Matthew L Sharp
ATTORNEY AT LAW

October 24, 2018

Elizabeth Brown
Clerk of the Court
201 S. Carson St.
Carson City, NV 89701-4702

Via facsimile 684-1601

Re: ADKT 0501 - NRAP 3F(b)(3)

Dear Ms. Brown:

I submit this letter to voice my opposition to the proposed rule, NRAP 3F(b)(3). The proposed NRAP 3F(b)(3) provides that any appeal of an order dismissing cases based upon NRCP 12(b)(2), NRCP 12(b)(5) and NRCP 56 "shall be submitted for decisions based on the record without briefs or oral argument unless the court otherwise order." There are three primary reasons that the proposed NRAP 3F(b)(3) should be rejected.

First, in my experience, a district court, as a general rule, only grants dispositive motions under NRCP 12(b)(5) and NRCP 56 where the motion is based upon a legal ground. The legal conclusion leading to dismissal of the case often involves a complex legal issue such as: (1) federal preemption; (2) the establishment of a new cause of action; or (3) an insurance coverage disputes. Similarly, based upon the United Supreme Court's recent ruling including *Bristol-Meyers Squibb Co. v. Superior Court. of Cal*, 137 S. Ct. 1773 (2017), the law relating to personal jurisdiction is in a state of flux, so a NRCP 12(b)(2) dismissal is likely to involve a legal issue that requires a decision from this Court. Nonetheless, the proposed NRAP 3F(b)(3) summarily deprives an appellant aggrieved by a NRCP 12(b)(2), 12(b)(5) or 56 order from filing a brief, the purpose of which is to advocate the appellant's position that the district court erred. While the proposed rule provides that the court may order briefs or oral arguments, there are no standards as to when briefing or oral arguments will be allowed. There are no procedures specified to allow the appellant to move for briefing or oral argument. It is not fair to the appellant to be deprived of the means to advocate the basis for the appeal.

Second, the proposed NRAP 3F(b)(3) unfairly differentiates between an order granting a summary judgment or a motion to dismiss and an order denying a summary judgment or motion to dismiss. As an example, this Court should consider the following examples: (1) the defendant files a motion for summary judgment on federal preemption which is denied; and (2) the defendant files a motion for summary judgment that is granted. Under the first example, the appeal of the order denying summary judgment continues to be treated as any other appeal. Under the second example, the appellant has no right to file a brief. One class of litigants who lost at the trial level are entitled to full consideration by the Nevada Supreme Court, but another class of litigants who lost because

432 Ridge Street • Reno, NV 89501
(775) 324-1500 Tel • (775) 284-0675 Fax
www.MattSharpLaw.com • Matt@MattSharpLaw.com

18-41829

a judge granted summary judgment are not given full consideration even though, under my example, the legal issues are the same. Not only is the result unfair, the proposed rule may have the unintended consequence of encouraging trial courts to grant summary judgments, because it will be less likely for the opinion to be overturned.

Third, the proposed amendment to NRAP 3F(b)(3) prohibits an appellant from setting forth his/her/its position as to why the district court erred. Instead, the Nevada Supreme Court or Nevada Court of Appeals is left to engage on its own accord as to whether the district court's decision was wrong. This is inconsistent with the fundamental notions that: (1) the litigants advocate their respective positions; and (2) the judiciary evaluates those positions in light of the law to conclude whose argument is more meritorious.

Fourth, the proposed NRAP 3F(b)(3) will disproportionately impact plaintiffs, because they are the party most often aggrieved by an order granting summary judgment and are the only party aggrieved by a NRCP 12(b)(2) or 12(b)(5) order. Further, the plaintiff aggrieved by an order granting summary judgment or a motion to dismiss is being deprived of a trial on merits. Yet under the proposed NRAP 3F(b)(3), those very plaintiffs are effectively deprived of the ability to fully advocate his/her position on appeal. The result is unfair to plaintiffs.

I urge this Court to not adopt NRAP 3F(b)(3). A litigant aggrieved by an order granting a motion to dismiss or motion for summary judgment should be afforded a full opportunity to present the arguments the litigant deems necessary to demonstrate why the district court committed error.

I wish to participate in the hearing on November 5, 2018.

Sincerely,

Matthew L. Sharp

MLS/ekb

432 Ridge Street • Reno, NV 89501
(775) 324-1500 Tel • (775) 284-0675 Fax
www.MattSharpLaw.com • Matt@MattSharpLaw.com