

# NACJ

Nevada Attorneys for Criminal Justice

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Feb. 29, 2024

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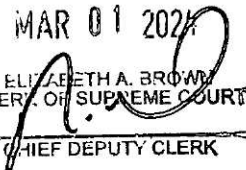
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Dear Justices of the Nevada Supreme Court,

Nevada Attorneys for Criminal Justice (NACJ) is a statewide organization dedicated to criminal defense. As such, any changes to the Rules of Appellate Procedure have a direct effect on the people we represent. A dedicated group of defenders from our organization has reviewed the changes proposed by ADKT 0580. Many of the changes are both necessary and better than the rule they will replace. But there are some changes that give us cause for concern, specifically those that would allow for the citation of unpublished opinions regardless of the publication date and that would change the "mailbox rule" for incarcerated persons. The following comment addresses these concerns.

NRAP 36 (c) (2) and (3): Failure to include a starting date related to when unpublished orders may be cited.

The changes to NRAP 36(c)(2) and (3) proposed by ADKT 0508 would allow all unpublished orders to be cited for persuasive value, no matter when the dispositions were issued. Thus, every unpublished order issued

since this Court was established in 1864 would become citable as persuasive authority.

Historically, unpublished orders or dispositions issued between 1864 and 2016 were not citable. SCR 123. The issuing court was well aware of this fact; so unpublished opinions' primary purpose was specifically to dispose of the case without setting precedent for the lower courts. This changed in 2015 when this Court repealed SCR 123 and amended NRAP 36. The change specifically limited citation to unpublished orders and cases decided on or after January 1, 2016—the new rules went into effect via ADKT 0504. This made sense because the prior unpublished dispositions were written with the understanding and intent that they would never be cited.

Coinciding with the creation of the Nevada Court of Appeals in 2017, this Court issued ADKT 0504 and again amended NRAP 36. In adopting ADKT 0504, the majority of the Court recognized the Nevada Court of Appeals would predominately focus on “error correction cases that provide little persuasive value and are more effectively resolved in non-citable unpublished orders.” Accordingly, NRAP 36(c)(2) and (3) were amended to prohibit citing unpublished Court of Appeals cases.

The proposed amendments to NRAP 36(c)(2) and (3) reverse course, going backward rather than forward. The proposed amendments allow parties to cite all unpublished cases in both Courts from 1864 to the present, something never intended by authors of the opinions.

NACJ asks the Court to limit citation to unpublished cases, as it has in the past, by establishing a start date. When the Court repealed SCR 123 and changed the rule on unpublished decisions, it set a start date so that the authors of the opinions, as well as the members of the bar, were on notice as to the purpose of the work.

NACJ urges this court to maintain the current rule allowing citation to unpublished Nevada Supreme Court opinions decided after January 1, 2016, as persuasive value because they were written with the understanding that such would be the case.

With regard to unpublished orders from the Nevada Court of Appeals, NACJ urges the Court to adopt a similar rule to that enacted in ADKT 0504, meaning limiting the citation of unpublished orders to dispositions issued after the date the currently proposed changes become effective.

NRAP 25: Changes to “Mailbox rule” as it relates to incarcerated persons

Rule 25 contains two provisions related to paper filings that pose a concern for unrepresented litigants, especially incarcerated people.

First, Rule 25(a)(2)(A) applies the “mailbox rule” to filings, which NACJ broadly supports. NACJ asks that the “mailbox rule” as identified in NRAP 4(d) be listed, quoted, or directly referenced in the amendments proposed to NRAP 25(a)(2)(A) to establish clarity and uniformity in the rules and acknowledge that the prison system interposes additional barriers between a litigant and the actual mail system.

NRAP 4(d) states:

Under this Rule must not be deemed a “second or successive petition” under NRS 34.810(2).

(d) Appeal by an Inmate Confined in an Institution. If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is delivered to a prison official for mailing on or before the last day for filing. If the institution has a notice-of-appeal log or another system designed for legal mail, the inmate must use that log or system to receive the benefit of this Rule.

(e) Mistaken Filing in the Supreme Court. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the Supreme Court rather than the district court, the clerk of the Supreme Court must note on the notice the date when it was received and send it to the district court clerk. The notice is then considered filed in the district court on the date so noted.

(f) Expediting Criminal Appeals. The court may, with or without motion by the parties, by a majority of its members, make orders to

expedite the handling of criminal appeals, including without limitation the following:

Second, Rule 25(a)(2)(B)(ii) says that paper that is electronically filed is only allowed by an unrepresented person pursuant to court order. This requirement is impractical for the incarcerated. Under the proposed rule, if electronic filing is or becomes available for incarcerated persons, it is unlikely the incarcerated will be able to obtain a court order in a timely fashion in order to use the system. Specifically, in real-world practical terms, prisoners are frequently denied counsel on pro se post-conviction petitions at the district court level. Less frequently, problems arise with the direct appeal. In both situations, the incarcerated person's only remedy is to file their own documents and notice of appeal to seek relief from this Court. Requiring a court order for all paper filings that are filed electronically presents a barrier to some of the most vulnerable of the population---the incarcerated. These people deserve equal access to the courts. NACJ respectfully asks this court to consider our proposed revisions to the draft of ADKT 580 so as to ensure clarity for practitioners and fair access to the judicial process for incarcerated.

Very truly yours,

*/s/ Scott Coffee*

Scott Coffee

Nevada Attorneys for Criminal Justice Liaison

Re: Proposed Changes to NRAP Via AKDT 0580

*/s/ William C. Hart, III*

William C. Hart, III

NACJ President

*/s/ Jim Hoffman*

Jim Hoffman

NACJ Committee Member

Scott Coffee, NACJ and/or its representative would also appreciate an opportunity to speak at the public hearing scheduled for March 7, 2024.