

Supreme Court of Nevada
ADMINISTRATIVE OFFICE OF THE COURTS

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DRAFT MEETING SUMMARY
COMMISSION ON NRAP

DATE AND TIME OF MEETING: March 14, 2023, 12 p.m.
PLACE OF MEETING: Remote Access via Zoom

Members Present:

Justice Kristina Pickering	Judge Bonnie Bulla	Judge Deborah Westbrook
Judge Michael Gibbons	Sally Bassett	Alexander Chen
Micah Echols	Bob Eisenberg	Dayvid Figler
Charles Finlayson	Adam Hosmer-Henner	Emily McFarling
John Petty	Dan Polsenberg	Abe Smith
Jordan Smith	JoNell Thomas	Colby Williams
Julie Ollom	Sharon Dickinson	
GUESTS		

Call to Order, Welcome, and Announcement: Justice Pickering welcomed everyone and called the meeting to order at 12:02 p.m.

Roll Call and Determination of Quorum Status: Roll was called, and a quorum was present.

Approval of February 15, 2023, Commission Meeting Minutes: Justice Pickering called for a motion to approve the minutes of the February 15, 2023, meeting. Bob Eisenberg moved, and Judge Bulla seconded to approve the minutes as presented. The motion passed unanimously.

The materials provided for this meeting can be found at:
<https://nvcourts.gov/AOC/Templates/documents.aspx?folderID=33507>

Discussion Items:

NRAP 4(a) (civil) Subcommittee Report – Mr. Eisenberg explained that the subcommittee reviewed NRAP4(a) and tried to make it consistent with its federal counterpart. The substantial change was to get rid of the harsh rule about the notice of appeal being jurisdictional and not allowing an extension of time

for filing. The subcommittee felt that it was about time that a provision was adopted that would allow for extensions of time for filing notices of appeal and a little bit of a grace period when somebody files untimely notices of appeal. Two different redline versions were distributed. One has a provision for reopening the time to file an appeal and the second one does not. Mr. Eisenberg discussed the following proposed section from the redline version that would allow motions for extension of time:

(6) Motion for Extension of Time.

(A) Except when an appeal period is set by statute, ~~the~~ the district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

Mr. Eisenberg explained that “good cause” appears often throughout Nevada case law, so the subcommittee did not attempt to define it. It would be up to each judge to exercise their discretion on what is good cause. Next, Mr. Eisenberg discussed the proposed section that would allow for an appeal to be reopened:

(7) Reopening the Time to File an Appeal. Except when an appeal period is set by statute, ~~the~~ the district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

- A. the motion is ~~filed~~ filed ~~withi~~no later than 180 days after notice of entry of the judgment or order;
- B. the court finds that the moving party established extreme and unforeseeable circumstances for reopening the time; and
- C. the court finds that no party would be prejudiced by reopening the time.

In order to get relief under this provision, you have to show “extreme and unforeseeable circumstances.” The federal rule has a reopening provision, and Nevada does not. There was a split with the subcommittee on this provision; in particular, most people did not like the 180 days provision.

Discussion highlights:

- The federal appellate system has not collapsed under the load of motions to reopen within 180 days and it should not be a big disaster if it’s adopted in Nevada.
- In the interest of finality, 180 days seems too long. The parties should know whether or not there is going to be an appeal sometime earlier than 180 days.

- It may be an uphill battle to convince the Justices on the Supreme Court to approve both motions for extension of time and reopening the time to file an appeal. Allowing a notice of appeal to be filed up to 180 days may be too much to ask for at this point.
- I think the 180 days will rarely be invoked. In 40 years of practice, I have never seen a case to reopen an appeal time in federal court, but there may be some bizarre cases where someone whose attorney abandoned them may be saved by reopening the appeal.
- “Good cause” and “excusable neglect” come directly from the federal rule and would have the gloss of analogous cases that could be relied on.
- Phaedra Kalicki had suggested the proposed language, “except when an appeal period is set by statute” based on her concern that under *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S.Ct. 13 (2017), if a statute sets forth a deadline for filing an appeal, it’s jurisdictional and can’t be expanded by a court rule.
- If a statute sets a deadline, is it jurisdictional or does the Supreme Court, as a matter of its own power—separation of powers, have the right to pass rules extending time?
- The “except when an appeal period is set by statute” language should be removed. It may be too difficult for criminal pro se litigants to navigate.
- Whether a statutory deadline may be extended by rule seems like something that the court may flesh out later.
- The subcommittee never considered extending the time to file a notice of appeal from 30 to 60 or 90 days.
- With regard to the motion for extension of time proposal, it looks like only an additional 30 days is allowed; however, if you account for how long that motion might be pending, you could be facing 90 days or more before it’s resolved, and that’s not considering additional time for tolling motions.

Mr. Hosmer-Henner raised concerns about the statutory and jurisdictional issues that were previously discussed. He said there is case law citing certain statutory deadlines are mandatory and jurisdictional in the district court, especially at the administrative level. Could this develop into a situation where you might have a mandatory and jurisdictional bar to filing a petition for judicial review in district court? The same statute might provide a 30-day period for filing an appeal and then the appellate courts would deem that to be a non-jurisdictional statute for the filing of an appeal rather than filing the initial petition for judicial review. He also wondered how that would play out with respect to the way different statutes are worded. For example, NRS 233B and some of the other gaming statutes say appeals could be taken in the manner prescribed by the Nevada courts, but other statutes in the trust context specifically say an appeal has to be taken within 30 days of when the notice of entry is filed. If flexibility is allowed with respect to some of the extensions, you could have a very different set of case law develop with respect to the way those two statutes are potentially worded. He does not think the “except when an

appeal period is set by statute” language would resolve his concerns, because then you have an issue about whether the specific statute is clear enough to mandate it and whether it says “may” or “shall” with respect to taking a notice of appeal.

Mr. Echols added that if the court adopts the new extension rule, he thinks the fix for the problem would be to go to the legislature and amend a lot of statutes to include the new language. For example, probate statute, NRS 155.190, used to say that the appeal was from the entry of order, not the notice of entry of order. There is some old case law in NRS 155.190 where appeals were dismissed because the party used the date of the notice of entry, not the actual entry. He thinks the proposed “except when an appeal period is set by statute” language would create two systems, one where the appeal is set by rule and is flexible, and one where it’s set by statute and is not flexible. If we say they should all be flexible, then it will be necessary for the Legislature to amend the statutes after the fact.

Mr. Polsenberg said that raises some interesting separation of powers issues, but thinks the court has the ability to expand the time procedurally and jurisdictionally for notices of appeal, similar to NRCP 60(b). He is in favor of dropping the language about statutory notices of appeal times but does not think the Legislature would need to change all of the statutes.

Mr. Finlayson suggested there were cases where the Nevada Supreme Court has said in certain context its entire appellate role is created by the Legislature and therefore the Legislature gets to decide the limits of that appellate authority.

Mr. Polsenberg responded that he thought that would come up under Article 6 of the Constitution, not the Legislature.

Justice Pickering said that the Court does have statutory authorization to promulgate all rules, so unless you have a statute that says point blank there are no exceptions to this, no extension allowed, she does not see this as an interpretive issue that could not get sorted out down the road. She stated further that she does not like having two systems in the rules, they are confusing as well as risky, and then you have to decide whether the statute provides otherwise.

After further discussion, a tentative vote was taken regarding **Subsection 6 only, Motion for Extension of Time**, with the removal of the proposed “except when an appeal period is set by statute” language. There was a split vote with approximately four voting against the proposal.

Mr. Eisenberg asked those who voted against it if it was the idea of an extension or the language about the statutory period they were against.

Judge Gibbons responded that he had two concerns. One, don’t change the system unless it’s broken, and two, the subcommittee did not address the idea of simply extending the time from 30 days to 60 or 90 days. By not vetting that alternative, it’s premature to go ahead with this. To add to his first

concern, he pointed out that today's discussion shows there will be a large amount of litigation coming out of this. There is too much uncertainty in how this will be applied, plus there will be a lack of uniformity in some cases because the extension will take much longer than 30 days for the litigation to play out. There is no cap on how long it can go on. It could theoretically go on for six months before it is decided. He thinks the alternative approach of extending the rule from 30 days to 60 or 90 is a clean approach that would avoid all of the post rule time litigation that would go with the current proposal.

Justice Pickering asked to recall the vote on **Subsection 6, Motion for Extension of Time** without the "except when an appeal period is set by statute" language. A roll call of the vote was taken. **There were 16 in favor of the motion and 4 against.**

Justice Pickering requested that in the brief time remaining she would like to address **Subsection 7, Reopening the Time to File an Appeal**. Mr. Eisenberg suggested taking a straw vote. He asked if anyone else agreed with Mr. Polsenberg's position in favor of the proposal and then asked Mr. Polsenberg if he still felt strongly enough about it that he would want to dissent. Mr. Polsenberg said that he did not feel that strongly. Mr. A. Smith said that he thought he was one of the advocates for subsection 7. There was no further need to debate keeping the proposed Subsection 7.

Judge Westbrook asked Mr. Eisenberg if he was going to discuss the other proposed modifications to Rule 4(a). Mr. Eisenberg said he could go through them, but that most were cosmetic changes to make them consistent with language in the federal rule. **Subsection 5, Effect of Certain Motions on a Notice of Appeal** deals with tolling motions. He said the redline version makes it look like a lot of changes, but it is not anything substantive. For example, "30 days from the date of" was changed to "30 days after" to make it easier to understand. It is the same idea that you shouldn't appeal until after the tolling motions are decided. While the tolling motions are pending the time for an appeal is not running. Ms. Ollom asked for clarification on 5(B)(ii), which appears to cover everything that is in 5(C). Mr. Smith pointed out the comment with the suggestion that 5(C) could be combined with 5(B)(ii). After further discussion, the decision was made to remove 5(C).

Subsection (2), Filing Before Entry of Judgment, is similar to language currently in Rule 4(b)(2). Mr. A. Smith said this subsection was added so that the parties would not be caught unaware if they had filed a notice of appeal before the formal entry of an order. They would still get credit for having filed the appeal, even though it was premature. He stated further that it is slightly different from what **Subsection 8, Premature Notice of Appeal**, is dealing with. In Subsection 8 you have an actual judgment you are appealing from, but you have tolling motions in the meantime. Where here, there is not a real judgment yet and so you are kind of appealing from the prospective judgment.

Justice Pickering asked Mr. Eisenberg to circulate a clean copy incorporating all of the changes agreed to during the meeting, including the information regarding the split vote on **Subsection 6, Motion for Extension of Time**. She asked that everyone review the clean copy to make sure that nothing was

lost with the elimination of Subsection 5(C). After further discussion it was agreed that Mr. Eisenberg would distribute two versions, one with Subsection 6 cleaned up and one without it.

Justice Pickering called for a show of hands of those approving Rule 4(a) as a whole, with the caveats discussed above. She clarified that if the four who voted against Subsection 6 did not have any other issues with the rest of the proposed revisions, they could vote in favor. There was a consensus that 4(a) as written is good except for the split on Subsection 6.

Mr. Petty commented that if the Commission were to change the time for filing a civil appeal to 60 or 90 days, then it would almost have to do the same for criminal appeals. That would jeopardize people who are convicted of crimes in which their sentences are fairly short, i.e., 12-30 months. If the time to file an appeal was lengthened, their prison sentences could expire before the court ever got around to deciding the merits of the issues. Therefore, he is not in favor of lengthening the time for filing appeals.

Mr. Polsenberg agreed with Mr. Petty, but from the perspective of a law firm risk manager. He said lawyers are going to wait until the last minute, and if they have a longer time to file a notice of appeal, many of them are going to forget to do it. The time to file an appeal should remain at 30 days.

Upcoming NRAP Commission meetings: The next meeting was scheduled for April 19, from 11 a.m. to 1:30 p.m.

The meeting was adjourned at 1:27 p.m.