KNOW YOUR RIGHTS:
PRISONERS

IMPORTANT NOTE:

This information was compiled by the ACLU of Nevada for informational purposes only and does not constitute legal advice. The law is always evolving. If you have access to a prison law library, it is a good idea to confirm that the cases and statutes cited below are still good law. The date at the bottom of the page reflects when this document was last updated. While we cannot answer legal questions, the ACLU of Nevada does consider possible cases that involve widespread, clear constitutional violations.

Be advised that filing a complaint does not guarantee that the ACLU of Nevada will provide legal assistance. There may be deadlines that affect your lawsuit or grievance. Unless and until the ACLU agrees to take your case, you are solely responsible for any and all statutes of limitations or other deadlines which might apply to your specific situation.

RESTRICTIONS ON VISITATION

1. Can prisoners be denied visitation rights?

Visitation restrictions do not violate the Constitution unless they have no reasonable relationship to a legitimate penological goal (a goal related to prison management and/or criminal rehabilitation).[1]

NDOC views visitation as a privilege for inmates that can be suspended. If visitation privileges are suspended, inmates and visitors are to be given notice and the reason for suspension.[2]

2. Restrictions on time, place, and manner of visit

Courts generally uphold restrictions on the time, place, and manner of visiting. NDOC provides that the warden/designee of each facility will regulate the number of visitors, visiting hours, and termination of visits based on security, space, and institutional emergency considerations.

3. Restrictions on who may visit

Courts have upheld rules restricting visitors. NDOC requires that visitors obtain prior approval before showing up at the facility. Anyone who arrives without prior approval will not be allowed to visit unless the warden/designee grants an exception. In certain circumstances, with certain categories of visitors, prior written approval from the warden/designee or director may be needed.

4. Restrictions on legal visits

All inmates have a right to legal visits, but the Sixth Amendment does not require full and unfettered contact between an inmate and his or her attorney in all circumstances.[3] NDOC permits attorneys to visit in reasonable numbers during normal visiting hours, consistent with the security needs of the institution. Exceptions must be approved by the warden/designee.

New laws after September 11th have limited the privilege of confidential communications with an attorney. If the Attorney General believes there is "reasonable suspicion" that a person in custody "may" use communications with attorneys or their agents "to further or facilitate acts of terrorism," the Justice Department "shall . . . provide appropriate procedures for the monitoring or review of communications between that inmate and attorneys or attorneys' agents who are traditionally covered by the attorney-client privilege." 28 C.F.R. § 501.3(d). In such cases, the Justice Department must provide written notice to the inmate and attorneys or get court authorization to monitor communications. *Id.*

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[1] *See Overton v. Bazzetta*, 539 U.S. 126, 141-42 (2003); *Turner v. Safley*, 482 U.S. 78, 89 (1987).

[2] NDOC, Administrative Regulation No. 719, Visitation (1992).

[3] *See Casey v. Lewis*, 4 F.3d 1516, 1523 (9th Cir. 1993) (prohibiting inmates from contact visitation with attorneys was rationally related to legitimate penological interests and did not violate right of meaningful access to courts).

MAIL PRIVILEGES

1. Do prisoners have a right to send and receive mail?

The Supreme Court has held that the First Amendment entitles prisoners to receive and send mail, subject only to the institution's right to censor letters or withhold delivery to protect institutional security, and if accompanied by appropriate procedural safeguards.[4]

Restrictions on **mail received by prisoners** must be rationally related to a legitimate penological interest.[5] Restrictions on prisoners' **outgoing correspondence** must be "no greater than is necessary " to protect an "important or substantial" government interest.[6]

The Constitution permits incoming non-privileged mail to be opened outside the prisoner's presence. Prison officials can read non-privileged mail for security or for other correctional purposes without probable cause and without a warrant.

NDOC requires that all **incoming general correspondence** be opened for the inspection of contraband, unauthorized items, and scanned by mailroom staff.[7] The warden/designee may prohibit **outgoing mail** under certain circumstances. If a particular correspondence has been prohibited, the inmate shall receive a written notice.

"Privileged" mail, including legal mail, is entitled to greater confidentiality and freedom from censorship. NDOC Administrative Regulation 750 provides a list of "privileged correspondence." These mailings can be can be inspected for contraband, but such inspection must occur in the presence of the inmate.[8]

NDOC allows incoming and outgoing legal or privileged mail to be censored in some circumstances. If censorship occurs, the sender and the inmate need to be notified of the confiscation. The inmate can then appeal the censorship through the grievance process.

2. What can a prisoner do if privileged mail is opened outside his/her presence?

A court will not necessarily rule for the prisoner whenever privileged mail is opened outside of the prisoner's presence. A prisoner will have a greater chance of winning a lawsuit if he or she shows actual harm from the opening of the letter outside the prisoner's presence. A prisoner also has a greater chance of winning if he or she can establish that the prison has a policy of opening privileged mail outside the recipient's presence. To establish that there is a policy, prisoners should file and retain copies of grievances each time the error occurs.

DISCIPLINARY SANCTIONS AND PUNISHMENT

1. How can an inmate challenge the nature of the punishment he or she received?

Courts give deference to prison officials' decisions about disciplinary punishment. Punishments that fulfill legitimate penological interests are generally upheld. The Supreme Court has provided four factors to decide whether prison regulations violate the Constitution.[9] Although courts would find most punishments with legitimate penological interests constitutional, they have found punishments that involve physical abuse or degrading conditions of punitive confinement unconstitutional.

NDOC's inmate disciplinary manual states that disciplinary sanctions imposed may not include: medication, religious items, basic cell furnishings, basic personal hygiene items, food (except as authorized by Administrative

[4] *Hudson v. Palmer*, 468 U.S. 517, 547 (1984).
[5] *Turner*, 482 U.S. at 89-91.
[6] *Procunier v. Martinez*, 416 U.S. 396, 413-14 (1974), *overruled in part on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989).
[7] NDOC, Administrative Regulation No. 750, Inmate General Correspondence and Mail (2003).
[8] *McCabe v. Wolff*, 995 F. 2d 232 (9th Cir. 1993) (unpublished table decision).

[9] These factors are: (1) whether the regulation has a "valid, rational connection" to a legitimate governmental interest, (2) whether alternative means are open to inmates to exercise the asserted right, (3) what impact an accommodation of the right would have on guards, inmates, and prison resources, and (4) whether there are "ready alternatives" to the regulation. *Turner*, 482 U.S. at 89-91.

Regulation 732, Alternative Diet), bedding and state issued clothing, access to the courts, or any item that is a constitutional entitlement.[10]

2. How can an inmate challenge the disciplinary sanction itself?

Prisoners may challenge disciplinary sanctions imposed on them under the Due Process Clause of the Fourteenth Amendment. The Supreme Court has said that inmates are **not** entitled to due process procedures for disciplinary punishments unless (1) there is a state-created liberty interest in freedom from such punishment, and (2) the punishment imposes atypical and significant hardship.[11]

Once a prisoner asserts that the discipline imposed is significant and atypical, he or she must still establish that the procedural safeguards in place were inadequate. Courts use three factors to make this determination: (1) the private interests involved, (2) the risk of an erroneous deprivation of such interest and the probable value of additional or substitute procedural safeguards, and (3) the government's interest, including burdens that different or additional procedures would entail.[12]

FREEDOM OF RELIGION

1. When is religious exercise protected?

Generally, beliefs that are "religious" and "sincerely held" are protected by the Free Exercise Clause of the First Amendment to the United States Constitution.

Courts disagree about what qualifies as a religion or a religious belief. In deciding whether something is a religion, courts have asked whether the belief system addresses "fundamental and ultimate questions," is "comprehensive in nature," and presents "certain formal and external signs."[13]

In addition to proving that a belief system is a religion, the inmate must show that the beliefs are sincerely held. In deciding whether a belief is sincere, courts sometimes look at how long a person has believed something and how consistently he or she has followed those beliefs.

2. What restrictions can be placed on an inmate's religious rights?

A prisoner's right to exercise his or her religion is balanced against the government's interests. The government may not impose a substantial burden on the religious exercise of prisoners unless that burden (1) is in furtherance of a **compelling governmental interest**, and (2) is the **least restrictive means** of furthering that interest. NDOC stipulates that any limitation or prohibition against religious practice must be consistent with these two requirements.[14]

Courts have often found that inmates have a right to avoid eating foods that are forbidden by their religious beliefs. Where reasonable accommodations by the prison can be made to provide religious meals, courts have ordered such diets be made available to inmates. Courts have also required accommodations for special religious observances related to meals.

Courts have protected prisoners from regulations that interfere with their ability to attend religious services or engage in prayer according to their religion. Courts have also found that restrictions requiring prisoners to violate the Sabbath or other religious duties violate the First Amendment.

Courts have often concluded that prison officials can ban religious objects if they could make a plausible claim that the objects could pose security problems. However, officials cannot ban some religious objects and not others without any justification. NDOC provides a list of recognized faith groups as well as the religious objects members of those groups may have. Courts have held that restrictions on a prisoner's right to religious literature violate the First Amendment.

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[10] NDOC, Administrative Regulation No. 707.1, Inmate Disciplinary Manual (2008).
[11] *Sandin v. Conner*, 515 U.S. 472, 483-84 (1995).
[12] *Wilkinson v. Austin*, 545 U.S. 209, 224-25 (2005).
[13] *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3rd Cir. 1981); *see also Alvarado v. City of San Jose*, 94 F.3d 1223, 1229 (9th Cir. 1996) (court found no cognizable religious interest at issue in case after applying the test from *Africa*).
[14] NDOC, Administrative Regulation No. 810, Religious Faith Group Activities and Programs (2008).

Prisoners have rarely been successful in challenging grooming and dress regulations. Courts have generally upheld restrictions on haircuts, headgear, and other religious attire. However, a prison rule about grooming may be vulnerable to attack if it is not enforced equally against all religions or if the prison provides no factual justification for it. NDOC gives inmates freedom in personal grooming "as long as their appearance does not conflict with the institution's requirements for safety, security, identification and hygiene."

THE PRISON LITIGATION REFORM ACT ("PLRA")

The PLRA makes it harder for prisoners to file lawsuits in federal court. The following parts of the PLRA are the most important for inmates.

1. Exhaustion of administrative remedies (42 U.S.C. § 1997e(a))

Exhausting remedies for the PLRA requires filing a grievance and pursuing all available administrative appeals. Some courts have held that if a prisoner does not file a grievance because he or she is unable to obtain grievance forms, no administrative remedy is "available" and the prisoner may file in court.

NDOC stipulates time limits for officials to respond to grievances.[15] Inmates should proceed onto the next appeal level if they do not receive a response within the time limit instead of claiming exhaustion. If an inmate does not receive a response at the final appeal level, and the time for response has passed, the prisoner has exhausted.

Courts differ on when failure to exhaust might be excused but the safest course is always: with respect to **each claim** and **each defendant** an inmate wants to bring in the eventual lawsuit, he or she should file a grievance and appeal it through all available levels.

If the court finds that a prisoner has not exhausted, the case is dismissed without prejudice. This means that the lawsuit may be filed again once the prisoner has exhausted, as long as the statute of limitations has not run. It is important to note that the statute of limitations can be tolled while a prisoner is in the process of exhausting. If an inmate has exhausted some claims, but not all, the court will dismiss only the unexhausted claims.

There is not a great deal of case law yet addressing whether a prisoner who misses a deadline in the grievance process forever loses his or her claim. If an inmate is in this situation, he or she should appeal though all the levels of the grievance system and explain the failure to file on time. NDOC sets time limits for grievance procedures. If an inmate fails to submit a grievance within the time limit, the claim is abandoned.

There are very few exceptions to the exhaustion requirement. Other means of notifying prison officials of a complaint, such as speaking to staff or writing to the warden, do **not** constitute exhaustion. Inmates **must** use the grievance system. The exhaustion requirement does not apply to cases filed before the effective date of PLRA, which is April 26, 1996.

2. Filing fees (28 U.S.C. § 1915(b))

All prisoners must pay court filing fees **in full**. If an inmate does not have the money up front, he or she can pay the filing fee over time through monthly installments from a prison commissary account, but the filing fee will not be waived. There is a statutory formula for setting up installment payments in the case of indigent prisoners.

3. Three strikes provision (29 U.S.C. § 1915(g))

Each lawsuit or appeal an inmate files that is dismissed because it is deemed frivolous, malicious, or does not state a proper claim counts as a "strike." After an inmate gets three strikes, he or she cannot file another lawsuit unless the entire court filing fee is paid **up front**. The only exception to this rule is if the inmate is at risk of suffering serious physical injury in the immediate future. The "imminent danger" exception applies at the time the prisoner attempts to file the new lawsuit, not at the time that the incident that gave rise to the lawsuit occurred.

4. Physical injury requirement (42 U.S.C. § 1997e(e))

An inmate cannot file a lawsuit for mental or emotional injury unless he or she can also show physical injury. The requirement of physical injury only applies to money damages; it does not apply to claims for injunctive and declaratory relief. Courts differ over what constitutes sufficient harm to qualify as a physical injury.

[15] NDOC, Administrative Regulation 740, Inmate Grievance Procedure (2004).