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201 South Carson Street, #201  
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**FILED**

JUL 06 2015

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

Re: **ADKT 504, July 1, 2015, Hearing**

Dear Justices:

This letter is in support of ADKT 504, which would allow citation of unpublished decisions as persuasive, but not mandatory authority. Ironically, as you are aware, “unpublished orders” are actually published. The “unpublished orders” are available on the court’s website and may be reviewed by anyone. Further, although SCR 123 prohibits the citation of unpublished orders, in some cases they have been used as persuasive authority. For example, in an Idaho federal bankruptcy case, the court cited as authority, the unpublished opinion of *Tsai v. Hsu*, 2010 WL 3270973 (Nev. Apr. 29, 2010). See *In Re Wallace*, No. 11-21077-TLM, 2013, 2013 WL 1681780, at \*6 (Bankr. D. Idaho Apr. 17, 2013). A Nevada lawyer may presumably cite to the federal bankruptcy decision that cites the unpublished Nevada decision, but not the unpublished decision itself. Moreover, despite its own rule, the Nevada Supreme Court, in an unpublished order, allowed citation to another unpublished decision in acknowledging it was “relevant.” (*Duffy v. OneWest Bank, FSB*, 2012 WL 1658792 (Nev. May 10, 2012).

Reasons supporting the rule allowing Nevada lawyers to cite to “unpublished orders” include:

1. District court judges and counsel are reviewing the unpublished orders. A judge may be relying on analysis contained in an unpublished order, but if the order is not cited, counsel may not know the court’s analysis came from an unpublished order. Allowing unpublished orders to be cited as persuasive authority allows for a more transparent decision making process.
2. The Court’s analysis in unpublished orders provides good, if not the best, guidance to the district court about the current Court’s interpretation on specific issues. Because the law evolves, the more recent unpublished orders may be better insight on an issue than an older published opinion.

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3. Other courts, including federal courts, have used unpublished Nevada orders in their published opinions. They do this to predict Nevada law. Technically, SCR 123 says they cannot. But if other courts are citing to these Nevada orders, it follows that they should also should be able to be cited in Nevada.
4. Given that the unpublished orders are available and careful lawyers review them, at least in their practice areas, it is awkward for there to be an ethical rule that prohibits citing them to opposing parties and the court.
5. The federal courts, including the Ninth Circuit, all allow unpublished dispositions to be cited in federal court. Although I have not done in-depth research into other state court rules, it appears that Nevada is in the minority by not allowing unpublished orders to be cited.
6. The Judicial Conference of the United States issued Federal Rule of Appellate Procedure 32.1, a new rule governing all federal courts, which states: "A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and (ii) issued on or after January 1, 2007."
7. Published and Unpublished Cases Ninth Circuit Federal Court of Appeals Rule 36-3(b) states that "[u]npublished dispositions and orders of this Court issued on or after January 1, 2007 may be cited to the courts of this circuit in accordance with Fed. R. App. P. 32.1." Unpublished cases and orders issued before January 1, 2007 may not be cited to except for example, "when relevant under the doctrines of law of the case," res judicata or collateral estoppel, or "as to show double jeopardy." Ninth Circuit Federal Court of Appeals Rule 36-3(c).
8. Allowing published orders to be cited improves accountability, since one may compare the results in similar cases and advocate for uniform application of the law. Because of the court's increasing caseload, a significant majority of its cases are being decided by unpublished orders, rather than published decisions, leading fewer interpretations and statements of Nevada law. As a result, both the bar and bench place more reliance on unpublished orders. The court's analysis in published orders provides the best guidance to judges and practioners as to the court's

interpretation on specific issues of law. Further, because the law evolves, the more recent unpublished orders are likely better insight on an issue than older published opinions.

In sum, “unpublished orders” that under SCR 123 are not permitted to be cited, are published and are cited. A district court judge that has read an unpublished order likely deems the unpublished orders as authority or at minimum, deems them to be insightful as to how the Supreme Court would rule on a similar issue. Not knowing when or which decisions a district court is relying upon, allowing the citation of “unpublished decisions” would make their use more transparent, improve accountability of the court and will likely result in more uniform application of the law. Please express your support for the repeal of SCR 123.

Sincerely,

A handwritten signature in black ink, appearing to read 'Bruce I. Shapiro', with a stylized flourish at the end.

BRUCE I. SHAPIRO, ESQ.

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