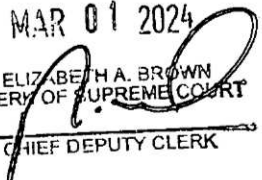


**IN THE SUPREME COURT OF THE STATE OF NEVADA**

IN THE MATTER OF THE CREATION OF  
A COMMISSION ON NEVADA RULES OF  
APPELLATE PROCEDURE

**FILED**

**MAR 01 2024**

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
CHIEF DEPUTY CLERK

**ADKT 0580**

**COMMENTS AND NOTICE OF APPEARANCE OF  
KEVIN C. POWERS, GENERAL COUNSEL,  
LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION**

**KEVIN C. POWERS**, General Counsel  
Nevada Bar No. 6781  
LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION  
401 S. Carson St.  
Carson City, NV 89701  
Tel: (775) 684-6830; Fax: (775) 684-6761  
Email: [kpowers@lcb.state.nv.us](mailto:kpowers@lcb.state.nv.us)

24-07537

## **COMMENTS AND NOTICE OF APPEARANCE**

In response to the Court's order on January 30, 2024, inviting written comments from members of the State Bar of Nevada regarding the proposed amendments to NRAP prepared by the Commission on the Nevada Rules of Appellate Procedure ("Commission") for consideration by the Court under NRS 2.120, Kevin C. Powers, General Counsel, Legislative Counsel Bureau, Legal Division ("LCB Legal"), hereby submits these written comments and a notice of appearance of the intent to appear and participate at the public hearing on the proposed amendments on March 7, 2024. For purposes of these comments, the following typeface and fonts are intended to have the following meanings:

1. Matter shown in bolded double underlined italics (e.g., ***bolded double underlined italics***) is new material that LCB Legal is proposing should be added to the amended rules; and
2. Matter shown in bolded italicized brackets with double strikethrough (e.g., ~~***bolded italicized brackets with double strikethrough***~~) is existing material that LCB Legal is proposing should be omitted from the amended rules.

### **Comment 1. Definition of "Pro Se."**

(a) Revise NRAP 1(e)(7) to read as follows:

(7) "Pro se" or "unrepresented" refers to a party acting on his or her own behalf without the assistance of counsel. The term does not include attorneys who are representing themselves and are active members of the State Bar of Nevada during such representation.

**Explanation:** In the course of litigation, attorneys who are active members of the State Bar of Nevada may be required to represent themselves in proceedings before Nevada’s appellate courts. For example, in cases where the district court has disqualified or imposed sanctions on attorneys under the civil rules or the rules of professional conduct, those attorneys have standing, in their own right, to seek writ relief and represent themselves in such writ proceedings before Nevada’s appellate courts. *See, e.g., State ex rel. Cannizzaro v. First Jud. Dist. Ct.*, 136 Nev. 315, 316-18, 466 P.3d 529, 530-32 (2020); *Valley Health Sys., LLC v. Estate of Doe*, 134 Nev. 634, 643-45, 427 P.3d 1021, 1030-31 (2018). Under such circumstances, those attorney litigants generally are not considered to be typical “pro se” parties; instead, they are subject to the same standards of professional conduct in the litigation as other attorneys representing parties. *See In re Discipline of Schaefer*, 117 Nev. 496, 507-08, 25 P.3d 191, 199-200, *opinion modified on denial of reh’g*, 31 P.3d 365 (2001) (holding that the rules of professional conduct prohibit a lawyer who is representing himself in a case from directly contacting another party to the case who is represented by counsel); *see also Dezzani v. Kern & Assocs., Ltd.*, 134 Nev. 61, 70, 412 P.3d 56, 63 (2018) (holding that attorney litigants who proceed pro se cannot be awarded attorney fees because when attorneys represent themselves or their law firms, no fees are actually incurred, but such attorney litigants may recover costs).

## **Comment 2. Appeal--When Taken.**

(a) Revise NRAP 4(a)(1) to read as follows:

\* \* \* Except as provided in Rule 4(a)(4), a notice of appeal must be filed after entry of a written judgment or order, and no later than ~~30~~ 35 days ~~{or alternatively 42, 49, 56, or 63 days}~~ after ~~the date that~~ service of written notice of entry of the judgment or order appealed ~~from is served. If~~ , except that if an applicable statute provides that a notice of appeal must be filed within a different time period, the notice of appeal required by these Rules must be filed within the time period established by the statute.

(b) Revise NRAP 4(a)(4)(A) to read as follows:

### **(4) Effect of Certain Motions on a Notice of Appeal.**

(A) If a party timely files in the district court any of the following motions under the Nevada Rules of Civil Procedure, ~~the time to file a notice of appeal runs for all parties from entry of an~~

~~order disposing of the last such remaining motion, and~~ the notice of appeal must be filed no later than ~~30~~ 35 days {or alternatively 42, 49, 56, or 63 days} ~~{from the date of}~~ after service of written notice of entry of ~~that order~~ the order disposing of the last such remaining motion: \* \* \*

**Explanation:** LCB Legal believes that the Court should revise the jurisdictional time limit for filing a notice of appeal so that it is consistent with the multiples-of-seven methodology adopted as part of the 2019 NRCP and NRAP amendments—such as changing the existing 30 days to 35, 42, 49, 56, or 63 days—because “[t]his simplifies time computation and facilitates ‘day-of-the-week’ counting.” NRCP 6 Advisory Committee Note—2019 Amendment; NRAP 26 Advisory Committee Note—2019 Amendment.

Additionally, LCB Legal believes that the Court should reject the proposed amendments that would allow the district court to extend the time to file the notice of appeal based on a party’s timely motion and showing of “excusable neglect or good cause.” If the Court believes that a rule change is necessary to “provide relief from the strict consequences of the [existing] jurisdictional limitation,” as stated in the Commission’s Reviewing Note, LCB Legal believes that the Court should simply extend the jurisdictional time limit to 35, 42, 49, 56, or 63 days, using the multiples-of-seven methodology, because such a clear and definite extension would avoid the extra burdens, costs, and difficulties imposed on both the district court and the parties by adopting the standard of “excusable neglect or good cause” for extensions of the jurisdictional time limit. *See State ex rel. Teeter v. Eighth Jud. Dist. Ct.*, 64 Nev. 256, 259, 180 P.2d 590, 592 (1947) (“Good cause has no fixed meaning, but depends upon the circumstances of each case to be determined by the legal discretion of the court.”); *Scrimmer v. Eighth Jud. Dist. Ct.*, 116 Nev. 507, 513, 998 P.2d 1190 (2000) (“The determination of good cause is within the district court’s discretion.”).

### **Comment 3. Bond for Costs on Appeal in Civil Cases.**

(a) Revise NRAP 7 to read as follows:

In a civil case, unless an appellant is exempted by law, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal. Rule 8(b) applies to a surety on a bond given under this Rule.

**Explanation:** Under Article 4, Section 22 of the Nevada Constitution, the Legislature has not waived its sovereign immunity and is exempted by law from the payment of another party's costs on appeal. NRS 218F.720(1) (providing that, in litigation, "the Legislature may not be assessed or held liable for: (a) [a]ny filing or other court or agency fees; or (b) [t]he attorney's fees or any other fees, costs or expenses of any other parties.").

**Comment 4. Brief of an Amicus Curiae.**

(a) Revise NRAP 29(f)-(h) to read as follows:

~~{(g)}~~ **(f) Reply Brief.** An amicus curiae may not file a reply brief.

~~{(h)}~~ **(g) Oral Argument.** An amicus curiae may file a motion to participate in oral argument, but the court will grant such motions only for extraordinary reasons.

**(h) During Rehearing, En Banc Reconsideration, and Review by the Supreme Court.** The provisions of this Rule apply to amicus briefs submitted in connection with rehearing, en banc reconsideration, and review by the Supreme Court. Such briefs may be filed irrespective of whether an amicus brief was filed by that ~~party~~ amicus curiae in the primary briefing. Except by the court's permission, the length of an amicus brief in these proceedings must not exceed 4,667 words.

**Explanation:** In Rule 29(a)-(e), the term "amicus curiae" is used consistently throughout those subparts of the rule. LCB Legal's proposed revisions ensure that the same term "amicus curiae" is also used consistently throughout Rule 29(f)-(h). As a result, all subparts of the rule will conform with the principle of statutory construction that "identical words used in different parts of the same act are intended to have the same meaning." *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986) (internal quotation marks omitted); *State, Office of Att'y Gen. v. Justice Ct. of L.V. Twp.*, 133 Nev. 78, 82, 392 P.3d 170, 173 (2017) (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012) ("A word or phrase is presumed to bear the same meaning throughout a text.")).

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**Comment 5. Appendix and Indices to Appendix.**

(a) Revise NRAP 1(e) by adding a definition for the appellate rules as a whole to read as follows:

(2) “Appendix” means the appendix and the separate document containing the indices to the appendix prepared under Rule 30.

(b) Revise NRAP 30(c)(3)-(4) to read as follows:

**(3) Cover.** The cover of an appendix ~~{shall}~~ must be white and ~~{shall}~~ must contain the same information as the cover of a brief under Rule 32(a), but ~~{shall}~~ must be prominently entitled “JOINT APPENDIX,” or “APPELLANT’S APPENDIX,” or “RESPONDENT’S APPENDIX” or “APPELLANT’S REPLY APPENDIX.”

**(4) Indices to Appendix.** The party filing the appendix must prepare both an alphabetical index and a chronological index, arranged in that order, identifying each document in the appendix with reasonable definiteness, and indicating the volume and page of the appendix where the document is located. These indices must be filed contemporaneously with the appendix as a separate document. The cover of the indices must be white and must contain the same information as the cover of a brief under Rule 32(a), but must be prominently entitled “INDICES TO JOINT APPENDIX,” or “INDICES TO APPELLANT’S APPENDIX,” or “INDICES TO RESPONDENT’S APPENDIX” or “INDICES TO APPELLANT’S REPLY APPENDIX.”

**Explanation:** The proposed amendments provide that the indices to the appendix must be filed contemporaneously with the appendix as a **separate document**. By defining the term “appendix” for the NRAP as a whole, LCB Legal’s proposed revisions ensure that every reference to the term “appendix” in the NRAP also encompasses the indices to the appendix even though they are filed as a separate document.

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## Comment 6. Form of Briefs, the Appendix and Other Papers.

(a) Revise NRAP 32(a)(7)(C) to read as follows:

**(C) Computing Page ~~++~~ and Type-Volume Limitations.** The disclosure statement, table of contents, table of authorities, jurisdictional statement, routing statement, and statement of the issues which must precede the statement of the case in the brief under Rule 28, and the signature blocks required by Rule 25(a)(5), certificate of service ~~and if required by Rule 25(d)(1), certificate of compliance with these Rules, required by Rule 32(a)(9),~~ and any addendum ~~containing statutes, rules, or regulations prepared under Rule 28(f) which must follow the conclusion in the brief under Rule 28,~~ do not count toward a brief's page ~~++~~ or type-volume limitation. The page ~~++~~ or type-volume limitation applies to all other portions of the brief beginning with the statement of the case, including headings, footnotes, and quotations, and ending with the last word in the conclusion in the brief. ~~{Pages in the brief preceding the statement of the case must be numbered in lowercase Roman numerals, and pages in the brief beginning with the statement of the case must be numbered in Arabic numerals.}~~

**Explanation:** LCB Legal believes that the page and type-volume limitations in Rule 32(a)(7)(C) should be as clear and precise as possible. LCB Legal also believes that the jurisdictional statement, routing statement, and statement of the issues—which precede the statement of the case under Rule 28(a)-(b)—should be excluded from the page and type-volume limitations. This is especially true if the Court adopts the proposed amendments to NRAP 17, which would revise the standards for determining the assignment or “routing” of cases between the Supreme Court and the Court of Appeals. Based on the Commission’s Reviewing Note, the proposed amendments would define the cases “ordinarily” retained by the Supreme Court to include categories that “are less clearly defined (e.g., ‘matters raising as a principal issue a question of first impression’) and are subject to [more] argument/interpretation by the parties in their routing statements.” Under such circumstances, LCB Legal believes that any argument/interpretation in the routing statement should not count toward the page or type-volume limitations.

DATED: This 29th day of February, 2024.

By: /s/ Kevin C. Powers

**KEVIN C. POWERS**, General Counsel

Nevada Bar No. 6781

LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION

401 S. Carson St.

Carson City, NV 89701

Tel: (775) 684-6830; Fax: (775) 684-6761

Email: [kpowers@lcb.state.nv.us](mailto:kpowers@lcb.state.nv.us)

### **CERTIFICATE OF SUBMISSION**

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the 29th day of February, 2024, pursuant to the Court's order on January 30, 2024, I submitted a true and correct copy of the Comments and Notice of Appearance of Kevin C. Powers, General Counsel, Legislative Counsel Bureau, Legal Division, by electronic mail, directed to:

Elizabeth A. Brown  
Clerk of the Supreme Court  
[nvscclerk@nvcourts.nv.gov](mailto:nvscclerk@nvcourts.nv.gov)

/s/ Kevin C. Powers  
An Employee of the Legislative Counsel Bureau