GORDON SILVER

December 3, 2014

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

Tracie Lindeman
Clerk of the Court
Nevada Supreme Court
201 South Carson Street
Carson City, NV 89701-4702

Re: ADKT 501

Dear Ms. Lindeman:

We write on behalf of the Gordon Silver attorneys who regularly handle appellate matters in the Nevada judicial system. We respectfully submit the following comments to the proposed Nevada Rules of Appellate Procedure amendments as requested in ADKT 501.

First, we address the proposed rules regarding the timing of when a case is assigned (if at all) to the Court of Appeals. It appears that the rules call for the assignment to occur after the briefing stage has been completed. *See* Rules 17(b)(3), 28(a)(5). We believe that it should be made earlier so as to protect against complications and conflicts arising from the Nevada Supreme Court presumptively handling all pre-assignment motions and settlement conference issues. Simply stated, as currently proposed it does not serve judicial economy because it will frequently require both Courts to learn each case. Rule 3 provides for the filing of a notice of appeal that contains *inter alia* the court to which the appeal is taken and a brief description of the nature of the action. Then, up to twenty days later, the parties file a docketing statement under Rule 14. Proposed Rule 14(a)(4) explains that the docketing statement's purpose is, in part, to assess presumptive assignments to the Court of Appeals. At this point, counsel is required to "state specifically all issues that counsel in good faith reasonably believes to be the issues on appeal." Rule 14(a)(5). Respondent then has seven days to clarify any issues or errors with appellant's docketing statement. Rule 14(f). We believe that enough information is available to the Nevada Supreme Court at this stage to make a presumptive determination under Rule 17 as to whether it is appropriately assigned to the Court of Appeals. If it is, then all motion practice can be ruled upon by that court, thereby eliminating the need for Supreme Court Justices to take time away from their already overburdened schedules at this early stage. It has been our experience that a good deal of motion practice occurs in the early stages of a case on appeal.

Moreover, this earlier assignment of the case could be implemented in conjunction with a rule that the Court of Appeals has the option to send a case back to the Nevada Supreme Court

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when (1) the case meets the factors enumerated in NRAP 40B but was inadvertently assigned to the Court of Appeals, or (2) the case was within one of the Rule 17 presumptive categories but warrants Nevada Supreme Court consideration. This could function in the same manner that Rule 40B petitions for review are handled—by consideration of factors such as "(1) Whether the question presented is one of first impression of general statewide significance; . . . (3) Whether the case involves fundamental issues of statewide public importance." Rule 40B(a).

Second, with regard to petitions for certiorari - Rule 40B(f) - we respectfully suggest that Rule 40B be amended to allow the decision of whether to grant certiorari to mirror Rule 40A(f) which addresses en banc consideration. Altering this Rule to mirror Rule 40A(f) and its requirement of approval by two Justices would be more efficient in that it would reduce the time from what is required by its current language, expedite the decision-making process and preserve judicial resources.

Third, we think that Rule 34 in its current format could be read as precluding oral argument before the Court of Appeals, as it is silent in that regard. We would suggest that the first sentence of Rule 34(a) be altered to read "The clerk shall advise all parties of the date, time, and place for oral argument, the time allowed for oral argument, the court before which argument will occur, and if before the Supreme Court, whether the full court or a panel will hear argument and, if deemed appropriate by the Court, the issues to be addressed at oral argument."

On a final note, although the proposed rules are silent in this regard, we believe that cases in which the Supreme Court grants certiorari need not necessarily be heard en banc. Just as the Court has been hearing and deciding cases by panels in the past, it can do so in the future. This approach will enable the Court to hear more important cases and decide them more quickly. The ability to petition for en banc consideration after a decision of a panel should still remain available to the litigants and the Court can, of course, decide to hear a matter en banc in the first instance when the petition for certiorari is granted. Certainly a case which is initially assigned to a panel may be reassigned en banc and vice versa.

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We thank the Court for the opportunity to comment on these important matters.

Respectfully submitted,

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