Supreme Court of Nevada
ADMINISTRATIVE OFFICE OF THE COURTS

KATHERINE STOCKS
Director and State Court
Administrator

JOHN MCCORMICK
Assistant Court Administrator

MEETING SUMMARY
COMMISSION ON NRAP

DATE AND TIME OF MEETING: December 15, 2022, 12 p.m.
PLACE OF MEETING: Remote Access via Zoom

Members Present:

Justice Kristina Pickering	Judge Bonnie Bulla	Judge Michael Gibbons
Sally Bassett	Alexander Chen	Kelly Dove
Bob Eisenberg	Dayvid Figler	Adam Hosmer-Henner
Debbie Leonard	Emily McFarling	John Petty
Dan Polsenberg	Abe Smith	Jordan Smith
Don Springmeyer	Deborah Westbrook	Colby Williams
Julie Ollom		
GUESTS		
Sharon Dickinson		

CALL TO ORDER, WELCOME, AND ANNOUNCEMENTS

Justice Pickering welcomed everyone and called the meeting to order at 12 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 NOVEMBER 15, 2022, COMMISSION MEETING MINUTES

Deborah Westbrook moved, and John Petty seconded to approve the minutes as written. Motion passed unanimously.

DISCUSSION ITEMS:

Final Approval

NRAP 40 Petition for Rehearing Proposal – Deborah Westbrook

Ms. Westbrook presented the revised proposed amendments to the rule in connection with the comments that were made during the last meeting.

- The time for filing a Petition for Rehearing was changed from 18 days to 14 making it compliant with the Federal rule.
- Subsection (c) (1) & (2) were reversed to make it clear that we are looking first at when the court may consider rehearing and then the exception language would follow that.

Don Springmeyer moved, and Colby Williams seconded to approve the proposed amendments to NRAP 40. Motion approved unanimously. Near the end of the meeting, Ms. Ollom moved, and Judge Bulla seconded to reopen NRAP 40 at the next meeting to remove "Number of Copies" from the heading for subsection (b). Motion carried unanimously. Ms. Westbrook will submit a corrected version at the next meeting.

NRAP 41 Issuance of Remittitur (Reopened) Proposal – Deborah Westbrook

Ms. Westbrook explained that NRAP 41 was reopened to change the time for issuance of remittitur from 25 days to 21 days. Judge Bulla moved and Ms. Dove seconded to approve the proposed amendment. The motion passed unanimously.

NRAP 40A Petition for En Banc Reconsideration Subcommittee Report – Deborah Westbrook

Ms. Westbrook presented the proposed amendments. The first recommendation, NRAP 40A(b), strikes the requirement of having to file a petition for rehearing before being allowed to file a petition for en banc reconsideration. Analogous FRAP 35 does not require rehearing first; the subcommittee feels it creates an unnecessary hoop that litigants have to jump through to get en banc reconsideration. The subcommittee also recommends adding language indicating that a petition for en banc reconsideration may not be filed while a petition for rehearing is pending. Ms. Westbrook called for discussion on the proposed amendments to NRAP 40A(b).

Ms. Ollom pointed out that currently there is a filing fee for rehearing but not reconsideration. She suggested the committee consider adding a filing fee for reconsideration in the event a party bypasses rehearing and goes straight to reconsideration. Judge Bulla suggested adding language indicating that if a motion for en banc

reconsideration is filed in the first instance, a filing fee will need to be paid. Mr. Polsenberg suggested charging a fee for both. Justice Pickering indicated that charging a fee for both is not a good idea and would cost too much to educate everybody. She agreed that a filing fee should be charged for reconsideration if rehearing is bypassed. After a lengthy discussion, the following language will be added to a new subsection (c) entitled **Filing Fee**:

> *Where a party has not previously sought rehearing, except as otherwise provided by statute, a $150 filing fee must be paid to the clerk at the time a petition for en banc reconsideration is submitted for filing.*

Discussion highlights regarding the pros and cons of simultaneous filings of rehearing and reconsideration:

- The federal rule allows parties to file rehearing and reconsideration at the same time as long as the petition covers the criteria for both en banc and panel rehearing. The panel will consider rehearing and if they don't get any yes votes then they turn the petition over to the other judges to determine if there are any votes for en banc.
- The subcommittee determined quite a while ago that it did not want to allow simultaneous filing for rehearing and reconsideration, but maybe there are good reasons to allow it.
- The 9th Circuit almost never hears anything in the first instance en banc.
- The main reason for Nevada to keep its rule the way it is, is that it's not administratively difficult to let the panel issue its order and then have the parties file an en banc reconsideration petition.
- Justice Pickering asked Ms. Ollom to consult with Ms. Brown, the Clerk of the Court, to see what her view is on this issue as far as tracking is concerned.
- To be clear, if Nevada were to follow the Federal Rule, there should not be two separate petitions filed at the same time; there would be one petition that goes to the panel first and then, if rejected, it would roll over to the en banc court and there would just be one dispositional order.
- Maintaining separate documents for rehearing and reconsideration is preferable because of the different standards.
- Being allowed to skip rehearing and go straight to reconsideration will speed things up.

Other Proposed Revisions:

Subsection entitled **Content of Petition**:

The petition must ~~shall~~ be supported by points and authorities and ~~shall~~ must contain ~~such~~ argument ~~in support of the petition~~ in support of those points. Except as necessary to establish the grounds for reconsideration set forth in NRAP 40A(a).

Subsection entitled **Form of Petition. . .** : the reference to Number of Copies will be removed, all references to "Answer" are changed to "Response" in conformance with the Federal rule, and if the court orders a response, the opposing party may file a reply within 7 days after service of the response.

Justice Pickering suggested deleting the subsection entitled **Frivolous Petitions**. After a brief discussion, Ms. Westbrook will remove that section from the next draft.

Subsection entitled **Untimely Petitions**: "unrequested answer or reply" has been removed and a new subsection entitled **Unrequested Response** added:

Absent an order requesting a response, the clerk must not receive or file a response, but must return it unfiled or, if the response was e-filed, must reject it.

NRAP 40B Petition for Review by the Supreme Court

Ms. Westbrook presented the proposed revisions to NRAP 40B. The first proposal removes the language "A party aggrieved by a decision of the Court of Appeals" and replaces it with "Any party may file a petition for review. . . ." Mr. A. Smith explained that if a party believes there is some error in the opinion that should be corrected, they may want rehearing or review to clarify a dispositive point, even if they may have been the prevailing party.

Ms. Westbrook remarked that NRAP 40B does not contain the language that's in NRAP 40 and 40A which states "except as necessary to establish the grounds for either 'rehearing' or 'reconsideration,'" or "matters presented in the briefs and oral arguments may not be reargued and no point may be raised for the first time." She asked if there was a reason for that and if it means the court will allow brand new arguments to be made in petitions for review that were not made in an opening brief? Justice Pickering replied that it does not and that any new arguments would have to be raised in and resolved by the Court of Appeals. She does not believe the distinction was deliberate and advised that the court has denied quite a few petitions for raising new issues.

Discussion highlights:

- When you look at NRAP 40B(a), there are three very broad factors the Supreme Court will consider before granting review. There is nothing regarding when the court would not grant review. Maybe we can add a fourth factor addressing whether the petition raises new issues.
- Suggested language for fourth factor: "whether the question presented was raised by the parties below or decided by the COA."
- A suggestion was made to insert a new sentence after the existing sentence that begins "The petition must state the question(s) presented. . . ." The new sentence would contain language similar to NRAP 40 & 40A about not rearguing issues previously presented in the briefs and oral arguments.
- The primary concern is whether it is a new issue because you do want to reargue the case. That's the reason for taking it up to the Supreme Court.
- When a Petition for Review is filed, it is, by nature, raising the same argument and we may not want to say they can't raise arguments previously raised. Basically, a Petition for Review states the Court of Appeals got it wrong and the Supreme Court needs to address it.
- How would you deal with the situation where the COA sua sponte decided the case based on an issue that the parties never briefed? Shouldn't the losing party have the right to go to the full Supreme Court and get that reviewed even though it was never briefed?
- Justice Pickering advised that when the court adopted these rules, they looked at similar appellate courts that had discretionary review as a basis for Nevada's rules.
- If there is a catch-all provision where a party can tell the Supreme Court an issue was not raised in the COA because the COA raised it sua sponte, and therefore it's being raised now, that may get their foot in the door. Then the Supreme Court can exercise its discretion to consider the issue.
- Another practical problem is that when the Supreme Court accepts a petition for review, the COA's disposition is vacated. The Supreme Court's review is almost like de novo review.

- It may be preferable to have the COA's disposition vacated pending a decision by the Supreme Court. Additional language could be added to NRAP 40B allowing the Supreme Court to issue a new disposition that replaces the COA's disposition or alternatively reinstate the COA's disposition.
- 40B(i), **Decision by Supreme Court**, includes a proposed new sentence, which states "[w]hen the Supreme Court grants a petition for review, the Court of Appeals decision is vacated." This codifies existing practice, but maybe the sentence could be revised stating, "unless the Supreme Court then decides to determine that review was improperly granted" or something similar.
- Instead of codifying existing practice, why not leave it up to the Supreme Court to vacate or not on a case-by-case basis?
- That would create ambiguity as to what the effect of the grant is.
- Response: It's already common in Westlaw to see a note that a case is presently on review and alerts everyone to the fact that its precedential value might be in doubt. In the meantime, there is no appellate decision. There should be a presumption that the COA decision is still valid unless it is reversed or overturned by the Supreme Court.
- Maybe we could articulate a default rule so that if the Supreme Court does want to vacate the COA decision, they would have to do so explicitly.
- Response: What function would that serve? Typically, a decision only goes into effect after remittitur issues or the mandate in the 9th Circuit. If review is granted, remittitur is generally delayed until after review is resolved.
- Following federal practice makes more sense if you have a case on a writ cert petition up to the U.S. Supreme Court, because we understand that things might change. But until then that COA decision is still going to be citable and good law for that circuit.
- Maybe the new language in the **Decision by Supreme Court** subsection should be modified to something like "when the Supreme Court grants a petition for review and issues a superseding order or opinion, the COA decision is vacated." Vacating the COA decision actually helps the Supreme Court to look at the case fresh and focus on what the district court did rather than the COA decision.

- Another suggestion was to change the proposed language to "unless otherwise ordered, a grant of petition for review does not vacate the COA decision."

Ms. Westbrook will clean up the proposed draft based on the discussions and submit a new proposal at the next meeting.

The next meeting was scheduled for January 17, 2023, and the meeting was adjourned at 1:11 p.m.