

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF AMENDMENT TO
NEVADA RULE OF APPELLATE
PROCEDURE 36 AND REPEAL OF
SUPREME COURT RULE 123 TO
ALLOW CITATION OF UNPUBLISHED
DISPOSITIONS.

ADKT 0504

FILED

SEP 14 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

*CORRECTED ORDER AMENDING
NEVADA RULE OF APPELLATE PROCEDURE 36*

WHEREAS, on February 28, 2017, the Honorable Michael A. Cherry filed a petition in this court seeking amendment of Rule 36 of the Nevada Rules of Appellate Procedure to clarify that only unpublished dispositions issued by the Supreme Court, not those issued by the Court of Appeals, may be cited for persuasive value; and

WHEREAS, this court solicited public comment on the petition and a public hearing was held in this matter on April 4, 2017; and

WHEREAS, this court recognizes that although some cases on the Court of Appeals' docket may raise discrete issues of interest to the legal community that are appropriately resolved by opinion, the majority of the caseload is comprised of error-correction cases that provide little persuasive value and are more efficiently resolved in non-citable unpublished orders. Therefore, this court has determined that the proposed rule changes are warranted to more effectively manage the Court of Appeals' caseload; accordingly,

IT IS HEREBY ORDERED that Nevada Rule of Appellate Procedure 36 shall be amended and shall read as set forth in Exhibit A.

IT IS FURTHER ORDERED that this amendment to the Nevada Rules of Appellate Procedure shall be effective 30 days from the date of this order. The clerk of this court shall cause a notice of entry of this order to be published in the official publication of the State Bar of Nevada. Publication of this order shall be accomplished by the clerk disseminating copies of this order to all subscribers of the advance sheets of the Nevada Reports and all persons and agencies listed in NRS 2.345, and to the executive director of the State Bar of Nevada. The certificate of the clerk of this court as to the accomplishment of the above-described publication of notice of entry and dissemination of this order shall be conclusive evidence of the adoption and publication of the foregoing rules.

Dated this 14th day of September, 2017.

Cherry, C. J.
Cherry

Gibbons, J.
Gibbons

Parraguirre, J.
Parraguirre

Stiglich, J.
Stiglich

cc: Vernon Leverty, President, State Bar of Nevada
Kimberly Farmer, Executive Director, State Bar of Nevada
All District Court Judges
Clark County Bar Association
Washoe County Bar Association
First Judicial District Bar Association
Administrative Office of the Courts

PICKERING, J., with whom DOUGLAS and HARDESTY, JJ., agree, dissenting:

Effective January 1, 2016, we repealed Nevada Supreme Court Rule 123, which with limited exceptions forbade citation of our “unpublished” or memorandum decisions. We also amended NRAP 36 to distinguish between published opinions from our court or the court of appeals, which establish mandatory precedent that all lower courts must follow, and unpublished dispositions from the supreme court or the court of appeals, which may be cited for their persuasive value, if any. These rule changes came on the heels of the creation of the court of appeals in 2015, and brought Nevada into line with the 2007 amendments the Federal Rules of Appellate Procedure, *see* Fed. R. App. P. 32.1, and with state appellate courts across the country that, beginning in 2001, have with few exceptions repealed the rules limiting the citeability of unpublished appellate dispositions that came into vogue in the 1970s. *See* David R. Cleveland, *Appellate Court Rules Governing Publication, Citation, and Precedential Value of Opinions: An Update*, 16 J. App. Prac. & Proc. 257, 258 (2015); David R. Cleveland, *Overturing the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. App. Prac. & Proc. 61, 63-68 (2009).

The changes to our rules followed hearings and extensive public comment. A number of justifications emerged for repealing SCR 123 and amending NRAP 36 to allow citation of unpublished appellate court dispositions. First, and most important, was accountability. Appellate courts decide cases by written order; the order not only says who wins and who loses but explains, even if only briefly, why this is so. Like-situated parties deserve like legal treatment from an appellate court. If a party finds



a case similar to his that the appellate court decided favorably to his cause, the party should be able to call the prior decision to the court's attention and expect that the court will either decide his case the same way or explain the differences between the two cases that lead the court to decide them differently. At the appellate level,

[t]he case is not alone considered as decided and settled, but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. Our ancestors brought it with them when they first emigrated to this country; and it is, and always has been, considered as the great security of our rights, our liberties, and our property. It is on this account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice or will of particular judges.

Joseph Story, *Commentaries on the Constitution of the United States* § 377 (Hillard, Gray & Co. 1833); see Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 *Stan. L. Rev.* 1435, 1483 (2004) (criticizing “the culture of unpublication” on the grounds that “it imperils the legitimacy of the judiciary, compromises transparency, and releases judges from the ‘discipline’ of producing reasoned decisions,” and so “strike[s] at the core of the legitimacy of judicial decisions and the court system more generally”) (quoting Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy or Collegiality Under Challenge?*, 42 *Md. L. Rev.* 766, 768 (1983)).

The other justifications for repealing SCR 123 and amending NRAP 36 to allow citation of unpublished appellate court dispositions were more practical. Today, the internet affords free access to all written appellate court dispositions, whether the court deems them “published” or

not. Given the sparse precedent in Nevada, lawyers and judges were consulting unpublished dispositions, despite the ban in SCR 123. With the court of appeals coming on board to share our workload, the unpublished dispositions of both our court and the court of appeals, it was thought, would be the product of more time and attention than had been possible in the past, blunting the main argument against citeability that some unpublished dispositions are not of a quality their citation should be allowed. And last, the law does not, and never has, required parties and lawyers to only cite mandatory precedent; non-mandatory authority, such as case law from out of state, is cited all the time for its persuasive value, if any. If a short-form unpublished disposition helps resolve a dispute, allows a party to predict the outcome of a potential dispute without having to take it to court, or offers a springboard for a more thoughtful discussion of how the law should evolve on a subject, there is a net gain for all concerned.

These reasons apply equally to the court of appeals as they do to our court. While SCR 123 predated the court of appeals and thus only banned citation of unpublished supreme court decisions, the 2016 amendment to NRAP 36 specifically allowed citation of both our unpublished dispositions and those of the court of appeals. Thus, the unpublished dispositions of the court of appeals have been citeable since that court began. The argument that allowing citation of the unpublished decisions of the court of appeals slows down its work is not persuasive. An appellate disposition represents the work of three judges; inherently, it is and needs to be reliable enough that it can at least be cited and talked about in other cases. The Nevada court of appeals does almost all of its work by unpublished disposition. While many do not appear to make new law, if a party finds that the decision clarifies or advances the law in some helpful

EXHIBIT A

AMENDMENT TO RULE 36 OF THE NEVADA RULES OF APPELLATE PROCEDURE

RULE 36. ENTRY OF JUDGMENT

(a) **Entry.** The filing of the court's decision or order constitutes entry of the judgment. The clerk shall file the judgment after receiving it from the court. If a judgment is rendered without an opinion, the clerk shall enter the judgment following instruction from the court.

(b) **Notice.** On the date when judgment is entered, the clerk shall mail to all parties a copy of the opinion, if any, or of the order entering judgment, if no opinion was written.

(c) **Form of Decision.** The ~~[court decides]~~ Supreme Court and Court of Appeals decide cases by either published or unpublished disposition.

(1) A published disposition is an opinion designated for publication in the *Nevada Reports*. The ~~[court]~~ Supreme Court or Court of Appeals will decide a case by published opinion if it:

(A) Presents an issue of first impression;

(B) Alters, modifies, or significantly clarifies a rule of law previously announced by ~~[the court;]~~ either the Supreme Court or the Court of Appeals; or

(C) Involves an issue of public importance that has application beyond the parties.

(2) An unpublished disposition, while publicly available, does not establish mandatory precedent except in a subsequent stage of a case in which the unpublished disposition was entered, in a related case, or in any case for purposes of issue or claim preclusion or to establish law of the case.

(3) A party may cite for its persuasive value, if any, an unpublished disposition issued by ~~[this court]~~ the Supreme Court on or after January 1, 2016. When citing such an unpublished ~~[disposition to this court,]~~ disposition, the party must cite an electronic database, if available, and the docket number and ~~[filing date in this court]~~ date filed in the Supreme Court (with the notation “unpublished disposition”). A party citing such an unpublished disposition must serve a copy of it on any party not represented by counsel. Except to establish issue or claim preclusion or law of the case as permitted by subsection (2), unpublished dispositions issued by the Court of Appeals may not be cited in any Nevada court for any purpose.

(d) Duplicate Order or Opinion.

(1) The justices of the Supreme Court, judges of the Court of Appeals, or district judges designated by the governor to serve on the Supreme Court or Court of Appeals for a specific case, if they are physically present within the State of Nevada, may sign duplicate copies of any order or opinion. If duplicate copies of an order or opinion are signed by the various members of the Supreme Court or Court of Appeals, the justices or judges signing the duplicate copies shall date their signatures on duplicate copies and shall immediately inform the clerk of the court that the duplicate copies are signed. The clerk of the court shall then note on the appropriate signature line of the original order or opinion that the absent justices or judges have signed duplicate copies of the order or opinion under this Rule. When possible, a facsimile of each signed duplicate copy of the order or opinion shall also be transmitted immediately to the clerk of the court. The duplicate copies of the order or opinion containing the original signatures of the justices or judges shall be sent by the fastest means available to the clerk of the Supreme Court, who shall place those duplicates in the court’s file.

(2) The clerk shall file an order or opinion that is signed in duplicate under this Rule upon receiving notice from the absent justices or judges that they have signed the duplicate copies. The order or opinion shall be effective for all purposes when the clerk receives notice under this Rule that the requisite number of signatures have been obtained and files the order or opinion. An order or opinion that is signed under this Rule shall contain a notice to the parties that it was signed under this Rule.

(e) Reversal, Modification; Certified Copy of Opinion to Lower Court. Where a judgment is reversed or modified, a certified copy of the opinion or other disposition shall be transmitted with the remittitur to the court below.

(f) Motion to Reissue an Order as an Opinion. A motion to reissue an unpublished disposition or order as an opinion to be published in the *Nevada Reports* may be made under the provisions of this subsection by any interested person. With respect to the form of such motions, the provisions of Rule 27(d) apply; in all other respects, such motions must comply with the following:

(1) Time to File. Such a motion shall be filed within 15 days after the filing of the order. Parties may not stipulate to extend this time period, and any motion to extend this time period must be filed before the expiration of the 15-day deadline.

(2) Response. No response to such a motion shall be filed unless requested by the court.

(3) Contents. Such a motion must be based on one or more of the criteria for publication set forth in Rule ~~[36(e)(1)-(3)]~~ 36(c)(1)(A)-(C). The motion must state concisely and specifically on which criteria it is based and set forth argument in support of such contention. If filed by or on behalf of a

nonparty, the motion must also identify the movant and his or her interest in obtaining publication.

(4) Decision. The granting or denial of a motion to publish is entrusted to the sound discretion of the panel that issued the disposition. Publication is disfavored if revisions to the text of the unpublished disposition will result in discussion of additional issues not included in the original decision.