

KEY CHANGES IN THE NEVADA RULES OF APPELLATE PROCEDURE

BY KELLY DOVE, ESQ.

The past year has brought more changes to the Nevada Rules of Appellate Procedure (NRAP) than several previous years combined. The creation of the new Court of Appeals resulted in substantial changes to the rules. Also of note is the repeal of the long-established rule prohibiting the citation of so-called unpublished dispositions. Following are some of the most noteworthy changes.

Division of Cases Between the Nevada Supreme Court and the Court of Appeals

The new NRAP 17 outlines the presumptive division of cases between the Nevada Supreme Court and Court of Appeals. The rule contains categories of cases that the Supreme Court “shall hear and decide,” as well as the type of cases that will be “presumptively

assigned” to the Court of Appeals. The Supreme Court will retain appeals, for example, in death penalty cases, cases involving election questions, questions of law certified by a federal court, appeals arising from business court, and appeals raising a question of statewide public importance or an issue of first impression. The Court of Appeals will presumptively hear appeals from judgments in tort cases of less than \$250,000, agency appeals, family law matters other than the termination of parental rights, challenges to discovery orders and appeals arising from the foreclosure mediation program.



The new rules likewise require parties to appeals to include in their briefing a routing statement specifying whether their particular matter should be retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17. Further, parties may advocate that the Supreme Court retain a case despite presumptive assignment to the Court of Appeals.

Appealing a Court of Appeals Determination

A party may appeal a Court of Appeals decision to the Nevada Supreme Court via a Petition for Review. Such a petition must state why the Supreme Court should consider the appeal. Factors include if the question presented is one of first impression, if there are conflicts within appellate court decisions, and if the issue is of statewide importance. NRAP 40B.

Citation to Unpublished Dispositions

The recent repeal of Supreme Court Rule 123 and amendment of NRAP 36 have removed the longstanding prohibition against citing so-called unpublished dispositions. The well-known Supreme Court Rule 123 provided that, with only narrow exceptions, “[a]n unpublished opinion or order of the Nevada Supreme Court shall not be regarded as precedent and shall not be cited as legal authority.” Starting at the beginning of this year, litigants may now cite unpublished opinions.

While widely supported, the change was not entirely without controversy. In fact, the Supreme Court invited comment on the proposed change from the Appellate Litigation Section of the state bar. Interestingly, the section could not reach a consensus and ultimately offered two position papers: one for and one against the change.

Proponents of the change in the rule pointed out the fact that practitioners regularly cite unpublished authority, despite the prohibition. They also argued that citing such cases promotes transparency and consistency in the law. Finally, they point out that, by making the rule prospective, the issuing justices and judges will be

aware of each opinion's potential to be cited. When this debate occurred with respect to the federal rules, Chief Justice John Roberts remarked, "A lawyer ought to be able to tell a court what it has done."

Likewise, those opposing the change closely followed Ninth Circuit Judge Alex Kozinski's objections to the analogous rule change in the federal courts: where each jurist is responsible for approximately so many published and unpublished dispositions per year, there is insufficient time to adequately prepare opinions worthy of publication and citation. Kozinski (in)famously commented, "When the people making the sausage tell you it's not safe for human consumption, it seems strange indeed to have a committee in Washington tell people to go ahead and eat it anyway." This analogy doesn't fully hold in Nevada's recent debate, where at least some of the people making "the sausage" support the change. Moreover, like the ultimate federal rule change, Rule 123 is prospective only.

In addition to being prospective only, the rule allowing for the citation of unpublished dispositions requires that the citing party specify that the opinion is an unpublished disposition and provide a copy to all unrepresented litigants. Finally, NRAP 36 specifies that unpublished dispositions don't "establish mandatory precedent," but may be cited for their persuasive value.

Telephonic Extensions Extended

Last, but certainly of interest to the busy practitioner: telephonic extensions, previously limited to five days, can now be obtained for up to 14 days. See NRAP 26.

Reading and reviewing the rules for each appeal is always a recommended practice. This year, it is essential. **NL**

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