BY SARA J. AGNE

A People's History of the Citation of Memorandum Decisions in Arizona

American historian Howard Zinn told his students, "You can't be neutral on a moving train."

Perhaps you also can't be neutral on citing unpublished opinions.[1] Indeed, a rules scholar who worked on a similar change in the federal appellate courts deemed it at the time, "without question, one of the most controversial proposals in the history of federal rulemaking."[2]

The federal change will have preceded Arizona's by eight years by the time the amended versions of Arizona Supreme Court Rule 111, Arizona Rule of Civil Appellate Procedure 28, and Arizona Rule of Criminal Procedure 31.24 take effect on January 1, 2015. The Arizona Supreme Court adopted with some modifications the changes proposed in an Arizona Supreme Court Rule 28[3] petition (R-14-0004)[4] that I, and my colleagues Barry Halpern and Joy Isaacs, submitted this year. In certain circumstances, Arizona court rules will now permit citation of memorandum decisions for persuasive value.

The Petitions That Went Before

To be sure, ours was not the first petition on this issue in Arizona (it was at least thrice-preceded by petitions ultimately rejected by the Arizona Supreme Court),[5] and it built on the efforts of those that went before. The Rule 28 rulemaking process itself—which fosters public comments and replies in an online forum recording rules' filings before the Court—contributed much to the ultimate form of the Petition and its Reply. So did the process of seeking a favorable comment from the State Bar of Arizona, through the considerations and votes of its committees and eventually its Board of Governors.[6]

Thom Hudson, head of the appellate practice group at Osborn Maledon, was involved significantly in two of the prior petitions on this issue, including one in 2010 that he filed on his own. Hudson says he studied the issue of permissive citation for more than 10 years, starting in 2004 when the State Bar's Civil Practice and Procedure Committee formed a subcommittee to determine whether and to what extent there should be changes to Arizona's citation rules. Hudson became sort of a guru on the issue for the Bar, reviewing everything he could find on it.

Initially the debate in Arizona centered on two issues: (1) Should memorandum decisions be publicly accessible? And, (2) should they be citable for more purposes than just those few set forth in the restrictive citation rule adopted in 1994?[7] Hudson said there was general consensus among Bar leadership on the first issue—access[8]—but the second issue split practitioners and jurists.

There were strong views on both sides of the question whether memorandum decisions should be citable for persuasive value (in addition to the permissible purposes of *res judicata*, collateral estoppel, law of the case, and alerting an appellate court to the existence of a memorandum decision so it could decide whether to publish an opinion, grant a motion for reconsideration or grant a petition for review). And, ultimately, the Court didn't adopt changes toward permissive citation for persuasive value until 2014.

Appellate Surprises

Hudson recalls the time before memorandum decisions were posted on the websites of the divisions of Arizona's Court of Appeals, which practice began in summer 2007. Not only were a "big chunk of decisions issued by the Court of Appeals non-citable," but appellate lawyers were from time to time caught off guard by media calls about memorandum decisions in cases on which they had been counsel.

The media had access to memorandum decisions on paper at the courts, but counsel usually would receive them by mail. In the interim between mailing and receipt, Hudson says, an appellate lawyer's first inkling of whether his or her client had prevailed might come not from the court but from a journalist. (As I am a former journalist, hearing this reminded me of the slightly queasy feeling I got one election

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Along with colleagues Barry Halpern and Joy Isaacs, Sara successfully petitioned to amend Arizona Supreme Court Rule 111, Arizona Rule of Civil Appellate Procedure 28, and Arizona Rule of Criminal Procedure 31.24, to permit citation, for persuasive value, of memorandum decisions of Arizona courts and unpublished decisions from other jurisdictions, under certain circumstances. The author gives special thanks to Rebekah Elliott, a 2013 and 2014 Snell & Wilmer summer associate, for her assistance with the Petition and Reply.

night when I realized too late that—while I had the early returns in front of me—the soon-to-be-conceding candidate I was interviewing by phone had not yet been privy to the bad news.)

Evolving Views

Hudson says his own views on permissive citation evolved during his early years studying the issue. At first he was of the mind that every decision an appellate court issues should be citable *and* precedential. Over time, he became convinced that appellate courts should be able to distinguish between precedential opinions and non-precedential memorandum decisions for a variety of reasons, including that non-precedential decisions allow appellate courts to see several variations of a case in a new, untested area of the law before having to announce a rule that will bind lower courts and litigants. Allowing practitioners to cite memorandum decisions facilitates the development of the law by making it easier for the appellate courts to intentionally face a variety of fact patterns before feeling compelled to issue an opinion.

Over time, Hudson adds, he might predict that even some of the restrictions on citation of memorandum decisions for persuasive value would be relaxed. (*See* "Seven Things I Learned About Citing Memorandum Decisions" on p. 51 for more on the specifics of the upcoming rule changes.) However, in Hudson's view, "No lawyer wants to cite an unpublished decision unless they have to," so the restrictions do serve a gatekeeping purpose.

Comments From the Court

Arizona Supreme Court Justice Rebecca White Berch says she had long favored citation of unpublished decisions and that several factors helped influence the decision that the time was right to change Arizona's rule. She says the main considerations included:

- Arizona was able to learn from the experiences of courts in other systems in which citation of unpublished opinions was permitted.[9] "As far as we can tell, no system has collapsed from overcitation," Justice Berch says, "and we've not heard reports from lawyers and law firms that they're spending noticeably more time on research now that they may cite unpublished opinions."
- There are times when there is no other authority on point. "While one can argue that any memorandum decision that really breaks new ground should have been published, many of us have seen situations in which that wasn't the case."

> "As far as we can tell, no system has collapsed from overcitation," Justice Berch says.

- A desire to bring reliance on the reasoning in memorandum decisions out of the background: "Judges and lawyers were often relying on the reasoning in memorandum decisions. They just weren't able to cite the authority supporting them. That didn't seem to be a good practice to encourage."
- And, overall, she adds, there is "a preference for openness and transparency."

While Justice Berch has long favored such a change, Vice Chief Justice John Pelander says he has changed his views on the issue over the last several years. Speaking on his own behalf in an email interview, Justice Pelander says he understood and appreciated the well-reasoned arguments on both sides of the citation debate, particularly as laid out by Hudson (who put forth the "pro" arguments) and Arizona Court of Appeals Judge Donn Kessler (who took the "con" position) in the June 2006 issue of ARIZONA ATTORNEY.[10]

In 2007, Justice Pelander joined his Arizona Court of Appeals Division Two colleagues (he joined the Arizona Supreme Court in 2009) in opposing a petition (R-07-0021) brought by the State Bar of Arizona that proposed changes to (1) make memorandum decisions accessible online, (2) allow parties to cite non-Arizona unpublished decisions for their persuasive value, unless such citation was prohibited by the issuing court, and (3) potentially allow citation of Arizona memorandum decisions for their persuasive value only on a prospective basis.

The State Bar's petition did not take an official position on that third proposed change but instead asked the Court to receive comments and "consider whether to join the federal appellate courts and the other states that have lifted the general ban on citing unpublished decisions."[11]

Arguments in Favor Win Out

Vice Chief Justice Pelander says that, based on his reflection and experience over the past seven years, he "now found the arguments in favor of a rule change more compelling than those opposing it":

> In particular, I reassessed my views in light of the facts that the federal courts have allowed citation to "unpublished" memo decisions for the past eight years without any major, reported problems, and both lawyers and trial court judges in Arizona generally support allowing citation of memorandum decisions under some limited circumstances beyond what our prior rule permitted.

Justice Pelander says he hopes the rule change will not result in any significant problems or adverse effects and that, at this point, he had no reason to believe any such consequences are likely:

> I trust that attorneys and parties will comply with the amended rule and not

misuse or abuse the change by citing memorandum decisions in circumstances outside Rule 111(c)'s scope. Likewise, I hope that the rule change does not dramatically increase the workload of courts or lawyers, and does not adversely affect the court of appeals' processing and disposition of cases.

Some Remain Unswayed

For his part, Judge Donn Kessler says his "views on citation of unpublished decisions have not changed." His June 2006 article for ARIZONA ATTORNEY, "Citation and Access Are a Dangerous Precedent" still sums up his position. "I agree with Justice Pelander that I hope the amended rule will not be abused and that time will tell if there are unanticipated consequences," he adds.

For a 30-minute CLE program regarding this article go to:
www.azbar.org/featuredsnippets

The Footballs and the Swipes

George King, litigator with Lang Baker & Klain PLC, and Secretary of the State Bar's Civil Practice and Procedure Committee, served on one of the committee's subcommittees on the issue over the years. He says Hudson was one who "worked hard on this for many, many years." "I think all lawyers in Arizona owe him a debt of gratitude," King adds.

Both Hudson and King compare the saga of the repeated denials of petitions on the issue to Lucy van Pelt's autumnal ritual of yanking the football away just before Charlie Brown can manage to kick it, as played out in Charles Schulz's *Peanuts* comic strip.

Even Schulz's seemingly spiteful van Pelt, though, eventually acknowledged some intrinsic value she was trying to impart in all those football swipes. In 1989, nearly 40 years after she first left Charlie kicking the air, she told him, "Think how the years go by, Charlie Brown … think of the regrets you'll have if you never risk anything."[12]

For a variety of reasons in 2014, the oft-controversial football of permissive citation of memorandum decisions was ripe for one more kick.

endnotes

1. Unpublished decisions of Arizona appellate courts are called "memorandum decisions" in the relevant court rules.
2. Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 FORDHAM L. REV. 23, 24 (2005) (Schiltz is now a U.S. District Judge for the District of Minnesota).
3. Rule 28, ARIZ.R.S.CT., sets forth the "Procedure for Adoption, Amendment or Repeal of Rules."
4. The Petition, Comments, and Reply are available via http://azdnn.dnnmax.com/AZSupremeCourtMain/AZCourtRulesMain/CourtRulesForumMain/CourtRulesForum/tabid/91/forumid/7/postid/2522/view/topic/Default.aspx.
5. The prior petitions included R-06-0038 (filed Nov. 1, 2006) (proposing amendments to "insure that appellate court judges issue published opinions in all cases presenting issues of first impression"); R-07-0021 (filed Dec. 11, 2007) (proposing amendments as discussed *infra*); and R-10-0032 (filed Aug. 12, 2010) (proposing amendments to "permit the citation of non-Arizona 'unpublished' decisions … in more circumstances than currently permitted"). All the prior petitions, comments and any replies are available in the Arizona Supreme Court's online rules forum: http://azdnn.dnnmax.com/AZSupremeCourtMain/AZCourtRulesMain/CourtRulesForumMain/CourtRulesForum/tabid/91/view/topics/forumid/7/Default.aspx.
6. The Board of Governors unanimously, with one abstention, approved its comment in support of the petition during its meeting on April 25, 2014. The comment suggested modifications to the proposed rule language that were adopted by Petitioners in their Reply and ultimately by the Court.
7. Citation to memorandum decisions was prohibited in Arizona in 1973. In 1994, the Arizona Supreme Court adopted a rule change permitting citation in limited circumstances "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." *See* Hon. Donn G. Kessler and Thomas L. Hudson, *The "Secret" History of Memoranda Decisions*, ARIZ. ATT'Y 11 (June 2006).
8. In July 2007 both divisions of Arizona's Court of Appeals expanded their websites to include the automatic posting of memorandum decisions, mooting part of the changes proposed by the 2007 State Bar petition. *See* Hon. John Pelander, Chief Judge, *Comment on Rule 28 Petition for Change in Rule 111, Arizona Rules of the Supreme Court, Relating to the Availability and Citation of Memorandum Decisions*, posted 5/20/2008, 6:51 PM, at 2, *available at* http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/1520515011871.pdf.
9. At the time we filed the Petition, our research showed that more than 30 other states permitted citation of unpublished decisions for at least their persuasive value.
10. *See* Thomas L. Hudson, *Make Memoranda Decisions Available Online and Allow Them To Be Cited as Persuasive Authority*, ARIZ. ATT'Y 14 (June 2006); Hon. Donn G. Kessler, *Citation and Access Are a Dangerous Precedent*, ARIZ. ATT'Y 15 (June 2006).
11. Petition R-07-0021, at 5-6 (filed Dec. 11, 2007), *available at* http://azdnn.dnnmax.com/AZSupremeCourtMain/AZCourtRulesMain/CourtRulesForumMain/CourtRulesForum/tabid/91/view/topic/forumid/7/postid/451/Default.aspx.
12. Eric Schulmiller, *All Your Life, Charlie Brown. All Your Life. The complete history of Lucy's pulling the football away*, SLATE.COM, Oct. 8, 2014, 9:33 AM, www.slate.com/articles/arts/culturebox/2014/10/the_history_of_lucy_s_pulling_the_football_away_from_charlie_brown_in_peanuts.html.

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7 Things I Learned About Citing Memorandum Decisions

1 It's controversial.

If someone has a view on permissive citation of memorandum decisions, it's usually a strong one. The arguments for and against permitting citation for persuasive value were aptly presented in the filing and discussion thread in the Arizona Supreme Court's Rules Forum on R-14-0004 ("the Petition").[1] (For more on the controversy and history of permissive citation in Arizona, *see* "A People's History of the Citation of Memorandum Decisions in Arizona" on p. 48.)

2 It was a long time coming.

Nearly 40 years after citation to memorandum decisions was prohibited in Arizona as part of the national trend of discouraging citation to unpublished opinions,[2] permissive citation is now trending back. Arizona joined more than 30 other states in allowing citation for at least persuasive value.

3 Fair warning is important—the change begins January 1, 2015.

The change applies prospectively only, giving fair warning to both courts and parties of the new permission to cite memorandum decisions for persuasive value under certain circumstances. Under new Rule 111(c)(1)(C), ARIZ.R.S.CT., a memorandum decision may be cited for persuasive value only if issued on or after January 1, 2015. … and only if other requirements discussed below are met as well.

4 If you're going to do it, do your research.

A memorandum decision may be cited for persuasive value only if "no opinion adequately addresses the issue before the court[.]" ARIZ.R.S.CT. 111(c)(1)(C). The term "opinion" is further defined in sections (a) and (b) of ARIZ.R.S.CT. 111. The Petition did not propose changes to those sections, and the Arizona Supreme Court's Order on it did not alter them.

5 Don't cite to a depublished opinion or a depublished portion of one.

The Court retained its ability to order depublication or partial depublication of an opinion certified for publication by the Arizona Court of Appeals. ARIZ.R.S.CT. 111(g). The change toward permissive citation does not encompass the ability to cite depublished material. ARIZ.R.S.CT. 111(c)(1)(C).

6 The intent was to put unpublished out-of-state/federal decisions on the same footing as Arizona memoranda decisions.

Arizona Supreme Court Vice Chief Justice John Pelander said the intent of new Rule 111(d) (addressing "Dispositions of Tribunals in Other Jurisdictions"), as he understood it, "was to put unpublished out-of-state/federal decisions on the same footing as Arizona memoranda decisions." ARIZ.R.S.CT. 111(d) now provides: "A party may cite a decision of a tribunal in another jurisdiction, as permitted in that jurisdiction. Such a decision may be cited on a point of Arizona law only if it complies with Rule 111(c)(1)(C)."

"In other words," Pelander added, "I believe the amended rule contemplates and indicates that parties can only cite non-Arizona unpublished decisions on points of Arizona law if the decision issues after January 1, 2015 and otherwise satisfies Rule 111(c)."

7 There's no duty to do it, but if you do, provide a copy or a free link.

New Rule 111(c)(4) provides that a "party has no duty to cite a memorandum decision," but new Rule 111(c)(3) requires that a party doing so "must provide either a copy of the decision or a hyperlink to the decision where it may be obtained without charge."

ENDNOTES

1. The Petition, Comments, and Reply are available via http://azdnn.dnnmax.com/AZSupremeCourtMain/AZCourtRulesMain/CourtRulesForumMain/CourtRulesForum/tabid/91/forumid/7/postid/2522/view/topic/Default.aspx.
2. *See* Hon. Donn G. Kessler and Thomas L. Hudson, *The "Secret" History of Memoranda Decisions*, ARIZ. ATT'Y 11 (June 2006).