

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ALLOW CITATION OF UNPUBLISHED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 No. 0504

FILED

FEB 27 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY Angela
CHIEF DEPUTY CLERK

PETITION

James Hardesty, Chief Justice, and Kristina Pickering, Associate Justice of the Nevada Supreme Court, petition the Nevada Supreme Court to amend NRAP 36 to permit citation of this court's unpublished dispositions and to repeal SCR 123, which forbids their citation except in narrow circumstances. If approved, the amendments would allow citation of unpublished dispositions but specify that such dispositions do not establish mandatory precedent. A draft of proposed NRAP 36 is attached.

This petition rests on the following:

1. The practice of issuing unpublished dispositions has led to controversy over whether such dispositions may be cited in unrelated litigation. *Compare, e.g., In re Burns*, 974 F.2d 1064, 1068 (9th Cir. 1992) (the "rule against citing unpublished [dispositions] serves a significant judicial purpose," in that it permits appellate courts to resolve cases efficiently and expeditiously "without the need to state the facts and how the case arose in order to display the context for purposes of future distinctions of the case from others, and without laboring to refine our language lest it be taken out of context") *with Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000) (holding that the practice of issuing dispositive orders and forbidding

their citation as legal authority is not a proper exercise of judicial power and thus violates Article III of the United States Constitution), *vacated*, 235 F.3d 1054 (8th Cir. 2000).

2. This court's caseload has required it to resolve increasing numbers of cases by unpublished disposition. These dispositions are not truly unpublished, though, as they are accessible on the court's website and through electronic research services such as WestlawNext.

3. The scarcity of published case law and the accessibility of unpublished dispositions has led practitioners to disregard SCR 123, which has led, in turn, to an increase in collateral disputes over sanctions for violating SCR 123.

4. The new court of appeals will reduce the workload of the supreme court and allow more time to be devoted to published and unpublished dispositions by both courts.

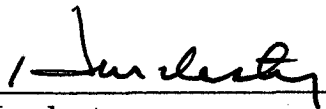
5. In 2006, Rule 32.1, Fed. R. App. P., was adopted to provide that the United States Circuit Courts of Appeals may not by local rule forbid citation of unpublished dispositions filed after its January 1, 2007 effective date. This amendment, and the local rule amendments that followed, provide a rich resource on which to draw in considering revisions to our rules on citation of unpublished dispositions.

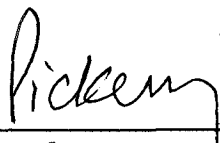
6. Proposed amended NRAP 36 allows citation of unpublished dispositions but provides that such dispositions do not establish mandatory precedent. The draft limits its permission to unpublished dispositions filed after its effective date. Finally, the draft includes rules to govern citation form and requires that citing counsel provide copies to unrepresented parties, so all parties have equal access to the dispositions cited.

7. These issues deserve public input and debate.

For these reasons, we ask that the court conduct public hearings on this matter and, if it deems appropriate after receiving input from the bar and the public, that the court adopt the proposed amendments to NRAP 36, attached, and repeal as unnecessary SCR 123.

DATED this 26 day of February, 2015.


_____, C. J.
Hardesty


_____, J.
Pickering

RULE 36. ENTRY OF JUDGMENT; FORM OF DISPOSITION

(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 cases by either published or unpublished disposition. ~~An unpublished disposition, while publicly available, may not be cited as precedent except in very limited circumstances, pursuant to SCR 123.~~

(1) A published disposition is an opinion designated for publication in the Nevada Reports and may be cited as precedent. The court will decide a case by published opinion if it:

(a1) Presents an issue of first impression;

(b2) Alters, modifies, or significantly clarifies a rule of law previously announced by the court; or

(c3) 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 [on or after _____]. When citing an unpublished disposition to this court, the party must cite an electronic database, if available, and the docket number and filing date in this court (with the notation "unpublished disposition"). A party citing an unpublished disposition must serve a copy of it on any party not represented by counsel.

(d) Duplicate Order or Opinion.

(1) The justices of the Supreme Court, or district judges designated by the governor to serve on the Supreme Court 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, the judges or justices 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 judges or justices 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 judges or justices 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 judges or justices 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 ~~in the case~~ 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(c)(1)-(3). 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.

| ~~———— [As amended; effective November 5, 2010.]~~