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OUR FILE NO.:

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Elizabeth A. Brown
Clerk of the Supreme Court
201 South Carson Street
Carson City, Nevada 89701

Comments Re: ADKT 0501 Proposal to Amend NRAP 3A and NRAP 3F

Dear Ms. Brown:

This correspondence concerns the proposed amendments to NRAP 3A and the adoption of NRAP 3F, which contemplates summary appellate proceedings for appeals from orders granting motions to dismiss and for summary judgment. In a nutshell, such appeals would be heard on the record without briefing.

I am authorized by all of the partners of Hutchison & Steffen, PLLC, to express our strong opposition to the proposal. The rest of the comments are my own.

In the more than a decade that I served as a staff attorney, I witnessed first-hand the great expansion of the caseload of the Court, and was involved in many discussions of how to address the flood. Multiple plans were proposed and implemented, with varying degrees of success. The problem of the caseload has nevertheless worsened since I left the Court, and continues to be a matter of great concern to the entire legal community. I do not profess or presume to have the answers. But as an appellate practitioner from more than one perspective for more than three decades, I am familiar with the problem (at least to some degree), and I am sympathetic to all measures that are necessary to address these concerns.

However, every time saving measure has disadvantages, and many (if not all) result in less thorough appellate review, and diminished confidence in the appellate remedy in general. As a practitioner, I shudder every time I hear Justices and Judges say "we need to find ways to expedite the decisions," because my experience has taught that haste often results mistakes. Justice Steffen wanted to issue omnibus orders simply dismissing appeals by number without comment, but Justice Gunderson (wisely in my view) insisted that if the Court stops justifying its decisions, they will be unjustifiable. In opposing a Court of Appeals, Justice Mowbray proclaimed to the media that all the Court needed to do to address the problem was "to end the leisurely practices of the past and tighten our belts." He was profoundly wrong. The problem is complex and there are no quick fixes. I do not need to tell you that.

Summary procedures for resolution of a category of cases as large, important and divergent as appeals from summary judgments and orders of dismissal seems to me a particularly dangerous and undesirable response to the caseload problem. It took the Court until 2005 to join the twentieth century and adopt a more workable standard for summary judgments in *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026 (2005). From my perspective, application of that standard has been inconsistent, at best. A majority of cases in today's legal climate are decided by settlement or judge issued orders rather than trial. A number of reasons for the shift from trying cases to negotiating cases have been posited, the most obvious culprit (in my view) being the disaster of current discovery rules and abuses. The result is that a great number of cases are decided by summary judgment, and these include simple cases, and the most complex cases that come before the Court.

Although the Supreme Court's review of summary judgments is *de novo*, an appellate court's review still differs (or at least should differ) from a district court judge's review. The arguments set forth in the record may or may not be adequate to fully inform the appellate court of the nuances of the case, and to fully address issues. Trial lawyers file pleadings and motion papers seeking to obtain judgments. Appellate lawyers (at least should) address policy and concerns about what the law should be, not just in the case before the Court, but for the good of the law generally. I know this is primarily the function of the Court, and I would not suggest that the Court is incapable of performing this function without the aid of lawyers, but the Court cannot really get the flavor of a case, any case, from a cold record. Briefs and oral argument serve important functions in every case, and in my view, even more so in cases that have been decided by a single judge in district court, some of whom are far better than others.

I believe that due process requires notice and a fair opportunity to be heard. In the case of appellate practice, I believe that briefing is a fundamental part of a fair opportunity to be heard. I understand that summary procedures have been adopted in many areas, and are justified and effective in some. I simply believe that the diversity of cases and subject matter addressed by motions to dismiss, which necessarily require a declaration of what the law is, and motions for summary judgment, the bread and butter of modern civil practice, defy categorization as a class of cases in which briefing and oral arguments can be summarily disposed of in favor of review on a cold record. Even if the Court retains (as the rule does) the ability to request briefs in cases warranting such, in the view of the Court, the problem of the Court's being inadequately informed in too many cases is a specter I cannot see the Court overcoming, and consistency becomes an issue of paramount concern.

With respect (and I have great respect for the Court and the Justices), I express my strongest opposition to a rule that would disallow briefing and oral argument in a category of cases as broad, important and divergent as orders granting dismissal and summary judgment. I

believe briefing of the law in these cases, which by their very nature present legal issues, is essential to the proper continued development of the common law, which at least to this point, has been a unified endeavor of the Courts and the Bar.

Sincerely,

HUTCHISON & STEFFEN, PLLC

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MKW/clp