Supreme Court of Nevada
ADMINISTRATIVE OFFICE OF THE COURTS

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MEETING SUMMARY
COMMISSION ON NRAP

DATE AND TIME OF MEETING: November 15, 2022
PLACE OF MEETING: Remote Access via Zoom

Members Present:

Justice Kristina Pickering	Judge Bonnie Bulla	Judge Michael Gibbons
Alexander Chen	Micah Echols	Bob Eisenberg
Charles Finlayson	Adam Hosmer-Henner	Debbie Leonard
Emily McFarling	John Petty	Dan Polsenberg
Abe Smith	Jordan Smith	JoNell Thomas
Deborah Westbrook	Colby Williams	
GUESTS		
Sharon Dickinson		

CALL TO ORDER, WELCOME, AND ANNOUNCEMENTS

Justice Pickering welcomed everyone and called the meeting to order at 12:01 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 OCTOBER 25, 2022, COMMISSION MEETING MINUTES

Judge Bulla moved, and Justice Pickering seconded to approve the minutes as presented. Motion carried unanimously.

DISCUSSION ITEMS:

Final approval of NRAP 8 and 27(e) – Jordan Smith

Mr. J. Smith referred everyone to the proposed draft amendment of Rule 27. As previously discussed at the last meeting, the commission decided to move a proposed provision from NRAP 8(a)(2)(B)(iii) to NRAP 27. The new proposal, section 27(e)(3)(A), sets out how emergency motions are handled when the district court's order or judgment has not yet been written or entered. He pointed out a typo in the last sentence of 27(e)(3)(A), which contains a reference to 27(e)(B). The correct reference should be 27(e)(3)(B).

Justice Pickering asked if the second sentence in 27(a)(2)(A)[1] could be deleted without losing any content. Mr. J. Smith agreed.

Mr. Petty moved, and Mr. Polsenberg seconded to approve the proposed amendments to Rules 8 and 27, including Justice Pickering's suggestion to remove language in 27(a)(2)(A). The motion passed unanimously.

NRAP 3C, 22 & 23 Subcommittee Report – JoNell Thomas

NRAP 3C Fast Track Criminal Appeals

Ms. Thomas explained the two revisions to the proposed draft amendment. The first is the highlighted comment on page 2, which reads as follows:

> The proposed amendments eliminate the possibility of the appointment of separate appellate counsel who would file a supplemental brief in addition to the fast track brief filed by trial counsel. Given the limited number of issues possible for a fast track brief in the guilty plea and probation revocation context, and given the goal of expediting briefing in these matters, supplemental briefing is not necessary.

The other change, highlighted on page 12, adds the words "and related documents" to the **Extensions of Time** section (g)(2)(A) **Seven-Day Telephonic Extension**. Both revisions were made in response to the discussion during last month's meeting. Ms. Thomas asked if there were any questions.

Discussion highlights:

- The language in the comment might be interpreted that appellant does not have the right to choose and hire his own attorney instead of the State Public Defender.

[1] The language Justice Pickering suggested removing says: The motion shall contain or be accompanied by any matter required by a specific provision of these Rules governing such a motion.

Response: The comment only applies to appointment of counsel, not retention of counsel.

- The comment was added in response to discussion during the October meeting, but maybe it creates more problems than it was meant to solve.
- The rule should not contain any language that precludes the possibility of supplemental briefing in the event the fast track statement is inadequate.
- Should the reference to the State Public Defender in subsection (b)(4) be broadened to include substitution of any counsel instead of just the State Public Defender?
- Changing it to a general substitution may be construed as an invitation to practitioners to take on a case, settle it, and then dump it on the Public Defender's offices statewide as a matter of course, which is a concern for a lot of the institutional defenders.
- There is an expectation that the Public Defender substitution is a special procedure for NRAP 3C and that NRAP 46 would apply to all other substitutions.
- NRAP 46 provides for counsel of choice. The proposed addition to NRAP 3C(b)(4) is designed to make sure attorneys do not bail on their clients without filing the necessary fast-track appeal documents and expect the indigent defense public attorney to do so.
- Maybe "all other substitutions must comply with Rule 46" could be added to the end of subsection (4).
- The current proposal should be left as is. The key is to make sure that trial counsel timely files the notice of appeal.
- Maybe it would be better if the language in the proposed subsection (b)(4) **Substitution of State Public Defender as Trial Counsel** was moved up to subsection (b)(2) **Responsibilities.** Subsection (b)(2)(A) would pertain to trial counsel and subsection (B) would pertain to substitution by the State Public Defender. That way, all the *responsibilities* are in one location, and it doesn't look like the State Public Defender has its own special section. Response: That would be putting two very different concepts into the same paragraph.
- What about making subsection (3) **Withdrawal**, more general by changing the title to **Withdrawal and Substitution**. It would clarify that both would need to comply with NRAP 46, except as provided in subsection (4).

- Maybe it would be less confusing if the heading in subsection (4) was changed to **Substitution of State Public Defender in Fast-Track Criminal Appeals**.
- The proposed amendments to Rule 3C are good as is and have been talked to death. Substitution by counsel other than the state public defender hardly ever happens.

Mr. Petty moved to approve 3C as proposed including elimination of the previously proposed comment. Ms. Westbrook seconded. Motion passed unanimously.

NRAP 22. Habeas Corpus Proceedings

Ms. Thomas explained the one proposed change. "Writ" was changed to "application" in the last sentence to make it consistent with the language in the first sentence. There was no discussion. Ms. Thomas moved to approve the proposed amendment to NRAP 22, and Ms. Westbrook seconded. Motion passed unanimously.

NRAP 23. Custody or Release of A Prisoner[~~s~~] in A Habeas Corpus Proceeding[~~s~~]

Ms. Thomas explained that none of the proposed amendments to this rule were substantive and that they basically clean up the language. Judge Bulla moved to approve the proposed amendment to NRAP 23, and Ms. Thomas seconded. Motion passed unanimously.

NRAP 40, 40A, & 40B Subcommittee Report—Deborah Westbrook

NRAP 40. Petitions for Rehearing

Ms. Westbrook presented the proposed amendments to NRAP 40. The first proposed amendments are to 40(a)(1) with the addition of the language "any party may file a petition for rehearing." This will make the language consistent in NRAP 40, 40A, & 40B. The next proposed amendment involves the duration. Currently, Rule 40A requires a Petition for Rehearing be filed in 18 days. The subcommittee initially recommended leaving it at 18, but Judge Bulla brought up some excellent points on changing it to 21 days. Judge Bulla explained that the counting should be in 7 day increments. She does not think it's going to make much of a difference in the timing, since after factoring in holidays and weekends, many times you are going to go 21+ days. She thinks it's a good change and is consistent with other rules as well.

Discussion highlights on 40(a)(1):

- It should be changed to 14 days to make it consistent with the Federal rules.
- 18 used to be 15 days to petition for rehearing and was changed to 18 to make it 15 plus three days for mailing.
- You can call and get a two-week extension if you need it. 21 days is a long time on a petition for rehearing.

- There is a huge value for offices to be able to track calendaring and for State and Federal court procedural matters that are calendared by staff staying the same. If a party needs extra time, they can call it and get it automatically. This is another one of those deadlines that if you blow it, you're gone.
- NRAP 36(e) **Motion to Reissue Orders as an Opinion** also has a 14-day deadline.

Ms. Westbrook stated that one of the things she and Judge Bulla discussed possibly modifying NRAP 41 to shorten the deadline for remittitur. Remittitur is currently 25 days, which is 7 days after the Petition for Rehearing deadline. The subcommittee proposes changing that to a 21-day deadline. Justice Pickering said she has not thought about it deeply, but it seems like a good idea. Since the Commission already voted to approve a proposed amendment to NRAP 41, it would have to be reopened at a future meeting to make that change.

A straw vote was taken to determine how many preferred changing the deadline for filing a Petition for Rehearing to 14 days and how many preferred 21 days. All but two preferred 14 days. The proposed amendment will be revised to reflect that preference.

Ms. Westbrook continued reviewing the proposed amendments to NRAP 40. The following proposed change was made to subsection (a)(2) **Contents**:

> The petition ~~shall~~ must state briefly and with particularity the points of law or fact that the petitioner believes the court has overlooked or misapprehended and contain argument in support of those points ~~shall contain such argument in support of the petition as the petitioner desires to present~~.

This proposed amendment would make it more cohesive, so the parties know they need arguments supporting the points in the petition, not whatever they feel like saying.

Subsection (b)(3) **Length**, NRAP 40, 40A and 40B each had slightly different language in the section describing length, the subcommittee determined that choosing the simpler language in NRAP 40B(d), for all three rules would be preferable:

> "Except by permission of the court, a petition for rehearing, or ~~an~~ a response ~~answer~~ to the petition may not exceed 10 pages or 4,667 words or, if it uses a monospaced typeface, 433 lines of text. ~~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.~~ A reply may not exceed one half of the page or type-volume limitations of the petition.

The subcommittee also recommends allowing an automatic reply brief to be filed in the event the court orders an answer to the petition. Ms. Westbrook asked for comments on this proposed amendment. Justice Pickering said that it would be helpful and since it's brief, it would catch things for somebody. She said the court does not order an answer unless they think there is something that needs to be looked at. Judge Gibbons also supported it. He said that they oftentimes must discuss whether they should allow a reply and that it should be automatic. Everyone else concurred.

Subsection (c)(1) **Scope of Application; When Rehearing Considered**

The Federal rule does not have any similar language to "matters presented in the briefs and oral arguments may not be reargued and no point may be raised for the first time." This language is unique to Nevada. Ms. Westbrook stated that her initial feeling was the language should be removed, but the subcommittee decided to keep it, but clarify that a party may argue the grounds for rehearing, which is necessarily a point that is raised for the first time. The proposal takes out the inherent contradiction where you are required to satisfy the standards of rehearing, which is essentially new points you wouldn't have ever raised in your brief. There was nothing you could point out in the initial briefing that the court would have ignored at that point. The proposal includes a new subsection (c)(2)(C) as an additional argument that can be made for the court's consideration on whether to grant rehearing:

> When a new rule of law, directly controlling on the disposition of the issues in the case, has issued after the court announced its order or opinion but within the time fixed for filing.

Discussion highlights on (c)(1) **Scope of Application; When Rehearing Considered:**

- Since you can only argue the three parameters outlined in (c)(2)(A-C) then why paragraph (1) needed?
- FRAP 40 says "[t]he 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."
- The point is, if the court did get something wrong or if there is something new or the court misread the case or the statute got repealed, or whatever it is, the court should be told.

- There are situations in which the court might decide something on an issue the parties didn't brief, and if that's the case, then rehearing should be sought. It may not necessarily be a point that was previously raised. I would support getting rid of subsection (c)(1) altogether.
- 99% of Petitions for Rehearing reargue exactly what was previously argued or raise something completely out of nowhere to exhaust it in federal court or other reasons. There must be a reason for rehearing. So, when it says you can't raise anything new, it means issues you could have raised earlier and chose not to.
- What about a general statement that the petition for rehearing should focus on whether the court overlooked, misapplied, or misapprehended a question of fact or law. In general, the petition should not reargue matters or present new grounds previously covered in the briefs.
- Let's combine (c)(2)(A-C) into one paragraph and then put the exception at the very end of the rule.
- The new "except as necessary" language in (c)(1) says you can't reargue or raise new points in a petition for rehearing, except to satisfy 40(c)(2). Then, 40(c)(2)(A) says "the court overlooked or misapprehended." This means the exception gives you the authority to reargue and raise new things. It seems that the exception kind of eliminates the whole purpose of 2(A).
- Response to previous point: It eliminates that contradiction. To satisfy (A) or (B), you may have to argue things that were not in your brief. Obviously, when you filed your brief, the court hadn't decided yet, so the court could not have overlooked or misapprehended anything at that point.
- It's an incredibly rare situation when the court misapprehends the facts or the law, but it occasionally happens. We are trying to tailor the rule for a narrow circumstance.

Justice Pickering requested that the subcommittee come up with something more succinct. She said problems come up when we start trying to specify everything. She likes the "misapprehended" or "overlooked" language because that does happen. Further, you get the wrong take on an argument, and it was raised in the briefs, perhaps not clearly, but the court should grant rehearing in cases where a mistake was made. You are not going to

find a sympathetic audience if you are raising it for the first time. You waived it if you didn't raise it in your opening brief. It's gone, except in case law based exceptions. We are not going to articulate all of that in a rule, but the rule should be useful to guide lawyers and to allow the court to cite a principal basis for granting or denying rehearing.

Ms. Westbrook asked Justice Pickering how she felt about the new subsection (C) "when a new rule of law, directly controlling . . . ." to which Justice Pickering responded that it's a true basis for rehearing but does not know if that detail needs to be included in the rule. Ms. Westbrook then asked if it might be sufficient to just swap (c)(1) and (c)(2) by putting them in opposite order. Justice Pickering thought that might work because it's not starting with an exception in that instance. The other is a catch-all, but one with a little bit of yield in it. Judge Bulla and Judge Gibbons agreed that would be a good idea. A straw vote was taken, and everyone agreed to that revision.

Ms. Westbrook went through the remaining proposed revisions. There was a brief discussion regarding the subsection on **Sanctions** after Justice Pickering commented that FRAP 40 does not have them and suggested removing it. The commission members agreed.

Ms. Westbrook will bring a revised proposal for NRAP 40 to the next meeting.

Justice Pickering announced that the next meeting is scheduled for December 15, 2022, and adjourned the meeting at 1:27 p.m.