NEVADA’S NEW COURT OF APPEALS

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On November 4, 2014, Nevada voters approved a court of appeals by a 53.78 percent majority, bringing much-needed aid to Nevada’s overloaded court system and permitting Nevada to join 40 other states that already have an intermediate appellate court system in place. Thus, the conversation has finally shifted from why Nevada needs a court of appeals to how its court of appeals will be composed and operated. So how will the new Court of Appeals operate?

The Composition of the Court of Appeals

The effective date of the Court of Appeals was January 5, 2015.

The initial Court of Appeals consists of three judges with statewide jurisdiction. Governor Brian Sandoval appointed the three inaugural Court of Appeals judges: Jerome “Jerry” Tao, Michael Patrick Gibbons and Abbi Silver. Judge Tao currently serves as a district court judge in the Eighth Judicial District Court, and has also worked in the Clark County District Attorney’s Office, the Clark County Public Defender’s Office and private practice. Judge Gibbons currently serves as a district court judge in the Ninth Judicial District Court, and has also worked in the Douglas County District Attorney’s Office and run his own private practice. Judge Silver currently serves as a district court judge in the Eighth Judicial District Court, and has also worked in the Clark County District Attorney’s Office, where she served as Chief Deputy District Attorney of the Special Victims Unit.

Each judge will serve an initial two-year term and will stand for reelection in 2016. Thereafter, the judges will serve six-year terms. Each judge will have two law clerks and a judicial assistant. Additionally, seven Supreme Court staff attorneys have been reassigned to work exclusively on Court of Appeals matters: three civil staff attorneys in Las Vegas, and four criminal staff attorneys in Carson City. As the Court of Appeals is independent from the Supreme Court, no staff attorney will be assigned to cases in both the Court of Appeals and the Supreme Court. However, the clerk of the Supreme Court will still function as the clerk of both the Supreme Court and the Court of Appeals.

Changes to the Appellate Process

Getting to the Court of Appeals

A party will still file an appeal with the Supreme Court in the same manner as provided for by the Nevada Rules of Appellate Procedure. In fact, from the practitioner’s standpoint, an appeal will operate largely the same way it does now, until briefing. Once a case is briefed, the Supreme Court will either retain the case or assign it to the Court of Appeals.

Certain cases will categorically remain in the Supreme Court throughout the appeal:

1. Proceedings invoking the original jurisdiction of the Supreme Court;
2. Direct appeals, post-conviction appeals and writ petitions in death penalty cases;
3. Cases involving ballot or election questions;
4. Cases involving judicial discipline;
5. Cases involving attorney admission, suspension, discipline, disability, reinstatement and resignation;
6. Cases involving the approval of prepaid legal plans;
7. Questions of law certified by a federal court;
8. Disputes between branches of government or local governments;
9. Administrative agency appeals involving tax, water or public utilities;
10. Cases originating in business court;
11. Appeals from orders denying motions to compel arbitration;
12. Cases involving the termination of parental rights or orders entered pursuant to NRS Chapter 432B;
13. Matters raising as a principal issue a question of first impression involving the United States or Nevada constitution or common law; and
14. Matters raising as a principal issue a question of statewide public importance, or an issue upon which there is an inconsistency in the published decisions of the Court of Appeals or of the Supreme Court, or a conflict between published decisions of the two courts.

Conversely, the following cases will be presumptively assigned to the Court of Appeals:

1. Post-conviction appeals, except those in death penalty cases and cases that involve a conviction for any offenses that are a category
A felony, appeals from certain pleas, and appeals from offenses that are not category A or B felonies or that only challenge the sentence imposed or the sufficiency of the evidence;
2. Appeals from a judgment of $250,000 or less in a tort case;
3. Appeals in statutory lien matters under NRS Chapter 108;
4. Administrative agency appeals except those involving water, tax or public utilities;
5. Cases involving family law matters other than termination of parental rights or orders entered pursuant to NRS Chapter 432B;
6. Appeals challenging venue;
7. Appeals challenging the grant or denial of injunctive relief;
8. Pretrial writ proceedings challenging discovery orders, or orders resolving motions in limine;
9. Appeals in trust and estate matters in which the corpus has a value of less than $5,430,000; and
10. Appeals arising from the foreclosure mediation program.

However, simply because a case is within one of the presumptive categories does not mean it will always be assigned to the Court of Appeals. In assigning cases, the Supreme Court will give due regard to the workload of each court. Further, parties will have some degree of input on the assignment of a case to the Court of Appeals. Specifically, at the briefing stage, the parties must include a routing statement, and if a case is one that would, by virtue of its subject matter, be presumptively assigned to the Court of Appeals, a party may choose to argue that the case should be retained by the Supreme Court due to the nature of a principal issue raised in the matter.

The Supreme Court has already identified 150 cases that it will likely transfer to the Court of Appeals upon its effective date. The Supreme Court anticipates assigning approximately 700 to 800 appeals per year.

Proceedings once in the Court of Appeals
The Court of Appeals will hear and decide only those matters assigned to it by the Supreme Court. If a case is transferred to the Court of Appeals, the Clerk of the Court will issue a notice to the parties, and pleadings from that point forward will be captioned “In the Court of Appeals of the State of Nevada.” Upon transfer to the Court of Appeals, a party cannot seek reassignment of the case.

As an independent court, the Court of Appeals can establish its own internal operating procedures. The Court of Appeals can elect to hear oral arguments. Further, the Court of Appeals may entertain motions in appeals that the Supreme Court has transferred to that court. The Court of Appeals can also choose to issue published opinions, which will be published in the Nevada Reporter.

Review from a Court of Appeals decision
Upon issuance of a decision by the Court of Appeals, a party can file a petition for rehearing of that decision with that court.

A party may also file a Petition for Review by the Supreme Court — which is the only way a Court of Appeals decision will be reviewable by the Supreme Court. The party must file the petition within 18 days after the Court of Appeals’ disposition or its decision on rehearing, and the petition must state the question(s) presented for review and the reason(s) review is warranted. It is within the Supreme Court’s discretion to entertain review of a Court of Appeals decision, and the Supreme Court will consider a variety of factors in exercising that discretion, including:

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; and
3. Whether the case involves fundamental issues of statewide public importance. The Supreme Court may grant review on the affirmative vote of a majority of the justices.

Conclusion
With the focus finally shifting from why Nevada needs a Court of Appeals to its operation, it is an exciting time to be a practitioner in the State of Nevada. The Court of Appeals will reduce the crushing caseload of the Supreme Court, allowing for faster resolution of appeals, more published opinions and more appeals decided en banc. Nevada’s “yes” vote will benefit Nevada for decades to come.

1. NRAP 1(e)(3).
2. However, in fast track criminal appeals, the fast track statement or response shall set forth whether the matter should be retained by the Supreme Court or assigned to the Court of Appeals. NRAP 3C(e)(1)(B)(ix); NRAP 3C(f)(1)(B). A similar requirement is in place for fast track custody appeals. NRAP 3E(d)(1)(H).
3. NRAP 17(a).
4. NRAP 17(b).
5. NRAP 28; see also NRAP 21 (contemplating a slightly different routing statement).
6. NRAP 17(e).
7. NRAP 40.
8. NRAP 40B. In all appeals from criminal convictions and post-conviction relief matters, a party shall not be required to petition for review of an adverse decision of the Court of Appeals to be deemed to have exhausted all available state remedies respecting a claim of error.

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