3/14/22 – NRAP 17, 40, 40A, 40B Subcommittee Meeting

Chair: Deborah Westbrook
John Petty
Colby Williams
Sally Bassett
Jordan Smith
Dayvid Figler
Sharon Dickinson
Jenny Noble

(Steve Silva & Charlie Finlayson participated via email)

NRAP 17 – Division of Cases Between Supreme Court and Court of Appeals

- We initially discussed Dayvid Figler's proposal to revise NRAP 17(b)(1) to exclude guilty pleas involving category A felonies from presumptive assignment to the Court of Appeals:

    - Dayvid explained that there is currently a national movement to reevaluate or create a degree of greater scrutiny for plea-negotiations. As a practitioner who has handled more category A felonies than any other type, Dayvid does not find any category A felony pleas to be mundane, standard, or routine. They are the most serious of offenses: sexual offenses, high level drug trafficking, and things that can put people in prison for life. If we say that "death is different," then life without the possibility of parole is akin to a death sentence and A felony-guilty pleas should be retained by the Supreme Court. The type of issues we look at in pleas are manyfold, and sometimes involve competency; there is no standardized plea canvassing, per se. Cases that do end up in pleas are complex as to the character of the individual and the sentencing itself. Sentencing comes with enhancements, so it's not only a life sentence, but a life sentence plus additional time. Moving A felony guilty pleas out of presumptive assignment to the Court of Appeals would symbolically send a message to district courts that the cases are serious. Dayvid understands that someone can always petition the Supreme Court if there is a unique issue, but symbolically it is important to recognize the complexity that exists and the significance of these cases.

    - John pointed out that the validity of plea negotiations can't be raised on direct appeal and that these guilty plea appeals address what happened at the sentencing proceedings. John was sympathetic but did not believe every category A guilty plea would need to be decided by the Supreme Court.

    - Sharon pointed out that she reads Rule 17 as a directive to the Court of Appeals that they are in charge of appeals from guilty pleas. She does not have a problem with it, but respects what he is saying, that life without should be looked at more

seriously. Sharon pointed out that if a party loses at the Court of Appeals, they still have the option to go to the Supreme Court on a petition for review.

- Jenny was concerned that to the extent Dayvid was talking about competency and complex issues attendant to A felonies, she can't imagine those issues outside the context of an ineffective assistance of counsel claim, which is a post-conviction issue, and this proposal would invite arguments that are more appropriate to the PCR process in direct appeal process.

- **Consensus:** After considering Dayvid's proposal, the group agreed to recommend that NRAP 17(b)(1) remain as is, with all appeals from guilty plea agreements presumptively being assigned to the Court of Appeals, unless the defendant indicates in the routing statement that there is an issue in the case that requires assignment to the Supreme Court.

- We discussed the two changes to NRAP 17 that were discussed at the 3/2 Commission meeting: (1) striking the word "published" from proposed NRAP 17(a)(13) to reflect the Commission's recommendation that unpublished decisions be cited; and (2) Steve Silva's proposal that we revise NRAP 17(b)(5) to remove the presumption that defense verdicts in tort cases go to the Court of Appeals.

  - Specifically, we discussed whether Steve's proposed revision to NRAP 17(b)(5) would adequately address the problem raised at the Commission meeting.

  - Jordan expressed concern that the addition of the phrase "awarding damages" would not solve the problem and would create a class of cases that did not have any presumptive assignment whatsoever (e.g., defense verdicts). Sharon agreed that this could cause a problem. Jordan and Colby agreed to work on some proposed alternative language.

  - **Consensus**: Steve's proposed revision to NRAP 17(b)(5) needs further discussion by the Commission. Note: Jordan subsequently reviewed the language and decided it satisfied the concerns raised at the 3/2 meeting, so he did not propose any alternative language.

- Deborah pointed out that a minor revision to NRAP 17(a)(6) might be necessary, depending on whether the Commission decides to expand NRAP 44's authority to consider certified questions of law to enable the Supreme Court to *also* consider certified questions of law from sister states and certain foreign jurisdictions, as occurs in Minnesota.

- **We discussed 2 new proposals by Jordan Smith**: (1) that we consider changing the mandatory language in NRAP 17(a) which states that the Supreme Court "shall hear and decide" the enumerated cases, to instead state that the Supreme Court "shall *ordinarily* hear and decide" the enumerated cases as other states with deflection-model

courts of appeals have done; and (2) that we consider modifying 17(a)(11) to ensure that *all* cases involving issues of first impression would ordinarily be retained by the Supreme Court (not just cases involving constitutional or common law), to address concerns raised by Justice Pickering at the 3/2 Commission meeting.

- Jordan explained his proposals to the group. As part of the Identification Subcommittee work, he had proposed simplifying our version of NRAP 17 based on the Iowa rule, which he was familiar with having handled appeals in Iowa. Iowa's rule is simpler, and gives both the Supreme Court and Court of Appeals more discretion in the types of cases they handle. His interest in this option was rekindled at our larger group meeting on 3/2, when we discussed whether there are ways the Supreme Court could reach issues of first impression easier. After discussions with Deborah and John, Jordan went back and dug into court rules and they came up with a structure similar to Idaho/Mississippi's rules, where certain categories of cases MUST be kept by the Supreme Court (e.g., death penalty, election questions, judicial discipline, etc.), but then there would be more general categories that the Supreme Court would have the discretion to "ordinarily retain." Along with this proposal, Jordan proposes revising 17(a)(11) to provide the Supreme Court with flexibility to keep issues of first impression that don't involve the constitution or common law. Jordan was also considering the possibility of getting rid of the presumptive categories for the Court of Appeals, but it would require quite a bit of restructuring to make this happen.

- Sally explained to the group that she thinks the purpose of NRAP 17 was to guide the parties in knowing which court would have the case and to help the Clerk's Office know which cases would be presumptively transferred and presumptively retained. If there is an issue of first impression, or an issue that they know the Supreme Court is interested in, they can screen it and recommend assignment. Sally thinks the presumptive categories for the Court of Appeals are there to help.

- Jordan acknowledged that his proposal to remove the presumptive categories for Court of Appeals assignment would be less clear cut than what the rule currently offers, and it might make the clerk's job more difficult, but it would give the Court more flexibility if it wanted, and would not require either Court to keep anything.

- Sharon would not recommend making the changes proposed by Jordan. She remembered when Rule 17 was first being discussed and comparisons were made with Iowa, there were concerns about sending too many cases to the Court of Appeals. Per Sharon, the Iowa Court of Appeals has 9 judges, and the Iowa Supreme Court has 7. So, if she recalls correctly, that was the reason the Iowa model was not used here. Sharon recalled that they put in subsection (c) "consideration of workload" to give regard to workload. Her understanding was that this language allows the Supreme Court to send issues of first

impression to the Court of Appeals. When she looks at subsection (b), nothing prohibits the Court of Appeals from issuing published decisions. She doesn't see them being restricted. Sharon also does not like the Iowa Court's use of the words "shall ordinarily" retain because those two words seem contradictory and ambiguous.

- Jordan stated he was not thinking of getting rid of NRAP 17(c). He read (c) as a check on how much can be sent down to the Court of Appeals.

- To address Sharon's concern with the contradictory phrasing "shall ordinarily retain" the group discussed changing the language to "*will* ordinarily retain" which reflects the Commission's desire to replace the word "shall" throughout the NRAPs.

- John and Deborah agreed that it might improve the rule to have three categories of cases: (1) cases that the Supreme Court *must* retain (e.g., NRAP 17(a)(1)-(10)); (2) cases that the Supreme Court *will ordinarily* retain (e.g., NRAP 17(a)(11)-(13); and (3) cases that the Court of Appeals will presumptively retain (e.g., NRAP 17(b)). John and Deborah both like the existing presumptive language for the Court of Appeals, and would not recommend omitting that.

- Sharon expressed concerned with making NRAP 17(a)(11)-(13) optional for assignment to the Supreme Court. Sharon uses NRAP 17(a)(11) and (12) a lot in criminal appeals because she wants to make sure Category C or D cases get up to the Nevada Supreme Court if they involve matters of first impression of statewide public importance. And the Court generally agrees with her. Sharon had a gross misdemeanor that was kept by the Supreme Court because there was a statewide issue of public importance. So, she likes the rule the way it is, *requiring* the Supreme Court to retain those cases. Additionally, Sharon pointed out that cases falling into the NRAP 17(a)(13) category would have to be retained by the Supreme Court because it involves inconsistencies in opinions.

- John suggested that with good advocacy in the routing statement, a party will still be able to convince the Supreme Court to retain cases of first impression, even if assignment is not mandatory.

- The group agreed with Sharon's concern about NRAP 17(a)(13), and that if Jordan's proposal were adopted, cases involving inconsistencies/conflicts in opinions should be included in the categories of cases that the Supreme Court "must" retain. The group discussed swapping NRAP 17(a)(9) (cases originating in business court) for NRAP 17(a)(13) (inconsistencies), so that cases originating in business court would "ordinarily" be retained by the Supreme Court. The business court proposal should be discussed further at the full Commission meeting.

- Jordan stated he will put together a draft NRAP 17 revision that takes into account the above suggestions so we can present it as an alternative to our current draft at the next Commission meeting.

- **Following the meeting Jordan put together two alternative drafts:** Version A (which brings Nevada's rule more in line with the Iowa rule and omits the specific presumptive categories for assignment to the Court of Appeals); and Version B (which reflects the hybrid model discussed at our 3/14 meeting that keeps the specific categories for assignment to Court of Appeals).

- There are now 3 draft Rule 17s that we will be discussing at the 3/28 meeting: (1) **Original revised Rule 17**; (2) **Version A**; and (3) **Version B**.

- **NO CONSENSUS YET**, but the group's preferences are as follows, in order of most preferred to least preferred:

    - **Jordan**: Version A, Version B, then Original Draft
    - **John:** Version B, Original Draft, then Version A
    - **Steve:** Original Draft, Version B, then Version A
    - **Deborah:** Version B, then Original Draft, but not Version A (I like having defined categories for the Court of Appeals and would not get rid of them)
    - **Colby:** Version B, Version A, then Original Draft
    - **Charlie:** Original Draft, then Version B ("If we were writing on a blank slate, I would probably pick version B, but as of now I prefer the original version").
    - **Sharon:** Original Draft (Sharon will offer additional input at the meeting on 3/28)

NRAP 40, 40A, 40B – Identity of who may petition under each rule

- The group discussed an issue pointed out by John Petty via email regarding an inconsistency between NRAP 40, 40A, and 40B as to who may file each type of petition:

> Rule 40B allows an "aggrieved party" to petition the Supreme Court for review of a decision by the Court of Appeals. Rule 40B(a) states: "A party aggrieved by a decision of the Court of Appeals may file a petition for review with the clerk of the Supreme Court."
>
> In contrast, Rule 40A(b) authorizes "any party" to petition for en banc reconsideration of a decision by a Supreme Court panel: "Any party may petition for en banc reconsideration of a Supreme Court's panel decision."

> And Rule 40 doesn't mention party, it just requires "the petitioner" to "state briefly and with particularity the points of law or fact that the petitioner believes the court has overlooked or misapprehended."
>
> Is there any reason for these distinctions (other than when drafted) or should we consider using the same language (at least in 40A and 40B) just for consistency? If the latter, we could go with "Any party" or "A party aggrieved by". On this point, we could leave Rule 40 alone.

- Steve responded via email, "Unless there is a well-articulated reason for the difference, I would support harmonizing them all to the "any party" standpoint. Sometimes you win, but the court does something awkward with the jurisprudence, and you shouldn't lose your ability to seek clarification just because you won the particular case."

- Deborah responded via email that the use of the phrase "aggrieved party" in NRAP 40B might have something to do with the concept of "standing"; the only other place in the Rules of Appellate Procedure that mentions an "aggrieved party" is NRAP 3A(a) which states, "A party who is aggrieved by an appealable judgment or order may appeal from that judgment or order, with or without first moving for a new trial."

- Sally talked to Phaedra and said they believed the use of the word "aggrieved party" was to reduce the number of petitions filed under NRAP 40B.

- Jordan agreed it should be made uniform but does think people do need to be aggrieved in some way, and that there has to be some feature like that in order to seek review.

- John agreed with Steve's suggestion that we harmonize the rules to say, "any party." By including a standard that must be met before review, rehearing or reconsideration will be granted, the rules *do* require an injury and do not promote advisory opinions. When a person points to things the court overlooked or misapprehended under NRAP 40, they are aggrieved.

- Jordan stated he was fine with revising the rules to state "any party".

- Colby agreed with the proposed revision, because a party still has to meet the standard for review, rehearing, or reconsideration.

- Sharon and Deborah agreed.

- **Consensus:** We will revise 40 and 40B to say, "any party" just like NRAP 40A.

NRAP 40 – Petition for Rehearing

- For NRAP 40(a)(1) the group *briefly* discussed the outstanding issue of whether to incorporate language from FRAP 40(a)(1), which allows the government/agencies/officers additional time to file a petition for rehearing in civil cases.

- Charlie could not make the meeting today, but is currently working with Debbie Leonard on agency issues in subcommittee 15. They will be meeting soon to discuss this, and after they have consulted, Charlie will circulate some proposed language for our subcommittee to consider.

- Note, however, Charlie has advised that this change is not as necessary as the related proposed change to NRAP 4, because a State agency can easily file a motion to extend the timeframe to file a petition for rehearing, which is not available under existing NRAP 4.

- By email, Steve indicated he was "in favor of additional time for public entities: often entities need a public meeting to decide what to do, and that is hard with the timeframes."

- **Consensus:** NRAP 40 cannot be finalized for Commission approval until we hear from subcommittee 15 and receive proposed language.

NRAP 40A – Petition for En Banc Reconsideration

- **Consensus:** Everyone agrees we are good to go on 40A, and can present our proposed revisions to the rule to the Commission for consideration.

NRAP 40B – Petition for Review by the Supreme Court

- The group discussed Sally's 50-state survey to decide whether to make additional revisions to NRAP 40B beyond what we have already proposed. The 50-state survey addressed: (1) whether a supreme court can order review of a court of appeals decision on its own motion; (2) whether, upon a grant of review, an appellate court decision is automatically vacated, or whether something else happens; and (3) whether, upon grant of review, briefing by the parties or amici is required or left to case-by-case orders.

- Sally advised that, as of right now, the Court can order additional briefing when a petition for review is granted. Sally stated she doesn't think it is clear what should happen to a Court of Appeals decision when the petition is granted. Currently, once a petition for review is granted is granted by the Supreme Court, the Court of Appeals decision is vacated. The purpose of the 50-state survey was to see how the process happens in other courts. But most of the other states don't have a push-down model like ours. Most states

do it differently, where they actually review the intermediate court's decision instead of ignoring it.

- Initially, we discussed whether to revise NRAP 40B to permit the Supreme Court to order review of a Court of Appeals decision on its own:

    - Sally's 50-state survey indicated that a majority of state supreme courts *may not* order review on their own initiative; instead, parties are required to file a petition.

    - John thinks we should stick with the majority of states which do not allow the supreme court to order review on its own. Placing that decision in the petitioner's hands is a good thing. John could imagine someone having a good (or good enough) result, not wanting to muddy the waters, and then the case is vacated because the Supreme Court wanted to take it up.

    - Colby agreed with John. He was not comfortable with the notion that if he doesn't challenge a decision, and other side doesn't challenge the decision, that it could be vacated and litigation would continue.

    - Jordan generally agreed, but as a counterpoint, indicated that perhaps there is a published decision that sets precedent that the Supreme Court would want to address.

    - John suggested that in that case, California has a provision that allows the supreme court to de-publish a court of appeals decision if they don't agree with the state of the law.

    - Jordan pointed out that FRAP 35 allows for sua sponte hearing/rehearing en banc.

    - **Consensus:** The subcommittee does not recommend revising the rule to allow for a final decision of the Court of Appeals to be reviewed on the Supreme Court's own initiative, absent a petition by one of the parties.

- Next, we discussed whether the Supreme Court should continue to automatically vacate a decision of the Court of Appeals when it grants a petition for review.

    - Sally indicated that it was difficult to find rules that address what happens when review is granted. Indiana says the decisions are automatically vacated.

    - Jordan pointed out that in the 9th circuit, there was a recent panel decision where Judge Van Dyke wrote the opinion and concurrence. En banc review was granted, and they vacated his decision under FRAP 35(a) and LR 35-3. Jordan pointed out that under the 9th circuit advisory committee notes, a 3-judge panel opinion cannot be considered binding until adopted.

- Sally asked whether our rule should provide for automatically affirming or reversing. Most states have alternatives to vacating decisions. The court could also reverse, do summary affirmance, reversal, etc.

- John commented that if we had a true intermediate appellate court system, then we would want the reversal and everything. But since it is a push-down system, it makes sense to get the full court to weigh in.

- Sharon, Deborah, and Jenny all agreed.

- Sharon proposed that it would be a good idea to write into the rule that the decision of the Court of Appeals would be automatically vacated up on review, and the group agreed.

- **Consensus:** Committee recommends that the Supreme Court continue to automatically vacate a decision of the Court of Appeals when it grants a petition for review, and to include language in NRAP 40B expressly indicating that the decision will be vacated.

- Should our court rules provide for briefing by the parties or amici? Or should this be left to case-by-case orders?

  - John stated that briefing by parties and amici should be discretionary with the Court on a case-by-case basis. The Court has the ability to direct supplemental briefing or not. Oftentimes, they isolate the issues they want the parties to focus on in an order directing supplemental briefing, which is helpful.

  - Sharon, Colby, Jordan, Jenny, and Deborah all agreed.

  - Deborah pointed out that the NRAP 29 subcommittee will be proposing language that will allow for amicus briefing in connection with proceedings under NRAP 40, 40A and 40B, so there would not be a need to add language to NRAP 40B addressing amicus briefs.

  - Sally stated she is fine with this, and that Justice Pickering was wondering if most states require briefs, and wanted to know how amicus groups would learn about the opportunity for briefing.

  - **Consensus**: Committee recommends that NRAP 40B not be changed to address supplemental briefing or amicus briefing upon grant of review. NRAP 40B is probably ready for discussion/consideration by the entire group.