cite to memorandum decisions.<sup>93</sup>

The national trend in favor of citing unpublished decisions bolsters the New Rule's adoption. The success of similar provisions in other jurisdictions suggests that Arizona will benefit from allowing citations to memorandum decisions.

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86. See *supra* Part I.

87. Halpern, *supra* note 26, at 7; see also *id.* at app. b.

88. Eckerstrom, *supra* note 11, at 15.

89. See generally Hon. John Pelander, Comment to *Petition to Amend Rule 111 Arizona Rules of the Supreme Court and Rule 28 of the Arizona Rules of Civil Appellate Procedure, Rule 31.24 AZ Rules of Criminal Procedure*, CT. RULES FS. (May 20, 2008, 6:51 PM), <http://www.azcourts.gov/Rules-Forum/aft/148>.

90. See Agne, *supra* note 29, at 49.

91. Eckerstrom, *supra* note 11, at 15.

92. *Id.*

93. Halpern, *supra* note 54, at 10 n.27 ("Arizona's regional neighbors New Mexico and Utah both permit citation of memorandum decisions. Utah allows their citation as precedent.").

### CONCLUSION

The change to the Arizona Supreme Court Rules, the Arizona Civil Procedure Rules, and the Arizona Criminal Rules will benefit the Arizona legal community. As time goes on, the body of memorandum decisions will grow, or, conversely, the number of published opinions will increase because the New Rule does not affect the number of cases judges must decide.<sup>94</sup> However, in contrast to the Former Rule, all opinions will now be citable; the only difference will be whether the court must follow the opinion as precedential authority or whether the court can take the decision under advisement as persuasive authority. Consequently, Arizona attorneys will reap the benefits of being able to cite a larger body of case law that addresses issues previously unaddressed.

The New Rule will make Arizona case law more consistent and fill in gaps left by published opinions. While the New Rule could decrease judicial economy by requiring judges to spend more time writing some memorandum decisions, its benefits outweigh this drawback. Ultimately, the New Rule aligns Arizona with the successful national trend of allowing citations to memorandum decisions.

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94. The number of lawsuits continues to grow every year. See Eckerstrom, *supra* note 11, at 3 n.1; Faull, *supra* note 3, at 2 (“[T]he criminal justice system has increasingly fewer resources while the demands on the system either remain the same or increase.”); Schiltz, *supra* note 18, at 35 (noting the dramatic increase in the number of cases appealed). Because the number of cases courts hear will probably continue to increase, the number of decisions judges issue will likely increase as well.