Supreme Court of Nevada
ADMINISTRATIVE OFFICE OF THE COURTS

KATHERINE STOCKS
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MEETING SUMMARY
COMMISSION ON NRAP

DATE AND TIME OF MEETING: July 27, 2022, Noon
PLACE OF MEETING: Remote Access via Zoom

Members Present:

Justice Kristina Pickering	Justice Abbi Silver	Judge Michael Gibbons
Sally Bassett	Alex Chen	Kelly Dove
Micah Echols	Bob Eisenberg	Dayvid Figler
Charles Finlayson	Adam Hosmer-Henner	Phaedra Kalicki
Debbie Leonard	Emily McFarling	John Petty
Dan Polsenberg	Steve Silva	Abe Smith
Jordan Smith	Don Springmeyer	David Stanton
JoNell Thomas	Deborah Westbrook	Colby Williams
GUESTS		
Sharon Dickinson		

Call to Order, Welcome, and Announcements. Justice Pickering called the meeting to order at approximately 12:05 p.m. and apologized for the late cancellation of the June meeting.

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 May 23, 2022, Commission Meeting Minutes. Justice Pickering called for a motion to approve the minutes of the May 23, 2022, meeting. Ms. Coates announced that there was one correction that Ms. Kalicki had emailed her. On page 4, the second sentence under discussion highlights, where it says: "it makes sense to allow sister states to so" should be corrected to: "it makes sense to allow sister states to do so." That correction will be made. Justice Pickering

asked if there were any other corrections. Seeing none, Justice Silver moved to approve the minutes as corrected. Judge Gibbons seconded. Motion passed unanimously.

Discussion Items:

NRAP 8, 21 & 27 Subcommittee report (Proposals for NRAP 8, 21 & 27) – Jordan Smith

Justice Pickering turned the meeting over to Mr. J. Smith.

NRAP 8. Stay or Injunction Pending Appeal or Resolution of Original Writ Proceedings: Mr. J. Smith advised that the subcommittee took a hard look at the federal rules and the related local rules from various circuits to see if they saw anything interesting or quirks to discuss and consider, and the overall theme is there are a lot of good ideas out there, but many of them may not necessarily fit in Nevada.

The first edit made is to 8(a)(1)(D):

> "if a district court stays an order or judgment to permit application to the Supreme Court for a stay pending appeal, an application for such stay shall be filed in the Supreme Court within 14 days after issuance of the district court's stay."

This edit came from 9th Circuit Rule 27-2, which imposes a deadline for a party to seek a continuation of the stay from the appellate court. If the district court stays an order or judgment below, sometimes practitioners will get an injunction and might be a little slow in seeking further relief in the appellate courts. The 9th Circuit Rule has a 7-day deadline, but the subcommittee decided to make it 14 days to be consistent with other court rules.

The next proposed change was made to Rule 8(a)(2)(B)(iii) which involves the context of the appendix. If a party is seeking a stay in an emergency situation and a copy of the district court's order is not available to attach, "counsel's statement of the reasons given by the district court will suffice until an order or transcript is available." Ms. Leonard suggested replacing "counsel's statement" with "declaration." There was a lengthy discussion regarding emergency motions in NRAP 27 and whether to remove "emergency" from this proposed amendment to NRAP 8. There was also a concern about not wanting counsel to get in the habit of just providing a statement without making an attempt to get the order in the first place. Mr. J. Smith will revise the proposed amendment to include a reference to the Rule 27 emergency rule and that if counsel provides a statement in lieu of an order, the statement should be a declaration under oath. After further discussion regarding pro se litigants, it was decided to change "counsel" to "movant."

Mr. J. Smith explained that the proposed amendment to the heading of NRAP 8(c) (Stays or Injunctions in Civil and Criminal Cases but Not Cases Involving Child Custody) was made to clarify that the rule covers stays and injunctions in civil and criminal cases, but not child custody cases. 8(f) was amended to be consistent with NRS 176.488 which addresses who must receive a copy of a stay in death penalty cases. This concludes the proposed revisions to NRAP 8.

Justice Pickering suggested tentative amendments to Rule 8(a)(1)(A) and 8(a)(2). Both reference filing motions with the Supreme Court or the Court of Appeals (COA). Precise language may be necessary to clarify that motions must be filed with the Supreme Court until the case has been transferred to the COA. Ms. Kalicki agreed with Justice Pickering's point but advised that the Clerk's Office handles this internally and regardless how the motion is captioned, it won't be docketed with the COA designation until after the case has been transferred to the COA. After a lengthy discussion, it was decided that Mr. J. Smith's subcommittee will draft amendments for both sections to address this issue.

NRAP 21. Writs of Mandamus and Prohibition and Other Extraordinary Writs. Below is a summary of potential modifications to Rule 21 and a brief explanation why:

21(a)(4) involves the contents of the record and clarifies that in "petitions arising from the district court, the appendix must also comply with Rule 10."

21(a)(5), the verification section, clarifies that a writ can provide either a declaration or an affidavit. NRS 53.045 allows the use of a declaration sworn under penalty of perjury in lieu of an affidavit.[i]

21(d) strikes the outdated language requiring an original and 2 copies to be filed with the court. Ms. Leonard questioned whether it's still necessary for paper filers to provide an original and two copies to the clerk's office. Ms. Kalicki advised that the rule says that, but that the clerk's office disposes of the extra copies. At the suggestion of Ms. Leonard, the "number of copies" language will be deleted from the rule.

The subcommittee will do further research regarding other issues related to replies, whether the court can grant a petition without an answer or response, and whether to change "may" to "must" in 21(b)(1). They will report back to the commission at a future meeting.

NRAP 27. Motions. Mr. J. Smith advised that NRAP 27 was given the greatest structural overhaul to match the formatting and style requirements of FRAP 27. Superficially, it looks quite different while the substance is unchanged in many ways. 27(a)(2)(A), (B) and (C) primarily mirror the federal rule. One item that warrants discussion is 27(a)(3)(A), "Time to File" a response to the

motion. Mr. Eisenberg suggested the time be lengthened to 14 days, but the subcommittee ultimately decided to leave it as is with the ability to request telephonic extensions still an option. Discussion highlights:

- 14 days is a good idea because it is very possible for a motion to get lost in emails if you are out of town or in trial for more than 7 days.
- You never really get 7 days because there will always be a weekend in there. When the Nevada Rules of Civil Procedure were amended, the exception for weekends and holidays was eliminated. The time for filing an opposition was extended from 5 to 7 days, but at best you have 5 business days and possibly only 3 business days during a holiday like Thanksgiving. Even though it's possible to call the Supreme Court and get an extension, the default should be 14 days.
- There was clarification that a motion for a procedural order may be disposed of without a response. Ms. Kalicki pointed to (a)(4)(b) where it says "[t]imely opposition filed after the motion is granted in whole or in part does not constitute a request to reconsider," and explained that the court doesn't wait for oppositions on procedural motions most of the time.
- If it doesn't interfere with that practice and procedure, then the longer breathing room is appropriate.
- One potential compromise, previously discussed and vetoed, would be adopting the federal rule of a 10-day time frame. That may be worth considering for people who practice in both federal court and our court.
- Telephonic requests to the Clerk's office for extensions are routine. If the deadline becomes two weeks, then basically parties will have a month, which seems excessive.
- The timing of the response will not be an issue with respect to most motions because most of them are procedural and the court is almost never waiting for a response on those. There might be some unusual ones where the attorney who has it decides to wait to see if there is going to be an opposition to it.
- It might be helpful to add a cross-reference to oral extension requests, which is 26(b)(1)(B).

The subcommittee will discuss the proposed revision further and report back at a future meeting.

Discussion highlights of proposed amendments to 27(a)(2)(B):

- In 27(a)(2)(B)(iii), there is a reference to the "trial court's opinion." Opinion is normally a published opinion of an appellate court. Maybe it could be changed to "order" or "decision" or deleted and changed to "trial court or agency's decision."
- 27(a)(2)(B)(iii) says "a motion seeking substantive relief must include a copy of the trial court's opinion or agency's decision as a separate exhibit." In line with our earlier discussion, should this rule require that it be included as an accompanying document to resolve any motion?
- The subcommittee will discuss revising the wording in 27(a)(2)(b)(iii) to make it clear that the exhibit is a requirement.

Judge Gibbons suggested the following amendment to 27(c):

> **(1) Authority of the Court Appeals to Entertain Motions.** The Court of Appeals and its judges may entertain motions in appeals or motions that the Supreme Court has transferred to that court.

Sometimes the Supreme Court will transfer a motion to the COA, but not the actual appeal. Making the change may avoid a problem later if someone who does not like the decision of a COA argues that the COA did not have jurisdiction because the appeal wasn't transferred. After discussion, Mr. J. Smith agreed that the suggested amendment made sense.

Mr. J. Smith briefly explained the proposed amendment to delete 27(c)(3)(A), "Procedural Motions." The subcommittee felt that was covered by the proposed revision of 27(b) involving "Disposition of a Motion for a Procedural Order." Subsection (B) "Orders of Dismissal" would not be deleted. He clarified that the language, "The Supreme Court or Court of Appeals may delegate to the clerk authority to enter orders of dismissal in civil cases," is not in the federal rule, but after consultation with Ms. Kalicki and the Clerk's Office, the subcommittee thought it best to leave it in. Justice Pickering advised that she has asked the Clerk's Office to look at whether there are any other 9th Circuit Rules on procedural orders that would be helpful to them. She will ask the Clerk's Office to reach out directly to Mr. J. Smith if they determine anything.

The proposed revision to 27(c)(2)(B), which came from the 11th Circuit's rule 27(1)(g), would add the following language:

> A ruling on a motion or other interlocutory matter, whether entered by a single judge or justice, is not binding upon the panel or full court to which the appeal is assigned on the merits, and the court considering the merits may alter, amend, or vacate it.

Ms. Leonard questioned whether the subcommittee had come across anything in the federal rules outlining how a party could challenge a single judge order. Mr. J. Smith advised they had, and that the subcommittee considered and ultimately rejected adding a separate provision addressing reconsideration of a motion. Ms. Kalicki advised that parties do file motions for reconsideration of one judge orders, which typically are referred to a panel to decide.

The next meeting was scheduled for August 17, 2022, at noon and the meeting was adjourned at 1:39 p.m.

[i] Research will be conducted to determine how many times "affidavit" is used within the NRAP after which the Commission will determine if each rule will be amended to add "or declaration" or amend Rule 1 to clarify that any reference to "affidavit" includes or allows for a declaration.