Supreme Court of Nevada
ADMINISTRATIVE OFFICE OF THE COURTS

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MEETING SUMMARY
COMMISSION ON NRAP

DATE AND TIME OF MEETING: May 23, 2022
PLACE OF MEETING: Remote--Microsoft Teams

Members Present:

Justice Kristina Pickering	Justice Abbi Silver	Judge Michael Gibbons
Sally Bassett	Alexander Chen	Kelly Dove
Robert Eisenberg	Charles Finlayson	Phaedra Kalicki
Debbie Leonard	Emily McFarling	John Petty
Dan Polsenberg	Steve Silva	Abe Smith
Jordan Smith	Don Springmeyer	David Stanton
JoNell Thomas	Deborah Westbrook	
GUESTS		
Tyler Christiansen-summer intern	Mackenzie Sullivan-summer intern	Chase Christensen-summer intern

Call to Order, Welcome, and Announcements: Justice Pickering called the meeting to order at 12:00 p.m.

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

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

Approval of April 25, 2022, Commission Meeting Minutes: Justice Silver moved, and Steve Silva seconded to approve the minutes as presented. Judge Gibbons requested that the following revisions be made to the minutes:

Amend the first sentence of the first paragraph on the second page to read:

At the request of Ms. Westbrook, Darin Imlay, from the Clark County Public Defender's office addressed a proposal that was made after the March 28, 2022, meeting to ~~move~~ place all juvenile cases ~~from subsection (a) to~~ under subsection (c), including NRS 62B.390 juvenile certification cases.

Judge Gibbons also requested that the following information be included in the minutes:

Proposed amendment:

17(c) Cases Ordinarily Assigned to Court of Appeals.

. . .

(6) Appeals from a judgment, exclusive of interest, attorney fees, and costs, of $250,000 or less in a tort case;

At the April 25, 2022, NRAP Commission Meeting, almost all members present recommended keeping this language the same. However, Justices Pickering and Silver voted to change the language to the following: "Appeals from a judgment awarding damages, exclusive of interest, attorney fees, and costs, of between $1 and $250,000 ~~or less~~ in a tort case." The subcommittee unanimously recommended that the tort rule not be changed and that included members that previously recommended changes.

Justice Silver and Steve Silva accepted the suggested amendments. There was no further discussion or objections. Justice Pickering called for a vote and the motion to approve the minutes as amended was approved unanimously.

NRAP 17 Subcommittee – Clerical vote confirming final draft with alternates – (Deborah Westbrook)

Justice Pickering advised that NRAP 17 was included on the agenda to make sure that all revisions were included and ready to go for a final vote. This will allow the amendment to be moved from draft stage to final for recommendation to the court.

Under subsection (c) Cases Ordinarily Assigned to Court of Appeals, the current draft includes:

"(1) Cases presenting the application of existing legal principles," which includes a comment referencing concern expressed by Ms. Dickinson and Ms. Bassett that was not discussed at the April 25 meeting. Justice Pickering said she was interested in hearing their views.

Ms. Dickinson was not in attendance, but Ms. Westbrook advised that Ms. Dickinson's concern, which she did not entirely understand, had to do with whether it might conflict with language already in subsection (a) Cases Always Retained by the Supreme Court.

Ms. Bassett stated that she did not think the language was needed and doesn't really fit with the rest of subsection (c), which deals with the categories of cases. She stated further that

subsection (a) kind of already addresses it. Justice Pickering agreed, stating that the Court often applies what it thinks are settled legal principles, but different facts of a case can raise questions of new application to existing principles, thereby extending or changing the law and its path.

Jordan Smith explained that the language came from an Iowa rule, but that other states' rules have similar phrasing. Further, Ms. Bassett's point that even cases retained by the Supreme Court could apply existing legal principals when resolving them is well taken, but that the proposal was made with the idea of capturing standard error correction types of cases.

Ms. Kalicki said her concern is that the proposal has taken a different direction from the method of other push-down courts. Subsection (b) has more clear-cut objective case categories, whereas this proposal is more subjective in nature, which the Court rejected when Rule 17 was originally created.

Judge Gibbons stated that the screening memos almost always contain this language within the recommendation to send the case to the Supreme Court or to the COA. In other words, if it doesn't fall into one of the defined categories, they fall back on the existing legal principles language, and recommend sending the case to the COA.

The commission discussed various revisions to the wording and eventually settled on "Cases presenting the application of settled law." However, after a vote, the commission was split on whether to go with that proposal or the current proposal of "Cases presenting the application of existing legal principles."

A final unanimous vote was taken to submit all of the proposed Rule 17 revisions to the Court with a reference to the three areas where the commission's votes were split:

1. Subsection (c)(6) "Appeals from a judgment, exclusive of interest, attorney fees, and costs, of $250,000 or less in a tort case" versus "Appeals from a judgment awarding damages, exclusive of interest, attorney fees, and costs, of between $1 and $250,000 in a tort case;"

2. Whether to leave business court cases in subsection (a) or move that category to subsection (b); and

3. Subsection (c)(1) "Cases presenting the application of existing legal principles" versus "Cases presenting the application of settled law."

NRAP 5, 12A, 29 & 44 Subcommittee report (Proposals for NRAP 29) – Deborah Westbrook for Micah Echols who was unavailable.

Rule 12A: Ms. Westbrook reported that after consideration, including a review in conjunction with NRCP 62.1, the subcommittee determined that since Rule 12A is basically identical to its federal counterpart, no revisions were necessary. Ms. Westbrook moved, and Steve Silva seconded, to leave Rule 12A as is. The motion passed unanimously.

Rule 5: Ms. Westbrook reported that the subcommittee did not prepare any specific revisions but would like the commission to consider whether to amend the rule to allow sister states and other jurisdictions to certify questions of law to the Supreme Court, as is done in Minnesota:

> The supreme court of this state may answer a question of law certified to it by a court of the United States or by an appellate court of another state, of a tribe, of Canada or a Canadian province or territory, or of Mexico or a Mexican state, if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision or statute of this state. *See Minn. Stat. § 480.065(3).*

Justice Pickering stated that the Court has seen a trend lately of questions being certified more broadly and earlier in cases that have not been adequately developed, which can be problematic in terms of occupying time and attention. However, she would be surprised if the Court would see a large increase in questions if the Court opened it up to sister states.

Discussion highlights:

- Since Rule 5 allows federal courts to certify questions of law, it makes sense to allow sister states to do so, but should certification by state courts be restricted to the state's highest courts?
- Nevada has endeavored to posture itself as an alternative to Delaware law;
- What about tribal courts? The highest court of an Indian tribe should be allowed to certify questions in the same manner as a sister state;
- Should the Nevada Supreme Court be telling a tribal court what to do?
- Generally, tribal issues that are not in tribal court will make their way through federal district court or through the state appellate court level;
- It's uncertain how the Indian Child Welfare Act would play out in this context;
- Some local tribes have entered into inter-local agreements with other governmental agencies and the State of Nevada that involve sometimes unsettled questions of State law.

A suggestion was made to conduct something like a 50-state survey to see how other states have limited their Rule 5. Justice Silver's interns will assist with this research project.

Ms. Westbrook asked for a show of hands to see how many are interested in expanding the rule to include sister states at a minimum. A majority are in favor. The subcommittee will come back to the next meeting with proposed language for amending Rule 5.

Rule 44: Ms. Westbrook presented the subcommittee's proposed revisions to Rule 44, which deal with cases involving constitutional questions when the State of Nevada is not a party:

> If a party questions the constitutionality of a statute of the State of Nevada ~~an Act of the Legislature~~ in any proceeding, including civil and criminal matters in which the state or its agency, officer, or employee is not a party in an official capacity, the

questioning party shall give written notice to the clerk of the Supreme Court immediately upon the filing of the docketing statement or as soon as the question is raised in the court. The clerk shall then certify that fact to the Attorney General.

Discussion highlights:

- The subcommittee considered including local regulations or codes whose constitutionality is questioned, but ultimately fell back on the language of the federal rule, which focuses on an "Act of Congress or statute";
- A normal person reading this rule may understand Nevada Statutes more readily than "Act of Congress."
- The federal rule may have included the language "Act of Congress or statute" because it also addresses state statutes;
- The purpose of the original rule is to remind the parties of the importance of raising and preserving issues by serving notice on the AG;
- Mr. Finlayson will want to consult with his colleagues at the AG's office to get their input on the proposed revisions;
- The revision is unnecessary because if it's an important enough issue, the District Attorney would inform the AG's office;
- Expanding the definition of statute would make it essentially harder for litigants to comply.

After further discussion and a vote by the commission, it was decided to reject the proposed amendment and keep the "Act of the Legislature" language.

The commission then reviewed the proposed new language, "including civil and criminal matters."

Jordan Smith explained that after the Las Vegas Township[1] case there was a bit of confusion under Rule 44 that the case involved the Declaratory Judgment Act. The Supreme Court, in that case, said that it didn't apply to criminal matters. So, people then started analogizing between the Declaratory Judgment Act and Rule 44. He thought a clarification one way or the other might be necessary in the appellate rule. However, the proposed language was not designed to change the outcome of any case.

After further discussion the commission voted to submit this proposed amendment to the Court.

Rule 29: Ms. Westbrook advised that the subcommittee mainly communicated via email after Mr. Echols circulated a draft amendment of NRAP 29 with incorporated provisions from FRAP 29. The first proposed amendment would allow an officer or agency of a political subdivision to file an amicus brief without first obtaining permission from the Court or the parties. This would allow more political divisions to weigh in on important cases. Currently, the State already has that right,

[1] *State, Office of the Att'y Gen. v. Justice Court of Las Vegas Twp.*, 133 Nev. 78, 392 P.3d 170 (2017).

whereas the public defender's office does not.

Several commission members voiced concerns that the proposed amendment could possibly create unintended consequences if multiple local agencies and officers chose to file competing amicus briefs. This could increase the briefing and litigation costs. Another concern was that it would be inconsistent to have individual departments or directorates within a local government organization be able to file amicus briefs separately and independently when they wouldn't be able to appear in that capacity if they were involved in the suit as a party.

Ms. Westbrook did not think that would happen very often because of the extra work involved. Mr. Silva stated that the pragmatic counter to that is public interest groups scouring the nation looking for cases that might be good vehicles for their cause and looking for sympathetic people who could be parties to get the amicus brief filed as a matter of right.

Justice Pickering pointed out that the Court has had situations where they have requested amicus briefing from officers or agencies who responded with split positions. The more information the court has when deciding a case, the better.

The next NRAP Commission Meeting was scheduled for June 30, 2022, from noon until 1:30 p.m.

The meeting was adjourned at 1:32 p.m.