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October 24, 2018

Via E-Mail

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

Re: ADKT 501 proposed amendments to NRAP 3A, and proposed NRAP 3F

Dear Ms. Brown:

This letter is to provide comments on the proposed amendments to NRAP 3A and proposed new NRAP 3F, regarding procedures for appeals from orders on motions to dismiss and motions for summary judgment. Please provide these comments to the justices.

This letter is being sent on my own behalf, on behalf of attorney Robert Vohl, and on behalf of other appellate attorneys who have expressed their views to us regarding the proposed rule changes.

A. Differences between venue orders and summary judgment or dismissal orders.

Prior to the proposed rule change, the only civil appeals conducted in Nevada without benefit of briefing by the parties were those involving venue orders. But there are substantial differences between the appeal of a venue matter and the appeal of a summary judgment or order of dismissal. Venue orders typically involve one issue – the propriety of venue. The only issue is usually whether the case was filed in the proper venue or whether the district court properly exercised its discretion to transfer or refuse to transfer venue. There is rarely an issue of first impression or significant precedential value. Due to the narrow scope of the issues, the records in such cases tend to be fairly small. Venue issues must be decided expeditiously, because the trial cannot proceed until the appeal is resolved, pursuant to NRAP 3A(b)(6)(A) (mandatory stay in venue appeal if requested by party).

In contrast, motions for summary judgment under NRCP 56 or motions to dismiss under NRCP 12 can involve any number, type or complexity of legal issues, including many issues that raise entirely separate questions of law. They can also involve thousands of pages of documentary evidence and lengthy hearing transcripts. And because the appeals are from final judgments, there is no pending or looming trial, and there is rarely a need to expedite such appeals.

B. Significance of appeals of summary judgment and dismissal orders.

A significant portion of Nevada's case law results from decisions on appeal from summary judgments and dismissal orders. From what we have been able to determine, it appears that hundreds of cases in the Nevada appellate courts have involved summary judgments or dismissal orders in the last few years. Many of these cases resulted in published opinions, suggesting that the cases involved issues of significant precedent or statewide importance.

C. Comprehensive review of the record would be required in the absence of briefs.

Motions for summary judgment or to dismiss frequently involve multiple legal grounds. Without briefs, the appellate court would not be directed to potential errors. Therefore, the appellate court would be required to identify all potential sources of error without assistance from the appellant, and to presume that every possible error is being challenged on appeal. Thus, in order to conduct a proper de novo review, the appellate court would need to conduct its own comprehensive review and analysis of every argument made in every motion paper filed in the district court, as well as every exhibit submitted by the parties and the transcript of any hearing held on the motion.

Further, without briefs, the appellate court would have no way to know which issues the appellant may have intended to raise on appeal, and which issues are not intended to be raised; and the court would need to engage in guesswork regarding the levels of importance of various issues to the appellant. Parties do not necessarily desire to challenge every part of the district court's decision on appeal, and they often elect to focus only on particular issues and aspects of the decision that they believe to be erroneous. A party might even elect to forgo a challenge to a specific ruling for reasons of a strategic nature. Without briefs, the appellate court would be required to assume that the appellant intended to challenge every issue, and that the respondent intended to continue to assert all of the same arguments that were advanced in the district court. As such, the appellate court would be required to review every facet of the ruling for error,

regardless of the scope of the challenge that might have been made by the appellant if an appeal brief had been filed.

Additionally, without an exhaustive review of the record relating to the motion, there would be no way to know if the district court's decision addressed all of the issues. Summary judgment and dismissal orders are not required to address issues in any formal fashion and need not contain any analysis at all. In short, the district court's decision may provide little or no guidance as to the grounds on which the motion was resolved. Thus, the appellate court cannot always rely on the decision itself to explain how the issues were actually decided or even whether they were fully decided.

Summary judgment is sometimes granted for reasons not argued by the moving party or only touched upon by the moving party. In contrast to many other types of rulings made by the district court, no rules prescribe requirements for the contents of a decision on summary judgment. As a result, such decisions vary widely in their level of detail, analysis and citation to legal authority, and therefore may require the appellate court to perform an extensive independent analysis in order to review the propriety of the decision and to develop the rationale and assemble the legal authorities necessary for the preparation of the appellate court's opinion.

D. The benefit of appellate briefs.

The scope of the appellate court's review is greatly narrowed by appeal briefs. Motions, oppositions and replies, with their exhibits, can consist of hundreds—and sometimes thousands—of pages in the district court record. Appellate briefs help direct the appellate court to those parts of the record that are important to the appeal issues. Without this benefit, the appellate court would be forced to wade through the record, trying to guess which parts are important to the parties and important to the issues presented.

Additionally, the appellant directs the appellate court to the specific issues it wants to challenge on appeal and to the specific arguments that it believes are worth raising. The briefs thus provide the court with a very important roadmap to identify the issues to be resolved and the bases for resolving the issues. Briefs also can tell the appellate court whether one or more of the issues was not addressed by the district court's decision. Many types of errors are not clear from the face of the decision and, in the absence of an appeal brief, would only come to light if the appellate court were to review the motion in exactly the same manner as a district court would be required to review it in the first instance.

Appeal briefs serve an important purpose in all appeals, including summary judgment and dismissal appeals. Appeal briefs will almost always help to streamline and facilitate the review process and provide the court with analysis of the lengthy appendix and legal authorities that can be used in the court's opinion. For the foregoing reasons, it seems highly probable that the scope of the review the appellate court would be required to undertake in the absence of briefs would likely multiply the volume of the court's workload many times over.

E. Quality of appellate law in Nevada.

With many appellate decisions issued every year in cases involving summary judgments and dismissal orders, decisions in such cases constitute a significant part of the universe of Nevada law. Every new decision by the Supreme Court is now citable for persuasive value, whether published or not. Allowing the parties to assist the court with the research and analysis of legal issues can only help to ensure that the decisions on appeal will continue to be of the highest possible quality and serve to advance the development of our state's decisional law.

Appellate advocacy is significantly different from advocacy in the trial courts. A trial attorney who receives a motion to dismiss or a motion for summary judgment has a limited time in which to obtain affidavits, gather other necessary evidence and documentation, conduct legal research, and prepare the opposition. And the moving attorney has only a limited time to research and prepare the reply. Consequently, district court motion papers frequently do not contain in-depth research and analysis. When the case is appealed, however, the appellate advocate can perform more thorough research and analysis—particularly for cases that involve significant precedential issues. This briefing helps the appellate court in deciding the issues and in issuing orders or opinions that will benefit judges, attorneys and parties statewide—well beyond the parties in the specific case at hand.

F. Orders granting summary judgments or motions to dismiss should not be singled out for special treatment.

The proposed rule would result in inconsistencies and arbitrary distinctions between the way similar appeals are treated. The proposed rule only pertains to "final judgments" granting a motion under Rule 56. It therefore does not apply to partial summary judgments or to appeals from final judgments in which appellants challenge orders denying summary judgment. As a result, if a party appeals at the end of the case and challenges an interlocutory order granting partial summary judgment, full briefing will be allowed, whereas no such briefing would be allowed for an order granting a full

summary judgment, even though the issues involved in the latter judgment may be far less complex or important than those involved in the former. And if a party appeals from an order denying summary judgment (after a final judgment has been entered in the case), briefing would be allowed.

There is also no sound reason for distinguishing the treatment of Rule 56 judgments from orders issued after any other type of motion that has been fully briefed in the district court.

G. The absence of briefing deprives the nonmoving party of a significant opportunity to argue its case.

The nonmoving party in the district court only has a single opportunity and a relatively short time to file an opposition, without a reply. But when that party is forced to appeal, there is a more meaningful opportunity to present both the basis of its opposition and the grounds for its assignment of error, because the appellant may file a reply brief. Indeed, this additional opportunity to be heard and to respond to the appellee's arguments is a fundamental right that parties now possess for every appeal. Thus, even if appellant's opening briefs sometimes contain significant overlap with the opposition filed in the district court (as is the case in many appeals, regardless of whether they are from summary judgments), it should always be of assistance to the appellate court to have the benefit of the appellant's reply brief.

H. Perception of the parties and public regarding appeals.

In the absence of appeal briefs directing the court to the issues and pertinent arguments, parties may question whether the appellate court has in fact been able to discern all of the potential errors that can only be found through a careful review of all of the arguments and evidence relating to each issue. Parties to an appeal are likely to have more confidence in the appellate process knowing that the court has been directed to specific issues and arguments—in other words, to be certain that they have had a full and fair opportunity to be heard on their claim of error.

Moreover, the proposed rule change would not only create arbitrary distinctions between the ways that appeals of various issues would be treated, but would also seem to generally limit plaintiffs' rights to argue their position on appeal, while favoring defendants—parties who almost never have full summary judgments entered against them. Thus, the new rule would appear to favor some litigants or classes of litigants over others based on nothing other than their status in the case. For example, because plaintiffs in personal injury cases are usually individuals, whereas defendants are often

defended and indemnified for their losses by insurance companies, a rule precluding the filing of appeal briefs could create the perception that summary judgment entered against individual plaintiffs will be more difficult to reverse on appeal due to the elimination of appellate arguments on their behalf, while the insurers or other corporate interests will be favored because of the opaque nature of the review.

I. Likelihood of more appeals and fewer settlements.

It seems likely that the proposed rule change would result in more appeals being filed. Under the proposed rule, because parties would not need to incur legal fees for preparing briefs, and would be able to appeal by simply paying the filing fee and preparing the appendix, there would be virtually no cost barrier to bringing an appeal. It therefore seems likely that many more appeals would be filed.

Further, without any costs relating to the preparation of briefs, cases will be less likely to settle. In settlement conferences, one of the most frequent and strongest arguments that settlement judges make in favor of settlements is the argument that not settling will be expensive to the parties, primarily due to preparation of briefs. Thus, settlement negotiations are very often influenced by the potential expense to the appellant of pursuing the appeal and the potential expense to the respondent of defending it. Those costs typically figure into the parties' settlement demands and offers. With less bargaining chips on the table and less incentive to settle, appeals will be more likely to proceed to a decision and the workloads of the appellate courts will increase accordingly.

J. Conclusion.

In conclusion, we believe there are important positive benefits to briefing in the vast majority of appeals from NRCP 56 summary judgments or NRCP 12(b) orders of dismissal. We strongly urge the court not to adopt the proposed rule change eliminating briefs in such cases.

Sincerely,

Robert L. Eisenberg (for himself, for Robert Vohl, and for other appellate attorneys who have shared their views with Mr. Eisenberg and Mr. Vohl)