

Supreme Court of Nevada  
ADMINISTRATIVE OFFICE OF THE COURTS

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## MEETING SUMMARY COMMISSION ON NRAP

**DATE AND TIME OF MEETING:** June 14, 2023

**PLACE OF MEETING:** Remote Access via Zoom

**Members Present:**

Justice Kristina Pickering	Judge Bonnie Bulla	Judge Deborah Westbrook
Judge Michael Gibbons	Sally Bassett	Alexander Chen
Sharon Dickinson	Kelly Dove	Dayvid Figler
Robert L. Eisenberg	Charles Finlayson	
	Emily McFarling	Erica Medley
Julie Ollom	John Petty	Dan Polsenberg
	Abe Smith	Jordan Smith
JoNell Thomas	Jessica Whelan	Colby Williams

**Call to Order, Welcome, and Announcements.** Justice Pickering welcomed everyone and called the meeting to order at 11:01 a.m. Justice Pickering announced that there is still a lot of work to get through, but hopes that the Commission can have the drafts completed by the August meeting so that it can go onto the Court's Administrative Docket in September.

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

**Approval of May 23, 2023, Commission Meeting Minutes.** Judge Bulla moved and John Petty seconded to approve the minutes as presented. Motion carried unanimously.

The materials provided for this meeting can be found at:

<https://nvcourts.gov/AOC/Templates/documents.aspx?folderID=33507>

## Discussion Items:

### **NRAP 25 Filing and Service Subcommittee--Julie Ollom.**

Justice Pickering called on Ms. Ollom to present Rules 25 and 25A but wanted to preface it by saying the subcommittee has worked with the Clerk's office on these rules and if the Court and the Commission approve the proposed amendments, the most significant change will be giving pro se litigants the option of electronic filing. This is something that Kelly Dove and her pro se subcommittee initiated several months ago. Justice Pickering also thanked Jessica Whelan and Erica Medley for helping out on this subcommittee.

### **Summary of proposed changes and comments:**

- Most of the proposed changes were made to match the structure of FRAP 25. 25(a)(2) was divided into different subsections for nonelectronic filing and electronic filing.
- Currently, electronic filing is not mandatory for persons represented by counsel. The proposal would make it generally mandatory for persons represented by counsel with an exception allowed if the attorney can demonstrate good cause.

### Discussion:

- How would you establish good cause? Is there a mechanism that an attorney would need to go through? The language is taken directly from the Federal rule which the court may want to look at, but it would most likely be by motion.
- Would allow pro se litigants to file electronically if allowed by court order. The court is not currently set up to allow pro se litigants to file electronically but has the capacity and would have to work it out with the vendor.
- Ideally, the rule would direct the pro se party to a form they could fill out to register for electronic filing.
- **Timeliness** provision in 25(a)(2)(B)(iii) is similar to the FRAP and incorporating NEFCR rules. Includes a sentence taken from the 9<sup>th</sup> Circuit which says “[I]f technical failure prevents timely electronic filing of any paper, the filing party

shall preserve documentation of the failure and seek appropriate relief from the court.” Nothing in the current rule addresses technical failure.

- **Same as a Written Paper** was taken from the Federal rules and says “[a] paper filed electronically is a written paper for the purposes of these rules.”
- **Clerk’s drop box** does not have any Federal rule counterpart but is used in our court extensively and should be kept. The existing rule was trimmed down.
- **Requests for Emergency or Expedited Relief** was trimmed down to remove self-explanatory language. A reference to Rule 27(e) governing emergency filings was added.
- **Filing by facsimile transmission** was left in and trimmed down since it is something that is requested occasionally. There is no Federal rule counterpart. Papers that are received for filing via fax are going to be an emergency situation, and generally granted for good cause. This section was also trimmed down.
- **Signing** replaces “original signature” because of electronic filing, and a sentence was added that says “a filing made through a person’s electronic-filing account and authorized by that person, together with that person’s name on a signature block, constitutes the person’s signature.” This was taken directly from the NEFCRs.
- **25(c) Manner of Service** separates the types of services for nonelectronic and electronic and was basically stylistic changes.

**Discussion:**

- Currently, consent to electronic service is automatic for those who are registered to file electronically. Now that this subsection is split up between nonelectronic and electronic service, what will that consent look like, and would it need to be something on file with the court or could the parties attach something to the certificate of service consenting to service by email? The proposed amendment does not change the current practice.
- Will there be a mechanism in place for lay people who choose to register for electronic filing but opt out of accepting every document by e-filing? If they don’t have their own method or

manner in which they can be served electronically, they would still have to be served with paper.

- Also, what if someone comes into the court, uses some sort of electronic filing for a document, and that now becomes the method of service?
  - Those who have registered for an e-filing account and file their document through the e-filing system will be served by email through the e-filing system. They will be just like any other attorney who is a registered e-filer.
  - We will probably need to have some explanation sheet or something there so that lay people understand that and are not expecting to be served by paper.
  - The 9<sup>th</sup> Circuit has a really terrific set of forms and procedures outlined in plain English to walk a pro se litigant through the process. The 9<sup>th</sup> Circuit system warns the users that once they sign up, they are all in. Everybody is on the same terms and gets simultaneous access to the documents when other parties to the case do. The Nevada Supreme Court could create its own website instructions that would walk someone through how to do that with the appropriate back up forms; the pro se subcommittee should consider endorsing that approach. That is work that is going to carry on past the conclusion of this Commission's business, but it's important.
- **Proof of service.** There is a bit of a substantive change here. By adding the rules under (d)(1) it would now read “[p]apers presented for filing **must** contain either of the following **if it was served other than through the court's electronic filing system:**” This would recognize that under the NEFCRs, service through the electronic filing system actually constitutes proof of service. If this proposed amendment approved, a separate proof of service will not need to be filed with the Clerk's office.

### **Discussion:**

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- If a document is served through the court's electronic filing system, that's sufficient. What happens if the party who needs to be served is unrepresented and can't access electronic filing? How would that be dealt with? So, if a person cannot be served electronically, they would either have to be served by paper or by email and a proof of service would need to be filed. The person being served by email would need to have consented under the NEFCRs prior to service. Then you would have to do a proof of service for anybody that you had to serve by paper.
- The final proposed change is the removal of subsection (3) that says in part "the clerk may permit papers to be filed without acknowledgment or proof of service . . . ." and replacing it with a new section entitled "**Clerk's Refusal of Documents**. The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules." Instead of rejecting non-compliant documents, the document would be filed and a notice sent out telling the party what is not in compliance. It would be up to the Court to determine how it wants to address any non-compliance with any documents.

**Discussion:**

- This procedure has been in place in the federal appellate courts since 1994.
- Sometimes I get concerned that I am going to have to respond to a noncompliant motion within a week, but usually the clerk's office is pretty fast about catching that. Do you anticipate that staying the same and that the clerk's office would take care of that, or do you think we might be in a position where we need to respond to a motion or something like that, even though it's not properly filed?
- The clerk's office should be doing the same compliance checks they are doing currently. However, the document would be filed and notice would go out advising what the deficiency is and setting forth a timeline to correct it. If the deficiency is not corrected in that timeframe, the opposing attorneys may need

to file a motion asking the court for relief based on the filing party's failure to correct.

A suggestion was made to include language in the rule comment section informing the parties to also check the NEFCRs.

After further discussion, Charles Finlayson moved, and Kelly Dove seconded to approve the proposed amendment of Rule 25 as presented. Motion carried unanimously.

**NRAP 25A— COURT COMPOSITION AND QUORUM—Erica Medley.**

Erica Medley stated the proposed revisions to NRAP 25A are basically stylistic. The rule was trimmed to remove redundancies. She stated that "quorum" was kept in the title of the rule for clarity. The rest of the rule makes more sense with it in there and also because NRS 2.135 tells the Supreme Court to adopt rules regarding panels. In regard to **Argument Participation**, the language was changed for stylistic purposes and to clarify that any absent Justice or Judge could listen to the recording, read a transcript of the oral argument recording, and then participate via the briefs.

After a brief discussion Mr. Eisenberg moved to approve the rule as presented and Judge Bulla seconded. The motion passed unanimously with the one abstention.

**NRAP 42 Voluntary Dismissal Subcommittee– Julie Ollom.**

Ms. Ollom presented the proposed revisions to NRAP 42. Currently, the rule almost mirrors the federal rule. The subcommittee recommends some changes to make it consistent with what is currently in NRAP 27(c)(3). The subcommittee also recommends removing the requirement that a stipulation or motion by the parties to voluntarily dismiss would not necessarily have to specify the payment of costs. The proposal is as follows:

Rule 42. Voluntary Dismissal

~~(a) Reserved.~~

(b) **Dismissal in the Supreme Court or Court of Appeals.** The Clerk may dismiss an appeal or other proceeding ~~if the parties file a signed dismissal agreement specifying how costs are to be paid~~ upon stipulation of the parties or uncontested motion by appellant or petitioner and **payment of** any fees that are due. But no remittitur or other process shall issue without a court order. ~~An appeal may be dismissed on the appellant's motion.~~ **Dismissal may be** on terms agreed to by the parties or **as** fixed by the court.

The proposed amendment would allow the clerk to dismiss an appeal based on motion of the appellant or petitioner, where previously the rule seemed to only apply to a party stipulation. NRAP 27(c)(3)(B) actually gives the court the authority to delegate permission to the clerk to dismiss an appeal based on motion. Ms. Ollom explained that the court's normal process is to dismiss the appeal by order unless there is an opposition, in which case it is referred to a panel to resolve. Any oppositions that are made are usually related to a statement of fees and costs that was submitted with the stipulation or motion to dismiss. The proposed amendment includes a comment suggesting that since this rule and 27(c)(3)(B) are very similar, it may not be necessary to keep both and suggests eliminating 27(c)(3)(B).

**Discussion:**

- Judge Westbrook stated she is fine with the proposed revisions to rule 42, but does not think that 27(c)(3)(B) needs to be eliminated.
- Rule 42 is not limited to only civil appeals. The question would be if we keep 27(c)(3) whether or not we should remove civil appeals. I am not sure whether it's a voluntary dismissal or if it is by stipulation of the parties why a criminal appeal should be treated any differently than a civil appeal.
- The provision on how fees and costs are paid is not being removed. The proposed amendment only clarifies that the clerk may dismiss an appeal or other proceeding requested by motion or stipulation unless that motion or stipulation includes a statement of fees and costs. If the statement of fees and costs is opposed, then the entire stipulation or motion will be referred to a panel to resolve.

Judge Westbrook moved and John Petty seconded to approve the amendment as presented. The motion passed unanimously.

As a point of clarification, the suggestion about eliminating Rule 27(c)(3)(B) will be revisited at another time.

**NRAP 3E Fast Track Child Custody Appeals—Emily McFarling and Judge Gibbons.**

Ms. McFarling explained that there are two issues to discuss. She and Judge Gibbons have come up with a proposed amendment for Rule 3E that is ready for discussion.

Alternatively, Julie Ollom has suggested moving those same substantive proposed changes

into the base rules, 9, 26 and 31, and eliminating 3E. Substantively, the two proposals are the same, it's just whether to keep Rule 3E or have all of the child custody rules divided up among the other rules.

Judge Westbrook expressed her concern with spreading the rules out, especially since a number of other major changes to Rule 9 are being discussed. It would be preferable to keep all of the child custody fast track issues in one place for folks to look at and find the information they need that governs their case.

Judge Bulla stated that is especially important for pro se litigants who are trying to find the rules. She would also prefer to keep Rule 3E.

Justice Pickering asked Judge Gibbons to weigh in on this since the Court of Appeals has the majority of the child custody cases. She said that the preference of the Court of Appeals really should control unless there is strong opposition from someone else.

J. Gibbons said he would be happy to comment. He thanked Julie for going through their proposal to see if it was possible to consolidate all of the rules and said he assumes the idea to shorten it was to be consistent throughout. He then gave a brief history on why Rule 3E was created. In 1991, SCR 251 was created. That rule carved out child custody cases stating that the district courts had to give them priority and resolve them within six months of the responsive pleading being filed. SCR 251 also says the Supreme Court shall expedite child custody cases. Rule 3E was created in 2006. It's been amended a couple of times since then and the rule is consistent with carrying out the intent that is expressed in SCR 251. Child custody cases are different and need to be resolved quickly. Children's lives are at stake and the uncertainty can really cause problems. The Court of Appeals staff who assist with the child custody cases went through the draft amendment proposals several times and Judge Gibbons said that he is happy with the way it turned out. It addresses the issues and balances between what the practicing attorneys need, what the pro se parties need, and what the court needs to resolve these cases quickly and efficiently. He said he is not sure if there is a compelling reason to get rid of it, but it would potentially have an unintended consequence of making it more difficult for some people to navigate through the rules of appellate procedure. He recommended keeping Rule 3E.

Justice Pickering asked the Commission members if there was anyone in favor of eliminating 3E and spreading out the proposal into other rules. No one raised their hand in favor. Rule 3E will remain intact.



At this point Ms. Ollom raised a question concerning the proposed draft that was circulated for the meeting. She stated that there were previous discussions about making Rule 3E consistent with 3C and the draft circulated for the meeting does not have those proposed changes. Ms. McFarling confirmed that she just realized herself that the wrong draft was provided for distribution. She offered to email the correct version to everyone or share it on the screen. Justice Pickering agreed that the rule draft could be shared on the screen but since the Commission members had not been able to review the correct draft prior to the meeting, they would not be able to approve the rule until the next meeting.

Ms. McFarling began explaining the proposed changes to Rule 3E.

**Summary of proposed changes:**

- Expands the types of cases to include guardianship of minors and parenting time.
- Changes the fast track brief to a standard opening brief. The timeframe for filing the opening brief is shortened from 60 days to 45 days. The answering brief and the appendix would be due 21 days later.
- **Sufficiency of the Rough Draft Transcript** section was modified to address a gap in the procedures that does not require pro se litigants to file an appendix. Because of that, the transcripts are not always provided with the original record because they are ordered later.
- Procedures seeking leave to file an expanded brief. The requesting party would have to file a request at least three days prior to the brief's due date and demonstrate that the complexity of the case warrants granting the request. The requesting party would also have to specify the number of additional pages, lines, or words needed.
- Updates procedures for requesting the removal of the appeal from the fast track program.
- Updates the wording on the timing for when the fast track cases have to be decided by the Court. The Court of Appeals must attempt to dispose of the matter within 90 days from the date the case is transferred from the Supreme Court. The Supreme Court must attempt to dispose of the matter within 90 days from the date it is submitted for decision.

There was a lengthy discussion between the commission members regarding the proposed changes as well as suggested changes. In the interest of efficiency, Justice Pickering asked that the subcommittee revisit the proposal based on today's discussion and circulate a draft to the full commission. The commission members can then relay any concerns or suggestions to the subcommittee and a revised draft can be presented at the July meeting.

**Appeals in District Court, Statutory & Agency Appeals Subcommittee—Charlie Finlayson.**

Mr. Finlayson explained that FRAP 15, which concerns agency appeals, is short and has a few things that are specific about how to title the brief and what not. Otherwise, it basically just says to follow the statutes. He stated that he discussed this briefly with Justice Pickering, and they agreed that since Nevada's agency rules are already in the statutes, a rule similar to FRAP 15 is not necessary. Agency appeals can be processed the way they have always been processed, as civil appeals but with parties following the rules provided in the specific statutes controlling each agency review decision. Mr. Finlayson moved that there was nothing for the Commission to do on this issue and Justice Pickering endorsed the motion. The rest of the Commission members agreed.

**Review of Submitted Rule Comments:**

Comments for the following rules were submitted:

**NRAP 3, 14 & 33**

**NRAP 4(a)**

**NRAP 4(b)**

**NRAP 12, 13, 17, 40, 40A & 40B**

**NRAP 7 & 39**

After a brief discussion, Justice Pickering asked the Commission to review the comments and if they had any edits to pass them on to the originator of the comments. She indicated that they look good to her and thanked everyone for their work.

**Committees With Reports Forthcoming:**

**NRAP 3A & NRAP 28, 28.1, 31 & 32 Civil Actions & Briefs**

**Subcommittees – Abe Smith**

**NRAP 24, 34 & 46A Pro Se Subcommittee – Kelly Dove**

**Rules of Practice in Court of Appeals Subcommittee – Judge Gibbons**

**NRAP 35 & 45A Judicial Subcommittee – Justice Pickering**

**NRAP 1, 26, 26.1, 28.2, 38, 45, 46, 47, 48 Scope and Operation of Rules;  
Regulation of Parties, Attorneys, and Clerk Subcommittee – Adam  
Hosmer-Henner**

**NRAP 9-11 Transcript; Record – Judge Westbrook**

**NRAP 16 Settlement – Emily McFarling**

Each one of the subcommittee chairs above who were in attendance gave a brief outline of where their proposed revisions were at and stated that they hope to have their proposals ready for discussion at either the July or August meeting.

**Upcoming NRAP Commission meetings:** The next two meetings were scheduled for July 19, 2023, and August 16.

The meeting was adjourned at 1:12 p.m.