

Supreme Court of Nevada
ADMINISTRATIVE OFFICE OF THE COURTS

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Director and State Court
Administrator



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DRAFT MEETING SUMMARY
COMMISSION ON NRAP

DATE AND TIME OF MEETING: January 17, 2023

PLACE OF MEETING: Remote Access via Zoom

Members Present:

Justice Kristina Pickering	Judge Bonnie Bulla	Judge Deborah Westbrook
Alexander Chen	Kelly Dove	Bob Eisenberg
Dayvid Figler	Travis Gerber	John Petty
Dan Polsenberg	Abe Smith	Jordan Smith
JoNell Thomas	Sally Bassett	Colby Williams
Julie Ollom		
GUESTS		

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 there were not enough members in attendance for a quorum. Justice Pickering announced that the meeting would proceed without a quorum and any votes taken will be formalized at a subsequent meeting.

The materials provided for this meeting can be found at:

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

Approval of December 15, 2022, Commission Meeting Minutes.

John Petty moved, and Justice Pickering seconded to approve the minutes as presented. Motion passed unanimously. Justice Pickering said that she was not sure how the quorum rules work in this context, but that we will go ahead as if we have a quorum for approval of the minutes.

DISCUSSION ITEMS:

Final Approval

NRAP 40A Petition for En Banc Reconsideration revised proposal – Judge Deborah Westbrook

Judge Westbrook explained that 40A(a) was broken into two parts, (a) **Grounds for En Banc Reconsideration** and (b) **Petition in Criminal Appeals; Exhaustion of State Remedies** so that it tracks with the format in 40B. The last sentence in the new subsection (b) concerning imposition of sanctions was removed at the suggestion of Ms. Bassett.

The title of subsection (c) was shortened to **Time for Filing. Effect of Filing on Finality of Judgment** was removed at the suggestion of Ms. Bassett because there is no discussion on that topic in the subsection. New language referencing Rule 36 was added as well as language forbidding petitions for en banc reconsideration if a petition for rehearing is pending.

There was a lengthy discussion regarding the different definitions of “panel” between NRAP 40, 40A, & 40B. Suggestions were made regarding possible language changes that would clarify the different meanings and make them consistent throughout all three rules. The final consensus was that a drafter’s note will be created.

A new subsection (d) **Filing Fee** was added based on discussion during the December meeting that if a party did not previously pay a rehearing fee, then a fee would be charged when a reconsideration petition was filed. Ms. Ollom advised that she has since confirmed that NRS 2.250 restricts the filing fee for rehearing petitions only. This new subsection will be removed, and the corresponding reference will be removed from 40B.

Subsection (h) **Decision by Supreme Court**, a drafter’s note will be created by Judge Bulla and Mr. Polsenberg explaining the panel process.

That concluded discussion of the revisions made since the previous meeting.

Judge Bulla moved and John Petty seconded to conditionally approve the revisions to NRAP 40A. Motion passed unanimously by those present. [No quorum]. A final clean version will be distributed to the full commission prior to the next meeting so that a final vote by a quorum can be taken at the next meeting.

NRAP 40B Petition for Review by the Supreme Court revised proposal – Judge Deborah Westbrook

Judge Westbrook began explaining the revisions that were made following last month’s discussion.

Justice Pickering had a concern with moving “[t]he petition must state the question(s) presented for review and the reason(s) review is warranted” portion of subsection (a) further down in the rule under

Content of Petition. She said that language was put in the beginning of the rule to emphasize that the court wants a clear statement of the question(s) the petitioner wants it to review. She thinks that as the court moves forward, it will eventually shift to a model where everything goes to the COA first, similar to California and the Federal courts, where the parties present questions that are worked up and carefully articulated. After a lengthy discussion it was decided that **Content of Petition** would be moved back up and become subsection (b). The other rules would be revised accordingly to make them consistent.

Judge Westbrook continued going through the current revisions until she got to **Untimely Petitions**, which is proposed new language to NRAP 40B:

A petition for review is timely if e-filed, mailed, or sent by commercial carrier to the clerk within the time fixed for filing. The clerk of the Supreme Court must not receive or file an untimely petition, but must return the petition unfiled or, if the petition was e-filed, must reject the petition.

A lengthy discussion followed regarding proper person prisoner cases where the timely filing is sometimes out of the control of the defendant. Different suggestions were made about adding language about including a notation in the docket that the document was untimely filed. During this discussion, Ms. Ollom spoke to the Clerk's Office and confirmed that their policy is that if a document is submitted electronically and is deemed untimely, a docket entry of rejection is made. Untimely documents received from proper person litigants are returned unfiled with a rejection letter. The rejection letter is scanned into the system with a docket entry entered stating "unfiled document." The proposed language for **Untimely Petitions** will stand and the issue related to proper person litigants in prison will be addressed by the Pro Se Subcommittee for NRAP 24, 34, & 46A.

The remaining revisions were discussed.

Mr. A. Smith then stated that he had been thinking about Justice Pickering's concerns regarding **Content of Petition** and the importance of petitioners setting out the questions. He asked if it would be helpful to consider something similar to the U.S. Supreme Court's rules for cert petitions which require the questions to be stated on a separate page in the petition. He offered to send her the rule to review for possible incorporation into NRAP 40B. Justice Pickering said she was open to that. Mr. Polsenberg pointed out that U.S. Supreme Court Rule 14, Content of a Petition for a Writ of Certiorari, does not include anything about the rule of four (four votes needed to grant cert), whereas NRAP 40A includes that two justices must vote to grant en banc reconsideration. Mr. Figler asked if the subcommittee could look at those issues and report back to the commission members.

Judge Westbrook clarified that it sounds as if there are two proposals on the table. One would be to have a modification to clarify that the issue(s) presented needs to be on its own separate page, and the second proposal is if the rule of four is not in the U.S. Supreme Court rule, do we take out the language in our rule discussing the majority.

Mr. J. Smith clarified that in Rule 40A, it is the rule of two and asked if that was actually in a statute. Ms. Ollom responded that it was in NRS 2.135 Panels:

1. The Supreme Court may sit, hear and decide cases in panels of three justices. Concurrence of a majority of the justices sitting on a panel is necessary to decide a case. The full Court shall reconsider any case decided by a panel if any two justices so request.
2. The full Court may assign to a panel any case over which the Supreme Court has jurisdiction.
3. If panels of justices are established, the Supreme Court shall:
 - (a) Adopt rules to govern the use of panels for the hearing and decision of cases.
 - (b) Designate the places of holding court by panels.(Added to NRS by 1997, 1529; A 2015, 3692)

Mr. J. Smith stated that it seems only applicable to Rule 40A and if the subcommittee is going to look at the U.S. Supreme Court rules, they might also want to take a look at Rule 10. Our current rule is a bit of an amalgamation of FRAP 10 and 14.

NRAP 40 Petition for Rehearing (Reopened) – Judge Westbrook

Judge Westbrook stated that the commission previously approved NRAP 40 and then there were some changes that were discussed at the last meeting. After that meeting, she said that Sally brought up the desire to make NRAP 40 consistent with 40A & 40B, so she circulated two drafts of NRAP 40—the first draft actually related to the changes requested by the commission and the structure is a bit different. The alternative draft basically tracks the language and order in 40A and 40B. She asked if there was an appetite to have all three rules follow the same general heading structure such that subsection (a) would be **grounds for rehearing**, subsection (b) would be **content of petition**, subsection (c) would be **time for filing**, etc. The response was affirmative.

Updated final drafts of all three rules will be circulated prior to the next meeting so that they can be formerly voted on.

Upcoming NRAP Commission meetings: The next meeting was scheduled for February 15, 2023, at noon.

The meeting was adjourned at 1:18 p.m.