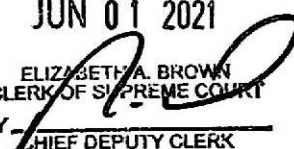


IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE CREATION) ADKT 0580
OF A COMMISSION ON NEVADA)
RULES OF APPELLATE PROCEDURE)

FILED

JUN 01 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  CHIEF DEPUTY CLERK

**RESPONSE TO ORDER SCHEDULING PUBLIC HEARING AND
REQUESTING PUBLIC COMMENT**

COMES NOW Chief Deputy Public Defender SHARON G.
DICKINSON, and submits the attached comments and proposed
amendments in response to the Nevada Supreme Court's Order Scheduling
Public Hearing and Requesting Public Comment filed on May 20, 2021.

DATED this 1st day of June, 2020.

CLARK COUNTY PUBLIC DEFENDER

By Sharon Dickinson

SHARON G. DICKINSON, #3170

MEMORANDUM

NRAP 10 (a)

In criminal appeals, it is not uncommon for something to be missing from the record or filed on the left side of the file. When this occurs, I file a motion to reconstruct the record if I need the document for the appeal. However, the question then becomes: What is the trial court record or the record on appeal and should it be corrected?

NRAP 10 (a) defines the trial record

(a) The Trial Court Record. The trial court record consists of the papers and exhibits filed in the district court, the transcript of the proceedings, if any, the district court minutes, and the docket entries made by the district court clerk.

Federal Rules of Appellate Procedure, Rule 10 (a) defines the record on appeal as:

(a) Composition of the Record on Appeal. The following items constitute the record on appeal:

- (1)** the original papers and exhibits filed in the district court;
- (2)** the transcript of proceedings, if any; and
- (3)** a certified copy of the docket entries prepared by the district clerk.

Suggested change to NRAP 10 (a):

a) Composition of the Record on Appeal. The following items constitute the record on appeal:

- (1)** the papers and exhibits filed, **lodged, or used** in the district court;
- (2)** the transcript of **court** proceedings or **JAVS**, if any;
- (3) the transcript of hearings outside the presence of the jury, if any;**
- (4)** the district court minutes, and

(5) the docket entries made by the district court clerk.

The words in red are added to the federal rule to include bench conferences, discussions held in chambers, and all items the jury sees during the trial.

Reason for the change:

1. Items observed are part of the record.

- *Philips v. State*, 105 Nev. 631, 782 P.2d 381 (1989) (when the record does not include the race of prospective jurors within the venire, the court suggests appellate counsel could put together a statement regarding the race of the prospective jurors when arguing a *Batson* claim);
- *Watters v. State*, 129 Nev. Adv. Op. No. 94, 313 P.3d 243 (2013) (court reversed a conviction based on the words and pictures on the prosecutor's Opening Statement PowerPoint); *State v. Hecht*, 319 P.3d 836 (Wash. Ct. App. Div. 1 2014) (improper pictures or improper written arguments within a Closing PowerPoint are grounds for reversal).
- Additionally, NRAP 10 (c) allows a litigant to correct inaccuracies in an interpreter's translation of a witness' testimony during the appellate process, thereby modifying the record to reflect what was actually testified to by the witness. *Quangbengboune v. State*, 125 Nev. 763, 220 P.3d 1122 (2009).
- *Preciado v. State*, 130 Nev. Adv. Op. No. 6, 318 P.3d 176, 178 (2014), bench and chamber conferences are part of the record on appeal.

2. Criminal appellate attorneys must review record for error.

There are 2 main standards of review used in criminal cases: (1) harmful error and (2) plain error. When evaluating a record for plain error, an appellate attorney looks for error not objected to at trial. Therefore, all portions of the trial must be included as the record for plain error review.

- NRS 178.602: Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.
- NRS 178.598: Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
- Nevada's performance standards for appellate defense counsel require her to raise all meritorious issues to include investigating unpreserved claims of error. *See Appellate and Post-Conviction Representation: Standard 3- 2: Identification of Issues on Appeal, Nevada Supreme Court Rule.*

3. Many documents are not filed with the court but are part of the record on appeal.

- **Court exhibits.**

In Clark County, court exhibits are exhibits or documents entered into evidence but not filed in the clerk's office. They are lodged or used at trial or at other hearings but filed in the district court clerk's evidence vault. Court exhibits are not given to the jury.

Court exhibits many include police reports, witness statements, the defendant's interrogation, jury questions, exhibits not admitted into evidence by the court, offers of proof, copies of PowerPoint presentations prepared by experts for their testimony, copies of PowerPoint presentations used by the attorneys for opening statements or closing arguments, jury instructions offered but rejected, all documents pertaining to the jury venire and jury selection, prior judgments of convictions used for habitual criminal proceedings, DVDs, etc.

- **Scaled documents or sealed exhibits**

It is my understanding that documents filed under seal are not file stamped because all filed stamped documents are available to the public.

NRAP 10 (c)

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(c) Correction or Modification of the Record.

If any difference arises about whether the trial court record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record conformed accordingly. Questions as to the form and content of the appellate court record shall be presented to the Supreme Court.

Federal Rules of Appellate Procedure, Rule 10 (e)

(e) Correction or Modification of the Record.

(1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.

(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:

(A) on stipulation of the parties;

(B) by the district court before or after the record has been forwarded; or

(C) by the court of appeals.

(3) All other questions as to the form and content of the record must be presented to the court of appeals.

See *Quanbengboune v. State*, 125 Nev. 763 (2009) where Court relied on Rule 10 (e) of the Federal Rules of Appellate Procedure when deciding how to reconstruct the record when an interpreter misinterpreted a defendant's trial testimony and the mistakes are not discovered until appeal, after the time period for filing a motion for a new trial expired.

Suggested change to NRAP 10 (c):

(c) Correction or Modification of the Record.

(1) If any difference arises about whether the trial court record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record conformed accordingly.

(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:

(A) on stipulation of the parties; or

(B) by the district court before or after the record has been forwarded.

(3) Questions as to the form and content of the appellate court record shall be presented to the Clerk.

NRAP 40: Petition for Rehearing

NRAP 40A: Petition for En Banc Reconsideration

NRAP 40B: Petition for Review by the Supreme Court

The Petitioner bears the burden in all three petitions. Therefore, whenever the Court issues an order directing an Answer then the Petitioner should be given time for filing a Reply. The current rules do not give a time period for filing a Reply.

NRAP 40 (d) Answer; Reply.

No answer to a petition for rehearing or reply to an answer shall be filed unless requested by the court. Unless otherwise ordered by the court, the answer to a petition for rehearing shall be filed within 14 days after entry of the order requesting the answer. A petition for rehearing will ordinarily not be granted in the absence of a request for an answer.

Suggested change for NRAP 40 (d) in red:

No answer to a petition for rehearing or reply to an answer shall be filed unless requested by the court. Unless otherwise ordered by the court: (1) the answer to a petition for rehearing shall be filed within 14 days after entry of the order requesting the answer; and (2) the Reply may be filed within 7 days after the filing of the Answer. A petition for rehearing will ordinarily not be granted in the absence of a request for an answer.

NRAP 40A (c) Answer and Reply.

No answer to a petition for en banc reconsideration or reply to an answer shall be filed unless requested by the court. Unless otherwise ordered by the court, the answer to a petition for en banc reconsideration shall be filed within 14 days after entry of the order requesting the answer. A petition for en banc reconsideration will ordinarily not be granted in the absence of a request for an answer.

Suggested change for NRAP 40A in red:

No answer to a petition for en banc reconsideration or reply to an answer shall be filed unless requested by the court. Unless otherwise ordered by the court: (1) the answer to a petition for en banc reconsideration shall be filed within 14 days after entry of the order requesting the answer; and (2) the Reply may be filed within 7 days after the filing of the Answer. A petition for en banc reconsideration will ordinarily not be granted in the absence of a request for an answer.

NRAP 40B (e) Response to Petition – suggested changes in red.

No response to a petition for review or a Reply shall be filed unless requested by the Supreme Court.

Nevada Rule of Appellate Procedure Appendix of Forms

I would suggest revamping some of the forms at the back of the rules so that anyone who has never handled an appeal before is able to simply follow the format.

I can provide the Court with some suggested changes if the Court is interested.

DATED this 1st day of June, 2021.

By Sharon Dickinson

SHARON G. DICKINSON, # 3710