From: Deborah Westbrook <Deborah.Westbrook@clarkcountynv.gov>
Sent: Tuesday, January 25, 2022 9:19 AM
To: Pickering, Justice Kristina <kpickering@nvcourts.nv.gov>; O'Dell, Telesia <todell@nvcourts.nv.gov>
Cc: Smith, Abraham <ASmith@lewisroca.com>; Petty, John <jpetty@washoecounty.gov>; Colby Williams <jcw@cwlawlv.com>; Bassett, Sally <sbassett@nvcourts.nv.gov>; Silva, Steven M. <ssilva@nossaman.com>; Sharon Dickinson <dickinsg@ClarkCountyNV.gov>; Noble, Jennifer <jnoble@da.washoecounty.gov>
Subject: Minutes, NRAP 17, 40, 40A, 40B Subcommittee Meeting 1-20-22

Hi Justices Pickering and Silver,

Last week, our subcommittee focused primarily on NRAP 17, because this was a new section that was added to our subcommittee at the last Commission meeting.

We invited Abe Smith to join us, because our discussion involved the recommendations that the Identification Subcommittee had made for revisions to that rule: (1) to address situations where cases don't fall neatly into NRAP 17(a) or NRAP 17(b); and (2) to formalize criteria and procedure for seeking initial en banc Supreme Court review in the first instance.

After discussion, the group consensus was that most likely, no changes would be needed to address issue (1), and as for issue (2), the group felt that the issue would be better addressed in the routing statement sections of different court rules (specifically, NRAP 28, NRAP 21, and possibly NRAP 3C and 3E, to the extent fast track statements are maintained).

The group also discussed, and agreed with, a proposal by John Reese Petty to separate out the two distinct concepts contained in NRAP 17(a)(12) and restate them standing alone, and that proposal is attached.

The group discussed several matters relating to NRAP 40B (including the 50-state survey that is being prepared regarding whether court of appeals decisions are typically vacated when petitions for review are granted, and providing for briefing by parties or amici in cases where review is granted).

There were several other small matters addressed, and those are discussed in the memo.

Please let us know if you have any questions or need anything further in advance of next week's meeting.

Thanks,

Deborah Westbrook

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1-20-22 NRAP 17, 40, 40A, 40B Subcommittee Discussion

Chair: Deborah Westbrook
John Petty
Colby Williams
Charlie Finlayson
Sally Bassett
Abe Smith
Sharon Dickinson
Jenny Noble

Minutes

(1) **Identification Subcommittee Proposal: revise NRAP 17 to create a default where cases are not presumptively assigned to either court.**

- **Abe** explained that the reason for this proposal was to address the situation where a case does not fall neatly into NRAP 17(a) or NRAP 17(b). In those types of cases, they have had to make a strategy decision between: (a) presenting it as a matter of first impression to get to the Supreme Court, or (b) couching it as error correction to route the case to the Court of Appeals. In the past, the position they've taken is that if a case is not presumptively assigned to Supreme Court, they ask for the case to be routed to Court of Appeals, but there's no presumption in the rule that says, "if a case is not presumptively assigned to Supreme Court, then it is presumptively assigned to Court of Appeals." So, his thought was that it might be helpful for general practitioners to have this default.

- **Charlie** suggested a possible fix could be to add language stating, "any case that does not fall into these categories are presumptively assigned to the court of appeals."

- **John** commented that subsection b already does what Abe was asking for, to the extent it says, "Except as provided in Rule 17(a), the Supreme Court may assign to the Court of Appeals any case filed in the Supreme Court."

- **Abe** commented that it may be the case that subsection b already does this. Abe had not yet interpreted the clause in subsection (b) which reads, "except as provided in Rule 17(a)." Abe is comfortable leaving it. Apart from the cases that the Nevada Supreme Court has to keep in subsection (a), it can assign everything, and then there is a smaller subset that can be reassigned.

- **Sharon** agreed with John's statement. Everything starts from the top: it goes to the Nevada Supreme Court, and they decide. She was curious as to what cases might fall through a loophole, because it seems like there are a lot of cases listed.

- **Abe** commented that the situation usually occurs in cases that fall outside the 17(b) limits: for instance, a tort case that is more than $250k but doesn't raise any issues of statewide public importance, or issues involving the NV constitution. Or, perhaps, a case that involves an issue of statutory first impression, but that does not involve the US Constitution or common law, and is not a question of statewide public importance, etc.

- **Abe** suggested we could perhaps add an additional category to subsection (b), for cases that present the application of existing legal principles.

- **Abe** asked Sally whether she ever encountered parties claiming, "we want a case assigned to the Nevada Supreme Court even though, realistically, it doesn't fall into the section (a) category."

- **Sally** said, "yes, all the time." And sometimes some of the presumptive cases that would go to the Court of Appeals are retained by the Supreme Court, because there may be too many cases going to the Court of Appeals. There are a lot of considerations that affect case assignment.

- **Charlie** asked Sally whether the default was that unless there is an exception, everything is retained by the Supreme Court?

- **Sally** said she didn't think so.

- **John** reiterated that, as the rule is currently written, except in cases that fall under section (a), the Court has discretion to assign as (b). John has had cases that should presumptively go to Court of Appeals, but the Supreme Court has kept them because it turns out there is an interesting issue that should be decided by the Supreme Court.

- **Charlie** pointed out that the next step would be to reach out to clerk's office, to see if this presents an issue on their side. And then if Abe doesn't think it's a pressing issue but maybe just helpful to add the language, he is flexible.

- **Abe** concluded that maybe we leave 17 alone and then provide another sentence or clause of guidance in NRAP 28 regarding the routing statement to say: state whether your matter is presumptively assigned, retained, <u>or not presumptively assigned to either court.</u>

- **CONSENSUS:** Subcommittee recommends that we <u>*do not*</u> revise *NRAP 17* to address the situation where a case does not neatly fall into category (a) or category (b). Instead, the *NRAP 28* Subcommittee can address whether to revise the routing statement to allow parties to state whether the matter is presumptively assigned, retained, or not presumptively assigned to either court.

(2) Identification Subcommittee Proposal: revise NRAP 17 to formalize criteria and procedure for seeking initial en banc Supreme Court review in the first instance?

a. **Option A – allow the parties to request en banc review it in the routing statement?** [note – this would also require revisions to NRAP 28(a)(5), (b)(2), and NRAP 28.1(c)(3) on routing statements, and revisions to NRAP 17(d)]

If the change was made within NRAP 17, it would be in NRAP 17(d), perhaps as follows:

(d) Routing Statements; Finality. A party who believes that a matter presumptively assigned to the Court of Appeals should be retained by the Supreme Court may state the reasons as enumerated in (a) of this Rule in the routing statement of the briefs as provided in Rules 3C, 3E, and 28 or a writ petition as provided in Rule 21. A party may not file a motion or other pleading seeking reassignment of a case that the Supreme Court has assigned to the Court of Appeals. A party who believes that a matter should be heard initially en banc may state the reasons as enumerated in NRAP 40A(a) in the routing statement of the briefs as provided in Rules 3C, 3E, and 28 or a writ petition as provided in Rule 21.

b. Option B – Include language in NRAP 17 that would require the parties to file a petition for initial en banc review, as in FRAP 35?

c. Subcommittee Members address Option A vs. Option B, and conclude that NRAP 17 is not the proper section to incorporate these revisions, and that the preference is to add language to the routing statement.

- **Abe** explained that the Identification Subcommittee's proposal to formalize criteria/procedure for seeking initial en banc Supreme Court review was based on the concern for infrequent practitioners who can't be expected to read all of the appellate rules. There is a mechanism for filing a petition to seek en banc review in federal court (e.g. FRAP 35), but it is not really workable here to have a whole petition/filing fee when the Court hasn't yet heard the case. Abe does not mind adopting a motion procedure (rather than requiring a petition), but it would be helpful to include in the rules somewhere that this is an option, because currently it is only listed in the IOPs (e.g., IOP 13). And since the IOPs already include criteria for en banc retention (e.g., IOP 2(c)(1)), it would be helpful to include that criteria in the NRAPs so practitioners know how to argue for en banc review in the first instance.
- **Charlie** pointed out that if the request for en banc review is only included in the routing statement, there is a concern that a clerk will make the decision as to en banc/panel without getting the justices involved. The

routing statement won't flag the case as something that needs to go to the panel for decision. Charlie would prefer a motion.

- **Abe** commented that the IOP's are just "here's how the court does it" and not really directions for the practitioners. Abe asked Sally whether placing the en banc request in the routing statement would create an administrative headache?
- **Sally** said she can ask the clerk's office about this but thinks that it might be more cumbersome to have motion practice than to have this included in the routing statement. Sally is not sure what a separate motion would add, and that the information in the routing would probably be sufficient.
- **Deborah** asked how the group felt about the proposed language for incorporation in NRAP 17, which would permit the parties to request en banc review in the routing statement.
- **CONSENSUS –** after discussion, the group concluded that NRAP 17 is about the division of cases between the Supreme Court and Court of Appeals, so it would be preferable to include this type of language in NRAP 28 instead. Subcommittee recommends keeping NRAP 17 clean and moving the en banc routing statement language NRAP 28.
- **Post Script:** After the meeting, John suggested via email that the routing-statement language allowing the parties to request initial en banc assignment should also be included in NRAP 21 on writs (specifically in NRAP 21(a)(3(A)). Abe suggested that that sub paragraph should, in general, be brought into better conformity to the routing statement of NRAP 28. And Deborah suggested that to the extent we decide keep the fast-track rules, NRAP 3C and NRAP 3E, we would probably also want to add language to those sections as well, specifically to NRAP 3C(e)(1)(B) and (f)(1)(B). Also, to NRAP 3E(d)(1).

(3) John Petty's Suggestion to separate out the two distinct concepts contained in NRAP 17(a)(12) and restate them standing alone. The additional language in the new (12): "that has application beyond the parties" is borrowed from NRAP 36(c)(1)(C).

(a) Cases Retained by the Supreme Court. The Supreme Court shall hear and decide the following:

…

(11) Matters raising as a principal issue a question of first impression involving the United States or Nevada Constitutions or common law; ~~and~~

(12) Matters raising as a principal issue a question of statewide public importance~~, or an issue upon which there is an inconsistency in the published decisions of the Court of Appeals or of the Supreme Court or a conflict between published decisions of the two courts.~~ that has application beyond the parties; and

(13) Matters raising as a principal issue an inconsistency in the published decisions of the Court of Appeals or of the Supreme Court or a conflict between published decisions of the two courts.

a. **Subcommittee Members' thoughts on John's Proposal:** Group consensus is that everyone likes this proposal and will recommend it be adopted.

(4) NRAP 40B – Committee Members' thoughts about whether to change our current rule that provides for COA decisions to be vacated upon a grant of review.

- **Sally** advised she is working on a 50-state survey with library staff which should be ready Monday. There are some rules out there that address this, but a lot of states don't have anything.
- **Charlie** initially thought it did not make sense for the NSC to vacate a COA decision and then reissue what is essentially the same decision. However, it might be better to have the NSC vacate the decision than to leave portions of a COA decision in place, and require practitioners to look in both places for precedent. He is interested to see what other states do.
- **Abe** said he had not looked at this issue, and was just speaking off-the-cuff, but was curious to know whether, perhaps, the NSC believed it had to vacate the COA decision as a jurisdictional matter, since the NSC is not conducting appellate review of the lower court. Abe also questioned whether they need to vacate it prematurely, when the petition is granted, or whether they could wait.
- **Sally** said she was not aware of a jurisdictional concern, but maybe it was because of the push-down model.
- **John** mentioned that California allows the Supreme Court to depublish lower appellate court opinions without explanation. But unlike California we only have one Court of Appeals so a de-publication process probably isn't needed in Nevada.
- **Sharon** thought that Abe's question about jurisdiction was interesting.
- **Abe** commented that probably the court would need to vacate if it were going to issue a decision that is in conflict.
- **Abe** indicated that the standard of review would be de novo, reviewing the COA decision
- **Sally** pointed out that, right now, there is no real review of anything the COA did when the NSC takes the case up.
- **Consensus:** Group will look at the 50-state survey and readdress at the next meeting.

(5) NRAP 40B – Committee Members' thoughts about providing for briefing by parties or amici in a case in which review is granted.

- **Consensus:** Group will look at 50 state survey and readdress at next meeting.

(6) [revisit this issue] Whether (for NRAP 40(a)(1)) we want to recommend adopting language from FRAP 40(a)(1) which allows government parties in civil cases to have 45 days to petition for rehearing, presumably to allow the government additional time to consider whether to challenge a ruling, given bureaucratic issues involved in making such decisions.

Compare NRAP 40(a)(1)

(1) Time. Unless the time is shortened or enlarged by order, a petition for rehearing may be filed within 18 days after the filing of the appellate court's decision under Rule 36. The 3-day mailing period set forth in Rule 26(c) does not apply to the time limits set by this Rule.

With FRAP 40(a)(1)

(1) Time. Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, unless an order shortens or extends the time, the petition may be filed by any party within 45 days after entry of judgment if one of the parties is:
(A) the United States;
(B) a United States agency;
(C) a United States officer or employee sued in an official capacity; or
(D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf–including all instances in which the United States represents that person when the court of appeals' judgment is entered or files the petition for that person.

a. **Charlie has received agency input:** In the context of NRAP 4, Charlie reached out and found out that at least one of the agencies the AG represents has to have an open meeting, put on public calendar, get public comment before taking action. We need to loop subcommittee 15 into this issue. (Debbie, Abe and Charlie)

b. **Thoughts for incorporating this concept in to NRAP 40(a)(1)?** Charlie needs more time to discuss with the agencies and consult with subcommittee 15.

(7) Final thoughts on NRAP 17?

- **Abe** pointed out that the dollar amount for estate taxes has gone up since the existing rule went into effect, so maybe we should revise the dollar value in FRAP 17(b)(14)?
- **Sally** will investigate and see.

NOTE: **Jenny Noble** could not make the meeting due to a scheduling conflict, but offered the following comments, agreeing with the subcommittee's recommendations: "I read through the minutes, and for what it's worth, I agree that NRAP 17 (b)'s "except as provided in Rule 17(a)" language is adequate regarding routing issues. I agree with John that adding the en banc request language to NRAP 21(a)(3)(A) would be beneficial. NRAP 17(a)(12) would be clearer if we broke it up, as John suggested."

Rule 17. Division of Cases Between the Supreme Court and the Court of Appeals

(a) Cases Retained by the Supreme Court. The Supreme Court shall hear and decide the following:

… .

(11) Matters raising as a principal issue a question of first impression involving the United States or Nevada Constitutions or common law; ~~and~~

(12) Matters raising as a principal issue a question of statewide public importance~~, or an issue upon which there is an inconsistency in the published decisions of the Court of Appeals or of the Supreme Court or a conflict between published decisions of the two courts.~~ that has application beyond the parties; and

(13) Matters raising as a principal issue an inconsistency in the published decisions of the Court of Appeals or of the Supreme Court or a conflict between published decisions of the two courts.

This modification separates two distinct criteria currently stated in NRAP 17(a)(12) and restates them standing alone. The additional language in the new (12): "that has application beyond the parties" is borrowed from NRAP 36(c)(1)(C).