APPELLATE BRIEFS

By: Debbie Leonard, McDonald Carano Wilson

IMPORTANT CHANGES TO THE APPELLATE RULES

The Supreme Court recently made some important revisions to NRAP 17 that reach beyond the appellate courts. These changes could influence how and where a plaintiff files its complaint in the district court in the first instance. They also expand the scope of cases that will be heard by the Court of Appeals. All Nevada lawyers, whether appellate practitioners or not, should pay attention to these changes.

NRAP 17 addresses the distribution of cases between the Supreme Court and the Court of Appeals. Specifically, the rule lists the types of cases that are retained by the Supreme Court and those that are "presumptively assigned" to the Court of Appeals. When originally created in 2015, NRAP 17 contained 14 categories of cases that the Supreme Court "shall hear and decide," which included appeals from cases that originated in business court and appeals from orders that denied motions to compel arbitration. The 2015 rules also identified ten categories of cases that were presumptively assigned to the Court of Appeals.

On October 12, 2016, the Supreme Court issued an order amending NRAP 17 and 21, which became effective January 1, 2017. The amendments to NRAP 17 in particular are significant, such that there are now just 11 categories of cases retained by the Supreme Court and 16 that are presumptively assigned to the Court of Appeals.

Perhaps the most noteworthy change is that now "cases originating in business court that do not involve questions of first impression" are presumptively assigned to the Court of Appeals. NRAP 17(b)(7). This is surprising because the supporters of Ballot Question 1 in November 2014, which asked voters to approve formation of a Court of Appeals, specifically characterized the Court of Appeals as an "error correction court."

Yet, by design, the business court docket tends to consist of complex business litigation, and the rules allow businesses to file their cases in business court to ensure that the assigned judge has experience presiding over sophisticated business disputes. *See* WDCR 2.1; EDCR 1.61. With this rule change, a business court case, no matter how complex, is presumptively assigned to the Court of Appeals unless the Supreme Court determines that the case presents a novel question of law that has not been previously addressed in Nevada.

Another significant amendment is that "appeals from postjudgment orders in civil cases" are now presumptively assigned to the Court of Appeals. This means that, for example, an appeal from a judgment that involves an issue of first impression is retained by the Supreme Court, while an order granting a motion under NRCP 60 to set aside that judgment is presumptively assigned to the Court of Appeals. Similarly, an order granting attorneys' fees is presumptively assigned to the Court of Appeals even if the underlying judgment is reviewed by the Supreme Court.

An appellate practitioner can always advocate in the routing statement that both appeals should be heard by the same court. But by specifically designating post-judgment orders for Court of Appeals review, the Supreme Court likely anticipated that the underlying judgment might not warrant the same treatment. A party will have to overcome the presumption.

Other notable changes: orders that deny motions to compel arbitration have been eliminated from the list of cases that the Supreme Court will retain but were not specifically added to the list of cases the Court of Appeals will presumptively hear. And the Court of Appeals will now presumptively hear a host of post-conviction criminal appeals and cases that involve a contract dispute where the amount in controversy is less than $75,000.

Although the judges of the Court of Appeals are certainly capable of aptly handling the new categories of cases identified in amended NRAP 17, this rule change marks an expansion in the scope of cases that the Court of Appeals will hear and decide. For litigants who have complex business disputes that they want Nevada's highest court to review, filing the case initially in business court may not be the appropriate path forward. All lawyers should consider discussing these appellate rule changes with their clients before filing a complaint in the district court.

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Request Fees and Costs: If a court finds a person in indirect contempt, the court may require the aggrieved party to pay the other party's "reasonable expenses", including fees and costs, to prosecute the contempt action.[15] Because the statute is discretionary, the party seeking fees should file an affidavit containing the information required by *Brunzell v. Golden Gate National Bank*[16] and *Miller v. Wilfong*[17] for a court to award attorney's fees and costs.

Attend the Hearing: To hold a person in contempt, a court must hold an evidentiary hearing.[18] Not all judges proceed with the hearing the same way. Sometimes, a hearing begins with a presentation of the moving party's prima facie case. On other occasions, the hearing begins with the alleged contemnor explaining why the court should not hold her in contempt.

Provide a Proposed Order: Giving the court a proposed contempt order that makes the necessary findings and provides for coercive relief—making sure the contempt is civil—is the last step to try to safeguard a successful contempt finding against reversal on appeal.

1*State ex rel. Malone v. Dist. Court of Sixth Judicial Dist.*, 52 Nev. 270, 275, 286 P. 418, 419 (1930).

2*Hildahl v. Hildahl*, 95 Nev. 657, 601 P.2d 58 (1979).

3NRS 22.030(3)(b) (permitting the court hearing the case to hear contempt actions in cases falling under NRS 3.223(1)).

4*Cunningham v. Eighth Judicial Dist. Ct.*, 102 Nev. 551, 559-560, 729 P.2d 1328, 1333-1334 (1986).

5Even an order a person believes is erroneous may be the basis for contempt until overturned or terminated. *Rish v. Simao*, ___ Nev. ___, 368 P.3d 1203, 1210 (2016). *But see Ex parte Gardner*, 22 Nev. 280, 285, 39 P. 570, 571 (1895) (holding a contempt order based on violation of a void order was also void).

6*Id.* at 559-60, 729 P.2d at 1333-34.

7NRS 22.030(2). *See also Awad v. Wright*, 106 Nev. 407, 409, 794 P.2d 713, 714 (1990).

8*Steeves v. Second Judicial Dist. Court*, 59 Nev. 405, 410-13, 94 P.2d 1093, 1095-96 (1939).

9*Rodriguez v. Eighth Judicial Dist. Court*, 120 Nev. 798, 804, 102 P.3d 41, 45 (2004).

10*Id.* at 804-05, 102 P.3d at 45-46.

11*Lewis v. Lewis*, 373 P.3d 878, 881 (Nev. 2016).

12 ___ Nev. ___, 352 P.3d 28, 31 (Nev. 2015).

13*Bongiovi v. Bongiovi*, 94 Nev. 321, 322, 579 P.2d 1246, 1246-47 (1978) *and Miller v. Miller*, 122 F.2d 209, 211 (D.C. Cir. 1941) (alimony); *Davidson v. Davidson*, 382 P.3d 880, 884 (Nev. 2016) (property division).

14NRS 125B.050.

15NRS 22.100(3).

16*Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 455 P.2d 31 (1969).

17*Miller v. Wilfong*, 121 Nev. 619, 119 P.3d 727 (2005).

18NRS 22.030(3) (describing a "trial"); NRS 22.100(1) (describing taking evidence before making a contempt finding).

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Please note, Judicial Ethics and Speciality Courts will return in May 2017.