11/9/21 – NRAP 40, 40A, 40B Subcommittee Meeting

Chair: Deborah Westbrook
John Petty
Colby Williams
Steve Silva
Charlie Finlayson
Sharon Dickinson
[Jenny Noble to review and assist with drafting]

Issues to Discuss

1. **Whether to allow a petition for en banc reconsideration to be filed in the first instance, without first filing a petition for rehearing, where the analogous federal rule permits the parties to do so.**

   - John: doesn't think you should have to jump through the rehearing petition to get to the reconsideration. If you want rehearing because a basis exists, because there was a mistake then fine, but if you are only wanting reconsideration, why waste your time?
   - Steve: litigants know whether it is a simple misapprehension, and they might reach a different result, or whether someone thinks they got a bad draw and wants to go en banc. Case law on en banc tells you what the factors are, some people will try to "en banc" everything, but savvy practitioners will do the right thing.
   - John: appellate counsel who has to file rehearing without merit, is filing a frivolous petition. So why make someone do that?
   - Sharon: agrees.
   - **Group consensus**: group unanimously recommends omitting the requirement of first filing a petition for rehearing before filing a petition for en banc reconsideration.

2. **Pros/cons of allowing simultaneous filing of a petition for rehearing and petition for en banc reconsideration. Do we want to allow simultaneous filing as in the federal rules?**

   - Charlie: didn't like simultaneous filing because it allows you to be vague as to what you're asking for, and the muddle the standard. Thinks it is better to file separate documents, rather than one combined document arguing both standards.
   - Steve: the rules are different, different standards, different purposes, so just mushing it all together feels like you're throwing a "Hail Mary" and hoping something will stick. It is good to allow litigants/appellant's counsel to inform the court as to *what* they think the court got wrong; thinks litigants should walk one path at a time.
   - John: agrees – that was why, in his proposal, he took out the sentence from 40B and put it in 40A, saying that when a petition for en banc rehearing is filed, you have to wait to file for a reconsideration.

- Steve: we could consider including something in either an IOP or NRAP, indicating, for efficiency, if the court, on reviewing a petition for rehearing decides to transfer the petition to en banc, it could be useful to do that; but, allowing dual filing would clog up the two separate routes in the clerk's office, where would be simultaneously routed to panel and en banc. For an NRAP practitioner-facing rule, it is preferable to let them pick their poison.
- Deborah: agrees that permitting dual filing is not a good idea.
- Colby: thinks this is right; was confronted with this issue in the 9th Circuit, and was debating whether to file a combined petition, given the uniqueness of the issues, and he had what he thought was a good template/example to work from, but when he tried to do it in his case, he found it tough to combine them. You're bouncing back/forth between standards in the same document. So, separate paths make sense.
- Steve: noted that when you do a combined filing, you take away an opportunity to further refine the decision before it goes en banc. Also, if you allow the practitioner to file both petitions at once, it could be tracked to rehearing instead of en banc, which does a disservice to litigants. It makes sense in some cases at 9th Circuit, but he want's to reorient this process on the fact that our NRAP is not a perfect analog for the FRAP. It is a supreme court, highest court, so its decisions have the full force of law, more so than a circuit court decision, so getting to actual finality is good here, and we want as clean of a process to get to en banc review, if we want to go there. To give the best record for the en banc.
- Sharon: no other thoughts. Agrees it's a good idea to do them separately. Thinks our cases are different from federal court, and our criminal system is set up separately.
- **Group consensus**: recommend that we should **not** adopt the portion of the the federal rule which allows petitions for rehearing and en banc reconsideration to be filed simultaneously.

3. **Whether to omit or modify the following language from NRAP 40(c)(1), which states, "Matters 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." And whether to omit or modify the following language from NRAP 40A(c) which states, "Matters presented in the briefs and oral arguments may not be reargued in the petition, and no point may be raised for the first time." This language is not currently found in NRAP 40B, nor is it found in the analogous federal rules FRAP 35 or FRAP 40.**

   - Deborah: Initially proposed omitting the language in its entirety to be consistent with the federal rules. Felt the language was self-contradictory, and it was difficult to see how a party could simultaneously satisfy both of those preconditions to filing. Felt the language was also unnecessary, as the rules already specify the contents of petitions for rehearing and en banc reconsideration. During the meeting, also raised the concern that this overly broad language is often used by an opponent of the petition to argue for outright rejection of the petition even when the review/rehearing standards are met. A party necessarily has to point to arguments already raised to show why the court overlooked something (NRAP 40(a)(2)), and as to an en banc petition, a party will necessarily be arguing "for the first time" how the decision meets the standard (NRAP 40A(a)).

- Colby via email: "I'm in favor of removing the language highlighted in bold. The language is arguably internally inconsistent. Additionally, to demonstrate how the court overlooked or misapprehended an issue of law or fact, one has to at least tacitly reargue the law or fact at issue."

- John via email: "Given the limited grounds upon which a petition for full court reconsideration may be granted, coupled with the specificity of Rule 40A(c)'s directive on the required showing for either ground, the additional limitation you note seems to me to be reasonable. For example, if I am the Court and I am called upon to determine whether a conflict exists in caselaw such that it is necessary to be definitively resolved, or the case has important constitutional or statewide issues beyond the present litigants, it really isn't necessary for me to be a super-reviewing court of the general merit issues briefed below. That is, I don't need to have the case reargued to me because I am looking at the case for a very narrow purpose. As to raising arguments for the first time in the petition, why should I consider something that could have but apparently was not briefed before the panel? And, unless the new issue is cognizable under either of the two grounds upon which reconsideration is possible, what new issue might be possible to raise?"

    - At the meeting, John added: A few years ago, Justice Hardesty gave a presentation before the Washoe County Bar Association and explained that these petitions for reconsideration are rare animals, and you have to make a strong case, and the factors you might take a look at are the factors present in other rules. If Justice Hardesty speaks for the Court, he is saying the same criteria applies across the board.

    - John further added: as to NRAP 40B, the Court of Appeals is sitting as another panel, and the Supreme Court will not want to be a super reviewing court for every error in the appellate process; there is finality to the panel's decision, and with respect to petitions for review of Court of Appeals decisions, it strikes him that the standard of review for full court consideration should be similar. In the petition, you should only argue the standard. Nothing says you can't show how the party below was damaged by them. So, we should consider adding similar language to NRAP 40B.

- Charlie via text: Pointed out that the intent of the language in these rules is that you should only argue for why you meet the standard for rehearing/reconsideration.
    - At the meeting, Charlie added that the point of the language is to tell practitioners to "focus on the standard; don't tell us what you already said before, and don't tell us something new." Charlie agreed that, as currently worded, the language is very broad and could be used by a law clerk to reject a petition entirely. But Charlie thinks the Court won't want to cut the language entirely.
    - Charlie could go either way on the question of adding similar (but revised) language to NRAP 40B.

- Steve via text: Echoed the sentiments of John and Charlie that the purpose of the language was to tell litigants that their sole focus must be on showing how the Court misapplied what it had, and that you can't just say the same stuff over and over, and you can't raise

new arguments either, but it is loosely-drafted and people tend to maximalist it, so it needs tinkering.

- During the meeting Steve added that he has always liked the additive language. In civil, they interpret it in the context of petitions for rehearing to say, "hey Court, at this line, you overlooked this argument, please rehear me," or "you overlooked this law, see where I cited it, please rehear me." In Steve's opinion, this is not a new argument, and it is not restating the same thing over again. He would prefer to keep the language in there. He has seen it misused by litigants, but in his opinion, the two sentences don't clash.
- Steve would propose reworking the language, or adding a prefatory sentence saying something like: "the point of a petition for rehearing is to do x, it is not an opportunity for mere repetition of arguments, or to make arguments that could have been made but were not raised."
- Steve would also request similar limiting language be in the NRAP 40B, telling practitioners to "focus on the standard, don't change your argument for the first time, and don't repeat arguments."
- But since it is unclear whether the language was omitted from NRAP 40B on purpose or inadvertently, Steve would propose that we recommend additional language for NRAP 40B and drop a footnote or explanatory language that we are uncertain whether the Court intended the rules to be the same, or different and it is up to the Court whether it wants to add similar language to the rule.

- Sharon: thought the purpose was to have a different type of review – so her impression was always they wanted a little bit different standard.

- **Group consensus**: Group would like to work on tightening up the language to avoid abuse on all sides, and will address whether to incorporate similar language into the NRAP 40B rule, at the Court's discretion.

4. **Charlie asked, what does it mean to be an "aggrieved party" as that term is used in NRAP 40B(a)?**
    - Steve responded that the rule is designed for review, not for seeking an advisory opinion. If the Supreme Court is going to treat Court of Appeals as an independent body that is of lower stature than Supreme Court, but is a body worthy of respect, we don't just want them reviewing everything. [Steve suggested we might make a note explaining that the word "aggrieved" has raised a question about how the rule applies, and whether its inclusion was inadvertent. We should ask the Court, does this language mean you have to be the *loser* on the merits to petition for review? Alternatively, if that is not intended, then do we want to revise this?]

5. **Whether we prefer the federal language or our existing, more specific, language describing when the Court may grant rehearings (language set forth below):**

> NRAP 40(c)(2)
>
> The court may consider rehearings in the following circumstances:
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> (A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or
>
> (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.
>
> FRAP 40(a)(2)
>
> Contents. The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.

- Colby, via email: "I don't feel strongly either way on this, but would note that subpart A appears focused on matters in the record whereas subpart B arguably allows rehearing based on something outside the record in admittedly rare circumstances – e.g., a controlling statute neither party raised originally, a controlling decision from the U.S. Supreme Court that is decided in the 18-day window to file a petition (which would seem to be outside the NRAP 31(e) provision for supplemental authorities), etc. In the subpart B scenario, I'm not sure how one would bring something to the Court's attention without it being deemed 'a point raised for the first time.' The proposal set forth above would obviously address that issue."
- Steve: prefers the language in Nevada's rule because it explains what we are trying to do; agrees with Colby's position that subpart B allows us to raise new authority like a new controlling US supreme court decision that couldn't have been raised in the briefing, because it didn't exist at the time. Steve mentioned that our existing rule on supplemental authorities (NRAP 31(e)) says supplemental authorities have to be filed before a decision comes out; asks if we should include a "supplemental authorities" provision the in rehearing section or relate that back to the supplemental authorities provision. No express rule exists to tell the Court that something new has come out requiring rehearing.
- John: agrees that our language is better than the federal language, and we have case law that addresses our language that we can rely on.
- Sharon: agrees that our language is better; likes the idea of adding supplemental authorities language in the petition for rehearing section. Sharon will draft something to that end.
- **Group consensus**: keep our more detailed language.

6. **Whether to adopt JoNell's proposed language in NRAP 40(c)(2)(C) to allow rehearing in a third circumstance -- "When a party intends to file a petition for rehearing en banc (NRAP 40A) to argue that an existing published decision should be overruled, modified, or reconciled."**
   - John: noted that a party could have argued in their initial briefs that the en banc court should review a request to overrule, modify or reconcile an existing published decision.
   - Deborah: noted that this language is not part of the federal rules.
   - **Group consensus**: we do not recommend adopting this language; it is not necessary if we are no longer requiring petitions for rehearing to be filed in order to get to en banc review.

7. **Whether to keep the 18-day timeframe for filing petitions for rehearing in NRAP 40(a)(1), or move to the 14-day timeframe for rehearing set forth in FRAP 40(a)(1).**
   - Colby via email: "I'd favor going to 14 days here. My experience, at least in the civil setting, is that rehearing petitions are often filed for no other purpose than delay. For cases that genuinely require more time to research the legal consequences of a decision, a party can seek leave for more time to file the petition. We've had to do this in the Ninth Circuit previously, and it is receptive to this practice if there is a good reason for it (e.g., where the Ninth Circuit has predicted the outcome of a previously-unaddressed state law question)."
   - Sharon: pointed out that if you keep it at 18 days, someone can still file it in 14.
   - Steve: has litigated cases where people elect the full panoply of review just for delay, frustration, but he thinks a 14-day turnaround is stringent. Would recommend moving to either 14 or 21 is to keep up with court's trend in rule crafting to provide for 7, 14, 21-day dates. Thinks 18 is a weird number for calendaring purposes. 14 or 21 would be better for ease of calendaring. So, Steve would recommend 21 days. Thinks the reason for using 18 days here is because the Court was trying to use a 7-day time frame working backwards from the issuance of the remittitur.
   - Deborah: I like keeping 18.
   - John: likes the idea of 21 days for the reasons expressed. It's a good time-frame. He does not think the Court would go back to 14. We should suggest 21 days and see what the court does.
   - Steve: Rule 41 deals with the remittitur – would suggest that we change that deadline (25 days), b/c it looks like the 18-day deadline is tied to this; suggests putting the deadline for the remittitur at 28 days to harmonize everything on a 7-day cycle;
   - Sharon: pointed out that increasing the remittitur deadline keeps our clients in prison longer. Also pointed out that there was a problem where we were filing writs to the US Supreme Court and the Court was were issuing the remittitur before we filed our writ. So that may be why the remittitur is issued when it is.
   - **No clear consensus on this one:** We may want to keep 18 for this and the petition for review, keep 14 for en banc. [alternately, we could flag the issue – could ask the court to revert the remittitur to the 21-day remittitur deadline, or increase it to 28 days]

8. **Whether to retain the 4,667 word-limits in our existing rules, see NRAP 40(b)(3), NRAP 40A(d), NRAP 40B(d), or reduce the length of such petitions to 3,900 words. See FRAP 35(b)(2)(A), FRAP 40(b)(1).**

   - Colby via email: "I'd note that Circuit Rule 40-1(a) extends the page limit to 4,200 words. This may be a good compromise between the two."
   - Deborah: likes having more words.
   - Steve: we are a Supreme Court system, so we have harder, final cases, not intermediate cases, so having additional words is useful.
   - Charlie: getting into the exact number of words is beyond the scope of what we're doing. That's not what we should be doing here; tinkering with words. It was created for some reason, and we should keep the same
   - John/Sharon: Agree.
   - **Group Consensus**: keep the existing word limits.

9. **Whether NRAP 40A and 40B should use the same terminology for the length limitation? (Steve Silva proposal)**
   - Steve: rules are functionally identical but have different language. Language should be the same. Steve likes 40B formulation better, because it is shorter, more succinct. Also likes the "except by permission" language in 40A.
   - Deborah: we need to add "or response to petition" to 40B.
   - **Group Consensus**: Recommendation makes sense and John will draft a version of these two to make them identical.

10. **Whether to remove archaic language in the rules which require the filing of an original and several courtesy copies of the briefs. John proposed the following:**

    Our appellate rules are replete with archaic language requiring paper filers to file an original and a variety of copies. JoNell has suggested language to accommodate the e-filer and paper filer (while keeping the copies requirement) but I proposed doing away with the copies requirement altogether. Here are my suggestions.

    RULE 40. PETITION FOR REHEARING
    (b) Form of Petition and Answer; Number of Copies; Length; Certificate of Compliance; Filing Fee.

    (d) Decision of Court of Appeals or Supreme Court Panel. A petition for rehearing of a decision of the Court of Appeals or of a panel of the Supreme Court, or an answer to such petition, shall comply in form with Rule 32, and unless e-filed, the ~~an~~ original ~~and 5 copies~~ shall be filed with the clerk ~~unless the court by order in a particular case shall direct a different number~~. One copy shall be served on counsel for each party separately represented.

RULE 40A. PETITION FOR EN BANC RECONSIDERATION

(d) Form of Petition and Answer; Number of Copies; Length; Certificate of Compliance. A petition for en banc reconsideration of a Supreme Court panel's decision, or an answer to such a petition, shall comply in form with Rule 32, and unless e-filed, the ~~an~~ original ~~and 8 copies~~ shall be filed with the clerk ~~unless the court by order in a particular case shall direct a different number~~. One copy shall be served on counsel for each party separately represented. Except by permission of the court, a petition for en banc reconsideration, or an answer to such a petition, shall not exceed 10 pages. Alternatively, the petition or answer is acceptable if it contains no more than 4,667 words, or if it uses a monospaced typeface, and contains no more than 433 lines of text. The petition or answer shall include the certification required by NRAP 40(b)(4) in substantially the form suggested in Form 16 of the Appendix of Forms.

RULE 40B. PETITION FOR REVIEW BY THE SUPREME COURT

(d) Content and Form of Petition. A petition for review shall comply in form with Rule 32, and unless e-filed, the ~~an~~ original ~~and 9 copies~~ shall be filed with the clerk ~~unless the court by order in a particular case shall direct a different number~~. The petition may not exceed 10 pages or 4,667 words or, if it uses a monospaced typeface, 433 lines of text. The petition shall succinctly state the precise basis on which the party seeks review by the Supreme Court and may include citation of authority in support of that contention. No citation to authority or argument may be incorporated into the petition by reference to another document.

- John: explained that he reached out to Justices Silver and Pickering and was advised by Justice Silver that the "5 copies" language was likely related to the fact that there used to be only 5 justices, who each needed a courtesy copy.
- Colby via email: "I'm in favor of proposed revisions set forth above."
- Deborah: moved to adopt John's recommendation and Steve & Sharon seconded the notion.
- John: was looking at the rules back in May and there are 10-20 rules that have similar language requiring filing of "x plus so many copies" and so if we want, John can send us the list and identify other rules that need to be approached similarly. And then we would share it with the larger NRAP committee and/or the committee tasked with looking at the general rules.
- Charlie: pointed out that John's proposal is slightly different from JoNell's proposed language, which split the relevant sentences into two parts, and began the second clause with the following language: "Unless the petition or answer is e-filed."

- **Group Consensus**: recommend John's proposal above.

11. Whether to revise NRAP 40(d) and NRAP 40A(e) to allow a reply brief to be filed, in the event the Court orders a response to the petition.

a. Compare NRAP 40(d) ("No answer to a petition for rehearing **or reply** shall be filed unless requested by the court.") with FRAP 40(a)(3) ("Unless the court requests, no response to a petition for panel rehearing is permitted").
b. Compare NRAP 40A(e) ("No answer to a petition for en banc reconsideration or reply to an answer shall be filed unless requested by the court.") with FRAP 35(e) ("No response may be filed to a petition for an en banc consideration unless the court orders a response.")
c. NRAP 40B does not currently prohibit the filling of a reply brief, but mirrors the federal rules. See NRAP 40B(e) ("No response to a petition for review shall be filed unless requested by the Supreme Court.")

Note that the analogous federal rules do not reference a reply brief, but simply say that a **response** may not be filed unless the Court requests one. It seems we have a couple of options: we could try to mirror the federal rules by omitting any reference to reply briefs in our rules, or expressly provide for a reply in the event the court orders an answer/response to the petition.

Note also, if we do want to provide for a reply, we would want to indicate the time-frame for filing such a brief, so we should discuss the timeframe.

- Sharon: had proposed that you would always be allowed to file a reply brief if the court orders an answer to the petition. This is because, if you file a petition you have the burden of proof. Right now, if the Court directs the other party to respond but does not order a reply, you have to file a motion, and in her experience, the Court always grants it. This change would give us the opportunity to file a reply without filing a motion.
- Deborah: agrees with the proposal, to save time and briefing.
- Charlie: doesn't have a strong opinion one way or another. When he was working at the Court, by the time he got the answer, he didn't need to read a reply because he personally never found them helpful. But now, as an advocate, he wants the opportunity to submit a reply. But doesn't know if the Court necessarily needs them.
- Steve: feels the same. If the court has ordered a response, there's smoke and fire, it's because they think the petitioner satisfied their burden. But he thinks it would be prudent to provide for a reply. Steve further pointed out that we should look at rule on briefing and motions. Replies are provided for by rule. Petitions for rehearing are like motions and should be governed closely by Rule 27, which provides for a reply,

within 7 days. Would encourage us to utilize parallel language from Rule 27 here, with the word "shall" being replaced with "may" or "must."

- Note--Rule 27(a)(4) provides, "Any reply to a response shall be filed within 7 days after service of the response. A reply shall not present matters that do not relate to the response."

- Charlie: noted that we need to add a page limit here.
- Steve: suggests that reply should be ½ of the length provided for in the rule; that way, if the Court subsequently changed the word-count for petitions, this language would not also need to be revised.
- **Group Consensus**: Recommend adding language providing for a reply to be filed. Steve will draft language to mirror rule 27 for timing (7 days), but using type-volume instead of page limits for length and change the word "shall" to "may" or "must.

12. Whether we want to retain the degree of specificity found in our rules, which are much more detailed than the analogous federal rules? Or simplify our rules to reflect the federal rules?

(E.g., NRAP 40(a)(3), which relates to petitions in criminal appeals and exhaustion of state remedies, and NRAP 40A(a), which states in part, that "The court considers a decision of a panel of the court resolving a claim of error in a criminal case, including a claim for postconviction relief, to be final for purposes of exhaustion of state remedies in subsequent criminal proceedings.").

- Steve: thinks this is a "big ticket item," and we are fundamentally more than a circuit court. We need our specificity that is lacking in the federal rules.
- Sharon: agree.
- Deborah: agree.
- John: agree.
- **Group Consensus:** Recommend keeping the degree of specificity in our existing rules.

13. Other changes?

- Steve: Would like if we make these preliminary changes and circulate, then when we get eyes on the refinements, other things will start to jump out.
- Deborah: we will point out to the Court that our initial proposals are preliminary in nature.

- Note: Group did not discuss whether we should adopt 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. Still need to decide if we want to consider adding something similar for state government entities in civil cases.