Supreme Court of Nevada
ADMINISTRATIVE OFFICE OF THE COURTS

KATHERINE STOCKS
Director and State Court Administrator

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Assistant Court Administrator

DRAFT MEETING SUMMARY
COMMISSION ON NRAP

DATE AND TIME OF MEETING: March 28, 2022
PLACE OF MEETING: Remote Access via BlueJeans

Members Present:

Justice Kristina Pickering	Justice Abbi Silver	Alexander Chen
Kelly Dove	Micah S. Echols	Robert Eisenberg
Dayvid Figler	Charles Finlayson	Judge Michael Gibbons
Adam Hosmer-Henner	Phaedra Kalicki	Debbie Leonard
Emily McFarling	John Petty	Steven Silva
Abe Smith	Jordan Smith	Don Springmeyer
JoNell Thomas	Deborah Westbrook	Colby Williams
Sharon Dickenson (guest)		

Call to Order, Welcome, and Announcements: Justice Pickering 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.

Approval of March 2, 2022, Commission Meeting Minutes: Bob Eisenberg moved, and Justice Sliver seconded to approve the minutes as presented. Motion carried unanimously.

Discussion Items:

The materials provided for this meeting can be found at: https://nvcourts.gov/AOC/Templates/documents.aspx?folderID=33507

NRAP 41 Subcommittee report (Alternates 3 & 4) – Justice Silver and Jordan Smith. Proposed alternate 4 was prepared by Jordan Smith and Justice Pickering in response to the commission's discussion during the March 2, 2022, meeting. Justice Silver asked if there was anyone who did not want to go with proposed alternate 4. Ms. Westbrook reminded everyone that Ms. Traum raised a concern during the last meeting with making citations to the federal question

mandatory. Ms. Westbrook suggested the following revision to alternate 3. After the word stay, insert:

> when evaluating good cause for a stay the court will consider whether a federal question previously presented on appeal is to be presented to the United States Supreme Court.

Mr. J. Smith advised that he tried to encapsulate that thought with the clause in alternate 4, which says: "if not, state why the motion should not be denied." This language gives someone an option where a federal question has not been preserved to still move forward with their motion or request with an explanation for why it wasn't. The phrase was borrowed from NRAP 27(e)(4).

Justice Pickering suggested revising alternate 4 where it currently says**:** "The motion must include a citation" **to:** "The motion should include a citation." Ms. Westbrook stated that revision should accommodate Ms. Traum's concerns. Justice Silver moved, and Ms. Westbrook seconded to approve alternate 4 with the one revision. Motion to approve this as the final version of NRAP 41 carried unanimously.

NRAP 17, 40, 40A & 40B Subcommittee report (Proposals for NRAP 17--Alternates A and B; 40A & 40B) – Deborah Westbrook. Ms. Westbrook began the discussion with NRAP 17, and the revisions made to the original proposed amendment following the March 2 commission meeting.

In response to a concern that defense judgments would always be assigned to the Court of Appeals under the way the rule was previously drafted, the alternate B amendment now reads:

> Appeals from a judgment awarding damages exclusive of interest, attorney fees, and costs, of $250,000 or less in a tort case. [NRAP 17(b)(5)]

Mr. A. Smith asked if that phrase would somehow indicate a non-zero award. Ms. Westbrook confirmed it would. She also said there would have to be a judgment where damages were awarded for it to fall under this rule, which means essentially, if it was a defense verdict, it's not presumptively assigned anywhere. Mr. A. Smith did not think that "awarding damages" necessarily excludes an award of zero, but that others may feel differently and suggested changing it to say:

> Appeals from a judgment awarding damages exclusive of interest, attorney fees, and costs, ~~of~~ between $1 and $250,000 in a tort case.

Judge Gibbons stated that based on his experience as Chief Judge of the COA for five of the seven years of the court's existence, he sees this issue on a regular basis with case assignments and thinks this is a solution in search of a problem. He explained that subsection (a) of NRAP 17 deals with cases that must be retained by the Supreme Court. Subsection (b) lists cases *presumptively* assigned to the COA. The *alleged problem* is that the COA is deciding all the defense verdicts. Judge Gibbons agreed that the COA is deciding many of them but certainly not all of them, because the Supreme Court does not assign all defense verdicts to the COA. He went on to explain the four-step process for cases ultimately retained by the Supreme Court or sent to the COA.

1. When an appeal is filed, appellant can give a detailed description in the routing statement which court it believes the case should be assigned to. No matter what the presumption may be, appellant can ask to have it heard by the Supreme Court.
2. Respondent gets the same opportunity in its routing statement.[i]
3. An attorney in the Clerk's Office considers the arguments from both routing statements, prepares a case summary sheet outlining those arguments, gives an analysis of how the rule applies, and its recommendation to the Court.
4. The Supreme Court reviews the case summary sheet and decides which court to assign the case to.

Judge Gibbons advised that typically, the Clerk's Office recommendation is followed. However, the Supreme Court retains the right to have any case it wants no matter what the presumption is and that occasionally happens. The current process is objective and for that reason he strongly opposes alternate A, which removes all the current presumptions and would leave the Clerk's Office attorney with nothing to go on, making the process very subjective. He prefers the objective criteria in alternate B. Judge Gibbons also suggested adding termination of parental rights cases to subsection (a) and guardianship and juvenile cases to the list of presumptive cases under subsection (b).

After further discussion, Ms. Westbrook called for a decision to be made regarding the *awarding damages* language and asked if the attorneys in the civil arena still have a concern with zero-dollar value defense verdicts after hearing Judge Gibbons' statement. Justice Pickering said she favors the language suggested by Mr. A. Smith. She thinks it is a mistake to assume that when a defendant wins, whether on dispositive motion or by defense verdict, the plaintiffs' appeal is presumptively routed to the court of appeals. She also wants to make the process as easy as possible for the Clerk's Office to determine what categories the cases fall under.

Mr. J. Smith explained the process he went through when he drafted alternates A and B, which he said was an attempt to bring NRAP 17 more closely in line with rules of similar states with push-down models and give the Supreme Court the option to reach questions of first impression not limited to the constitutions or matters of statewide public importance while simultaneously allowing the COA and future cases to reach questions of first impression as caseloads permit. Alternate A is more closely aligned with Iowa, which has sort of a catch-all phrase regarding the types of cases that go to the COA. Alternate B is very similar to Idaho and Mississippi, where it creates a class of cases that the court must retain, like Nevada's current rule has.

Ms. Dickenson stated that she is in favor of the original NRAP 17 amendment that was prepared by the subcommittee. She said Nevada's push-down model is different from the other states referenced above. Each of those COAs also have more judges than Nevada's COA. NRAP 17 acknowledges that Nevada's push-down model is different. NRAP 17(c) states:

> In assigning cases to the Court of Appeals, due regard will be given to the workload of each court.

Ms. Dickenson's view is that NRAP 17(c) tells us what the Court wants to do. She looked at the Court's operating procedures, dated May 20, 2021, and noted Rule 2(c)(1) says:

> Cases tracked for en banc decision should be those raising substantial precedential, constitutional or public policy issues, or where en banc consideration is necessary to secure or maintain uniformity of the court's decisions.

She does not think that alternates A and B take that into consideration.

After discussion, it was decided to remove the following language:

> Cases in which provisions of the Nevada Constitution or statutes grant original or exclusive jurisdiction to the Supreme Court. NRAP 17(a)(1).

The suggested language came from Iowa Rule of Appellate Procedure 6.1101(1), Idaho Appellate Rule 108(a)(1), and Mississippi Rules of Appellate Procedure 16(a).

The commission ran out of time to go any further with the agenda. Two revised alternate drafts for NRAP 17 will be distributed shortly.

Justice Pickering asked everyone to think about scheduling a future two-to-three-hour meeting to get through the agenda backlog.

The next meeting is scheduled for April 25, 2022, at noon.

Meeting adjourned at 1:18 p.m.

Please email questions, topic suggestions, calendar items, or other inquiries to Sally Bassett at sbassett@nvcourts.nv.gov or Sharon Coates at scoates@nvcourts.nv.gov

[i] Judge Gibbons advised that many counsel either do not file a routing statement or incorrectly analyze NRAP 17, which is where the problem exists. Attorneys need to follow the rule when they file their routing statement.