DECEMBER 15, 2022

NRAP COMMISSION MEETING

Supreme Court of Nevada
ADMINISTRATIVE OFFICE OF THE COURTS

KATHERINE STOCKS
Director and State Court Administrator

JOHN MCCORMICK
Assistant Court Administrator

MEETING NOTICE AND AGENDA
COMMISSION ON NRAP
VIDEOCONFERENCE

DATE AND TIME OF MEETING: December 15, 2022, 12:00-1:00 p.m.
PLACE OF MEETING: Remote Access via Zoom:
Meeting I.D.: 898 0323 2471 Passcode: 192515

All participants attending via teleconference should mute their line when not speaking. It is recommended that teleconference attendees use a landline and handset in order to reduce background noise.

I. Call to Order, Welcome, and Announcements

II. Roll Call and Determination of Quorum Status

III. Approval of November 15, 2022, Commission Meeting Minutes

IV. Discussion Items:

A. Final Approval

1. NRAP 40 Proposal – Deborah Westbrook **[5 minutes]**
2. NRAP 41 (Reopened) Proposal – Deborah Westbrook

B. NRAP 40A & 40B Subcommittee Report – Deborah Westbrook **[15 minutes]**

C. NRAP 7 & 39 Subcommittee Report – Debbie Leonard **[20 minutes]**

D. NRAP 10, 11, & 12 Subcommittee Report – Don Springmeyer **[20 minutes]**

E. NRAP 4(a) (civil) Subcommittee Report – Bob Eisenberg **[if time allows]**

V. Rule Status Report – updated

VI. Upcoming NRAP Commission meetings: TBD

VII. Adjournment

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

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DRAFT 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.

RULE 40. PETITION FOR REHEARING

(a) Procedure and Limitations.

(1) Time. Unless the time is shortened or enlarged by order, any party may file a petition for rehearing ~~may be filed~~ within ~~18~~ 14 days after the filing of the appellate court's decision under Rule 36. The 3-day mailing period set forth in Rule 26(c) does not apply to the time limits set by this Rule.

(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.~~ Oral argument in support of the petition will not be permitted. Any claim that the court has overlooked or misapprehended a material fact ~~shall~~ must be supported by a reference to the page of the transcript, appendix or record where the matter is to be found; any claim that the court has overlooked or misapprehended a material question of law or has overlooked, misapplied or failed to consider controlling authority ~~shall~~ must be supported by a reference to the page of the brief where petitioner has raised the issue.

(3) Petitions in Criminal Appeals; Exhaustion of State Remedies. A decision by a panel of the Supreme Court, the en banc Supreme Court, or the Court of Appeals resolving a claim of error in a criminal case, including a claim for postconviction relief, is final for purposes of exhaustion of state remedies in subsequent federal proceedings. Rehearing is available only under the limited circumstances set forth in Rule 40(c). Petitions for rehearing filed on the pretext of exhausting state remedies may result in sanctions under Rule 40(g).

(b) Form of Petition, ~~and~~ ~~Answer~~Response, and Reply; Number of Copies; Length; Certificate of Compliance; Filing Fee.

Commented [DW1]: Per discussion of 11-15-22, Commission agreed to change the filing deadline to 14 days, as in the Federal Rule. Note, we still likely need to revisit NRAP 41(b) and 41(c)(1) and change the deadline for remittitur from 25 days to 21 days.

Commented [DW2]: Per discussion of 11-15-22, Commission agreed to remove reference to "briefly" in this section.

(1) Decision of Court of Appeals or Supreme Court Panel. A petition for rehearing of a decision of the Court of Appeals or of a panel of the Supreme Court, or ~~an answer~~a response to such petition, ~~shall~~ must comply in form with Rule 32, and, unless e-filed, the ~~an~~ original ~~and 5 copies shall~~ must be filed with the clerk. ~~unless the court by order in a particular case shall direct a different number.~~ One copy ~~shall~~ must be served on counsel for each party separately represented.

(2) En Banc Decision. A petition for rehearing of a decision of the en banc Supreme Court, or ~~an answer~~a response to the petition, ~~shall~~ must comply in form with Rule 32, and, unless e-filed, the ~~an~~ original ~~and 9 copies shall~~ must be filed with the clerk. ~~unless the court by order in a particular case shall direct a different number.~~ One copy ~~shall~~ must be served on counsel for each party separately represented.

(3) Length. 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.

(4) Certificate of Compliance. A petition for rehearing, ~~or an answer~~a response, or a reply ~~shall~~ must include a certificate that the submission complies with the formatting requirements of Rule 32(a)(4)-(6) and the page- or type-volume limitation of this Rule, computed in compliance with Rule 32(a)(7)(C). The petition ~~or~~, ~~answer~~response, or reply must be accompanied by a completed certificate of compliance substantially similar to Form 16 in the Appendix of Forms.

(5) Filing Fee. Except as otherwise provided by statute, a $150 filing fee ~~shall~~ must be paid to the clerk at the time a petition for rehearing is submitted for filing.

(c) Scope of Application; When Rehearing Considered.

~~(1) Matters presented in the briefs and oral arguments may not be reargued in the petition for rehearing, and no point may be raised for the first time on rehearing.~~

(~~2~~1) The court may consider rehearings in the following circumstances:

(A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, ~~or~~

(B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case, or

(C) 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.

(2) Except as necessary to establish the grounds for rehearing set forth in NRAP 40(c)(1), matters presented in the briefs and oral arguments may not be reargued, and no point may be raised for the first time.

(d) ~~Answer~~Response; and Reply. No ~~answer~~ response to a petition for rehearing ~~or reply to an answer shall~~ may be filed unless requested by the court. ~~Unless otherwise ordered by the court, the~~ The ~~answer~~ response to a petition for rehearing ~~shall~~ must be filed within 14 days after entry of the order requesting the ~~answer~~response, unless otherwise directed by the court. A petition for rehearing will ordinarily not be granted in the absence of a request for a~~n~~ ~~answer~~response. If a response to the petition is ordered, the petitioner

Commented [DW3]: Per discussion of 11-15-22, Commission discussed reordering NRAP 40(c) (1) and (2) to list the grounds for rehearing first, and the limiting language second.

may file a reply within 7 days after service of the response. A reply must not present matters that do not relate to the response.

(e) Action by Court if Granted. If a petition for rehearing is granted, the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case. A petition for rehearing of a decision of a panel of the Supreme Court ~~shall~~ must be reviewed by the panel that decided the matter. If the panel determines that rehearing is warranted, rehearing before that panel will be held. The full court ~~shall~~ must consider a petition for rehearing of an en banc decision.

(f) Untimely Petitions~~; Unrequested Answer or Reply~~. A petition for rehearing is timely if e-filed, mailed, or sent by commercial carrier to the clerk within the time fixed for filing. The clerk ~~shall~~ must not receive or file an untimely petition, but ~~shall~~ must return the petition unfiled or, if the petition was e-filed, must reject the petition. ~~The clerk shall return unfiled any answer or reply submitted for filing in the absence of an order requesting the same.~~

(g) **Unrequested Response.** 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.

~~**(g) Sanctions.** Petitions for rehearing which do not comply with this Rule may result in the imposition of appropriate sanctions.~~

Commented [DW4]: Per discussion of 11-15-22, Commission agreed to remove subsection (g) on sanctions.

RULE 41. ISSUANCE OF REMITTITUR; STAY OF REMITTITUR

(a) [~~When Issued; Contents.~~

~~**(1) When Issued. The court's remittitur shall issue 25 days after the entry of judgment unless the time is shortened or enlarged by order. Unless an appeal or other proceeding is dismissed under Rule 42, a formal remittitur shall issue.**~~

~~**(2)**~~**] Contents.** A certified copy of the judgment and **[~~opinion~~]** written decision of the court **[~~, if any,~~]** and any direction as to costs shall be included with the remittitur.

(b) When Issued. The court's remittitur shall issue ~~**25**~~ 21 days after the entry of judgment unless the time is shortened or enlarged by order. Unless an appeal or other proceeding is an original proceeding under Rules 5 or 21 or is dismissed under Rule 42, a formal remittitur shall issue.

(c) Effective Date. The remittitur is effective when issued.

[~~(b)~~] (d) Stay of Remittitur.

(1) Petition for Rehearing or En Banc Reconsideration. The timely filing of a petition for rehearing or en banc reconsideration stays the remittitur until disposition of the petition, unless the court orders otherwise. If the petition is denied, the remittitur shall issue ~~**25**~~ 21 days after entry of the order denying the petition, unless the time is shortened or enlarged by order.

(2) Petition for Review by Supreme Court. The timely filing of a petition for review by the Supreme Court of a Court of Appeals' decision shall stay the issuance of the remittitur of the Court of Appeals. Upon the issuance of an order denying a petition for review, the clerk of the Supreme Court shall issue the remittitur.

(3) Application for Certiorari to the United States Supreme Court.

(A) A party may file a motion to stay the remittitur pending application to the Supreme Court of the United States for a writ of certiorari. The motion must be served on all parties and must show there is good cause for a stay and identify the question(s) the party expects to present to the United States Supreme Court. The motion should include a citation to where the question(s) identified were raised and resolved in Nevada state courts and, if not, state why the motion should not be denied.

(B) The stay shall not exceed 120 days, unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of the Supreme Court of Nevada a notice from the clerk of the Supreme Court of the United States that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court of the United States.

(C) The court may require a bond or other security as a condition to granting or continuing a stay of the remittitur.

(D) The clerk of the Supreme Court shall issue the remittitur immediately when a copy of a United States Supreme Court order denying the petition for writ of certiorari is filed.

RULE 40A. PETITION FOR EN BANC RECONSIDERATION

(a) Grounds for En Banc Reconsideration. En banc reconsideration of a decision of a panel of the Supreme Court is not favored and ordinarily will not be ordered except when (1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or (2) the proceeding involves a substantial precedential, constitutional or public policy issue. The court considers a decision of a panel of the court resolving a claim of error in a criminal case, including a claim for postconviction relief, to be final for purposes of exhaustion of state remedies in subsequent federal proceedings. En banc reconsideration is available only under the limited circumstances set forth in Rule 40A(a). Petitions for en banc reconsideration in criminal cases filed on the pretext of exhausting state remedies may result in the imposition of sanctions under Rule 40A(g).

(b) Time for Filing; Effect of Filing on Finality of Judgment. Any party may petition for en banc reconsideration of a Supreme Court panel's decision within 14 days after written entry of the panel's decision under Rule 36 or, if the party timely filed a petition of rehearing, within 14 days after written entry of the panel's decision to deny rehearing. A petition for en banc reconsideration may not be filed while a petition for rehearing is pending before the panel. The 3-day mailing period set forth in Rule 26(c) does not apply to the time limits set by this Rule. No petition for en banc reconsideration of a Supreme Court panel's decision to grant rehearing is allowed; however, if a panel grants rehearing, any party may petition for en banc reconsideration of the panel's decision on rehearing within 14 days after written entry of the decision. ~~If no petition for rehearing of the Supreme Court panel's decision is filed, then no petition for en banc reconsideration is allowed.~~

Commented [DW1]: Our subcommittee unanimously recommends omitting the requirement of first filing a petition for rehearing before filing a petition for en banc reconsideration. This requirement is not found in the analogous FRAP 35 and creates an unnecessary hoop for litigants to jump through to obtain en banc reconsideration.

Commented [DW2]: Our subcommittee unanimously recommends *against* adopting the portion of FRAP 35 which allows for petitions for rehearing and reconsideration to be filed simultaneously. This proposed language is similar to the language in NRAP 40B(c), which prohibits a petition for review from being filed while a petition for rehearing is pending

Commented [DW3]: Our subcommittee unanimously recommends omitting the requirement of first filing a petition for rehearing before filing a petition for en banc reconsideration.

(c) Content of Petition. A petition based on grounds that full court reconsideration is necessary to secure and maintain uniformity of the decisions of the Supreme Court or Court of Appeals ~~shall~~ must demonstrate that the panel's decision is contrary to prior, published opinions of the Supreme Court or Court of Appeals and ~~shall~~ must include specific citations to those cases. ~~If the~~A petition ~~is~~ based on grounds that the proceeding involves a substantial precedential, constitutional, or public policy issue~~, the petition shall~~ must concisely set forth the issue, ~~shall~~ must specify the nature of the issue, and ~~shall~~ must demonstrate the impact of the panel's decision beyond the litigants involved. 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. ~~as the petitioner desires to present~~. Except as necessary to establish the grounds for reconsideration set forth in NRAP 40A(a), ~~M~~matters presented in the briefs and oral arguments may not be reargued ~~in the petition~~, and no point may be raised for the first time.

(d) Form of Petition, ~~and Answer~~Response, and Reply; Number of Copies; Length; Certificate of Compliance. A petition for en banc reconsideration of a Supreme Court panel's decision, ~~or an answer~~a response to such a petition, or a reply ~~shall~~ must comply in form with Rule 32, and unless e-filed, ~~an~~ the original ~~and 8 copies shall~~ must be filed with the clerk ~~unless the court by order in a particular case shall direct a different number~~. One copy ~~shall~~ must be served on counsel for each party separately represented. Except by permission of the court, a petition for en banc reconsideration, or ~~an answer~~a response to such a petition, may not exceed 10 pages or 4,667 words or, if it uses a monospaced typeface, 433 lines of text. ~~shall may 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~~

Commented [DW4]: Our subcommittee recommends replacing the word "shall" with "may" or "must" which are used throughout the FRAPs and which comports with the more modern approach.

Commented [DW5]: The additional language clarifies that a party may direct the court to matters already raised in the briefs/arguments when necessary to establish grounds for reconsideration. The language also clarifies that a party may argue the grounds for reconsideration (which is necessarily a "point … raised for the first time").

Commented [DW6]: The federal rules governing panel rehearings (FRAP 40) and en banc determinations (FRAP 35) both utilize the word "Response" instead of "Answer." We recommend making this change here as well.
https://www.law.cornell.edu/rules/frap/rule_35
https://www.law.cornell.edu/rules/frap/rule_40

~~than 433 lines of text.~~ Any reply may not exceed one half of the page or type-volume limitations of the petition. The petition ~~or~~, ~~answer~~response, or reply ~~shall~~ must include the certification required by NRAP 40(b)(4) in substantially the form suggested in Form 16 of the Appendix of Forms.

(e) ~~**Answer**~~ **Response and Reply.** No ~~answer~~ response to a petition for en banc reconsideration ~~or reply to an answer shall~~ may be filed unless requested by the court. ~~Unless otherwise ordered by the court, the~~ The ~~answer~~ response to a petition for en banc reconsideration ~~shall~~ must be filed within 14 days after entry of the order requesting the ~~answer~~response, unless otherwise directed by the court. A petition for en banc reconsideration will ordinarily not be granted in the absence of a request for a response~~n answer~~. If a response to the petition is ordered, the petitioner may file a reply within 7 days after service of the response. A reply must not present matters that do not relate to the response.

(f) Action by Court if Granted. Any two justices may compel the court to grant a petition for en banc reconsideration. If a petition for en banc reconsideration is granted, the court may make a final disposition of the cause without reargument or may place it on the en banc calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(g) Frivolous Petitions; Costs Assessed. Unless a case meets the rigid standards of Rule 40A(a), the duty of counsel is discharged without filing a petition for en banc reconsideration of a panel decision. Counsel filing a frivolous petition ~~shall~~ will be deemed to have multiplied the proceedings in the case and to have increased costs unreasonably and vexatiously. At the discretion of the court, counsel personally may be required to pay an appropriate sanction, including costs and attorney fees, to the opposing party.

Commented [DW7]: To maintain consistency in the language governing the length of petitions & responses in NRAP 40, 40A and 40B, we recommend simplifying the language in NRAP 40(b)(3) and NRAP 40A(d) to make it more like the current language in NRAP 40B(d), and then using the same language in all three rules.

Note: NRAP 40B(d) contains the following sentence. "The petition may not exceed 10 pages or 4,667 words or, if it uses a monospaced typeface, 433 lines of text." .

Commented [DW8]: We recommend allowing a reply brief to be filed in the event the Court orders a response to the petition. If the Commission agrees, then we need to add language addressing the length of a reply brief in this section.

Commented [DW9]: If the Commission agrees with our proposal to allow a reply brief to be filed in the event the Court orders a response to the petition, then we recommend striking the words, "or reply to an answer" from the first sentence of the rule. This language is similar to the language in NRAP 27(a)(4).

(h) Untimely Petitions~~; Unrequested Answer or Reply~~. A petition for en banc reconsideration is timely if e-filed, mailed, or sent by commercial carrier to the clerk within the time fixed for filing. The clerk ~~shall~~ must not receive or file an untimely petition, but ~~shall~~ must return the petition unfiled, or if the petition was e-filed, must reject the petition. ~~The clerk shall must return unfiled any answer or reply submitted for filing in the absence of an order requesting the same.~~

(i) Unrequested Response. 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.

RULE 40B. PETITION FOR REVIEW BY THE SUPREME COURT

(a) Decisions of Court of Appeals Reviewable by Petition for Review. A decision of the Court of Appeals is a final decision that is not reviewable by the Supreme Court except on petition for review. Any party ~~A party aggrieved by a decision of the Court of Appeals~~ [DW1]may file a petition for review with the clerk of the Supreme Court. The petition must state the question(s) presented for review and the reason(s) review is warranted. Supreme Court review is not a matter of right but of judicial discretion. The following, while neither controlling nor fully measuring the Supreme Court's discretion, are factors that will be considered in the exercise of that discretion:

(1) Whether the question presented is one of first impression of general statewide significance;

(2) Whether the decision of the Court of Appeals conflicts with a prior decision of the Court of Appeals, the Supreme Court, or the United States Supreme Court; or

(3) Whether the case involves fundamental issues of statewide public importance.

(b) Petition in Criminal Appeals; Exhaustion of State Remedies. In all appeals from criminal convictions or postconviction relief matters, a party ~~shall~~ is not ~~be~~ required to petition for review of an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when a claim has been presented to the Court of Appeals and relief has been denied, the party ~~shall be~~is deemed to have exhausted all available state remedies. Review of decisions of the Court of Appeals by the Nevada Supreme Court is limited to the circumstances set forth in these Rules and is an extraordinary remedy outside the normal process of appellate review, which is not available as a matter of right.

(c) Time for Filing. A petition for review of a decision of the Court of Appeals must be filed in the Supreme Court within ~~18~~ 14 days [DW2]after the filing of the Court of Appeals' decision under Rule 36, or its decision on rehearing under Rule 40. A petition for review ~~shall~~ may not be filed while a petition for rehearing is pending in the Court of Appeals. The 3-day mailing period set forth in Rule 26(c) does not apply to the time limits set by this Rule. The clerk of the Supreme Court ~~shall~~ must not receive or file an untimely petition, but ~~shall~~ must return the petition unfiled or, if the petition was e-filed, must reject the petition.

(d) Content and Form of Petition. A petition for review ~~shall~~ must comply in form with Rule 32, and unless e-filed, an original ~~and 9 copies shall~~ must be filed with the clerk ~~unless the court by order in a particular case shall direct a different number~~. ~~The petition may not exceed 10 pages or 4,667 words or, if it uses a monospaced typeface, 433 lines of text.~~ [DW3]The petition ~~shall~~ must succinctly state the precise basis on which the party seeks review by the Supreme Court and may include citation of authority in support of that contention. No citation to authority or argument may be incorporated into the petition by reference to another document.

(e) Response to Petition and Reply. No response to a petition for review may~~shall~~ be filed unless requested by the Supreme Court. ~~Unless otherwise ordered by the court, t~~The response to a petition for review must be filed within 14 days after entry of the order requesting the response, unless otherwise directed by the court. A petition for review will not ordinarily be granted in the absence of a request for a response. If a response to the petition is ordered, the petitioner may file a reply within 7 days after service of the response. A reply must not present matters that do not relate to the response. Any response or

reply must comply in form with Rule 32, and unless e-filed, an original shall be filed with the clerk. [DW4]

(f) Length of Petition and Response. Except by permission of the court, a petition for review by the Supreme Court, or a response to such a petition, may not exceed 10 pages or 4,667 words or, if it uses a monospaced typeface, 433 lines of text.

(g) Length of Reply. Any reply may not exceed one half of the page or type-volume limitations of the petition.

(h) Certificate of Compliance. The petition, response, or reply must include the certification required by NRAP 40(b)(4) in substantially the form suggested in Form 16 of the Appendix of Forms. [DW5]

(~~f~~i) Decision by Supreme Court. The Supreme Court may grant a petition for review on the affirmative vote of a majority of the justices. The Supreme Court's decision to grant or deny a petition is final and is not subject to further requests for rehearing or reconsideration. When the Supreme Court grants a petition for review, the Court of Appeals decision is vacated. [DW6]

(~~g~~j) Action by Supreme Court When Petition Granted. The Supreme Court may limit the question(s) on review. The Supreme Court's review on the grant of a petition for review ~~shall~~ will be conducted on the record and briefs previously filed in the Court of Appeals, but the Supreme Court may require supplemental briefs on the merits of all or some of the issues for review.

(k) Unrequested Response. 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.

RULE 7. BOND FOR COSTS ON APPEAL IN CIVIL CASES

(a) When Bond Required. In a civil case, ~~unless an appellant is exempted by law, or has filed a supersedeas bond or other undertaking that includes security for the payment of costs on appeal,~~ the appellant shall file a bond for costs on appeal or equivalent security in the district court with the notice of appeal. ~~But a~~A bond shall not be required of an appellant who is exempted by law, has filed a supersedeas bond or other undertaking that includes security for the payment of costs on appeal, or is otherwise not subject to having costs taxed against the appellant.

(b) Amount of Bond. The bond or equivalent security shall be in the sum or value of $~~5~~0750 unless the district court fixes a different amount. A bond for costs on appeal shall have sufficient surety, and it or any equivalent security shall be conditioned to secure the payment of costs if the appeal is finally dismissed or the judgment affirmed, or of such costs as the Supreme Court or Court of Appeals may direct if the judgment is modified. If a bond or equivalent security in the sum or value of $~~5~~0750 is given, no approval thereof is necessary.

(c) Objections. After a bond for costs on appeal is filed, a respondent may raise for determination by the district court clerk objections to the form of the bond or to the sufficiency of the surety.

(d) Proceeding Against a Surety. Rule 8(b) applies to a surety upon a bond given under this Rule.

Commented [DL1]: The sub-committee wonders whether this entire rule should be substituted with the language from FRAP 7, which is much simpler.

Commented [DL2]: Does the rule need to specify how the bond gets released after remittitur?

RULE 7. BOND FOR COSTS ON APPEAL IN CIVIL CASES

(a) When Bond Required. In a civil case, ~~unless an appellant is exempted by law, or has filed a supersedeas bond or other undertaking that includes security for the payment of costs on appeal,~~ the appellant shall file a bond for costs on appeal or equivalent security in the district court with the notice of appeal. ~~But a~~A bond shall not be required of an appellant who is exempted by law, has filed a supersedeas bond or other undertaking that includes security for the payment of costs on appeal, or is otherwise not subject to having costs taxed against the appellant.

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FRAP 7. BOND FOR COSTS ON APPEAL IN A CIVIL CASE

In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal. Rule 8(b) applies to a surety on a bond given under this rule.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 24, 1998, eff. Dec. 1, 1998.)

RULE 39. COSTS

(a) Against Whom Assessed. The following rules apply in civil appeals unless the law provides or the court orders otherwise:

(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;

(2) if a judgment is affirmed, costs are taxed against the appellant;

(3) if a judgment is reversed, costs are taxed against the respondent;

(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

~~**(b) Reserved.**~~

~~**(c)**~~**(b) ~~Costs of Briefs, Appendices, Counsel's Transportation; Limitation.~~Limitations on Costs.**

(1) Costs of Copies. The cost of producing necessary copies of briefs or appendices shall be taxable in the Supreme Court or Court of Appeals at a rate not to exceed 10 cents per page, or at actual cost, whichever is less. ~~The cost of producing necessary copies of briefs or appendices shall be taxable in the Supreme Court or Court of Appeals at rates not higher than those generally charged for such work in the area where the district court is located.~~

(2) Costs of Counsel's Transportation. The actual costs of round-~~-~~trip transportation within Nevada for one attorney, actually attending arguments before the Supreme Court or Court of Appeals, ~~between the place where the district court is located and~~to the place where the appeal is argued shall be taxable in the Supreme Court or Court of Appeals. For the purpose of this Rule, "actual costs" for private automobile travel shall be deemed to be ~~15 cents per mile~~the rate established by the Internal Revenue Service for business travel at the time such travel occurs~~, but where commercial air transportation is available at a cost less than private automobile travel, only the cost of the air transportation shall be taxable~~.

(3) Bill of Costs. ~~A~~Only those categories of costs identified in this section are taxable in the Supreme Court or Court of Appeals. A party who wants such costs taxed shall — within 14 days after entry of judgment — file an itemized and verified bill of costs with the clerk, with proof of service.

(4) Objections. Objections to a bill of costs shall be filed within 7 days after service of the bill of costs, unless the court extends the time.

(5) Limit on Costs. The maximum amount of costs taxable under this section shall be $~~500~~750.

~~**(d)**~~**(c) Clerk to Insert Costs in Remittitur.** The clerk shall prepare and certify an itemized statement of costs taxed in the Supreme Court or Court of Appeals for insertion in the remittitur, but issuance of the remittitur must not be delayed for taxing costs. If the remittitur issues before costs are finally determined, the district court clerk must — upon the Supreme

Commented [DL1]: This could be eliminated if e-filing became mandatory

Court clerk's request — add the statement of costs, or any amendment of it, to the remittitur.

~~(c)~~(d) **Costs on Appeal Taxable in the District Courts.** The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this Rule:

(1) the preparation and transmission of the record;

(2) the reporter's transcript, if ~~needed~~ necessary to determine the appeal;

~~(3) preparation of the appendix;~~

~~(4)~~(3) premiums paid for a supersedeas bond or other ~~bond~~ security to preserve rights pending appeal;

and

~~(5)~~(4) the fee for filing the notice of appeal. [As amended; effective March 1, 2019.]

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Rule 39. Costs

(a) **Against Whom Assessed**. The following rules apply unless the law provides or the court orders otherwise:

(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;

(2) if a judgment is affirmed, costs are taxed against the appellant;

(3) if a judgment is reversed, costs are taxed against the appellee;

(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

(b) **Costs For and Against the United States**. Costs for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law.

(c) **Costs of Copies**. Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

(d) **Bill of Costs: Objections; Insertion in Mandate**.

(1) A party who wants costs taxed must—within 14 days after entry of judgment—file with the circuit clerk and serve an itemized and verified bill of costs.

(2) Objections must be filed within 14 days after service of the bill of costs, unless the court extends the time.

(3) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must—upon the circuit clerk's request—add the statement of costs, or any amendment of it, to the mandate.

(e) **Costs on Appeal Taxable in the District Court**. The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

(1) the preparation and transmission of the record;

(2) the reporter's transcript, if needed to determine the appeal;

(3) premiums paid for a bond or other security to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

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CIRCUIT RULE 39-1. COSTS AND ATTORNEYS FEES ON APPEAL

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39-1.1. Bill of Costs

The itemized and verified bill of costs required by FRAP 39(d) shall be submitted on the standard Form 10 provided by this Court. It shall include the following information: (Rev. 1/1/05)

(1) The number of copies of the briefs or excerpts of record reproduced; and (Rev. 1/1/05)

(2) The actual cost per page for each document.

39-1.2. Number of Briefs and Excerpts

Costs will be allowed for the required number of paper copies of briefs and 1 additional copy. Costs will also be allowed for any paper copies of the briefs that the eligible party was required to serve. (Rev. 1/1/05; 1/1/09; 12/1/09)

If excerpts of record were filed, costs will be allowed for the number of copies of the excerpts of record ordered by the Court to be produced, plus 1 copy for the filer and 1 copy for each party required to be served in paper form. (Rev. 12/1/09; 12/1/19)

39-1.3. Cost of Reproduction

In taxing costs for photocopying documents, the clerk shall tax costs at a rate not to exceed 10 cents per page, or at actual cost, whichever is less. (Rev. 1/1/05; 12/1/09)

39-1.4. Untimely Filing

Untimely cost bills will be denied unless a motion showing good cause is filed with the bill. (Rev. 7/93)

39-1.5. Objection to Bill of Costs

If a response opposing a cost bill is filed, the cost bill shall be treated as a motion

under FRAP 27. (Rev. 12/1/09)

The Clerk or a deputy clerk may prepare and enter an order disposing of a cost bill, subject to reconsideration by the Court if exception is filed within 14 days after the entry of the order. (Rev. 7/93, 12/02; 12/1/09)

RULE 10. THE RECORD

(a) The ~~Trial~~ District Court Record. The ~~trial~~district court record consists of the papers and exhibits filed in or otherwise retained by the district court, the transcript of the proceedings, if any, the district court minutes, and the docket entries made by the district court clerk.

(1) Retention of Record. The district court clerk shall retain the ~~trial~~district court record. When the court deems it necessary to review the ~~trial~~district court record, the district court clerk shall assemble and transmit the portions of the record designated by the clerk of the Supreme Court in accordance with the provisions of Rule 11. Any costs associated with the preparation and transmission of the record shall be paid initially by the appellant, unless otherwise ordered.

(b) The Record on Appeal.

(1) The Appendix. For the purposes of appeal, the parties shall submit to the clerk of the Supreme Court copies of the portions of the ~~trial~~district court record to be used on appeal, including all transcripts necessary to the Supreme Court's or Court of Appeals' review, as appendices to their briefs. Under Rule 30(a), a joint appendix is preferred. This Rule does not apply to pro se parties. The Supreme Court or Court of Appeals will determine whether its review of the complete record is necessary in a pro se appeal and direct the district court clerk to transmit the record as provided in Rule 11(a)(2).

(2) Exhibits. If exhibits cannot be copied to be included in the appendix, the parties may request transmittal of the original exhibits to the clerk of the Supreme Court under Rule 30(d).

(3) Audio or Video Recordings. If an official audio or video recording of a district court proceeding is necessary to the appellate court's meaningful

Commented [DW1]: Sharon proposes the following definition instead:

(a) The Trial Court Record. The following items constitute the trial court record:
(1)The papers and exhibits filed, lodged, or used on the record in district court;
(2)The transcript of court proceedings, in court or outside the presence of the jury;
(3)Video and audio, if applicable;
(4)The district court minutes; and
(5)The docket entries made by the district court clerk.

Per Sharon, these changes are necessary because:

NRAP 10 (a) - Why change the definition of "trial court record."

1. Nevada Supreme Court allows items observed but not preserved to be reconstructed as part of the record on appeal.

•*Philips v. State*, 105 Nev. 631, 782 P.2d 381 (1989) (when the record does not include the race of prospective jurors within the venire, the court suggests appellate counsel could put together a statement regarding the race of the prospective jurors when arguing a *Batson* claim);
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•Additionally, NRAP 10 (c) allows a litigant to correct inaccuracies in an interpreter's translation of a witness' testimony during the appellate process, thereby modifying the record to reflect what was actually testified to by the witness. *Quangbengboune v. State*, 125 Nev. 763, 220 P.3d 1122 (2009).
•*Preciado v. State*, 130 Nev. Adv. Op. No. 6, 318 P.3d 176, 178 (2014), bench and chamber conferences are part of the record on appeal.

2. Appellate attorneys must review everything for error.

There are 2 main standards of review used in criminal cases: (1) harmful error and (2) plain error. When evaluating a record for plain error, an appellate attorney looks for error not objected to at trial. Therefore, all portions of the trial must be included as the record for plain error review.

•NRS 178.602: Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. ... [1]

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review of an issue raised on appeal, a party may request that the court direct the district court clerk to transmit the recording to the clerk of the Supreme Court. The court will not accept audio or video recordings in lieu of a transcript.

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(c) Correction or Modification of the Record.

(1) If any difference arises about whether the ~~trial~~district court record truly discloses what occurred in the district court, the difference ~~shall~~ must be submitted to and settled by that court and the record conformed accordingly.

(2) If anything material to either party is omitted from or misstated in the district court record by error or accident, the omission or misstatement must be corrected:

(A) on stipulation of the parties;

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(B) on order of the district court; or

(C) on order of the Supreme Court or Court of Appeals.

(3) ~~Questions~~ All other questions as to the form and content of the ~~appellate court~~ record shall be presented to the ~~clerk~~Supreme Court or Court of Appeals.

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- NRS 178.602: Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.
- NRS 178.598: Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
- Nevada's performance standards for appellate defense counsel require her to raise all meritorious issues to include investigating unpreserved claims of error. *See Appellate and Post-Conviction Representation: Standard 3- 2: Identification of Issues on Appeal, Nevada Supreme Court Rule.*

3. Many documents are not filed with the court but are part of the record on appeal.

- **Court exhibits.**

In Clark County, court exhibits are exhibits or documents entered into evidence but not filed in the clerk's office. They are lodged or used at trial or at other hearings but filed in the district court clerk's evidence vault. Court exhibits are not given to the jury.

Court exhibits many include police reports, witness statements, the defendant's interrogation, jury questions, exhibits not admitted into evidence by the court, offers of proof, copies of PowerPoint presentations prepared by experts for their testimony, copies of PowerPoint presentations used by the attorneys for opening statements or closing arguments, jury instructions offered but rejected, all documents pertaining to the jury venire and jury selection, prior judgments of convictions used for habitual criminal proceedings, DVDs, etc.

- **Sealed documents or sealed exhibits.**

It is my understanding that documents filed under seal are not file stamped because all filed stamped documents are available to the public.

RULE 11. PREPARING AND FORWARDING THE RECORD

(a) Preparation of the Record. ~~Upon written direction from the court, the district court clerk shall provide the clerk of the Supreme Court with the papers or exhibits comprising the trial court record.~~ The district court clerk must transmit the trial court record to the clerk of the Supreme Court only when required by statute or court rule or upon order of the Supreme Court or Court of Appeals. The ~~record shall be assembled, paginated, and indexed~~district court clerk must assemble, paginate, and index the record in the same manner as an appendix to the briefs under Rule 30. If the Supreme Court or Court of Appeals determines that its review of original papers or exhibits is necessary, the district court clerk shall forward the original trial court record in lieu of copies.

(1) Exhibits. If the Supreme Court or Court of Appeals directs transmittal of exhibits, the exhibits shall not be included with the documents comprising the record. The district court clerk shall place exhibits in an envelope or other appropriate container, so far as practicable. The title of the case, the court docket number, and the number and description of all exhibits shall be listed on the envelope, or if no envelope is used, then on a separate list.

(2) Record in Pro Se Cases. When the court directs transmission of the complete record in cases in which the appellant is proceeding without counsel, the record shall contain each and every paper, pleading and other document filed, or submitted for filing, in the district court. The record shall also include any previously prepared transcripts of the proceedings in the district court. If the Supreme Court or Court of Appeals should determine that additional transcripts are necessary to its review, the court may order the reporter or recorder who recorded the proceedings to prepare and file the transcripts.

Commented [DW1]: Sharon has proposed that we revise the rule as follows:

(a) Preparation of the Record.
(1)**Appellant and Respondent.** The Appellant and Respondent will prepare and forward the appendix pursuant to Rule 30 unless a written directive is sent from the court to the district court.
(2) **Written directive to the district court.** The district court clerk must transmit the trial court record to the clerk of the Supreme Court only when required by statute or court rule or upon order of the Supreme Court or Court of Appeals. The district court clerk must assemble, paginate, and index the record in the same manner as an appendix to the briefs under Rule 30. If the Supreme Court or Court of Appeals determines that its review of original papers or exhibits is necessary, the district court clerk shall forward the original trial court record in lieu of copies.
(3) **Exhibits…**
(4) **Record in Pro Se Cases…**

(b) Duty of Clerk to Certify and Forward the Record. The district court clerk shall certify and forward the record to the clerk of the Supreme Court. The district court clerk shall indicate, by endorsement on the face of the record or otherwise, the date upon which it is forwarded to the clerk of the Supreme Court.

(c) Time for Forwarding the Record. The trial court record shall be forwarded within the time allowed by the court, unless the time is extended by an order entered under Rule 11(d).

(d) Failure of Timely Transmittal; Extensions.

(1) Failure of Timely Transmittal. A district court clerk who fails to forward a timely record on appeal without sufficient excuse may be subject to sanctions.

(2) Extension of Time; Supporting Documentation and Affidavits. If the district court clerk cannot timely forward the record, the clerk shall seek an extension of time from the requesting court. A motion to extend the time for transmitting the record shall be accompanied by the affidavit of the clerk or deputy clerk setting forth the reasons for the requested extension, and the length of additional time needed to prepare the record.

RULE 12. DOCKETING THE APPEAL; FILING OF THE RECORD

(a) Docketing the Appeal. Upon receiving the copies of the notice of appeal and other documents from the district court clerk under Rule 3, the clerk of the Supreme Court shall docket the appeal and immediately notify all parties of the docketing date. Automatic appeals from a judgment of conviction of death shall be docketed in accordance with SCR 250. If parties on opposing sides file notices of appeal from the same district court judgment or order, in accordance with Rule 4(a), the appellants and cross-appellants shall be designated as provided in Rule 28.1. A subsequent appeal shall in all respects be treated as an initial appeal, including the payment of the prescribed filing fee. Cross-appeals will be filed under the same docket number and calendared and argued with the initial appeal.

(b) Filing the Record. Upon receiving the record, the clerk of the Supreme Court shall file it and immediately notify all parties of the filing date.

[As amended; effective July 1, 2009.]

Rule 12. Docketing the Appeal; Filing a Representation Statement; Filing the Record

(a) **Docketing the Appeal**. Upon receiving the copy of the notice of appeal and the docket entries from the district clerk under Rule 3(d), the circuit clerk must docket the appeal under the title of the district-court action and must identify the appellant, adding the appellant's name if necessary.

(b) **Filing a Representation Statement**. Unless the court of appeals designates another time, the attorney who filed the notice of appeal must, within 14 days after filing the notice, file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

(c) **Filing the Record, Partial Record, or Certificate**. Upon receiving the record, partial record, or district clerk's certificate as provided in Rule 11, the circuit clerk must file it and immediately notify all parties of the filing date.

(As amended Apr. 1, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 24, 1998, eff. Dec. 1, 1998; Mar. 26, 2009, eff. Dec. 1, 2009.)

RULE 4. APPEAL — WHEN TAKEN

(a) Appeals in Civil Cases.

(1) Time and Location for Filing a Notice of Appeal. Except as provided in Rules 4(a)(5), and 4(c), In a civil case in which an appeal is permitted by law from a district court, the notice of appeal required by Rule 3 shall be filed with the district court clerk. ~~Except as provided in Rule 4(a)(4), a notice of appeal must be filed after entry of a written judgment or order, and no later than within~~no later than 30 days after ~~the date that~~ written notice of entry of the judgment or order appealed from is served. If an applicable statute provides that a notice of appeal must be filed within a different time period, the notice of appeal required by these Rules must be filed within the time period established by the statute.

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(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

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(23) Multiple Appeals. If one party timely files a notice of appeal, any other party may file ~~and serve~~ a notice of appeal ~~within~~ no later than 14 days after the date when the first notice was served, or within the time otherwise prescribed by Rule 4(a), whichever period ~~last expires~~ends later.

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(34) Entry Defined. A judgment or order is entered for purposes of this Rule when it is signed by the judge or by the clerk, as the case may be, and filed with the clerk. A notice or stipulation of dismissal filed under NRCP 41(a)(1) has the same effect as a judgment or order signed by the judge and filed by the clerk and constitutes entry of a judgment or order for purposes of this Rule. If that notice or stipulation dismisses all unresolved claims pending in an action in the district court, the notice or stipulation constitutes entry of a final judgment or order for purposes of this Rule.

(45) Effect of Certain Motions on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Nevada Rules of Civil Procedure, ~~the time to file a notice of appeal runs for all parties from entry of an order disposing of the last such remaining motion, and~~ the notice of appeal must be filed no later than 30 days ~~from the date of~~ after service of written notice of entry of ~~that~~ the order disposing of the last such remaining motion:

(~~A~~i) ~~a motion~~ for judgment under Rule 50(b);

(~~B~~ii) ~~a motion under Rule 52(b)~~ to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment;

(~~C~~iii) ~~a motion under Rule 59~~ to alter or amend the judgment under Rule 59;

(~~D~~iv) ~~a motion~~ for a new trial under Rule 59; or

(v) for relief under Rule 60 if the motion is filed no later than 28 days after service of written notice of entry of the judgment or order.

(B)

(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(5)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this

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Rule measured from the service of written notice of entry of the order disposing of the last such remaining motion.

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~~(5~~C) ~~**Appeal From Certain Amended Judgments and Post-Judgment Orders.**~~ An appeal from a judgment substantively altered or amended upon the granting of a motion listed in Rule 4(a)(45), or from an order granting or denying a new trial, is taken by filing a notice of appeal, or amended notice of appeal, in compliance with Rule 3. The notice of appeal or amended notice of appeal must be filed after entry of a written order disposing of the last such remaining timely motion and ~~no later than~~within 30 days ~~from the date of~~after service of written notice of entry of that order.

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(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

~~(B) For any motion filed under Rule 4(a)(6), the motion may not be granted on an ex parte basis, and adequate notice must be given to the other parties in accordance with local rules.~~

(~~C~~B) No extension under this Rule 4(a)(6) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

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period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the motion is ~~filed within~~no later than 180 days after notice of entry of the judgment or order;

(B) the court finds that the moving party established extreme and unforeseeable circumstances for reopening the time; and

(C) the court finds that no party would be prejudiced by reopening the time.

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(~~7~~9) **Amended Notice of Appeal.** No additional fees shall be required if any party files an amended notice of appeal in order to comply with the provisions of this Rule.

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(e) Mistaken Filing in the Supreme Court. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the Supreme Court rather than the district court, the clerk of the Supreme Court must note on the notice the

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NRAP Commission – Rule Status

NRAP RULE		DISCUSSION	APPROVED
1	SCOPE, CONSTRUCTION OF RULES		
2	SUSPENSION OF RULES	**Sep. 26, 2022**	**Approved with no revisions (Sep. 26, 2022)**
3	APPEAL — HOW TAKEN		
3A	CIVIL ACTIONS: STANDING TO APPEAL; APPEALABLE DETERMINATIONS		
3B	CRIMINAL ACTIONS: RULES GOVERNING	**Discussed Oct. 25, 2022**	**Approved (Oct. 25, 2022)**
3C	FAST TRACK CRIMINAL APPEALS	**Discussed Oct. 25, 2022; Nov. 15, 2022**	**Approved (Nov. 15, 2022)**
3D	JUDICIAL DISCIPLINE: RIGHT TO APPEAL; HOW TAKEN; RULES GOVERNING		
3E	FAST TRACK CHILD CUSTODY APPEALS		
4(a)	APPEAL — WHEN TAKEN (CIVIL)		
4(b)-(f)	APPEAL -- WHEN TAKEN (CRIMINAL)	**Discussed Jan. 31, 2022**	
5	CERTIFICATION OF QUESTIONS OF LAW	**May 23, 2022; Aug. 17, 2022**	**Approved (Aug. 17, 2022)**
7	BOND FOR COSTS ON APPEAL IN CIVIL CASES	**On agenda for Dec. 15, 2022**	
8	STAY OR INJUNCTION PENDING APPEAL OR RESOLUTION OF ORIGINAL WRIT PROCEEDINGS	**Discussed July 27, 2022; Oct. 25, 2022; Nov. 15, 2022**	**Approved (Nov. 15, 2022)**
9	TRANSCRIPT; DUTY OF COUNSEL; DUTY OF THE COURT REPORTER OR RECORDER	**Discussed Apr. 25, 2022;**	
10	THE RECORD	**On agenda for Dec. 15, 2022**	
11	PREPARING AND FORWARDING THE RECORD	**On agenda for Dec. 15, 2022**	
12	DOCKETING THE APPEAL; FILING OF THE RECORD	**On agenda for Dec. 15, 2022**	
12A	REMAND AFTER AN INDICATIVE RULING BY THE DISTRICT COURT ON A MOTION FOR RELIEF THAT IS BARRED BY A PENDING APPEAL		**Approved with no revisions (May 23, 2022)**
13	COURT REPORTERS' AND RECORDERS' DUTIES AND OBLIGATIONS; SANCTIONS		
14	DOCKETING STATEMENT		
16	SETTLEMENT CONFERENCES IN CIVIL APPEALS		
17	DIVISION OF CASES BETWEEN THE SUPREME COURT AND THE COURT OF APPEALS		**Approved with 3 alternate provisions (May 23, 2022)**
21	WRITS OF MANDAMUS AND PROHIBITION AND OTHER EXTRAORDINARY WRITS	**Discussed July 27, 2022; Sep. 26, 2022**	**Approved (Sep. 26, 2022)**
22	HABEAS CORPUS PROCEEDINGS	**Discussed Nov. 15, 2022**	**Approved (Nov. 15, 2022)**
23	CUSTODY OF PRISONERS IN HABEAS CORPUS PROCEEDINGS	**Discussed Nov. 15, 2022**	**Approved (Nov. 15, 2022)**
24	PROCEEDINGS IN FORMA PAUPERIS		
25	FILING AND SERVICE		
25A	COURT COMPOSITION, SESSION, QUORUM AND ADJOURNMENTS		
26	COMPUTING AND EXTENDING TIME		
26.1	DISCLOSURE STATEMENTS		

27	MOTIONS	**Discussed July 27, 2022; Sep. 26, 2022; Nov. 15, 2022**	**Approved (Sep. 26, 2022; Nov. 15, 2022)**
28	BRIEFS		
28.1	CROSS-APPEALS		
28.2	ATTORNEY'S CERTIFICATE		
29	BRIEF OF AN AMICUS CURIAE	**Discussed May 23, 2022; Aug. 17, 2022; Sep. 26, 2022**	**Approved (Sep. 26, 2022)**
30	APPENDIX TO THE BRIEFS	**Discussed Apr. 25, 2022;**	
31	FILING AND SERVICE OF BRIEFS		
32	FORM OF BRIEFS, THE APPENDIX AND OTHER PAPERS		
33	APPEAL CONFERENCES		
34	ORAL ARGUMENT		
35	DISQUALIFICATION OF A JUSTICE OR JUDGE		
36	ENTRY OF JUDGMENT		**Approved (Mar. 2, 2022)**
37	INTEREST ON JUDGMENTS	**Sep. 26, 2022**	**Approved with no revisions (Sep. 26, 2022)**
38	FRIVOLOUS CIVIL APPEALS — DAMAGES AND COSTS		
39	COSTS	**On agenda for Dec. 15, 2022**	
40	PETITION FOR REHEARING	**Discussed Nov. 15, 2022** **On agenda for Dec. 15, 2022**	
40A	PETITION FOR EN BANC RECONSIDERATION	**On agenda for Dec. 15, 2022**	
40B	PETITION FOR REVIEW BY THE SUPREME COURT	**On agenda for Dec. 15, 2022**	
41	ISSUANCE OF REMITTITUR; STAY OF REMITTITUR	**On agenda for Dec. 15, 2002**	**Approved (Mar. 28, 2022)**
42	VOLUNTARY DISMISSAL		
43	SUBSTITUTION OF PARTIES	**Sep. 26, 2022**	**Approved with no revisions (Sep. 26, 2022)**
44	CASES INVOLVING CONSTITUTIONAL QUESTIONS WHERE STATE IS NOT A PARTY		**Approved (May 23, 2022)**
45	CLERK'S DUTIES		
45A	SEAL OF SUPREME COURT		
46	ATTORNEYS		
46A	PARTIES APPEARING WITHOUT COUNSEL		
47	RULES OF APPELLATE PRACTICE		
48	TITLE		