Supreme Court of Nevada
ADMINISTRATIVE OFFICE OF THE COURTS

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DRAFT MEETING SUMMARY
COMMISSION ON NRAP

DATE AND TIME OF MEETING: August 17, 2022, Noon
PLACE OF MEETING: Remote Access via Zoom

Members Present:

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

Call to Order, Welcome, and Announcements. Justice Pickering called the meeting to order at noon. The minutes from the July 27, 2022, meeting will not be available until the next 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

DISCUSSION ITEMS:

NRAP 5, 29 Subcommittee report (Proposal for NRAP 5 & 29) – Micah Echols & Deborah Westbrook.

NRAP 5. Certification of Questions of Law: Ms. Westbrook reminded everyone that the subcommittee had explored the concept of opening up NRAP 5 certification to sister states, tribes,

etc. During the May 23 meeting Justice Silver's interns were asked to conduct a 50-state survey to see how other states handle the issue. Justice Pickering also raised concerns about the recent trend of questions being certified more broadly in cases where the facts were not adequately developed, which could be problematic in terms of having premature cases come to the court for decisions that are not necessary when the facts are ultimately litigated in the case. The interns prepared a memo with the results of the survey. In addition, Sally Bassett prepared a memo addressing how other states limit their certification rules to help prevent receipt of premature questions and advisory opinion requests. The subcommittee members met on August 10 to discuss the memos as well as Virginia and Delaware's certification rules that seem to be effective in terms of putting up guardrails.

Discussion highlights regarding the proposed amendment to section (a) Power to Answer:

- The proposed language comes from the Virginia and Delaware rules. The Uniform Certification of Questions of Law Act has been updated, and different states across the country have amended their certification rules to make them more informative.
- The proposed language makes clear that the Nevada Supreme Court has discretion in deciding whether to answer a certified question and expands the courts that may certify a question. It also states: "*Certification ordinarily will not be accepted if facts material to the question of law certified are in dispute.*"
- There was further discussion about this last sentence. The subcommittee explained that Delaware is very clear that certification will not be accepted if facts material to the issue certified are in dispute, but the subcommittee wanted to leave that option open for the court if it's an important matter. The language puts parties and certifying courts on notice that a certified question is less likely to be accepted if there are material facts in dispute.
- There was concern about the standard for certification when the case is at the motion to dismiss level. If the case is at the motion to dismiss level, then certification could still be appropriate because the Nevada Supreme Court would accept the facts in the light most favorable to the non-moving party, even if those facts are disputed by the moving party.
- If a question is accepted and it turns out there are disputed facts, then the court is weighing in on hypothetical questions and it becomes an advisory question. The thought is to discipline the process to prevent courts from sending over questions that are not essential to the resolution of the case.

There was discussion as to whether "ordinarily" should be removed from section (a) so that certification must be denied if any material facts are in dispute. Ms. Westbrook asked for comments from those who usually do civil appeals or deal with appellate issues related to certification of cases where facts might be in dispute, depending on the stage the litigation is in:

- In civil cases, facts are often in dispute during summary judgment and the parties disagree about whether those disputed facts are material to the disposition of the summary judgment motion. That same problem can be replicated in a certified question where you might have a good faith disagreement on a factual issue, but what really matters is the legal determination of whether the fact is material. The use of "ordinarily" would give the Nevada Supreme Court flexibility to accept a certification, reach a determination in materiality, and nevertheless answer the question.
- In addition to giving the court some flexibility, there might be cases where the parties will tell the Nevada Supreme Court, hey this is disputed, but for whatever reason the certifying court does not treat it as a dispute. It just makes sense to accept the certified question even if the party continues to dispute material facts.

Justice Silver called for a vote on the proposed amendment to section (a). A vote was taken, and it was 19 to 1 in favor of "ordinarily." The language in the proposed amendment was accepted with one minor edit.

Proposed amendment to section (c) Contents of Certification Order is based on Virginia's rules on certification. The standards that the certifying court must meet should be reflected in the certification order, which must include statements "identifying any facts that are in dispute," "explaining how the certified question of law may be determinative of the cause then pending in the certifying court," and "setting forth relevant, decisions, if any, of this Court and the Nevada Court of Appeals and the reasons why such decisions are not controlling." This parallels the current language in section (a) and gives the certifying courts more guidance in what they need to tell the Supreme Court about why they are seeking certification to make it more likely their request will be granted.

Proposed amendment to section (d) Preparation of Certification Order incorporates language from the Virginia Supreme Court rules on certification giving the Court discretion to restate any question of law certified or request clarification with respect to any question certified or to any facts.

Mr. Eisenberg asked if the subcommittee had discussed the first sentence in section (d), which says that the certification order must be "signed by the judge presiding at the hearing. . . ."

There isn't always a hearing or one judge signing it. Ms. Westbrook advised they did not discuss that portion of the rule. Justice Pickering surmised the language has been modernized and dropped in the federal rule. After a brief discussion, the commission decided to remove that clause.

A proposed "Note" to be added to the rule says: "The phrase 'may be determinative of the cause then pending' bears the judicial gloss set forth in *Volvo Cars of North America, Inc. v. Ricci*, 122 Nev. 746, 137 P.3d 1161 (2006)." This Note is intended to give the certifying court notice of the meaning of this phrase, which is included in section (a).

Justice Silver moved, and John Petty seconded to approve the proposed amendments to Rule 5. Ms. Westbrook asked for all those in favor of the rule as amended to raise their hands. The vote was 18 in favor and 1 opposed. Ms. Westbrook asked Mr. A. Smith what his concern was. He replied that there had been no discussion on the proposed amendment to section (h), which would delete the language, "shall be res judicata as to the parties." He expressed concern that the deletion of this language would undermine the efforts by the Commission to ensure that certified questions do not result in advisory opinions. This led to further discussion on that language.

Summary of discussion on proposed amendment to section (h) Opinion:

- If a court has some other reason to decide the case, i.e., waiver, then an opinion answering the certified question would not be *res judicata.* A rule requiring an appellate court in another jurisdiction to treat the opinion as *res judicata* in such situations, where the court has valid reasons to address the claim, would be inappropriate.
- We don't necessarily know that the answer to a certified question is always going to bind those two parties as to all issues. The deletion of the *res judicata* language narrows the answer's relevance to this case, and does not create the risk that the certifying court will ignore the decision, as it has already stated in its certification order how the Supreme Court's answer is dispositive of the case.
- The deletion was proposed because *res judicata* is archaic language that has been replaced by claim or issue preclusion. Language that the opinion "shall bind the parties" or "shall be preclusive" or something similar may be more appropriate.
- If we delete the archaic language and don't replace it with different language, people will argue about the significance of the deletion.
- "Law of the case" is probably the more appropriate doctrine because it focuses on this case and indicates that it is limited to this case. An answer to a certified question is certainly an appellate court decision that then binds the rest of the case throughout its life.

After further discussion, the committee decided to replace the deleted *res judicata* language with language stating that the written opinion has "the same preclusive effect as a judgment under Rule 36."

Justice Silver asked if a new vote should be taken with the new language. Justice Pickering responded that the movant and the 2nd need to reopen and amend the motion.

Since the vote was being reopened, Ms. Leonard asked for clarification on the meaning of the "bears judicial gloss" language in the proposed Note and asked if it could be revised to make the meaning clearer. After further discussion it was decided to change "bears the judicial gloss set forth in" to "has the meaning set forth in."

J. Silver called to reopen the vote with the changes to NRAP 5(h) made by Mr. A. Smith, and the changes to the note made by Ms. Leonard. She then made a motion to approve the rule as discussed and John Petty seconded the motion. Ms. Westbrook asked for all those in favor to raise their hands. The vote was unanimous, 19 to 0.

NRAP 29. Brief of an Amicus Curiae: Mr. Echols began discussing the proposed draft amendments to Rule 29. The proposed revision to section (a) would broaden the scope of who can file an amicus brief without leave of court. It also provides that a party may submit a blanket consent letter as to the filing of amicus briefs; this language came from the U.S. Supreme Court rule.

Summery of discussion on proposed amendments to section (a) When Permitted:

- There was concern about whether the court would still have discretion to deny leave to file after receipt of a blanket consent letter. The practice in the U.S. Supreme Court when parties submit blanket consent letters is to just file the amicus briefs so the court doesn't have to make the determination on whether it's going to accept amicus briefs. A lot of those briefs are then ignored.
- Why should a non-governmental party be automatically allowed to file an amicus just because no one objects? Isn't the main purpose of the motion to give the court the chance to say yes or no?
- One point that the FRAP has and this rule doesn't is that the appellate court may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification. We have case law that a disqualified lawyer on an amicus doesn't necessarily result in the disqualification of the judge involved. It dates back to the *Ainsworth v. Combined Ins.* case in Nevada, but the law on judicial disqualification has moved forward since then. Did the subcommittee omit that language intentionally or didn't see it? Mr. Echols' response was

that he did not think they had talked about it, but he could take it back to the subcommittee to discuss.

After discussion on its redundancy, the commission decided to remove section (b) Foreign Counsel. Changing "shall" to "must" in section (c) Motion for Leave to File, was stylistic. Section (d) Contents and Form would require corporate amici to file a disclosure statement. It would also require any amici not listed in the first sentence of section (a) to include a statement indicating:

(i) a party or a party's counsel authored the brief in whole or in part;

(ii) any person(s)—other than the amicus curiae, its members, or its counsel—contributed money, or other consideration, intended to fund preparing or submitting the brief and, if so, identifies each person.

Summary of discussion on this proposed addition:

- This is a feature from both the federal rule and U.S. Supreme Court Rule 37.
- While this makes sense in the U.S. Supreme Court, where there would be circumstances where an amicus might need some help, requiring it in state court could have the effect of discouraging amicus briefs.
- The point is not to encourage some organization to sign and sponsor an amicus brief that is completely written by someone else. That doesn't sound like it's truly an amicus brief.
- It makes sense to disclose whether a party or a party's counsel contributed money, but if you had like two law firms who wanted to do an amicus brief, and one law firm gave money to the other law firm to do the brief, would that have to be disclosed? Why require the disclosure of "any person" as opposed to just the "party or party's counsel"?
- FRAP 29 draws a distinction between party contributions and other person contributions. It's likely designed to make sure that if an amicus is being supported by some special interest money group, that they disclose that fact to the court so the court can give it the appropriate weight to which it's entitled.

There was a lengthy discussion regarding the proposed new language in section (f) Time for Filing and the new section (i) During Rehearing, En Banc Reconsideration, and Review by the Supreme Court. Both sections will be extensively rewritten, and a new proposed amendment will be discussed at a future meeting.

Announcements:

Sally Bassett will prepare a report on the status of the NRAP amendments that have been approved by the commission and which are still pending so the commission can estimate going

forward how much more work it has to do and budget its time.

Justice Silver asked if Rules 2 and 37 could be added to the next agenda. She believes that a decision had been made previously that neither of those rules need to be amended and would like to have the commission formalize a vote to that effect.

Justice Pickering will send out an email regarding Ms. McFarling's request for assistance.

The next meeting was scheduled for September 26 at noon.

Meeting was adjourned at approximately 1:50 p.m.