

Supreme Court of Nevada
ADMINISTRATIVE OFFICE OF THE COURTS

KATHERINE STOCKS
Director and State Court
Administrator



JOHN MCCORMICK
Assistant Court Administrator

**COMMISSION ON NEVADA
RULES OF APPELLATE PROCEDURE**

DATE OF MEETING: November 22, 2021

PLACE OF MEETING: Remote Access via BlueJeans

Members Present:

Justice Kristina Pickering	Justice Abbi Silver	Kelly Dove	Micah Echols
Robert Eisenberg	Dayvid Figler	Charles Finlayson	Travis Gerber
Judge Michael Gibbons	Adam Hosmer-Henner	Phaedra Kalicki	Debbie Leonard
Emily McFarling	John Petty	Daniel Polsenberg	Abe Smith
Jordan Smith	Don Springmeyer	JoNell Thomas	Anne Traum
Deborah Westbrook	Alexander Chen		

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

Roll was called and a quorum was present.

Approval of October 25, 2021, Commission Meeting Minutes: Justice Pickering welcomed everybody and asked if there were any amendments or if anyone would like to make a motion to approve the minutes. The following corrections will be made:

Jordan Smith, Co-Chair, should have been included with the Identification Subcommittee.

Deborah Westbrook was mistakenly listed as Co-Chair instead of a member of the NRAP 3C Fast Track Criminal Appeals Subcommittee.

Justice Silver moved and JoNell Thomas seconded to approve the minutes as corrected. Justice Pickering asked for anyone opposed to raise his or her hand, otherwise the minutes will be accepted as approved. The motion was unanimously approved.

Discussion Items:

Identification Subcommittee to discuss Proposed List of Subcommittees. Justice Pickering thanked everyone for all the work done so far. She also reminded everyone of the importance of using consistent language in the rules, i.e. “must for shall” and “response for answer”. She requested that the Identification Subcommittee take charge of tracking that. This will allow for a safety net at the end when everything is organized. Abe Smith agreed to have their subcommittee undertake that responsibility. Justice Pickering turned the meeting over to Abe Smith to walk the committee through the Identification Subcommittee’s report. A link to the entire report, entitled Proposed List of Subcommittee’s report, can be found at:

<https://nvcourts.gov/AOC/Templates/documents.aspx?folderID=33507>.

The Identification Subcommittee decided that instead of creating a subcommittee dedicated to so called “no brainer” rules, they thought it made sense to distribute what they thought of as “no brainer” rules throughout the various subcommittees. This would allow those with subject-matter expertise to evaluate what revisions to make. In terms of the actual division of subcommittees, they discussed rules by groupings and subject matter areas and tried to put the rules where they made sense as outlined below:

Group/Topic 1 Scope of Operation Rules; Regulation of Parties, Attorneys, Clerk (Rules 1, 2, 25, 26, 26.1, 28.2, 38, 43, 45, 46, 47, and 48). This grouping was briefly discussed--no revisions requested.

Subcommittee Chair: Adam Hosmer-Henner
Member: JoNell Thomas

Group/Topic 2 Commencing the Appeal; Settlement (Rules 3, 3A, 14, 16, and 33). This grouping was briefly discussed--no revisions requested. Phaedra Kalicki suggested adding Julie Ollom, Chief Assistant Clerk of the Court, to this subcommittee because of her Rule 16 expertise.

Subcommittee Chair: Emily McFarling
Members: Abe Smith and Julie Ollom

Group/Topic 3 Criminal Rules Subcommittee (Rules 3B, 3C, 22, and 23). A subcommittee for Rule 3C was created during the October 25, 2021, meeting. The Identification Subcommittee determined that Rules 3B, 22, and 23 best fit with 3C. JoNell Thomas asked if it would make sense to move capital case appeals, special topic 14.5 from page 7 of the report, to this subcommittee. Abe Smith agreed to make that change.

Subcommittee Chair, JoNell Thomas
Members: Alex Chen and Charles Finlayson (prosecutors), John Petty and Dayvid Figler (defense), Deborah Westbrook, Anne Traum, and Phaedra Kalicki

Group/Topic 4 Judicial Subcommittee (rules 3D, 25A, 35, and 45A). Abe Smith suggested it might be appropriate to have one of the Justices on this subcommittee. Justice Pickering volunteered to chair this subcommittee. She believes that the Court has a pending ADKT regarding judicial discipline. Phaedra Kalicki volunteered to join and advised she has a lot of research on Rule 35. Abe Smith pointed out that Rule 45A—Seal of the Supreme Court, does not include a provision for the Seal for the Court of Appeals.

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Subcommittee Chair: Justice Kristina Pickering
Member: Phaedra Kalicki

Group/Topic 5 Fast Track Child Custody Appeals subcommittee (Rule 3E). This was briefly discussed--no revisions requested.

Subcommittee Chair: Emily McFarling
Member: Judge Michael Gibbons

Group/Topic 6 When to Appeal, Costs, and Interest (Rules 4, 7, 37, and 39). A subcommittee for Rule 4 was created during the October 25, 2021, meeting. After discussing the addition of Rules 7, 37, and 39 to that subcommittee, the committee decided to create a separate Costs and Interest Subcommittee for those rules. The two subcommittees may need to work together for consistency on any overlapping issues.

Rule 4 Subcommittee-Civil Chair: Bob Eisenberg
Members: Dan Polsenberg, Abe Smith, Micah Echols, Kelly Dove, Phaedra Kalicki, Kim Edwards

Rule 4 Subcommittee-Criminal Chair: Deborah Westbrook
Members: John Petty, Alex Chen, and Charles Finlayson with assistance from Jenny Noble

Costs/Interest Subcommittee (Rules 7, 37, and 39).
Chair: Debbie Leonard
Members: (none currently assigned)

A link to all of the NRAP 4 subcommittee reports can be found at:
<https://nvcourts.gov/AOC/Templates/documents.aspx?folderID=33507>

NRAP 4 Subcommittee Status Report--Criminal: Deborah Westbrook's Highlights: The full subcommittee decided to split up Rule 4 into civil and criminal subgroups, with the criminal practitioners dealing with the bulk of Rule 4. They went through and compared the Federal Rules with Nevada's Rules looking at things they thought would be improvements. The following are some of the rules discussed.

Rule 4B: The current rule needs language to clarify that habeas applies and to make it apparent that a number of the sub-headings deal with untimely direct appeals from JOC's and post-conviction petitions.

Bring in aspects from the Federal Rule allowing an appeal to be filed within 30 days after the latter of either the entry of the judgment or order being appealed or the filing of the State's Notice of Appeal.

FRAP 4(b)4 Allow motions for extension of time to file an appeal in the case of excusable neglect or good cause. The subcommittee members unanimously agreed that it would be preferable to allow for this sort of filing making it less likely that there would be a need for an appellate deprivation claim.

FRAP 4(b)5 A proposal was made to provide that the filing of a notice of appeal does not divest the District Court of jurisdiction to correct a sentence under FRAP 35A.

NRAP 4(f) One possible revision would be to allow the court to issue an order expediting criminal appeals, with or without motion by the parties.

NRAP 4 Subcommittee Status Report--Civil: Bob Eisenberg's Highlights: After a lot of debate, the consensus of this subcommittee was that extensions should be allowed for notices of appeal, late notices of appeal, and extensions for post judgment tolling motions. How to go about implementing that language, was also subject to quite a bit of debate and Bob Eisenberg thinks it's fair to say they still have a lot of work to do before they feel comfortable submitting something. Deborah Westbrook advised that John Petty was going to forward some Federal case law to their group, which she will share with everyone, regarding how the Federal Courts have addressed these extensions. Justice Pickering commented on Dan Polsenberg's "extensions of time" discussion outlined in the subcommittee's November 9, 2021, report. He explained that the federal courts allow extensions of time calculated from entry of judgment, but in Nevada, it is calculated from service of entry. The NRCP committee declined to eliminate the calculation of service of notice of entry, since the appellate rules do not allow extensions. Justice Pickering believes there will be a lot of debate on this issue. Dan Polsenberg does not love the notices of entry, but if the rule is changed, he is concerned that it may cause many boomer attorneys to commit malpractice. Bob Eisenberg reminded everyone that electronic filing is prevalent throughout most of Nevada, but not all of Nevada. The problem is that the Clerk's office in some judicial districts mail electronic notices and other judicial districts do not. The subcommittee will study the issue and will try to make a good recommendation. His inclination is to leave it the way it is.

Group/Topic 7 Certification, Huneycutt, Amicus, Constitutional Questions (Rules 5, 12A, 29, and 44). A subcommittee for Rule 29 was created during the October 25, 2021, meeting. The Identification Subcommittee decided that even though these rules are not exactly related, they were probably simple enough, with the exception of the amicus question (Rule 29), and could be dealt with together. Micah Echols had no objections to the additional rules. Justice Pickering commented that the Amicus rule is a little unto itself because it also comes up in petitions for rehearing and reconsideration. She would like if the committee could come up with a mechanism in the rules for lawyers to know when important issues are pending on the Supreme Court docket prior to the briefing deadline, so that if it is appropriate amicus briefs can be filed. She believes this would improve the briefing. The Court already has a page on its website that lists pending certified questions. Abe Smith advised that in the interest of time, he has not been referring to the third column in the Identification Subcommittee's report, but he would like to caution that they are very much preliminary thoughts. Mainly, it was a way of disentangling what they thought were the no brainer rules from those that required additional consideration. Their suggestions are merely launching points that might be worth considering. For example, Rule 44, Jordan Smith commented that the U.S. Supreme Court has a mechanism for calling for the views of the Solicitor General and perhaps Nevada could create something similar.

Subcommittee Chair: Micah Echols

Members: Colby Williams, Steve Silva, Deborah Westbrook, Jordan Smith

NRAP 29 Subcommittee Status Report--Micah Echols: The subcommittee members have traded some emails but have not had a meeting yet. It seems to make sense to blend most of FRAP 29 into NRAP 29. They are looking at some U.S. Supreme Court provisions as well as a

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handful of some Federal cases that come up frequently in the court's orders on amicus motions. The subcommittee will then whittle down what makes sense. Dan Polsenberg recently received an email about a Federal committee considering changing FRAP 29. He will try to get some information and forward it to Micah Echols.

Group/Topic 8 Transcript, Record, Appendix (Rules 9, 10, 11, 12, 13, and 30). A subcommittee for Rule 30 was created during the October 25, 2021, meeting. These rules are closely related. It is not clear to the Identification Subcommittee how much work this might be. Rules 9 through 13 are already somewhat close to the Federal rules. Don Springmeyer briefly discussed a preliminary conversation he had with the Clerk's office regarding the possible elimination of the alphabetic appendix and the 250-page limitation. Phaedra gave some insight on the reasons why the Clerk's office would not be in favor of this. For example, many of the appendices are available online but not easily searchable. She also said that the thought of dealing with 30+ volumes of appendixes without an alphabetized index would be frightening. It is difficult to bind documents larger than 250 pages. Justice Pickering offered to explore this issue.

Subcommittee Chair: Don Springmeyer
Member: Bob Eisenberg

Group/Topic 9 Routing, Petitions for Rehearing and Review (Rules 17, 40, 40A, and 40B). A subcommittee for Rule 40A was created during the October 25, 2021, meeting. Justices Pickering and Silver briefly discussed some preliminary ideas they would like the subcommittee to consider. (1) It has been six years since the COA opened. Are Rules 17 and 40B adequate for the job they were originally created to do? (2) When the Supreme Court grants a Petition for Review, it vacates the COA's decision, but does not routinely ask for additional briefing. (3) The Petition for Review is not usually granted to correct an error. Instead, it is granted because the issue is important and deserves clearer development. It does not make sense to rely on the initial briefs that may not be what the Court would like them to be. (4) Do other Courts of Appeal with a similar structure as Nevada request merits briefs when they take a question. The court has the authority to ask for supplemental briefs but it is almost never does.

Subcommittee Chair: Deborah Westbrook
Members: John Petty and Colby Williams, Steve Silva, Charles Finlayson, Sharon Dickinson, Jenny Noble (to review and assist with drafting)

A link to this subcommittee's November 8 and 19 reports can be found at:
<https://nvcourts.gov/AOC/Templates/documents.aspx?folderID=33507>

NRAP 40, 40A, & 40B Subcommittee Status Report—Deborah Westbrook's Highlights: Revise existing rules to allow a Petition for EB Reconsideration to be filed in the first instance without first filing a Petition for Rehearing. The Federal Courts allow this and the simultaneous filing of rehearing and reconsideration petitions. The consensus of the subcommittee was to allow the former, but not the latter. Filing a rehearing petition is a waste of time if it is a *stare decisis* issue the attorney wants the EB Court to resolve.

They also discussed either removing or revising the current language in NRAP 40(c)(1) and 40A(c) that says, "[m]atters presented in the briefs and oral arguments may not be reargued in the petition for rehearing, and no point may be raised for the first time on rehearing." The language seems to be contradictory. A rehearing petition needs to restate some matters in order to meet the standard

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of review and in a reconsideration petition, you may be telling the court why there is an issue of statewide importance you may not have mentioned earlier. The consensus would be to work on tightening up the language to avoid abuse on all sides. Justice Pickering stated that what the Court is looking for in that rule is for the parties to cite to where the issue was previously raised in the existing record.

Group/Topic 10 Stays, Injunctions, Writs, Motions (Rules 8, 21, and 27). This section deals with issues that are tangential to the briefing, i.e. motions (Rule 27) or stays and injunctions (Rule 8). These three rules are fairly related and there is probably a lot to talk about with all three.

Subcommittee Chair: Jordan Smith

Members: Don Springmeyer, Dan Polsenberg, Phaedra Kalicki, and John Petty (representing criminal side)

Group/Topic 11 Briefs (rules 28, 28.1, 31, and 32). This grouping was briefly discussed- no revisions were requested.

Subcommittee Chair: Abe Smith

Member: Kelly Dove

Group/Topic 12 Judgment, Remittitur (Rules 36 and 41). A subcommittee for Rule 36 was created during the October 25, 2021, meeting and will now include rule 41.

Subcommittee Co-Chairs Justice Abbi Silver and Judge Michael Gibbons

Members: John Petty and Colby Williams

Group/Topic 13 Pro Se Subcommittee (Rules 24, 34, and 46A). A subcommittee for Pro Se Rules/Issues was created during the October 25, 2021, meeting. Rule 24 would be part of that. Perhaps make some kind of provision in Rules 34 and 46A for pro se litigants to argue before the court. The question for the subcommittee would be is there anything missing that it would like to include. Justice Pickering commented that these rules overlap with issues like ordering the transcript and the pro bono issues that go with it.

Subcommittee Chair: Anne Traum

Members: Justice Kristina Pickering, Kelly Dove, Dayvid Figler, Charles Finlayson, and Phaedra Kalicki

Group/Topic 14 Special Topics (FRAP 47—Rules to Appellate Practice). Abe Smith hesitated to call this section a subcommittee since he is not sure if the committee wants to address the issues outlined.

14.1—Rules of Practice in Court of Appeals. Given Nevada's unique appellate structure, the rules of appellate procedure govern both the COA and the Supreme Court. The Identification Subcommittee was not certain if there is a need for the COA to have their own rules or not. Justice Pickering commented that would be contrary to trying to expedite appeals. She asked Judge Michael Gibbons to talk to his colleagues on the COA and report back to the committee. Judge Gibbons' quick reaction to separate rules was that it is highly doubtful. They try to be consistent wherever they can be, though staff always knows what the correct procedure is. Every time the COA tries to deviate, it causes a problem. Judge Gibbons commented that the COA does have a

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few Internal Operating Procedures (IOPs) that are different from the Supreme Courts, but those do not affect the rules committee. He will consult with his colleagues. Justice Pickering commented that, if possible, it would be desirable to add any IOPs to NRAP that affect practitioners. For example, there is an IOP for requesting supplemental briefing from the parties if the Court wants to decide a case on an issue not previously raised or briefed. The Court's IOP's are unknown to practitioners outside of Nevada and probably not known by many within Nevada.

Subcommittee Chair: Judge Michael Gibbons

Appeals in District Court, Statutory and Agency Appeals (Group/Topics 14.2, 14.3, and 14.4). These topics relate to appeals that are heard in the district courts. For example, agency appeals or appeals of probate or commitment procedures that are still governed by the NRAP and if there is anything that needs to be addressed. Justice Pickering stated there are also issues related to NRS 233B. She is not certain if the water cases or some of the other cases that do not fall under the Administrative Procedure Act will need separate rules. She asked Debbie Leonard to take on these topics. Justice Silver suggested that Charles Finlayson, from the AG's office, be included in this subcommittee regarding the prison and parole board appeals.

Subcommittee Chair: Debbie Leonard

Members: Charles Finlayson, and Abe Smith (Rule 14.2)

14.5—Capital Case Appeals. Moved to the Criminal Rules Subcommittee.

Justice Pickering thanked Abe Smith, Jordan Smith, and Emily McFarling for their work on this project. There is a huge amount of work going forward, but all of the rules are now under somebody's watch. If it is determined that any of the rules intersect with something else, those two subcommittees can work with one another. Anyone who would like to volunteer for any of these subcommittees is welcome to contact Justices Pickering or Silver, or the chairs directly.

January 24, 2022, is the date set for the next meeting. The subcommittee chairs should inform either Justice Pickering or Justice Silver as soon as possible if they will have anything to present at the meeting and when the materials will be ready so that an agenda can be timely prepared and distributed so that everyone will have time to review it prior to the meeting.

Meeting adjourned at 1:46 p.m.