December 3, 2014

To: The Nevada Supreme Court
From: Liaison Committee, Appellate Litigation Section of the State Bar of Nevada

Re: Comments on ADKT 501 – Proposed Amendments to the NRAP

The Appellate Litigation Section of the State Bar of Nevada would like to make the following comments to ADKT 0501 and/or would ask for clarification on the following points:

1. As an initial comment, a subsection of the Liaison Committee of the Section has been working on broader proposed revisions for the Nevada Rules of Appellate Procedure. Those proposed revisions are not included in the comments described herein. The Section hopes to provide draft proposals to the Court in 2015, which will take in to account all rule amendments adopted from the current ADKT.

2. It is unclear from the Rules as to when a case is actually assigned to the Court of Appeals (COA) by the Nevada Supreme Court (NSC). Some practitioners are concerned that they will not know how to appropriately caption their pleadings and/or address the proper court.

   It appears from the Rules that assignment will take place after briefing, as indicated by the rules regarding "routing statement(s)." *See* Proposed Rule 28(a)(5) and 28(b)(2); Proposed Rule 21(a)(1). However, all references to the "appellate court" in procedural rules that are triggered pre-briefing make it appear that the assignment takes place well before briefing. *See e.g.* Rule 3(b) (discussing consolidation of cases by the "appellate court"); If, in fact, assignment does not take place until after briefing—*i.e.,* after the routing statement is made and challenges to assignment to the COA takes place—then there is no need to include references to the COA in any rules related to docketing statements, transcript requests, or any other procedural rules which are in effect prior to full briefing.

   This raises questions as to how pre-briefing/pre-routing motions and writ issues are decided. For example, Rule 8 amends the language for a preliminary injunction or stay pending appeal to allow either the COA or NSC to decide the motion and further allows a single justice or judge to

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issue the injunction (8(a)(2)). Other motions, such as motions to dismiss an appeal, may also be made before briefing.

Additionally, it is unclear which court will direct an answer to a writ petition and whether routing will occur before or after an answer to a writ petition is directed. The proposed revision to Rule 21, addressing writ petitions, requires a routing statement but one of the two courts will seemingly be directing an answer to the writ petition without the other party's answer and/or routing statement. *See also* Rule 14(a)(2) (no requirement for docketing statement for writ proceedings); Rule 14(a)(4) (purpose of the docketing statement is to "asses[ ] presumptive assignment" to the COA).

The Section suggests clarification for practitioners. Specifically, that until a case is actually assigned and transferred to the COA, only the NSC may decide pre-briefing motions and make the initial determination of whether to direct an answer to a petition for extraordinary relief. The Iowa Rules of Appellate Procedure include the following rule, a form of which may be appropriate for Nevada:

> 6.1002(6) *Authority of the court of appeals and its judges to entertain motions.* The court of appeal and its judges may entertain motions only in appeals that the supreme court has transferred to that court. In such appeals, a single judge of the court of appeals may entertain any motion and grant or deny any relief which may properly be sought by motion, except that a single judge may not dismiss, affirm, reverse, or otherwise determine an appeal. The action of a single judge may be reviewed by the court of appeals upon its own motion or a motion of a party. A party's motion for review of the action of a single judge shall be filed within 10 days after the date of filing of the challenged order.

3. According to the definitions in Rule 1(e)(3) "Clerk" or "clerk of the Supreme Court" is "the person appointed to serve as clerk of both the Supreme Court or Court of Appeals." Throughout the proposed rules, however, there is reference to "clerk of the appellate court." *See e.g.* Rule 3C(b)(3); Rule 3C(d)(3)(D);

Rule 3C(e)(1)(D). The Section suggests correcting either the definitions or the references to the clerk throughout the rules. Similarly, Rule 1(e)(3) – refers to both Clerk and clerk of the Supreme Court as they are one in the same. The Section is unsure of the need to define both if they are one in the same.

4. Rule 1(e)(4) and (5) – unsure of need to define "Court" and "Appellate Court" as they mean the same thing.

5. Rules 14(a)(2) uses the term "commence" as to original proceedings. Yet, it appears that all actions at the appellate level are "commenced" at the NSC and, only after assessment, are later assigned to the COA. The Section recommends removing the term "commence."

6. Rule 17:
17(a)(1)(B), (N), 17(b)(1)(A)– remove the word "primary" prior to "offense" as " it is neither a term of art nor defined and may lead to confusion and increased litigation.

17(a)(1)(N) – add "s" to the word "decision" so that it reads "inconsistency in the published decision[s] of the Court of Appeal . . ."

17(b)(1)(B) – the word "principal" is not defined. It is thus ambiguous as to the $250,000 judgment: does "principal judgment" include all damages? Does it mean inclusive or exclusive of interest, penalties, and attorneys fees and costs? The Section suggests clarifying language or simply removing the word "principal."

7. Rule 40B – It is unclear whether a petition for rehearing in the COA is *required* before a party can file a petition for review with the NSC. ("within 18 days after the filing of the Court of Appeals' decision under Rule 36, ***or*** its decision on rehearing under Rule 40. A petition for review shall not be filed while a petition for rehearing is pending in the Court of Appeals.") (emphasis added); *See also* NRAP 40A(b).

Additionally, is a petition for review that is granted automatically assigned to the en banc court? Because Rule 40B(g) requires a majority of the NSC to grant petition, it appears to be en banc. This question arises from a concern that a petition for review might go to a panel which would require additional rounds of petitioning to get to the en banc court.

Also, the Section suggests deleting the phrase "of general statewide significance" from Rule 40B(a)(1) as it seems to be redundant of Rule 40B(a)(3).

8. Rule 25(c)(3) – new sentence right before (d) – take out extra word "of" that appears to be a typo– "Service through the court's electronic filing system is complete at the time [of] that the court....

9. Rule 26(b)(1)(B) – we noticed that this rule extends the telephonic extension from 5 to 14 days – but a corresponding change was not made in Rule 31(b)(1) – was this intentional?

Rule 26(b)(1)(B) – suggest adding the word "telephonic" to the last sentence – "The grant of a telephonic extension of time..."

Rule 26(c) – practitioners who practice regularly at the appellate level are aware that NRAP and NRCP and the local rules for the 2d and 8th judicial districts differ as to whether the 3-day mailing period applies to service through electronic means. The NRCP and local rules allow the additional 3-days even where the parties are e-filers and receive e-service; the NRAP does not. To clarify for those less familiar with the differences – the Section suggests adding a reference to Rule 25(c)(3) at the end of the first sentence of Rule 26(c) – " ... unless the party being served is a registered user of the electronic filing system. See NRAP 25(c)(3). . . ." Alternatively, the Section suggests an express statement that the 3 calendar days are not added to the prescribed period when the party being served is a registered user of the electronic filing system.

The Appellate Litigation Section of the Nevada State Bar extends its appreciation to the Justices of the Nevada Supreme Court and the Clerk of the Supreme Court for accepting these written comments. While they may not reflect the individual views of each practitioner-member of the Section, they reflect the overall comments and concerns of the Section as a whole.

Attorneys Jackie Gilbert and Jordan Smith will be attending the public hearing at 2:00 p.m. on Thursday, December 4, 2014 to discuss these comments.

Sincerely,

Marla J. Hudgens

Chair of the Appellate Litigation Section
of the Nevada State Bar