

IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA POLICY RESEARCH
INSTITUTE, INC.,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
JESSICA K. PETERSON, DISTRICT
JUDGE,

Respondents,

and

BRITTNEY MILLER, AN INDIVIDUAL
ENGAGING IN DUAL EMPLOYMENT
WITH THE NEVADA STATE
ASSEMBLY AND CLARK COUNTY
SCHOOL DISTRICT; DINA NEAL, AN
INDIVIDUAL ENGAGING IN DUAL
EMPLOYMENT WITH THE NEVADA
STATE SENATE AND NEVADA STATE
COLLEGE AND COLLEGE OF
SOUTHERN NEVADA; JAMES
OHRENSCHALL, AN INDIVIDUAL
ENGAGING IN DUAL EMPLOYMENT
WITH THE NEVADA STATE SENATE
AND CLARK COUNTY PUBLIC
DEFENDER; AND SELENA TORRES,
AN INDIVIDUAL ENGAGING IN DUAL
EMPLOYMENT WITH THE NEVADA
STATE ASSEMBLY AND A CLARK
COUNTY PUBLIC CHARTER SCHOOL;
AND THE LEGISLATURE OF THE
STATE OF NEVADA,

Real Parties in Interest.

No. 86459

FILED

MAY 23 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *Elizabeth A. Brown*
DEPUTY CLERK

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This emergency petition for a writ of mandamus challenges a district court order denying petitioner's motion for completion of the district court record. In particular, petitioner seeks to supplement or complete the district court record with the proposed findings of fact and conclusions of law (FFCL) submitted by the parties, as directed by the district court, to chambers for the court's consideration. Real parties in interest have filed an answer opposing the requested writ.

Petitioner asserts that, because the proposed FFCL were submitted directly to chambers, they were not filed and did not become part of the district court record, as described in NRAP 10(a) ("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."). Petitioner sought below to have the proposed FFCL included in the district court record for purposes of appeal, explaining that it will argue on appeal that the proposed FFCL show that the district court disregarded the matters as presented by the parties and failed to act as a neutral arbiter. See NRAP 10(b)(1) (describing the record on appeal as comprised of relevant "portions of the trial court record"); *Carson Ready Mix, Inc. v. First Nat. Bank of Nev.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) ("We cannot consider matters not properly appearing in the record on appeal."). According to petitioner, the proposed FFCL should be included in the record under NRAP 10(c), which acknowledges that the record should disclose "what occurred in the district court."

The district court denied relief, however, concluding that the proposed FFCL were "merely informal suggestions" prepared for the court's convenience, as the court ultimately prepared its own findings and

conclusions when drafting its decision, and that the proposed FFCL were not necessary to support petitioner's arguments regarding party presentation because the parties' moving papers are in the record. For similar reasons, in their answer to the petition, real parties in interest argue that the proposed FFCL are not properly included in the record or necessary to appellate argument. Real parties in interest cite to a federal district court case summarily stating that proposed findings are mere informal suggestions and not part of the record on appeal, *see Am. Elastics, Inc. v. United States*, 84 F. Supp. 198, 199 (S.D.N.Y. 1949), and to 9C Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2583 (3d ed. 2008), which recognizes "the usual rule" that only findings and conclusions signed and filed as part of the record on appeal will be considered by an appellate court but also explains that courts do in fact often take note of proposed findings and indicates that such proposed findings truly are part of the district court proceedings and thus the appellate court record. *But see* 16A Charles Alan Wright, Arthur R. Miller & Catherine T. Struve, *Federal Practice & Procedure* § 3956.1 (5th ed. 2019) ("Conversely, papers sent to the district judge's chambers but not filed with the district clerk may be viewed as outside the record.").

Here, the parties submitted their proposed FFCL to chambers at the court's request, and the court apparently considered those proposed FFCL before drafting its dispositional order. We conclude that the parties' proposed FFCL thus reflect part of the district court proceedings and must be included in the record so that the "record truly discloses what occurred in the district court." NRAP 10(c).

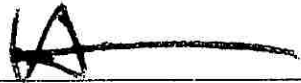
Including the proposed FFCL in the record accords with both Nevada law and practices elsewhere. In *Byford v. State*, we recognized that a judge's ethical duty to accord to every party a right to be heard requires

the judge to ensure that parties are informed of and given an opportunity to respond to another party's proposed findings and conclusions. 123 Nev. 67, 69, 156 P.3d 691, 692 (2007) ("Such review is important to ensure that the proposed order drafted by the prevailing party accurately reflects the district court's findings."). While the drafter's comment on which the *Byford* analysis was based did not survive revisions to the code, the underlying rule remains: NCJC Rule 2.6(A) requires a judge to "accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." Similarly, including in the record proposed FFCL that were considered by the court promotes a party's right to be heard. See also *Townsend v. Columbia Operations*, 667 F.2d 844, 849 (9th Cir. 1982) (documents submitted at the request of the district judge, physically present at argument, referred to by the parties, and providing the basis for the district court's opinion reflected what actually occurred in the district court and are properly part of the record on appeal even though they were not filed); *United States v. Burke*, 781 F.2d 1234, 1246 (7th Cir. 1985) ("Appellate judges are entitled to see all the materials that the district judge considered."). Further, petitioner seeks to include the FFCL in the record not to argue that they represent the district court's actions but to support a procedural argument concerning the manner in which the district court decided the case. Petitioner thus having stated a proper purpose for including the proposed FFCL in the district court record, the district court should have granted the motion to complete the record.

Accordingly, under the circumstances, where the proceedings in petitioner's appeal are subject to a legislative continuance but petitioner's opening brief is due immediately upon resumption of the appellate

proceedings,¹ we conclude that writ relief is warranted here. See NRS 34.160; *Dekker/Perich/Sabatini Ltd. v. Eighth Judicial Dist. Court*, 137 Nev. 525, 527, 495 P.3d 519, 522 (2021) (explaining that mandamus may issue to control a manifest abuse of or arbitrary or capricious exercise of discretion when no adequate legal remedy exists). Therefore, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to grant petitioner's motion seeking to include in the district court record the parties' proposed FFCL and to conform the record accordingly.

 _____, J.

Herndon

 _____, J.
Lee

 _____, J.
Parraguirre

cc: Hon. Jessica K. Peterson, District Judge
Fox Rothschild, LLP/Las Vegas
Berna L. Rhodes-Ford
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP/Las Vegas
Wiley Petersen
Legislative Counsel Bureau Legal Division
Eighth District Court Clerk

¹We note that the district court denied a legislative continuance for the discrete record issue addressed here.