Supreme Court of Nevada
ADMINISTRATIVE OFFICE OF THE COURTS

KATHERINE STOCKS
Director and State Court Administrator

JOHN MCCORMICK
Assistant Court Administrator

MEETING SUMMARY
COMMISSION ON NRAP

DATE AND TIME OF MEETING: March 2, 2022
PLACE OF MEETING: Remote Access via BlueJeans

Members Present:

Justice Kristina Pickering	Justice Abbi Silver	Sally Bassett
Alexander Chen	Kelly Dove	Micah S. Echols
Robert Eisenberg	Dayvid Figler	Charles Finlayson
Judge Michael Gibbons	Phaedra Kalicki	Debbie Leonard
Emily McFarling	John Petty	Daniel Polsenberg
Steven M. Silva	Abraham Smith	Jordan Smith
Don Springmeyer	David Stanton	JoNell Thomas
Anne Traum	Deborah Westbrook	Colby J. Williams

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

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

Approval of January 31, 2022, Commission Meeting Minutes. Justice Pickering asked if there were any questions or concerns about the minutes or if someone would like to make a motion to approve them. Justice Silver moved, and Steven Silva 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 36 Subcommittee update – Justice Silver—Justice Silver asked Ms. Kalicki to report on two issues she researched following the January 31, 2022, meeting.

1. When did unpublished Nevada Supreme Court decisions first became available on electronic databases? **Answer:** It's not possible to investigate this as to every possible electronic database. However, Westlaw advised that the first table decision was published in March of 2008 which corresponds with when the Court began posting them to its website.
2. Do all District Court judges receive electronic notice of Nevada Supreme Court dispositions? **Answer:** Only e-filers receive electronic notice of dispositions. A copy of all dispositions is mailed to the applicable District Court after they are filed and again when the remittitur is issued. There is no way to know if the dispositions make it to the District Court Judge's desk. Justice Silver said that when she was a District Court judge, she and the other judges would receive stacks of dispositions. She also said that it's not unusual for pending cases to be reassigned to a different judge and suggested that if attorneys do not receive information on the status of their cases after they have been remanded, they should contact the District Court Clerk's office to request a status check.

Considering the response to question 2, Justice Pickering asked if anyone wanted to revisit the amendment to Rule 36 which was voted on and approved by the Commission at the January 31, 2022, meeting. Should the last sentence in section (c)(3) be amended as follows:

> A party citing such an unpublished disposition must serve a copy of it on any party not represented by counsel <u>if it is not available in an electronic database</u>.

Discussion was held and a decision was made to leave Rule 36 as previously approved.

NRAP 41 Subcommittee report–Justice Silver—This item was carried over from the January 31, 2022, meeting to allow time for research on the "substantial question" and "good cause" language in the original draft amendment. Ms. Kalicki submitted a research memo addressing how the courts in death penalty states[i] handle stays of remittitur, particularly in criminal and death penalty cases. The memo includes a copy of Wright & Miller's practice manual on FRAP 41(d)(1).[ii] Substantial question is discussed in fn 5 of the manual, which states in part that the votes of four justices are necessary to grant a cert petition.

Discussion highlights:

If "substantial question" is defined to mean that the votes of four or more justices would be necessary to grant cert, it's difficult to believe the standard could ever be met in state court.

If the amendment only applies to civil cases, what will be the standard for criminal cases?

> Ms. Westbrook thought that it would be whatever standard is currently in place for motions to stay remittitur in criminal cases. Civil cases would fall under the new standard.

The Court does have cases where people have not raised an issue of federal constitutional law and only want to run the clock out and avoid having the remittitur issued.

There may be a financial incentive for lawyers to delay matters in civil cases, but not in criminal cases where many of the petitioners are indigent.

Mr. J. Smith also submitted a research memo arguing the commission members should adopt FRAP 4(d)(1) (alt 1) without exempting criminal cases. He said that the language in "FRAP 41(d)(1) could be modified to delete the reference to 'substantial case' and solely use a 'good cause' standard." This would apply to both civil and criminal cases and partially lessen the burden for those requesting a stay of remittitur pending a cert petition:

Alternate Draft Amendment 3

> A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. 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

A number of people seem to be comfortable with the "good cause" provision. The breakdown in the discussions appear to be over what constitutes "good cause," which might be better developed through case law rather than rule drafting. If a "good cause" requirement is incorporated, the sophisticated civil litigants will have to show preservation for why it's a jurisdictional argument, while the less sophisticated pro se parties would only need to make a short concise statement of what they think the U.S. Supreme Court is going to review. A "good cause" requirement demonstrates that there are standards while leaving flexibility for the court to grant or deny motions based on the particulars of the case and avoid having to split the standards for civil and criminal.

Mississippi's rule (see Ms. Kalicki's memo) requires a showing of a substantial question and good cause only in criminal cases. A suggestion was made to use some of the Mississippi language but delete the word "substantial" so that the petitioner must clearly demonstrate that a federal question was previously raised and resolved. This could apply to both civil and criminal. Mr. J. Smith was asked to take draft alt 3 and modify it with language from Mississippi's rule to create a new alt draft 4 for circulation prior to the next meeting.

Ms. Traum suggested that if the Court is interested in spelling out the standard without necessarily creating new compliance issues for pro se petitioners, guidance language could be incorporated into the rule stating that the court "will consider and look to see if a federal question or constitutional issue was preserved."

NRAP 17, 40, 40A & 40B Subcommittee report (Proposals for NRAP 17)–Deborah Westbrook: Ms. Westbrook thanked Mr. A. Smith for joining their subcommittee regarding NRAP 17 revision recommendations suggested by the Identification Subcommittee:

1. Address situations where cases don't fall neatly into NRAP 17(a) or (b).
   Outcome: This would be better addressed in the Routing Statement (NRAP 28 subcommittee). It might make sense to include language in the Routing Statement where the parties state whether their case is presumptively assigned, retained, or not presumptively assigned to either court. Ms. Westbrook's subcommittee offered to assist with a sentence or clause of guidance.

2. Formalize criteria and procedure for seeking en banc Supreme Court review in the first instance.
   Outcome: This would be better addressed in the Routing Statement (NRAP 21(a)(3)(A) subcommittee). They also suggest that there may be some disconnect between NRAP 21(a)(3)(A) and NRAP 28 that needs to be clarified. Finally, there is language in the fast-track statement which discusses the Routing Statement. The NRAP 3C and 3E subcommittees may want to add language providing for EB treatment to those sections.[iii]

The subcommittee submitted a proposed amendment to NRAP 17, which splits 17(a)(12) in to two subsections as it contains two different concepts:

> (12) Matters raising as a principal issue a question of statewide public importance that has application beyond the parties[iv]; and
> (13) Matters raising as a principal issue~~, 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.

They also propose amending (17(b)(14) as follows:

> (14) Cases involving trust and estate matters in which the corpus has a value of less than ~~$5,430,000~~[v] the applicable federal estate tax exemption amount; and

Discussion highlights:

Mr. Figler will submit written comments to the subcommittee.

At the suggestion of Mr. Eisenberg, the committee agreed to remove both uses of "published" in new subsection 13, since the revision of NRAP 36 will allow citation of unpublished decisions.

Justice Pickering questioned if 17(b)(5), which currently reads: "[a]ppeals from a judgment, exclusive of interest, attorney fees, and costs, of $250,000 or less in a tort case;" is over inclusive because if there is a defense verdict, they are automatically routed to the Court of Appeals.

Mr. Eisenberg suggested that (b)(5) be amended to make it similar to 6 as follows: "[a]ppeals from a judgment in which the amount in controversy is $250,000 or less in a tort case." That way even if it's a defense verdict, the case will stay in the Supreme Court.

Mr. Silva suggested the following language: "[a]ppeals from a judgment awarding damages, exclusive of interest, attorney's fees, and costs of $250,000 or less in a tort case."

Judge Gibbons pointed out that Rule 17 is divided into two parts—one that states which cases will automatically be retained by the Supreme Court and the other that is presumptive on what goes to the Court of Appeals. It's not completely accurate to say that certain cases automatically get sent to the Court of Appeals. The Court of Appeals is presumptively assigned family law cases, but the

Supreme Court retains discretion to keep a case if it wants to issue a published opinion on a particular topic. It's up to the parties to put in the routing statement if their case happens to be a $1 million case and should be retained by the Supreme Court.

Mr. Echols said he has found Rule 17(b)(5) to be workable. In the last couple of years, he has had more cases in the Court of Appeals than the past. However, maybe a year ago, he had three cases that were all defense verdicts, two went to the Court of Appeals and one went to the Supreme Court. He does not mind placing the burden on the attorneys to explain why a case should go to the Supreme Court instead of the Court of Appeals or conversely to the Court of Appeals, even if the issues may be based upon a first impression issue or statewide importance. He is satisfied with the way parts (a) and (b) work together but understands concerns about hot button issues with sanctions or other trends that the Supreme Court would like to look at. It is worth thinking about and bringing up again at the next meeting. Justice Pickering agreed but said she would like to see a shift from the emphasis on "statewide importance" and conflicts to just the issues that need to be developed in criminal and civil cases.

NRAP 17 will be deferred to the next meeting so draft amendment can be revised and for the subcommittee to discuss the opinions that were brought up at this meeting.

UPCOMING DATES/EVENTS: The next two meetings are scheduled for March 28 and April 25, 2022.

MEETING WAS ADJOURNED AT 1:18 P.M.

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[i] The death penalty states are Alabama, Arizona, Arkansas, Florida, Georgia, Mississippi, Texas, and Utah.

[ii] *Wright & Miller*-16AA Fed. Prac. & Proc. Juris § 3987.1-Stay of Mandate Pending Certiorari (5th ed.).

[iii] Ms. Leonard wondered if NRAP 17(a) was already a proxy for en banc consideration and whether it needs to be called out separately in the routing statement. Justice Pickering responded that the court's screening procedure includes whether the cases will be sent to the Supreme Court or Court of Appeals. If sent to the Supreme Court, they are further screened for en banc, panel, staff, or chambers. The routing statement is important as far as what's in the concept and they do overlap, but the focus of Rule 17 is the division between the two and Justice Pickering would be inclined to take the subcommittee's recommendation and have the other subcommittees address it.

[iv] This language is borrowed from NRAP 36(c)(1)(C.

[v] This amount represents the federal estate tax exemption amount that existed when the rule was first adopted and changes yearly. Currently the amount is $11,700,000.