

PROPOSED:

## Make Memoranda Decisions Available Online and Allow Them To Be Cited as Persuasive Authority

While conducting research in connection with a somewhat novel issue, you are unable to find any published decision on point, but you stumble across a memorandum decision from the Arizona Court of Appeals that squarely addresses your issue. What do you do?

You would like to tell the judge about the decision. Your client would like you to tell the judge about it. The judge would even like you to tell her about it. But Arizona’s current rules concerning the citation of memoranda decisions—among the strictest in the nation—flatly prohibit you from mentioning the case to the judge.<sup>1</sup> Moreover, if there is an appeal, you may not even tell the Court of Appeals about its own prior decision, even though the issue is ripe for a published decision and the prior decision would inform the dialogue in con-

nection with a developing legal doctrine. To cite the case would not only violate the rules, but would be considered “unethical.”<sup>2</sup>

Fortunately, litigants do not face this frustrating situation in every case. After all, a decision that touches on a new legal issue should have been published.<sup>3</sup> Nevertheless, a memorandum decision sometimes addresses a relevant issue unlike any published decision. When that occurs, banning litigants and courts from citing the memorandum decision may not only result in delaying the case’s resolution, but it may hinder the development of the law by masking the need for a published decision. Moreover, by not making memoranda decisions readily available—as are unpublished decisions in every federal circuit—the rule distorts the perception of the law and removes important incentives to judicial decision-making that a system of truly public decision-making provides.

For these and other reasons, Arizona’s strict limitation on the use of memoranda decisions should be modified.<sup>4</sup> In particular, litigants and courts should be able to cite such decisions when there is no published decision directly on point, subject to the caveat that such decisions should be considered nonbinding authority to be given persuasive value in accordance with the merits of the decision’s reasoning and analysis.

Such a rule, adopted by several other jurisdictions, balances the institutional concerns that arise from the caseload faced by many courts with the institutional benefits and policy reasons that favor a permissive system of citation.<sup>5</sup> In addition, Arizona Court of Appeals memoranda decisions

should be made publicly available in a searchable online database.

### Online Access

As a threshold matter, because the Arizona Court of Appeals is a public body that is empowered to decide the law, memoranda decisions from that court should be publicly available in an online, searchable database. The very purpose of the legal system is to set forth a system of public rules “addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation.”<sup>6</sup> But for a legal system to actually provide such a framework, the system of rules must be made publicly available in a meaningful way.

Professor Lon Fuller powerfully made this point in his famous “King Rex” allegory, in which he detailed “at least eight ways” in which a system of legal rules “may miscarry” and fail to properly be called “a legal system at all.”<sup>7</sup> King Rex’s second route to failure arose when he failed to publicize or make available the rules with which citizens must abide.<sup>8</sup> By failing to make memoranda decisions easily accessible—which decisions account for more than 90 percent of those issued—the Court of Appeals fails to make publicly accessible an important body of law.

It may be true that these decisions often involve “routine” matters that are readily resolved on the basis of well-accepted legal principles. But this weighs in favor of making them publicly available. This is because it is the “routine” case about which a client often seeks advice and, depending on that

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advice, may or may not ultimately pursue litigation or some other course. In rendering that advice, it 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. Consequently, knowing how the Court of Appeals deals with "routine" issues is important to the basic function of allowing rational persons to regulate their conduct and govern their affairs.<sup>9</sup>

Moreover, leaving for public consumption the small percentage of published decisions makes both predicting and understanding the law more difficult. Under the Court of Appeals' current practice, "published" decisions by their nature usually involve difficult issues that often could have been decided more than one way. Viewing these cases as exemplifying the "law" reinforces the common misperception that judges have more discretion than they in fact do, and it suggests "a failure of congruence between the rules as announced and their actual administration."<sup>10</sup> Yet existing law controls the outcome of

most cases. Making memoranda decisions difficult to access distorts this important reality about our legal system.

Opponents of this approach ignore the fact that unpublished decisions are readily available on Westlaw for every federal circuit, including the four that (currently) most restrict their citeability (the Second, Seventh, Ninth and Federal Circuits).

Indeed, the issue is not whether unpublished decisions are publicly available—they are—but whether they should be readily available. Moreover, appellate judges currently have ready access to memoranda decisions via a crude database. Historically, at least in the civil division, superior court judges also reg-

ularly received copies of civil memoranda decisions. Thus, any risk of "untoward reliance on such decisions by judges" (as Judge Kessler refers to it) has long existed. Indeed, cost issues aside, there is no good reason for making access to public documents more difficult.

### Citable for Persuasive Purposes

Memoranda decisions should also be citable.

One of the fundamental precepts of the rule of law in a liberal democratic society is that "similar cases be treated similarly."<sup>11</sup>

Making the entire corpus of a court's decisions publicly available (and readily so) and allowing anyone who comes before the court to cite the court's prior decisions help to institutionalize this precept in at least two ways.

First, when the entirety of a court's decisions are readily available and citable, it makes it more likely that the court will become aware of its other decisions in similar cases. Second, this may help judges draw distinctions between cases on principle when they decide superficially similar cases differently.<sup>12</sup>

The philosopher John Rawls has argued that "the precept that like decisions be given in like cases" imposes an important check on "the discretion of judges" by "forc[ing] them to justify the distinctions that they make between persons by reference to the relevant legal rules and principles."<sup>13</sup> Moreover, "as the number of cases increases, plausible justifications for biased judgments become more difficult to construct."<sup>14</sup> It may be defensible to allow a court to issue nonprecedential decisions, but a system that allows judges to effectively decide "secret" cases undermines this foundational aspect of the rule of law.<sup>15</sup>

Transparency in judicial decision-making also strengthens the judiciary by making it more likely that the public will per-

ceive the court as applying the law equally to all citizens. Indeed, given the foundational importance of the equal application of law, a strong argument can be made via King Rex that it is illegitimate for a court that purports to be based on the rule of law to prohibit a litigant who appears before it from citing to the court one of its own prior decisions.

Considerations of free expression likewise weigh heavily in favor of permitting litigants to cite memoranda decisions. The very reasons courts and commentators routinely invoke in favor of allowing a wide range of free expression—particularly in the realm of ideas—weigh equally in favor of allowing free expression when it comes to advancing arguments in court, including the shorthand argument of citing a memorandum decision.

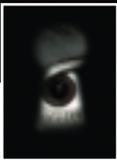
Tellingly, in his discussion concerning the "liberty of thought and discussion" in *On Liberty*, John Stuart Mill began by observing that "[n]o argument" was needed against the idea that the government could not legitimately "determine what doctrines or what arguments [the people] shall be allowed to hear."<sup>16</sup> Yet prohibiting litigants from citing memoranda decisions is in effect a substantive bar on how people may argue to their government. One would thus suppose that such a restraint on speech would require a particularly powerful justification.<sup>17</sup>

Allowing litigants to cite memoranda decisions also helps to ensure institutional accountability and protect against using memoranda decisions to avoid the rule of law. Arizona's current rules give the Court of Appeals the power, in effect, to "hide" a decision by deeming it a memorandum decision, even though the decision should be published. Although people disagree about whether and to what extent this actually occurs, some have expressed this concern and there is a perception by some that this goes on today. Giving the power to decide whether something may be cited to those who are governed by the court's rules will strengthen the public perception of the institution and provide important institutional incentives for accountability well into the future.<sup>18</sup>

Finally, allowing the citation of memorandum decisions for persuasive value gives

A system that allows judges to effectively decide "secret" cases undermines a foundational aspect of the rule of law.

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judges the power "to engage in a dialogue with each other across cases and across panels" before coming to a consensus on a legal issue.<sup>19</sup> As professors Douglas Berman and Jeffrey Cooper have argued, citable memoranda decisions can "play an important role in the development of legal doctrine, [by] allowing appellate judges to engage in intra-court dialogue before reaching a firm resolution of difficult legal issues."<sup>20</sup> Allowing practitioners to cite these cases "facilitate[s] the development of the law" by making it easier for the court to intentionally face a variety of fact patterns before feeling compelled to issue an opinion.<sup>21</sup>

### Banning Citation Not Supportable

Critics of more liberal citation rules, including Judge Donn Kessler in his thoughtful article, often advance two principal arguments to justify citation restrictions.

First, they argue that restrictions are necessary for appellate courts to function efficiently. As Judge Kessler puts it, modifying Arizona's rule "would drastically increase the cost and delay to the judicial system in deciding cases" because "the judges would have to take much longer" to issue decisions.

Second, critics argue that relaxing the citation rules would overwhelm the appellate courts, lower courts and litigants with additional legal authorities to review. But the critics' case does not withstand scrutiny and fails to satisfy the burden necessary to trump the underlying democratic values that weigh in favor of permitting citation.

### A. Court Burden No Greater

With respect to the first argument, nothing in the proposed rule requires judges to work any differently than they do now. To the contrary, precisely because the proposed rule only allows memoranda decisions to be cited for persuasive value when there is no controlling authority on point, the court need not change its practices except in minor ways.

For example, the court should make clear that memoranda decisions may suffer from the various defects Judge Kessler describes to ensure that the superior court and litigants view them with the caution

they deserve. But a simple comment to any rule change could achieve this objective. Panel members should also indicate if they concur only with the result, but they need not feel obliged to elaborate any further. Thus, the proposal need not significantly affect the manner in which memoranda decisions get decided.

Judge Kessler argues, however, that unless the Court of Appeals vets memoranda decisions as thoroughly as opinions, relying upon them may be misplaced. But the Court of Appeals already understands both the limitations of memoranda decisions and that their value lies entirely with the strength of a decision's reasoning and analysis. Presumably, the Arizona Supreme Court would also not be "improperly" influenced by a memorandum decision. Thus, the principal concern seems to be that the superior court may be unduly influenced by memoranda decisions unless the Court of Appeals "vet[s]" these decisions as thoroughly as opinions.

This concern, however, rests on the erroneous assumption that the superior court will give undue weight to memoranda decisions. But if the Court of Appeals does not change its practices, the 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. Under existing practices, it is precisely when the record and/or briefing are poor that memoranda decisions typically lack the depth and detail necessary to make them useful. In other cases, however, these decisions have a detailed analysis that a superior court judge may find helpful to the case's resolution.

The superior court's historical practices also suggest that it will not be "improperly" influenced by memoranda decisions that do not undergo more thorough vetting. For years, superior court judges in the civil division had memoranda decisions available to them. Many judges, I am told, found them helpful and did not have difficulty determining the appropriate weight, if any, to give them. And, under the existing rules litigants may cite unpublished minute entries to the superior court.<sup>22</sup> Trial judges are able to evaluate these and other authorities for persuasive value only.

As for potential consequences, in at least some instances a case will be decided correctly and earlier because of a memorandum decision. Furthermore, if 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.

### B. No Burden of Legal Authority

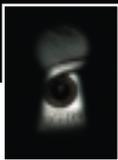
The second principal argument contends that regardless of whether the Court of Appeals changes its practices, allowing citation will burden courts and attorneys with an increased volume of citations. Judge Kessler, for example, argues that, "Trial judges could have to review almost 15 times more Arizona decisions if attorneys could cite Arizona unpublished decisions."

But this argument too ignores the fact that memoranda decisions often lack the depth necessary to make them useful even as persuasive authority. It also serves no purpose to cite a memorandum decision that simply invokes well-settled law explained by published decisions. Indeed, when such decisions may only be cited in the absence of controlling authority, a litigant who cites a memorandum decision implicitly concedes that existing law does not control the point urged. Thus, notwithstanding the "ingenuity of attorneys," there is no incentive to either exercise that "ingenuity" or to spend additional time researching memoranda decisions in most instances.

Nevertheless, there will be times when litigants believe that citing an unpublished decision would be helpful to their cause, and they will be right. But this typically will be when the controlling authority is scant, and the memorandum decision addresses an issue in a manner unlike any published decision. It is thus because, as Judge Kessler says, "Beauty ... is in the eye of the beholder" that litigants, rather than courts, should be able to determine when such cases may be cited.<sup>23</sup> Moreover, these instances, though important, will be comparatively rare, and thus will not unduly burden litigants or the courts.

That litigants and courts will not become overburdened is also borne out by the "actual, contemporaneous experience, in both the federal and state contexts, with

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what [rules that allow such citation] ... in fact do."<sup>24</sup>

When the United States Judicial Conference Advisory Committee on Appellate Rules voted to modify the federal rule to require the four restrictive circuits, including the Ninth Circuit, to permit the citation of unpublished decisions, more than 500 comments poured in concerning the change raising many of the same points Judge Kessler makes in his article.<sup>25</sup> Although there was little or no criticism from judges who had actual experience with courts that allowed the citation of their unpublished decisions, judges in circuits that banned citation (*e.g.*, the Ninth Circuit) voiced concerns.

To determine whether these concerns had merit, the Federal Judicial Center (FJC), a statutorily authorized research and education agency of the federal judicial system, conducted empirical research to understand the impact of allowing such citation in all federal circuit courts.<sup>26</sup> The FJC surveyed all 257 sitting circuit judges and a random sample of attorneys who practice before those courts.<sup>27</sup> Tellingly, those who believed that allowing citation would adversely affect the functioning of the judiciary generally sat in circuits that prohibited citation. In circuits where such citation occurred, the judges generally agreed that changing the federal rule would have "no impact on the number of unpublished opinions, the length of unpublished opinions, or the time it takes to draft them."<sup>28</sup>

This evidence is particularly insightful because two circuits—the First Circuit and D.C. Circuit—recently changed their citation rules to allow citation, and judges from these circuits did not experience the problems critics predicted.<sup>29</sup> Furthermore, the majority of lawyers "said that a rule permitting citation to unpublished opinions would not impose a burden on their work, and most expressed support for such a rule."<sup>30</sup>

Thus, the best evidence available—contemporaneous experience from courts that permit citation to unpublished decisions and have experience with both systems—strongly suggests that the bad consequences will never come to pass.

## Conclusion

There are many good reasons that weigh heavily in favor of making memoranda decisions available online and allowing litigants and courts to cite them as nonbinding precedent. Given the connection of these reasons to the very functioning of the rule of law, a particularly weighty reason is required to justify banning one from citing a court's own prior decision.

The practical concerns offered by Judge Kessler and others may justify allowing courts with large case volumes to distinguish between precedential and non-precedential decisions. But they fail to justify prohibitions on citation for persuasive purposes when no published decision on point exists.

Thus, courts should be empowered to determine whether one of their decisions will constitute binding precedent. But the power to decide whether a decision is citable should reside with litigants and courts alike. 

## endnotes

1. See ARCAP 28(c); Rule 111(d), ARIZ.R.S.Ct. These rules have been interpreted as "mak[ing] it improper to cite unpublished decisions as authority," and "appl[ying] to memorandum decisions from any court." *Walden Books Co. v. Arizona Dep't of Revenue*, 12 P.3d 809, 814 (Ariz. Ct. App. 2000).
2. Ethics Op. 87-14.
3. See ARCAP 28(b)(5) (setting forth the criteria that should be considered in deciding whether to publish a decision, which includes whether the decision "establishes, alters, modifies or clarifies a rule or law").
4. There has been renewed debate concerning whether litigants and courts should be able to cite a court's unpublished decisions, and if so for what purposes. Background to this debate, which is presumed in this article, is found in the historical background beginning on page 10 of this issue.
5. For example, First Cir. R. 32.3(a)(2) provides: Citation of an unpublished opinion of this court is disfavored. Such an opinion may be cited only if (1) the party believes that the opinion persuasively addresses a material issue in the appeal; and (2) there is no published opinion from this court that ade-

quately addresses the issue. The court will consider such opinions for their persuasive value but not as binding precedent.

Five other circuits have similar "discouraging" rules: the Fourth, Sixth, Eighth, Tenth and Eleventh. Of the states, 22 permit citation to unpublished decisions.

6. JOHN RAWLS, A THEORY OF JUSTICE 235 (1971).

7. LON L. FULLER, THE MORALITY OF LAW 39 (Rev. ed. 1969):

The first and most obvious [way a system of legal rules may miscarry] lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only itself cannot guide action, but undercuts the integrity of rules prospective in effect, since it puts them under threat of retroactive change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules; or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration.

8. *Id.*

9. In less than "routine" cases, a memorandum decision may help save research time by pointing to relevant decisions, and this use of a memorandum decision does not assume the judges were acting as "law clerks for private counsel," but rather that judges decide cases on the basis of relevant authorities.

10. Fuller, *supra* note 7, at 39.

11. Rawls, *supra* note 6, at 235.

12. For an example of an argument along these lines, see Suzanne O. Snowden, "That's My Holding and I'm Not Sticking to It!" *Court Rules That Deprive Unpublished Opinions of Precedential Value Distort the Common Law*, WASH. U. L. Q. 1253, 1259 (Jan. 2001).

13. Rawls, *supra* note 6, at 237.

14. *Id.*

15. Some commentators have thus argued that all decisions should be citable and constitute binding precedent. See, *e.g.*, Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 758-59 (2003).

16. JOHN STUART MILL, ON LIBERTY 15 (1859) (Hackett Publishing ed. 1978).

17. Of course, courts may legitimately impose reasonable time, manner and place restrictions on litigants, but precluding citation of a court's own prior decision is more akin to a content-based restriction than is a restriction like a page limitation.

18. Judge Kessler argues that the provisions that allow parties to ask for publication and reference memoranda decisions in a petition for review adequately address these issues related to the development of the common law. But it is typically parties unrelated to the litigation that desire to cite the memorandum decision, and by the time the memorandum decision is discovered, it is generally too late to file a

motion to publish or join in a petition for review as *amicus curiae*. Moreover, the Arizona Supreme Court reviews memoranda decisions with much less frequency than published decisions, and being able to cite memoranda decisions in a petition for review does little to solve the problem when the decisions are not readily accessible.

19. Douglas A. Berman & Jeffrey O. Cooper, *In Defense of Less Precedential Opinions: A Reply to Chief Judge Martin*, 60 OHIO ST. L.J. 2025, 2040 (1999).  
 20. *Id.* at 2025.

21. *Id.*  
 22. See State Bar Ethics Op. No. 87-14 (citing a decision of another superior court solely and expressly for its persuasive value is not ethically improper, even where the superior court is acting as a “reviewing court” for a special action or lower court appeal and where the rules governing such unique appeals incorporate rules of civil appellate procedure).  
 23. In cases such as this, it would also not be unusual to research other jurisdictions’ law, and adding memoranda decisions to the mix would not significantly

increase the attorneys’ burden (particularly if the decisions were readily accessible in an online searchable database). Such a database thus helps level the playing field between litigants with different levels of resources because under the current system large law firms are able to maintain their own data bank of memoranda decisions.

24. Statement of Stephen R. Barnett, *Hearing on Proposed Amendments to the Federal Rules of Appellate Procedure Before the Appellate Rules Committee, United States Judicial Conference 2-3*

(April 13, 2004) available at [www.nonpublication.com/barnett32.1.pdf](http://www.nonpublication.com/barnett32.1.pdf).

25. See *id.*  
 26. See Federal Judicial Center, *Citations to Unpublished Opinions in the Federal Courts of Appeals: Preliminary Report 1* (April 14, 2005) available at [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).  
 27. *Id.* at 1-2.  
 28. *Id.* at 3.  
 29. *Id.* at 11-13.  
 30. *Id.* at 15.