



NRAP 5 AND THE INTERSECTION OF STATE LAW AND FEDERAL JURISDICTION

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When considering appellate options, an oft overlooked, underutilized and poorly analyzed avenue through which to obtain review by the Nevada Supreme Court is Nevada Rule of Appellate Procedure (NRAP) 5. NRAP 5 gives the Nevada Supreme Court discretionary authority to answer questions of Nevada state law that have been certified by a federal court. NRAP 5 lies at the intersection of the jurisdiction of a federal court to decide issues of law raised in cases properly within the court's jurisdiction and the Nevada Supreme Court's authority to make the final determination as to matters of Nevada state law. As such, knowing when appellate certification is available, when to consider bringing an NRAP 5 motion, and when federal courts and the Nevada Supreme Court are likely to certify such questions, are invaluable tools in the appellate toolbox.

Is NRAP 5 Available to Me?

NRAP 5 provides a mechanism for bringing an issue of state law before the Nevada Supreme Court while a case is

pending in the Supreme Court of the United States, a court of appeals of the United States or the District of Columbia, a United States district court or a United States bankruptcy court. Thus, when considering NRAP 5, the threshold question is whether certification is available under the rule.

By its express terms, NRAP 5 is only available if the following criteria are met:

1. There is a proceeding in a federal court;
2. That proceeding involves a question of Nevada law;
3. The question of Nevada law is potentially outcome determinative of the case; and
4. It appears to the certifying court that there is no controlling precedent in the decisions of the Nevada Supreme Court.

Assuming these criteria are met, NRAP 5 may be invoked by a party to the federal court proceeding, by filing a motion for certification with the federal court. A federal court may also certify a question sua sponte.

If NRAP 5 is Available to Me, Should I Bring an NRAP 5 Motion?

Assuming certification is an available option, the next question is whether or not certification should be sought. Certification can reduce delay, cut costs and increase the assurance of gaining an authoritative response.¹ However,

important factors including: the need for an expeditious resolution, the factual strength of the case, the complexity of the legal issue, concerns regarding the costs of the litigation, and the timing of a motion to certify must be considered.

First, it is important to consider any need for expeditious resolution. As the Nevada Supreme Court is one of the busiest courts in the country, it will take some time to decide an accepted certified question. Thus, this procedure could result in delaying the final determination of a pending federal case.

Second, questions of law are not decided in the abstract and courts are generally forbidden from issuing advisory opinions. The facts of a case are applied to the question of law at issue. Thus, it is important to analyze the factual strength of the case in the context of the relevant legal issue, in order to determine whether or not the case is an appropriate one in which to raise the legal issues which could potentially have broader implication on your client and your client's future conduct. It is also important to consider the factual strength of the record to determine your likelihood of success on the issue should the Nevada Supreme Court choose to accept certification.

Third, the complexity of the legal question is important to consider. Certification is more likely to be granted for consideration of complex issues of state law. On the other hand, the issue may be simple and there may be conformity among the jurisdictions that have considered such an issue, making it less likely to be appropriate for certification.

Fourth, it is important to consider the costs of certification. In the event the Nevada Supreme Court accepts the certified question, it will be necessary to brief the issue (as one would in a normal appeal) and educate the Nevada Supreme Court, which previously had no knowledge regarding the facts and issues raised in the case. This is likely to increase the overall cost of the litigation.

Finally, one must consider the timing of filing a motion to certify. NRAP 5 does not specify when certification should be sought. There may be advantages to seeking certification early in a case, or in waiting until after discovery has been completed. This decision will vary depending on the unique circumstances of each case.

If I Decide to Bring an NRAP 5 Motion, When will a Federal Court Certify a Question to the Nevada Supreme Court?

As a Nevada state court rule of appellate procedure, NRAP 5 only governs the circumstances under which the Nevada Supreme Court may answer certified questions. However, there is a distinct, and often overlooked, threshold question as to what circumstances govern a federal court's decision as to whether a certification order should be issued in the first place.

Novel or undecided issues of state law often present themselves in federal proceedings. Such issues may arise in either a case brought pursuant to the federal court's diversity jurisdiction, or when the federal court exercises supplemental jurisdiction over a claim for relief arising under state law.

In such circumstances, the federal court has the authority to, and often does, decide the question of law by predicting how the Nevada Supreme Court would decide the issue and/or obtaining guidance from other jurisdictions, statutes, treatises and restatements of the law². In contradistinction to a federal court's authority to decide cases, it is axiomatic that the Nevada Supreme Court has the final authority to interpret issues of Nevada law.³ Thus, it is clear that a federal court has authority to certify a legal question to the Nevada Supreme Court.

Nevertheless, there is no federal rule of civil procedure or local rule in the District of Nevada that governs when certification may issue. Rather, like the Nevada Supreme Court itself, federal courts have broad discretion in deciding whether to certify a question of law.⁴ In deciding whether to exercise its discretion, federal courts in this circuit have considered factors such as:

1. If the issue is one of first impression or if there is controlling precedent;
2. Whether or not the issue is likely to recur;
3. If the issue has generated conflicting decisions elsewhere;
4. Whether the issue has broad application;
5. If law from other states is instructive;
6. The Nevada Supreme Court's case load;
7. Comity and federalism concerns;
8. The timing of the certification;

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9. If certification will save time, money and resources, or promote cooperative judicial federalism; and
10. If the question implicates important issues of Nevada state public policy.⁵

Additionally, when a motion for certification is made for the first time after the movant has lost on the issue before the federal court, the movant generally must show “particularly compelling reasons” for certification.⁶

If the Federal Court Certifies a Question, When will the Nevada Supreme Court Decide such a Question?

Upon receiving a certification order, the clerk of the Nevada Supreme Court docket the case and notifies the parties of that action. However, even if the technical requirements for certification have been met, the Nevada Supreme Court has discretion to deny consideration of the certified question. To determine whether to exercise that discretion, the Nevada

Supreme Court considers the following:

1. If the certified question’s answer may be determinative of part of the federal case;
2. If controlling Nevada precedent exists; and
3. If the answer will help settle important questions of law.⁷

If the Nevada Supreme Court accepts certification of a question of law, the parties are obligated to brief the certified question unless the court orders otherwise. The clerk of the Supreme Court notifies the parties of the court’s decision to accept certification and sets a briefing schedule. Questions certified to the Nevada Supreme Court are automatically assigned for en banc consideration.

In sum, while the path to certification can be derailed at either the federal or state level, in the appropriate case, an NRAP 5 motion can be an invaluable tool for achieving authoritative and definitive guidance, and should be considered by any litigator facing a situation in which an issue of Nevada law arises for which there is no definitive guidance. ■

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- 1 *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997).
- 2 *Strother v. S. California Permanente Med. Grp.*, 79 F.3d 859, 865 (9th Cir. 1996).
- 3 *Danforth v. Minnesota*, 552 U.S. 264, 291-92 (2008).
- 4 *Carolina Cas. Ins. Co. v. McGhan*, 572 F. Supp. 2d 1222, 1226 (D. Nev. 2008)
- 5 *Carolina*, 572 F. Supp. 2d at 1226; *Lee v. Enter. Leasing Co.-W.*, 3:10-CV-00326-LRH, 2012 WL 3996848 (D. Nev. Sept. 10, 2012).
- 6 *Carolina*, 572 F. Supp. 2d at 1226 (internal quotations omitted).
- 7 *Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 189-90, 209 P.3d 271, 274 (2009).



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