Supreme Court of Nevada
ADMINISTRATIVE OFFICE OF THE COURTS

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DRAFT

MEETING SUMMARY
COMMISSION ON NRAP

DATE AND TIME OF MEETING: January 31, 2022, Noon
PLACE OF MEETING: Remote Access via BlueJeans

Members Present:

Justice Abbi Silver	Justice Kristina Pickering	Sally Bassett
John Asher (on behalf of Alexander Chen)	Kelly Dove	Robert Eisenberg
Dayvid Figler	Travis Gerber	Judge Michael Gibbons
Adam Hosmer-Henner	Phaedra Kalicki	Debbie Leonard
Emily McFarling	John Petty	Daniel Polsenberg
Steven Silva	Abe Smith	Jordan Smith
Don Springmeyer	JoNell Thomas	Anne Traum
Deborah Westbrook	J. Colby Williams	Charles Finlayson

Call to Order, Welcome, and Announcements: Justice Pickering called the meeting to order at 12:03 p.m.

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

Approval of November 22, 2021, Commission Meeting Minutes: Justice Pickering welcomed everyone and asked if there were any amendments or if anyone would like to make a motion to approve the minutes. Ms. Leonard moved, and Justice Silver seconded to approve the minutes as presented. The motion was unanimously approved.

Discussion Items:

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

NRAP 4 (Appeal—When Taken) Criminal Subcommittee Report – Deborah Westbrook—In regard to FRAP (4)(b)(4)--Motion for Extension of Time, Ms. Westbrook discussed how the federal rule interprets excusable neglect and the subcommittee's draft amendment of NRAP 4(b)(4), which adopts FRAP 4(b)(4)'s language allowing for extension of time to file a notice of appeal if there is excusable neglect or good cause. (See page 4 of the subcommittee materials). She also advised that Mr. Finlayson has consulted with the chiefs of several divisions of State government who have some concerns about the proposed amendment to adopt the FRAP 4(b)(4) language. He plans to communicate with them further to see if their concerns can be allayed with legal research.

Several subcommittee members raised concerns about NRAP 4(b)(4) referencing specific statutes; omission of an existing or newly added statute from the rule could invite future reliance on the omitted statute as being subject to an excusable neglect standard.

Mr. A. Smith pointed out that in one of the articles that was attached to the materials, (he thought it was the Federal Practice Manual) there were quite a few Westlaw overruling indications. He asked Ms. Westbrook if she knew if that's largely because of *Hamer,*[i] which probably clarified or overruled many of the cases cited in the article, or if something else was calling those cases into question. Ms. Westbrook was not sure and said she would check on that.

In response to comments made by Mr. A. Smith and Mr. Polsenberg about possible separation of powers issues arising from NRAP 4(b)(4)'s extension of time for filing an appeal. Ms. Westbrook referred to a 10th Circuit decision from 2010 that she came across in a treatise, which concluded that FRAP 4(b)(4) can extend the time for filing an appeal beyond the 30-day period set by federal statute because the rule was procedural in nature. However, the 10th Circuit decision also discussed how FRAP 1(b) had prohibited courts from construing rules as extending or limiting appellate jurisdiction but that courts could now extend the jurisdictional deadline because FRAP 1(b) was abrogated. Nevada's current appellate rule 1(b), however, says exactly what the abrogated rule in the former federal rule said, which cuts against the holding of the 10th Circuit case. Ms. Westbrook thinks the subcommittee would probably need to change the language in NRAP 1(b) in order to have a court rule extending a statutory time limit.

This item will be discussed further at a future meeting.

NRAP 36 (Entry of Judgment) Subcommittee Report – Justice Silver

Justice Silver went through the proposed amendment, which allows the citation of unpublished court of appeal decisions, as with supreme court decisions. There was a lengthy discussion regarding the effective date for allowing the citation of unpublished dispositions for persuasive value. Rule 36(c)(3). Discussion followed concerning the amendment allowing the citation unpublished dispositions. Mr. Silva explained that he was against the initial repeal of SCR 123 and the Rule 36 change allowing citation of unpublished dispositions and opposes removing the date limitation. He suggested that before changing or repealing the date that they research what date unpublished decisions first became available on electronic databases. Ms. Kalicki will research the answer to that question. He said that even though Rule 36(c)(3) requires "[a] party citing such an unpublished disposition [to] serve a copy of it . . . ." he has not seen much compliance in that respect. Judge Gibbons pointed out that the Nevada Court of Appeals has always written their orders as if they could be citable and used by the Bar or the Court.

Mr. A. Smith inquired if the reason for deleting Rule 36(e) (Reversal, Modification; Certified Copy of Opinion to Lower Court) for redundancy is because the notice is electronically sent when remittitur is issued. Justice Silver confirmed that is correct. Ms. Leonard asked about the rural courts that do not have e-flex. Ms. Kalicki can verify with the Clerk's office, but she believes that all district court judges are on the e-flex system and receive notification once a disposition is filed in the case.

Justice Pickering called for tentative approval of the proposed Rule 36 amendment, subject to bringing it back on the agenda.

Justice Silver moved to approve the proposed amendment with one additional revision—removing the January 1, 2016, date restriction when citing to unpublished dispositions. Bob Eisenberg seconded the motion.

The motion passed with one opposition. Ms. Kalicki will get answers from the clerk's office on the two questions and report back.

NRAP 41 (Issuance of Remittitur; Stay of Remittitur) Subcommittee Report – Justice Silver

Justice Silver went through the proposed amendment explaining that what they tried to do was to compare each section with the corresponding FRAP and make the appropriate amendments. There was a lengthy discussion regarding the additional language added to Rule 41(d)(3)(A):

> A party may file a motion to stay the remittitur pending application to the Supreme Court of the United States for a writ of certiorari. The motion must be served on all parties and must show that the petition would present a substantial question and that there is good cause for a stay.

Ms. Thomas was concerned with the "substantial question" language and questioned how she would prove that her case has value. She suggested adding "except in death penalty cases" to the amendment since they will always present a substantial question.

Ms. Kalicki responded that all Ms. Thomas would need to say in her motion is that she is filing a cert petition and on what basis. A copy of the cert petition would not be necessary. The addition of this language is to try and weed out the cases where the motion for stay is filed for delay purposes.

Ms. Kalicki advised that the additional language was requested by the clerk's office and taken from FRAP 41(d)(1). Most motions to stay remittitur pending cert are cases with purely state law issues and state parties that the U.S. Supreme Court is not going to accept. The current rule allows for an automatic stay of the remittitur, which can delay enforcing a judgment among any number of other things. She stated that when she worked on these motions in the Clerk's office, it was more common to see abuse in civil cases where the motions were filed as a delay tactic, whereas criminal cases almost always have at least one constitutional issue to raise.

The discussion continued and the following amendment was suggested:

> "The motion must be served on all parties. In civil cases, the motion must show that the petition would present a substantial question and that there is good cause for a stay.

Mr. J. Smith voiced his opposition to that change, asserting that the rule should mirror the federal rule instead of making it more complicated by distinguishing between civil and criminal cases.

Mr. Finlayson stated that they may want to exclude criminal cases from this rule. For purposes of inmates who are seeking federal habeas relief, the timelines run off certain dates and they get credit for that time when they are seeking cert. If the Nevada Supreme Court were to deny a motion to stay remittitur, the inmate would have to file a state habeas petition while their time to file cert in federal court is still running. He would like to take some time to think about how that might affect inmates in federal court.

Justice Pickering suggested carrying this over to the next meeting so that research can be done on how other state courts address this. She is worried that they are going to get into a tangle where they are making things inconsistent and inspiring litigation. Justice Silver suggested also looking at death penalty states instead of just states in general to see what their rule says regarding this.

After further discussion, Justice Silver made a motion to vote on the revision limiting the language to civil cases as stated above.

Justice Pickering called for a second and Ms. Thomas seconded.

Justice Silver asked if there was any opposition, and several people raised their hands. She then asked to hear from the opposition and what their concerns are.

Mr. J. Smith said that he voiced most of them already—there are concerns among practitioners, even in capital cases, of delay tactics, and these tactics are not limited to civil cases.

Mr. A. Smith stated that his concerns come from the opposite perspective. As an example, certain family law cases like termination of parental rights (TPR) cases and adoption cases are akin to a civil death penalty case, where delay on one side or the other could be very prejudicial to the families involved. He does not necessarily have a problem with substantial question/good cause applying in all cases because he thinks it would be satisfied easily in some cases, but he is concerned that family law cases would also have to meet this heightened burden if it applies only in civil cases.

Mr. A. Smith suggested that another reason for delaying the vote on this amendment would be that he would like to suggest shortening the 120-day time limit in Rule 41(d)(3)(B). He said he is not sure where the 120 days comes from, as the deadline for a cert petition is 90 days and then there is this provision in there about serving the notice from the Clerk of the Supreme Court. If the concern is that you wouldn't know right at day 90 whether the Supreme Court had docketed it, he thinks there might be other ways to deal with that rather than having this extra 30 days built in there. Ms. Kalicki stated that the extra 30 days was added because the Clerk's office found that it was often taking up to 20 days for the U.S. Supreme Court to notify them that a cert petition had been filed. There was a period of time with shorter timelines where the Clerk's office was having to recall remittiturs.

Justice Pickering stated that the comments from A. Smith and J. Smith suggest a motion to table the vote and asked Justice Silver if she was ok with that. Justice Silver said yes. Justice Pickering said that will give those who have reservations about where to draw the line time to think about it. Justice Silver suggested that Mr. A. Smith and Mr. J. Smith, as well as anyone else, submit proposed amendments for discussion at the next meeting.

Ms. McFarling suggested that, to ensure consistency in the rules, each of the subcommittees flag any requirements for service and filing of extra copies, etc., that have become outdated in light of e-filing. Ms. Leonard said that those rules would not be obsolete for those who are not e-filing and asked if there was an inclination to make e-filing mandatory. Justice Pickering responded that the Committee should debate that issue which could possibly overlap with some of the pro per/pro se issues that Professor Traum is looking at.

The motion on NRAP 41 is tabled and the remainder of the agenda including the late distributions made will be discussed at the next meeting, which is scheduled for March 2, 2022.

MEETING WAS ADJOURNED AT 1:21 P.M.

[i] *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017).