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Tracie K. Lindeman  
Clerk of the Supreme Court  
201 S. Carson St.  
Carson City, Nevada 89701

**Re: ADKT 504**

Dear Ms. Lindeman:

Please accept this letter in response to the Court's request for comments concerning ADKT 504, proposing amendments to SCR 123. I generally oppose the proposal. I would also like to participate in the July 1 hearing.

The court's concerns about the state of practice are correct in that Nevada has a general dearth of published decisions that causes some practitioners to disregard SCR 123 and NRAP 36. Unpublished dispositions are available for public review through [www.nvcourts.gov](http://www.nvcourts.gov) and various commercial legal databases. I routinely review these unpublished dispositions, and encourage other attorneys to do so, because they can be a resource for vetting various legal theories to better hone a client's position. I also routinely discuss these unpublished dispositions, and those from Nevada's federal court, on my civil discovery blog, [www.compellingdiscovery.com](http://www.compellingdiscovery.com). Again, they are a resource that can help lawyers learn from the mistakes or failed arguments of others.

However, I oppose the proposal to amend SCR 123 and NRAP 36. My opposition stems from the discussion about citing unpublished federal district court orders. It is generally permitted now, however for good reason. The "process by which district court judges decide whether to submit their opinions to West Publishing Company (or, more accurately, which 'dropoff window' they choose at West's—the F. Supp. window or the Westlaw window) is very different from the deliberate culling process that is supposed to be performed in the circuit courts." William T. Hangley, *Opinions Hidden, Citations Forbidden: A Report and*



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June 23, 2015

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**FILED**

JUN 29 2015

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY: *[Signature]*  
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15-19759

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*Recommendations of the American College of Trial Lawyers on the Publication and Citation of Nonbinding Federal Circuit Court Opinions*, 208 F.R.D. 645, 659 (2002). The selection of federal district court decisions for publication is merely through chance and there is no meaningful distinction between those decisions that a judge might select for publication and those that are not. This Court correctly recognized this and permits citation to unpublished "federal district court dispositions, which may be cited for their persuasive, if nonbinding, precedential value." *Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. Adv. Rep. 42, 245 P.3d 542, 546 n.7 (2010).

However, Nevada's appellate courts do engage in a deliberate editorial process to decide which opinions should be published. There is also often a stark difference in the format and level of analysis provided in published decisions and that in unpublished dispositions. If SCR 123 and NRAP 36 are amended as currently proposed, the collateral arguments that currently arise over citation to unpublished dispositions will now instead be over how much weight a district court should give an unpublished disposition. Worse, I am aware of unpublished dispositions that reached opposite conclusions on the same topic, only later to be resolved via a published decision in a third case. The rules would merely trade one collateral argument for another.

I support the Supreme Court's efforts to address the relative scarcity of caselaw in Nevada. The solution is to allow the Court of Appeals to assist as was intended and for both appellate courts to continue publishing decisions in a methodical manner. I see the proposed amendments to SCR 123 and NRAP 36 as adding more uncertainty to the law, rather than clarifying it.

Alternatively, the petition notes and relies heavily upon NRAP 32.1, as well as Ninth Circuit Rule 36-3. If SCR 123 and NRAP 36 are amended, I agree it would be beneficial to follow the federal example.

Sincerely,



Michael P. Lowry