

1 **NRAP 12.1 – Proposed**
2 **(Adopt Federal rule with comment)**

3 **Rule 12.1 Remand After an Indicative Ruling by the District Court on a**
4 **Motion for Relief That Is Barred by a Pending Appeal**

5 (a) **Notice to the Supreme Court of Appeals.** If a timely motion is made in
6 the district court for relief that it lacks authority to grant because of an appeal that
7 has been docketed and is pending, the movant must promptly notify the supreme
8 court circuit clerk if the district court states either that it would grant the motion or
9 that the motion raises a substantial issue.

10 (b) **Remand After an Indicative Ruling.** If the district court states that it
11 would grant the motion or that the motion raises a substantial issue, the supreme
12 court or the court of appeals may remand for further proceedings but the appellate
13 court retains jurisdiction unless it expressly dismisses the appeal. If the appellate
14 court of appeals remands but retains jurisdiction, the parties must promptly notify
15 the supreme court circuit clerk when the district court has decided the motion on
16 remand.

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18 **DRAFTER’S NOTE—2017 AMENDMENT**

19 This new rule corresponds to NRCP 62.1, which provides the procedure for any
20 motion that the district court cannot grant because of a pending appeal. After an
21 appeal has been docketed and while it remains pending, the district court cannot
22 grant relief on any issue which is directly related to the issues on appeal without a
23 remand. But it can entertain the motion and deny it, defer consideration, state that

1 it would grant the motion if the supreme court or the court of appeals remands for
2 that purpose, or state that the motion raises a substantial issue.

3 The procedure formalized by this rule is helpful when relief is sought from an
4 order that the court cannot consider or reconsider because the order is the subject of
5 a pending appeal. NRAP 12.1 does not attempt to define the circumstances in which
6 an appeal limits or defeats the district court's authority to act in the face of a pending
7 appeal. The rules that govern the relationship between trial courts and appellate
8 courts may be complex, depending in part on the nature of the order and the source
9 of appeal jurisdiction. NRAP 12.1 applies only when those rules deprive the district
10 court of authority to grant relief without appellate permission.

11 To ensure proper coordination of proceedings in the district court and the
12 supreme court or the court of appeals, the movant must notify the clerk of the
13 supreme court if the district court states that it would grant the motion or that the
14 motion raises a substantial issue. If the district court states that it would grant the
15 motion or that the motion raises a substantial issue, the movant may ask the
16 appellate court ~~of appeals~~ to remand so that the district court can make its final
17 ruling on the motion. A local rule may prescribe the format for the litigant's
18 notifications and the district court's statement.

19 Remand is in the ~~appellate~~supreme court's discretion. The ~~appellate~~supreme
20 court may remand all proceedings, terminating the initial appeal. In the context of
21 postjudgment motions, however, that procedure should be followed only when
22 appellant has stated clearly its intention to abandon the appeal. The danger is that
23 if the initial appeal is terminated and the district court then denies the requested
24 relief, the time for appealing the initial judgment will have run-out and a court might

1 rule that the appellant is limited to appealing the denial of the postjudgment motion.
2 The latter appeal may well not provide the appellant with the opportunity to raise
3 all the challenges that could have been raised on appeal from the underlying
4 judgment. See, e.g., *Browder v. Dir., Dep't. Of Corrections of Ill.*, 434 U.S. 257, 263
5 n.7 (1978) (“[A]n appeal from denial of Rule 60(b) relief does not bring up the
6 underlying judgment for review.”). This is not to endorse the notion that the
7 ~~appellate~~supreme court should decide that the initial appeal was abandoned—
8 despite the absence of any clear statement of intent to abandon the appeal—merely
9 because an unlimited remand occurred, but the possibility that a court might take
10 that troubling view underscores the need for caution in delimiting the scope of the
11 remand.

12 The ~~appellate~~supreme court may instead choose to remand for the sole purpose
13 of ruling on the motion while retaining jurisdiction to proceed with the appeal after
14 the district court rules on the motion (if the appeal is not moot at that point and if
15 any party wishes to proceed). This will often be the preferred course in light of the
16 concerns expressed above. It is also possible that the ~~appellate~~supreme court may
17 wish to proceed to hear the appeal even when the district court indicates that it would
18 grant the relief. In appropriate circumstances, the ~~appellate~~supreme court may ~~in~~
19 ~~appropriate circumstances~~ choose a limited rather than an unlimited remand. That
20 said, when relief is sought in the district court during the pendency of an appeal,
21 litigants should bear in mind the likelihood that a new or amended notice of appeal
22 will be necessary in order to challenge the district court’s disposition of the motion.

23 If the ~~appellate~~supreme court remands but retains jurisdiction, subdivision (b)
24 requires the parties to notify the clerk when the district court has decided the motion

1 on remand. This is a joint obligation that is discharged when the required notice is
2 given by any litigant involved in the motion in the district court.

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