October 24, 2018

Elizabeth A. Brown
Clerk of the Supreme Court
201 S. Carson Street
Carson City, NV 89701

Re: ADKT 501, Proposed NRAP 3F

Dear Ms. Brown:

The Appellate Litigation Section of the State Bar of Nevada (the "Section") writes to express its unequivocal opposition to the petition in ADKT 501 to eliminate briefing in certain civil appeals. As this Court is aware, the Section is composed of members of the Bar actively engaged in appellate practice, including numerous former Nevada Supreme Court and United States Circuit Courts of Appeals law clerks and staff attorneys.

The Section was informally polled to invite comment from its members. Every member who responded opposed ADKT 501. Those in opposition include the current executive committee, along with five past chairs of the Section. Indeed, the Section contemplated providing two position statements concerning the proposed change – one for, and one against – as it has in the past with respect to other proposed rule changes. However, no Section member voiced support for ADKT 501. The Section finds this uniformity of opinion telling. For the following reasons, the Section urges the Court not to adopt ADKT 501.

Without the Benefit of Appellate Briefing, the Parties Have No Meaningful Opportunity to Identify Error, and Comprehensive Review of the Record Would Be Required.

An often quoted statement that has become a legal adage notes, "Judges are not like pigs, hunting for truffles buried in briefs," *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir.1991) (per curium), and "need not excavate masses of papers in search of revealing tidbits—not only because the rules of procedure place the burden on the litigants, but also because their time is scarce." *Northwestern Nat'l Ins. Co. v. Baltes*, 15 F.3d 660, 662-63 (7th Cir.1994) (Easterbrook, J.) The current proposal eliminating briefing will require the Court to devote scarce judicial resources to hunting through appendices and trial court records.

Briefing assists the Court in locating the material issues underpinning the dispute between the parties. Briefing actually makes appeals of this nature faster, not slower, as only the issues cogently briefed by parties with appropriate citation to the record and authority are live on appeal.

An obvious counterpoint is that all those arguments could have and should have been made in the briefing below. *See Old Aztec Mine v. Brown*, 97 Nev. 49, 623 P.2d 981 (1981). But this misses the point that district court briefing is fundamentally different than appellate briefing. An opposition to a dispositive motion addresses the arguments raised by the movant party, but cannot address the order the district court enters. In other words, an opposition cannot anticipate and serve as a "pre-buttal" to errors of the district court.

The proposed lack of briefing means that any discussion, or revelation of erroneous thinking or overlooking of evidence that comes out at the hearing or in the written order cannot be addressed. Respectfully, the absence of appellate advocacy will not improve appellate practice, nor the body of appellate law.

The Proposed Rule Arbitrarily Bans Appellate Advocacy as to Certain Classes of Dispositive Orders.

The proposed rule embraces case-terminating dispositive orders granting motions to dismiss for want of personal jurisdiction, for failure to state a claim upon which relief can be granted, and for summary judgment. However, the fact that some judgments are a result of dispositive motions under NRCP 12(b)(2), (5), or NRCP 56, while others are the result of evidentiary hearings, other rules of civil procedure (such at NRCP 12(c)), or trials is not a sound basis to differentiate the extent of appellate review.

First, that argument the granting of dispositive motions is reviewed de novo is not an adequate basis to omit briefing. Many issues are reviewed de novo but are not subject to the proposed rule change, such as the interpretation of contracts, the interpretation of statutes, and administrative appeals. However, no short-circuited appeal process is proposed for other de novo appeals. The singling out these types of dispositive motions therefore cannot be justified by the type of review.

Additionally, appeals from dispositive motions are not inherently simpler or less complex than appeals from trials. Issues decided via dispositive motions can be simple or complex, while issues decided at trial can likewise be similar or complex. Presumptively affording a simple appeal from a trial the presumption of more process than an appeal from a complex summary judgment determination lacks a solid basis. This rule would also have the effect of allowing parties to obtain full briefing concerning any interlocutory order (dispositive or otherwise) as long as any part of the case culminated in a trial. Relatedly, appeals from other types of orders, such as preliminary injunction orders, NRCP 60(b) orders, and attorneys' fees orders would all remain entitled to full

briefing, while Rule 12 or 56 orders would not. This problematically creates unequal treatment of similarly situated litigants based on the procedural posture of the dispositive order.

Further, in the Eighth Judicial District, for example, it is customary for the prevailing party to draft the order of the court for review and approval. As such, a raw review of the record will generally consist of three pieces of work-product in favor of affirmance and authored by the prevailing party (motion, reply, and order) and one piece of work-product in favor of reversal (the opposition). This is not a level playing field for appellate review. Briefing, which includes the opportunity for the appellant to identify error in the order is necessary for fairness in the process.

It is unsound to treat appeals from certain dispositive motions as second class, and tends toward unfairness.

Eliminating Briefing Will Not Likely Increase Efficiency, Reduce Cost, or Shorten the Time to Decision

While the purpose of the proposed rule change has not been made explicit, its likely goal is to increase efficiency and obtain decisions more quickly. Though these are generally laudable goals, ADKT 501 is unlikely to further them, and to the extent it does so, it can be at the expense of fairness and sound process.

Eliminating Appellate Briefing Is Not Efficient.

For the same reasons addressed above, the absence of appellate briefing will have a different cost, as there will be no opportunity for the litigants to narrow the matter by carefully choosing the issues to raise on appeal, or identify the error in the district court's order. The courts will thus be tasked with reviewing the universe of briefing below and the entire appendix. Particularly in appeals of summary judgment, the appendix on appeal can be thousands of pages in length.

Moreover, denying appellants the right to file briefs on appeal would likely result in their seeking alternative means to protect their interests. Without the traditional opportunity to highlight issues for the Court, litigants are likely to increasingly file petitions under NRAP 40, 40A, and 40B, if those are the only avenues to allow some form of appellate briefing. Additionally, as the appellate courts may order briefing, parties may find themselves engaged in briefing about whether an appeal should be briefed. This meta-briefing is not constructive or efficient.

The Source of Delay in Appellate Practice is Generally Not the Briefing Schedule.

While some have suggested that the lack of a briefing schedule will reduce delay by allowing the appellate courts to consider appeals earlier, we believe that supposition misidentifies the source of delay. The appellate courts' massive caseload and backlog prevents the courts from deciding appeals more quickly. That more appeals may be ready for decision sooner will do nothing to alleviate the core issue, which is the caseload. Currently, fully-briefed appeals often are not decided for six months to more than a year from the time they are fully briefed, strongly suggesting that appeals' readiness for determination is not the cause of delay.

Additionally, as the appellate courts may elect to order briefing in particular appeals, briefing schedules may be ordered months into an appeal, rather than as a matter of course shortly following a notice of appeal. If briefing is ordered only after significant review, such appeals will be more delayed than if the parties had complied with a set briefing schedule.

Eliminating Appellate Briefing May Increase the Filing of Appeals.

Eliminating briefing would serve to generally make appeals less expensive by eliminating the attorney fees associated with briefing. By limiting the cost of an appeal to the filing fee and preparation of the appendix, non-prevailing parties may feel emboldened to appeal, even if the appeal is meritless and the chance of success exceedingly low. In other words, eliminating the cost barrier to bringing an appeal would likely result in many more appeals. There would only be an upside to filing an appeal. This would, obviously, exacerbate the issues of backlog.

Additionally, with no briefing cost, it will certainly be more difficult to settle appeals in the Courts' settlement program. Settlement negotiations are often influenced by the potential expense of proceeding with the appeal, and thus removing that expense removes an incentive to settle a pending appeal.

Less Extreme Alternatives Can Address the Appeals for Which a Streamlined Approach May Be Appropriate.

Increased efficiency in less complex appeals can be achieved with less extreme changes to the Rules, and without affecting appeals that warrant full appellate briefing.

For example, the Court may consider the practice of the United States Court of Appeals for the Ninth Circuit, which allows for a respondent to move for summary affirmance in appeals where a result is clearly mandated. Respondents can file such motions early in the appeal, and stay the briefing schedule while the motion is considered. The fast track system utilized in many family law appeals could likewise be a workable model. Alternatively, the summary procedure contemplated in ADKT 501, or an expedited briefing schedule could be made available to parties by stipulation.

The Court Should Decline to Adopt Significant Changes to Appellate Review Coinciding with an Overhaul of the Nevada Rules of Civil Procedure.

While the timing of this proposed rule change is not dispositive, as the Section does not envision supporting it at a future time, it notes that the timing here is uniquely inappropriate to radically change the standards for appellate practice. This Court is poised to adopt extensive amendments to the entirety of the Nevada Rules of Civil Procedure, including proposed amendments to NRCP 12 and 56, through ADKT 0522. Changing the rules and then changing the process by which decisions under those rules are reviewed at the same time will increase uncertainty in the law, and will hamper attorneys' ability to counsel clients on the range of expected outcomes.

Conclusion

In sum, the Section believes that ADKT 501 will undermine the value and quality of appellate advocacy in Nevada, harm litigants' ability to have their day in Court, and will not actually increase efficiency and reduce costs. We respectfully request that this Court decline to adopt the proposed rule change.

Very truly yours,

Kelly H. Dove and Steven M. Silva

On Behalf of the Appellate Litigation Section of the State Bar of Nevada

Ingersoll, Amanda

From: Lengsavath, Ruby <rlengsavath@swlaw.com>
Sent: Wednesday, October 24, 2018 2:15 PM
To: Supreme Court Clerk
Cc: Dove, Kelly
Subject: ADKT 501 - Comments to the Court from Appellate Litigation Section of the State Bar of Nevada
Attachments: 2018 1024 ADKT 501 Section Letter.pdf

Good afternoon,

Please confirm that this email satisfies proper service regarding Filed Comments from Appellate Litigation Section of the State Bar of Nevada.

Please let me know if you have any questions.

Thank you.

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