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

Tracie K. Linderman
Clerk of the Supreme Court
201 South Carson Ave.
Carson City, Nevada 89701

RE: ADKT 0504

As this Court well knows, Marty Keach and I work on many cases together. We have looked at ADKT 0504 and wish to provide some input to the Court regarding same. In sum, we object to the proposal, however, we understand the Court's reasoning and suggest the 9th Circuit approach instead.

ADKT 0504 wishes to make unpublished decisions available for citation and to make them "persuasive but not binding precedent." In a sense, the Proposal wishes to have its cake and eat it too. Persuasive precedent is but a hair away from binding precedent. In other words, if the Proposal is accepted, Nevada will now have "sort of" law. That is not helpful to practitioners nor is it helpful to the citizens of Nevada. And, to be sure, it will create more issues for District Court Judges who will now be able to tell the Supreme Court that it was wrong, and, who will have to grapple with "persuasive" precedent by the same folks who order "binding" precedent.

Unpublished orders are not decisions. They are simply Orders. They do not have the meat of a published decision and, many times, seem to miss the balance and clarity of a published decision. Now, the typical Orders would never be cited anyway. For example, the denial of writs of mandamus seem to come almost every day. But, some make pronouncements of law that would now be "persuasive" precedent below. The reality is that this new "persuasive precedent" is going to add to the Supreme Court's docket—not subtract.

Any "persuasive" precedent is up for argument. When defense counsel brings Unpublished Decision X to the District Court, and the District Court relies on same to make an evidentiary ruling (for example), a guaranteed appeal has now been made. The reason? Persuasive precedent can always be changed. It is not subject to stare decisis. So, the Court will then have to ultimately publish an opinion regarding the subject to have some kind of finality. We, of course, recognize that all decisions, published or not, can be changed. But, unless one established that the Court was wrong in its legal reasoning (see, **Am. Home Assur. Co. v. Eighth Judicial Dist. Court**, 122 Nev. 1229 (Nev. 2006)) the Court's ruling generally

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withstands change. With the Proposal, it is all up for grabs, and, this Court will necessarily see an increase in its docket as a result.

To be clear, the new appeals will be based upon not a misapplication of the law, but the law itself. So, every unpublished decision will now have, in effect, a second bite at the apple.

The reasoning behind the Proposal certainly makes sense and is understandable. The Court's Docket is overflowing and the Court does not have time to state the facts and circumstances under which the case arose and refine the language in each opinion. We understand the issues with the Docket. But, it is one thing to have an unpublished decision that resolves a particular case. It is quite another to all of a sudden create precedential law with those decisions that this Court admits lack the facts and circumstances upon which the case arose and do not have refined language. Unpublished decisions simply can miss too much to be relied upon by any Court, let alone be precedential value.

We recently were involved in a matter where defense counsel cited **Vaughan v. Harrah's Las Vegas, Inc.**, 2008 Nev. Unpub. LEXIS 3 (Nev. 2008) arguing that this Court found that an employee was not in the course and scope. The problem with the decision was that the facts of the case weren't in the Order and the reasoning for the decision was not in the Order. Simply citing law as if it were blackletter law does not help the practitioner. Our job is to understand why a decision went the way it did in order to buttress our argument or, explain why the case does not apply. Being able to cite decisions like **Vaughn** for pronouncements of law allow counsel to simply state law without any reasoning. It is like citing headnotes. Orders are perfect for a particular case—but others relying on those Orders for some sort of precedent don't have the reasoning behind them to allow them to be properly relied upon.

The power of the Supreme Court is that its actions direct the District Courts. It also allows for practitioners to have a guiding principle of the law. Using unpublished decisions will allow for unfettered analysis and no guidance. Because the opinions will just be "persuasive", one can imagine a District Court Judge disagreeing with a Supreme Court Unpublished decision. The Supreme Court should not have two classes of opinions and two classes of precedent. It detracts from the Court's ultimate rule of law.

As provided above, we have certainly seen defense counsel cite unpublished decisions. The Proposal's reasoning is based in part on the disregard of SCR 123. Because counsel does not follow the Rules is not a reason to get rid of the Rule. Perhaps stricter enforcement would resolve the issue. If counsel violated the page length rule, or font rule, this Court would have something to say about it. It would not simply throw out the Rule.

Nevertheless, we understand that this Court is tired of seeing petty disputes about who cited what. To resolve that issue and others, the Ninth Circuit allows for Unpublished Opinion citation. See 9th Cir. Rule 36-3. But, it makes clear that such opinions are not precedent. Following the 9th Circuit rule would allow the Court to relieve itself of the SCR 123 issue with citations. But it would maintain the precedential value of an unpublished decision by, in essence, making it meaningless to other litigants (except for law of the case or claim/issue preclusion matters). This would solve the two classes of opinions and two classes of precedent problem.

Of course, the other alternative would be for this Court to simply make all opinions and orders published. If an opinion is good enough to be made, then, the argument goes, why shouldn't it be published and precedential? To be sure, all opinions would now require factual details and explanatory legal reasoning. And, to be sure, the already crowded docket would explode. So, we understand why this would not be acceptable.

Because of docket needs by the Court, there need to be two classes of opinions. But, we need to recognize that the precedential value of a "lesser" opinion should be what the 9th Circuit termed, "not precedent."

We respectfully request that this Court adopt 9th Circuit Rule 36-3 regarding unpublished decisions instead of ADKT 0504

Very truly yours,

ECKLEY M. KEACH, CHTD.
MURDOCK & ASSOCIATES, CHTD.

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REM/tnd