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December 4th, 2015

FILED

DEC 04 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT

BY S. Young
DEPUTY CLERK

Nevada Supreme Court
Supreme Court Clerk's Office
c/o Tracie K. Lindeman
201 South Carson Street
Carson City, Nevada 89701

Re: ADKT 510 – Comments on Proposed Amendments to
NRAP 3C

Chief Justice Hardesty and Justices,

Nevada Attorneys for Criminal Justice is an organization of criminal defense attorneys and represents over 150 attorneys who practice in criminal defense in the state of Nevada, including practitioners from both Northern and Southern Nevada and the rural counties in Nevada. Since most appeals in criminal cases are taken by the defendant, NACJ has a strong interest in the Fast Track provisions of the Rules of Appellate Procedure.

NACJ makes the following proposals: 1) the provision of NRAP 3C should be repealed entirely. 2) if NRAP 3C is not repealed—a) exemptions should not be limited to appeals from jury verdicts or orders in PCR proceedings; b) provisions should be made which will permit the withdrawal of counsel prior to the filing of the Fast Track Statement; c) the current practice of ordering full briefing when requested should be codified.

1. NRAP 3C Should be Repealed

Members of the court have expressed concerns regarding both the quality of the Fast Track Statements submitted to the court and the fairness to counsel of prohibiting withdrawal of counsel (whether retained or appointed) prior to the filing of the Fast Track Statement. These concerns will not be alleviated if only tried and PCR cases in A and B Felonies are exempted and if lower level felonies are not exempted at all. In fact, the concerns are likely to be exacerbated since many "track" attorneys (most of whom are not appellate practitioners) will be handling the cases which are not exempted.

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Important issues which should be fully briefed arise in many (and possibly more often in) lower level felonies or misdemeanors: e.g., issues involving search and seizure, voluntariness of confessions, withholding of evidence and disputes regarding presentence investigation issues.

It is unclear whether the number of lower level cases which will still be subject to Fast Track treatment is high enough to provide any meaningful reduction in workload for the court. Since the sentences are shorter and more likely to be the result of negotiated pleas, it is likely that the number of appeals which would fall in this category is quite small.

Finally, during the discussions leading up to the creation of the Appellate Court, defense practitioners were assured by members of the court that the Fast Track program would no longer be necessary based on the reduction in caseload and that it would be repealed. This court has often acknowledged that appellate litigation requires specialized skills. No appeal in a criminal case should be decided on less than full briefing by trial counsel who has been forced to write the Statement even if she is not compensated

2. If the Fast Track Rule is not Repealed:

a) Exemption from Nrap 3C Should Not Be Limited to Jury Verdict and PCR Cases

The proposed amendment broadens the application of the Fast Track Rule to cover cases which were disposed of short of trial or which resulted in a guilty plea but involve defects in the rendering of the plea or sentencing issues. For instance, an appeal by the State of a grant of a Motion to Dismiss would be subject to the Fast Track rule even in an A or B felony case. Similarly, an appeal from the imposition of a habitual offender sentence which resulted from a plea would be subject to Fast Track treatment.

b) Trial Counsel Should be Permitted to Withdraw Prior to the Filing of the Fast Track Statement

Under NRAP 3C(b)(2), trial counsel is required to file the Notice of Appeal, Fast Track Statement and Request for Rough Draft Transcript Request before seeking to withdraw in the appellate court, and places the burden on trial counsel to "adjust their public or private contracts for compensation to accommodate the additional duties imposed by this Rule." This is an unfair burden to both appointed counsel and to the private criminal client. Appointed counsel are simply not in a position to demand additional compensation from government contracts. The private client, if able to retain appellate counsel will end up paying trial counsel for the work required for the Fast Track statement and separate appellate counsel for the same work.

As this court knows, identification of the issues and presentation of those issues in an appellate posture are critical to the court's understanding of the appellate case. Accordingly, care and skill must be applied to the Fast Track Statement to avoid an erroneous disposition. The drafting of the Fast Track Statement should not be left in the care of an attorney who may not possess appellate skills and who is forced to do the work whether or not she is compensated.

Trial counsel is not always skilled in identifying and framing issues for appellate consideration. Over the past 20 years, most civil litigation law firms have recognized the necessity of creating appellate specialists due to the difference in the skills required for decent appellate practice. Most institutional defender offices have specialized units to conduct appellate litigation. Under the current rule, the Fast Track Statement may decide the case (even in non-tried A and B Felonies and all lower level convictions under the proposed amendment) when it is written by an attorney who may have no appellate competence and who will likely not be compensated for the work on the Statement.

NACJ suggests the following amendments to NRAP 3C(b) if NRAP 3C is not repealed in its entirety:

(1) **Definition.** For purposes of this Rule, "trial counsel" means the ~~attorney who represented the defendant or post-conviction petitioner in district court in the underlying proceedings that are the subject of the appeal~~ of record for the party seeking to appeal, at the time of sentencing or at the time that the order which is the subject of the appeal, is entered.

(2) **Responsibilities.** Trial counsel shall file the notice of appeal ~~rough draft transcript request form and fast track statement, and consult with appellate counsel for the case regarding the appellate issues that are raised.~~ Trial counsel shall arrange their calendars and adjust their public or private contracts for compensation to accommodate the additional duties imposed by this Rule.¹

(3) **Withdrawal.** ~~To withdraw from representation during the appeal, trial counsel shall file with the Clerk a motion to withdraw from representation. The motion shall be considered only after trial counsel has filed the notice of appeal and rough draft transcript request and fast track statement. The granting of such motions shall be conditioned upon trial counsel's full cooperation with appellate counsel during appeal.~~

¹This amendment is offered to reduce the risk that the Notice of Appeal will not be filed due to the transition from trial counsel to appellate counsel.

c) Current Practice Regarding Full Briefing Should be Codified

NACJ has been advised that all requests to opt out of the Fast Track Program will be granted. This practice should be codified so that practitioners are aware of the policy. Accordingly, the following amendments to NRAP 3C(k)(2) are recommended:

(2) ~~Motion for Full Briefing Request to Opt Out of Fast Track Program~~

(A) A party may seek leave of the court to remove an appeal from the fast track program and direct full briefing. The motion may not be filed solely for the purposes of delay. It may be filed in addition to or in lieu of the fast track pleading.

~~(B) The motion must identify specific reasons why the appeal is not appropriate for resolution in the fast track program. Such reasons may include, but are not limited to, the following circumstances:~~

~~(i) The case raises one or more issues that involve substantial precedential, constitutional, or public policy questions; and/or~~

~~(ii) The case is legally or factually complex.~~

~~(C) If the issues or facts are numerous but not complex, full briefing will not be granted but an excess page motion may be entertained.~~

(B) The Court will grant all Motions to Opt Out filed in compliance with this Rule and schedule full briefing.

(C) No opposition may be filed, unless ordered by the court.

(D) If counsel has moved to Opt out of the Fast Track program but later determines that full briefing is not necessary, counsel may file a Motion to Opt back into the Fast Track program by filing a Motion and the Fast Track Statement simultaneously. The motion must be filed by the due date of the Opening Brief established in the briefing schedule.