

# BACK STORY

## PRACTICE TIPS FOR THE NEVADA COURT OF APPEALS

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*During its inaugural year, the Court of Appeals travelled the state, conducting numerous CLE presentations and holding oral arguments on the road. Through these presentations, the court offered valuable insight and tips for practitioners, including the following.*

### Know the Rules

Of course an appellate practitioner will be familiar with the Nevada Rules of Appellate Procedure (NRAP). However, a few rules deserve extra attention. NRAP 40B is an important rule for Court of Appeals practitioners, because it provides the procedure for petition for review by the Nevada Supreme Court in circumstances where a litigant seeks to appeal a Court of Appeals decision. NRAP 40B also provides factors the Supreme Court will consider in determining whether or not to exercise its discretion to grant a petition for review.<sup>1</sup> NRAP 28 provides the requirements and format of briefs; briefs that do not adhere may result in sanctions.<sup>2</sup> For criminal and child custody appeals, NRAP 3C and 3E set fast-track procedures that differ from the normal process. Finally, because there is no e-filing in the Court of Appeals, applicable deadlines are particularly important.

### Make the Record

The court can only rule upon the record properly presented before the court. Hence, a party must create the record below, and then must transmit the record to the court with the appeal. If factors relevant to an adverse ruling change during the course of proceedings in district court, ask for reconsideration. Submit written orders to the district court to properly memorialize oral rulings, even favorable ones. If your appeal raises a jury instruction issue, include every proposed jury instruction.

### Give the Routing Statement the Attention it Deserves

NRAP 17 prescribes the division of cases between the Court of Appeals and the Supreme Court. During the screening process, the chief justice of the Supreme Court and court staff read the routing statement in each brief to determine whether to retain the appeal or assign it to the Court of Appeals. Because the routing decision is final,<sup>3</sup> the routing statement provides the only opportunity to influence that decision. Good routing statements cite NRAP 17 and its applicable subsection(s), and concisely explain why an appeal belongs in either court. If a case presumptively belongs in the Court of Appeals under NRAP 17(b), but a party wants to be

heard by the Supreme Court because it also raises an issue of first impression or of statewide public importance,<sup>4</sup> the routing statement should explain the issues.<sup>5</sup>

### Lead with the Best, but Include Every Argument

The best arguments deserve the most space in a brief and should come first. That said, a litigant is well-advised to include every argument, because the court will address each of them, and may focus on an issue that the parties did not find important.<sup>6</sup> The court may even rule on an issue that was not addressed in the briefs. Each issue should have its own heading, and should cite the record and specific legal authority. Failure to include legal authority is grounds for an adverse ruling.

### Treat an Oral Argument Before the Court of Appeals Like One Before the Supreme Court

Focus on the legal issues. Do not waste time arguing about the facts if the panel does not ask about them. As in the Supreme Court, the best attorneys are over-prepared, but responsive to the court's questions. A recent published opinion, based in part on an issue that the parties did not brief, highlights the importance of flexibility at oral argument.<sup>7</sup> **NL**

1. See NRAP 40B(a)(1)-(3).
2. NRAP 28(j).
3. NRAP 17(d).
4. NRAP 17(a)(13), (14)
5. NRAP 17(d).
6. See, e.g., *Palmieri v. Clark Cnty.*, 131 Nev. Adv. Op. 102, --- P.3d ---, n. 14 (Nev. Ct. App. 2015).
7. See *id.*

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