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June 26, 2015

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

FILED

JUN 30 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

Re: ADTK #504 repealing SCR 123

To the Justices of the Supreme Court:

In Posner v. Tassely, #63326, I had filed a motion to declare SCR 123 unconstitutional. The court denied the motion but moved forward with #504 to achieve the same goal. I feel honored that my motion precipitated the proposed major changes to the rules. Since the court already has my motion with its extensive citation of authority, there is no need to resubmit it with this letter.

My concern with the proposed NRAP change is that it simply proposes an arbitrary date that unpublished decisions issued after it can be cited but not those decisions issued prior to that time. There appears to be no rhyme or reason for that distinction other than it is a copycat version of FRAP 32.1.

FRAP 32.1 was studied extensively in the federal court system before its adoption. See Patrick J. Schiltz, *Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 Fordham L. Rev. 23 (2005). Professor Schiltz was the reporter for the advisory committee on the federal rules of appellate procedure. His article is detailed.

The arbitrary date on citing unpublished cases serves no purpose and creates an unwieldy "caste system" of unpublished decisions: those before the date and those after it. There is no good policy reason to have that unrealistic distinction in the rule.

One other concern deserves a comment. RPC 3.3(a)(2) requires a lawyer to disclose controlling authority to the court even if opposing counsel does not and even if adverse to one's own client. The failure to cite unpublished decisions should not be considered a basis for professional discipline of a lawyer even if there are adverse unreported decisions in existence.

Respectfully submitted,

Robert W. Lueck
ROBERT W. LUECK, ESQ.

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DEPUTY CLERK

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