Supreme Court of State of Washington No. 90934-2

No. 44346-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TORRE J. WOODS, individually,

Appellant,

v.

HO SPORTS COMPANY, INC., a for-profit Washington Corporation,

Respondent,
And

MICHAEL E. WOODS, individually,

Respondent.

MICHAEL WOODS' RESPONSE TO TORRE WOODS' MOTION TO STRIKE ANSWER TO PETITION FOR REVIEW AS UNTIMELY

Ben F. Barcus, WSBA# 15576
ben@benbarcus.com
Paul A. Lindenmuth, WSBA#15817
paul@benbarcus.com
The Law Offices of Ben F. Barcus
& Associates, PLLC
4303 Ruston Way
Tacoma, WA 98402
Phone: 253-752-4444
Fax: 253-752-1035

I. IDENTITY OF RESPONDING PARTY

Respondent Michael Wood asks for the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT

Michael E. Woods (now deceased), hereafter Michael, (for clarity), asks that the Court deny Torre Woods' Motion to Strike Michael Woods' Answer to Petition for Review as untimely. As alternative relief, Michael asks the Court to provide him leave to file an Amended Answer to Petition for Review. Said amended Answer to Petition for Review is being filed contemporaneous with this Response, along with an errata showing the very minor changes between it and the "Answer to Petition to Review and Cross-Petition to Review" which is the subject of Torrey's motion.[1]

III. FACTS RELEVANT TO MOTION

Michael concurs with Torre's Statement of Facts set forth within its "Motion to Strike." Torre's Statement of Facts accurately set forth the procedural history of this case which, for the purpose of this Motion, is a dispositive consideration.

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[1] As Torre and Michael share the same last name, in order to avoid confusion and add clarity, first names are being used within this document. Obviously, no disrespect is intended. Additionally it is also noted that, as referenced in his Answer and Cross-Petition, Michael Woods recently passed away. Once appropriate paperwork has been filed within the Pierce County Superior Court, an Estate will be appropriately substituted as a party defendant in this action.

Additionally, it is pointed out that under the terms of RAP 13.4(d), that Michael had, (and has), 30 days from October 15, 2014, to file a "Answer" to HO Sports Petition for Review. Michael's "Answer" was in filed and served well within that time frame. Of course, the same would be true with respect to Michael's Amended Answer, which has excluded the "Cross-Petition" language which Torre's counsel has apparently taken offense.

As discussed below, Michael does not entirely agree with the position taken by Torre regarding appropriate timing for the filing of a "Cross-Petition Review." However, to the extent that disagreement may exist with respect to when a party can file a "Cross-Petition for Review" the resolution of such a controversy is at most academic. This is because, as a matter of content, Michael could file the exact same document, labeled as an "Answer to Petition for Review," and it would have the same practical effect.

In other words, the position taken by Torre absurdly places form over substance, and is inconsistent with modern rules practices. As stated long ago by this Court in *Curtis Lumber Co. v. Sortor*, 83 Wash. 2d. 764, 767, 522 P.2d 822 (1974), "the basic purpose of the rules of civil procedure, ' . . . is to eliminate or at least to minimize technical miscarriage of justice inherent in archaic procedural concepts once

characterized by Vanderbilt as "the sporting theory of justice." "Such disdain for placing "form over substance," also animate our rules of appellate procedure. *See* RAP 1.2(a). RAP 1.2(a) under the heading of "interpretation" provides:

> *These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases in issue will not be determined on the basis of compliance or non-compliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in Rule 18.8(b).*

As shown below, the "Motion to Strike" filed by Torre is somewhat pointless. This is because, even if we assume arguendo that Michael's "Answer and Cross-Petition for Review" is untimely as a "Cross-Petition for Review," it is still a timely filed "Answer," under the terms of RAP 13.4(d). As Michael clearly is entitled to file a timely "Answer," raising issues not raised in the initial Petition, Torre's argument may be somewhat interesting on an academic level; they are not on a practical level.

Michael does not necessarily agree with the basic premise of Torre's position that Michael's "Cross-Petition for Review" necessarily would be untimely upon proper application of the Rules of Appellate Procedure.

IV. ARGUMENT

A. It Is Implied By The Rules Of Appellate Procedure That A Party Has A Reasonable Amount Of Time To File A "Cross-Petition For Review" After The Filing Of An Initial Petition For Review.

A search of the terms of "cross-petition for review," within the Westlaw database for Washington, results in a wide variety of "hits." Thus, it appears that as a matter of relatively wide spread practice, there is recognition that a party who is the not the party who files the initial "petition for review" can file a "Cross-Petition For Review." Thus, even though the terms "Cross-Petition For Review" are not anywhere within our Rules of Appellate Procedure.

It is noted that RAP 13.4(a) provides that "the first party to file a petition for review must, at the time the petition is filed, pay the statutory filing fee to the clerk of the court of appeals in which the petition is filed." This Rule pre-supposes that there can be a Petition for Review and subsequent Petitions for Review, filed by other parties, which presumptively can be called "Cross-Petitions for Review."

The Petition for Review, as correctly out by Torre, must be filed within 30 days after the issuance of the Court of Appeals decision or the denial of the motions listed in the Rule. (RAP 13.4 (a).

Here, the first Petition to Review was filed on October 15, 2014, at least a few days "under the wire" of the 30 day deadline. Michael's Cross-Petition was filed on October 23, 2014, a little more than one week later. It is respectfully suggested that no one can reasonably argue that Michael waited ***an unreasonable amount of time prior to making a determination to file a "Cross Petition for Review" following the initiation of Supreme Court review by H. O. Sports.***

The Court can take note that the filing of a notice of appeal or a notice of cross-appeal is an important determination. As it relates to a cross-appeal, a party who otherwise nor might not be motivated to initiate an appeal, nevertheless may make a determination that a cross-appeal is appropriate, once review is initiated, in order to preserve issues and for other practical and strategic reasons. RAP 5.2(f) acknowledges that a determination to file a Notice of Cross-Review is something which, as a matter of minimal due process, is something a party should be provided some time to contemplate.

RAP 5.1(d) provides under the heading "cross review":

> *Cross review means review initiated by a party already a respondent to an appeal or a discretionary review. A party seeking cross review must file a notice of appeal or a notice of a discretionary review within the time allowed under Rule 5.2(f).*

RAP 5.2(f) acknowledges that a determination to file a notice of cross review is something which, as a matter of minimum due process, is afforded an appropriate amount of time for consideration. Under the terms of RAP 5.2(f) a party is afforded 14 days after service of a notice of appeal to file their own notice of appeal for "cross review". [2]

Somewhat curiously, RAP 13 does not provide a similar provision for the filing of a "cross petition for review". Absent such an express provision a party intending to file a "cross review" should be provided a reasonable period of time following the filing of a petition for review to seek cross review.

There is certainly nothing within the terms of RAP 18.8(b) which would preclude such a determination. RAP 18.8(b) under the heading of "restrictions on extension of time" provides:

> *The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file* ***a notice of appeal, a notice of discretionary review, a motion for discretionary review of a decision of the court of appeals, a petition for review, or a motion for reconsideration.*** ***The appellate court will ordinarily hold the desirability and finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section.*** *The motion to extend time is*

[2] RAP 5.1 and RAP 5.2 appear to be directed towards the initiation of an appeal to one of our intermediate appellate courts. However, RAP 5.2(f) does provide a 14 day timeframe to file for a "cross review" after a timely filing of a "notice for discretionary review." As indicated by RAP 13.4(a) an appeal to the Supreme Court of a court of appeals decision, is a form of "discretionary review." Thus, arguably the terms of RAP 5.2(f) and its 14-day window should be applied.

determined by the appellate court to which the untimely notice, motion or petition is directed. (Emphasis added.)

By its express terms, there is nothing within RAP 18.8(b) which even addresses a "petition for cross review".[3] Court rules are interpreted just like statutes and are construed in a manner which best serves their purposes. See *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 809, 947 P.2d 721 (1997). When interpreting a statute, (or court rule), a court should not add words which the "legislature" has not included. See, *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). Here, the drafters of RAP 18.8(b) left out "cross reviews" and/or "petitions for cross review" from the terms of RAP 18.8(b). On the face of the rule, the purpose of the limitations on extending time within RAP 18.8 (b), advance a policy which favor finality of decisions. Because cross review, (notices of appeal), and/or petitions for cross review before the Supreme Court are filed **after the review process has already been invoked by another party, no legislative purposes would be served by limiting the period of time for their filing.**

Given the exclusion of "cross reviews" from the terms of RAP 18.8(b) the terms of RAP 18.8(a), have full application. Thus, the appellate court can set the period of time for the filing of a "petition for cross review" as

[3] Also, for obvious reasons, it does not reference a notice of appeal–cross review as permitted under the terms of RAP 5.1 and RAP 5.2.

is necessary "in order to serve the ends of justice." "Ends of justice" are best served by providing a reasonable period of time in which to file a petition for cross review, after the initiation of review in the Supreme Court.

In other words, no valid purpose would be served by unduly restricting a party's ability to file a cross review petition.

B. Michael Woods Should be Granted Leave To File An Amended Answer to Ho Sports Petition for Review.

That being said, it is noted that given the language of RAP 13.4 and 13.7 such an analysis, at the end of the day, is simply academic. This is because under the terms of RAP 13.4(d) a party, who has not filed the initial petition for review can nevertheless raise "new issues" within its Answer to the petition for review. RAP 13.4(d) provides under the heading of "answer and reply" the following:

> *A party may file an answer to a petition for review.* ***If the party wants to seek review of any issue that is not raised in the petition for review, including any issues that were raised but not decided in the court of appeals, the party must raise those new issues in an answer*** ... (Emphasis added.)

RAP 13.7(b) which applies after review has been accepted in case that the "scope of review" is as follows:

> *If the Supreme Court accepts review of a court of appeals decision, the Supreme Court will review only the questions raised in the motion for discretionary review, ... , or the*

> *petition for review* ***and answer****, unless the Supreme Court orders otherwise upon the granting of the motion or petition. ...* (Emphasis added.)

Given this broad language, Michael within his Answer to Ho Sports' Petition for Review. was and is fully authorized to raise the issues set forth within his "Answer and Cross Petition." See, 3 WAPRAC – RAP 13.4, at page 10 (7th Ed. 2013) (Courtesy copy attached); (See, discussions regarding 2006 Amendment to RAP 13.4). Given the broad scope of RAP 13.4 and 13.7, it is well recognized that a party responding to a petition for review, **does not have to file a cross petition for review, but may raise new issues within their answer.** In *Blaney v. Internat'l Ass'n of Machinists*, 151 Wn.2d 203, 210 n. 3, 87 P.3d 757 (2004), this Court provided:

> *The district also asserts that Ms. Blaney may not argue that the jury instruction was proper because "she did not file a cross petition review or otherwise affirmatively seek relief before the court on that issue. RAP 13.4(d) and 13.7(b) do not require Ms. Blaney to "file a cross petition ... or ... affirmatively seek relief."* ***The rules merely require the issue to be raised. The issue was raised in a lengthy footnote in Ms. Blaney's answer, as well as repeated reference to the erroneous nature of the jury instructions in the district's petition for review.***

Michael was authorized under the rules to raise issues which were before the appellate court, but not addressed within HO Sports' petition for review. He did so within his "Answer," and to the extent that it is

labeled a "cross petition for review" the court can view such terms as being superfluous. Alternatively the court should permit Michael to file an amended Answer which, even as of now, would be timely filed under the terms of RAP 13.4.

V. CONCLUSION

For the reasons stated above, Torre's motion to strike should be denied. Michael should be afforded a reasonable amount of time to file a petition for cross review following Ho Sports' filing of the initial petition. Further, even if we assume arguendo that as a "petition review," Michael's filing was untimely, it nevertheless was a timely "Answer." The Court should accept it as such, or provide Michael with leave to file the amended Answer, which has been filed contemporaneous with this response.

For the reasons stated above Torre's motion should be denied. Under the terms of RAP 13.4 and 13.7 Michael is and was authorized to raise new issues in his Answer. As such, Torre's assertion at page 3 of his motion, that "Michael Woods cannot seek to recast his untimely petition for review as an 'answer' to HO Sports' petition to review" is plainly wrong. This assertion is pure *ipsa dixit,* (because I say so), and unsupported by any citation to authority and/or reasoned argument. Thus the Court should disregard it. See, *Cowiche Canyon Conservancy v. Bosley*, 188 Wn.2d 801, 809, 828 P.2d 549 (1992); *Saunders v. Lloyd's of*

London, 113 Wn.2d 330, 345, 779 P.2d 249 (1989). If the Court is not inclined to disregard, such an assertion is disposed of by the plain terms of RAP 13.4(d), which provides that a party can raise in an "Answer," any issues that were raised but not decided in the Court of Appeals.

Torrre's motion should be denied and/or, alternatively, Michael should be granted leave to file the Amended Answer to Petition for Review contemporaneously filed with this response.

Dated this 5 day of November, 2014.

Paul A. Lindenmuth, WSBA# 15817
Of Attorneys for Respondent
Michael E. Woods

DECLARATION OF SERVICE

I, **MARILYN ZIMMERMAN,** hereby declares under the penalty of perjury under the laws of the State of Washington that the following is true and correct:

That I am over the age of 18 years of age, have personal knowledge of the facts herein, and am competent to testify thereto.

I am a paralegal working for the The Law Offices of Ben F. Barcus & Associates, PLLC.

On the 5th day of November, 2014, a true and correct copy of the MICHAEL WOODS' RESPONSE TO TORRE WODDES' MOTION TO SRIKE ANSWER TO PEITITON FOR REVIEW AS UNTIMELY was sent for delivery as indicated to the following:

Original filed via legal messenger (original and one copy) to:
Court of Appeals, Division II
Clerk's Office
950 Broadway, Suite 300
Tacoma, WA 98402-4427
coa2filings@courts.wa.gov

Via email and U.S. Mail to the following:
John R. Connelly, Jr.
Nathan Roberts
Connelly Law Offices
2301 N. 30th St.
Tacoma, WA 98403-3322
Email addresses:
jconnelly@connelly-law.com
nroberts@connelly-law.com
pwells@connelly-law.com

Thomas R. Merrick
Nicholas Thomas
Merrick Hofstedt & Lindsey PS
3101 Western Ave, Suite 200
Seattle, WA 98121-3017
Email addresses:

tmerrick@mhlseattle.com
nthomas@mhlseattle.com
mbrandt@mhlseattle.com
jballard@mhlseattle.com
pchandler@mhlseattle.com

Philip A. Talmadge
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwil, WA 98188
Email address:
phil@tal-fitzlaw.com

Howard M. Goodfriend, Esq.
1619 8th Ave North
Seattle, WA 98109
howard@washingtonappeals.com

DATED this 5th day of November, 2014.

Marilyn DeLucia, Paralegal
The Law Offices of Ben F. Barcus & Associates, PLLC.

Washington Practice Series TM
Database updated August 2013

Rules Practice
Karl B. Tegland [a0]

Part
III. Rules on Appeal
Rules of Appellate Procedure (RAP)
Title
13. Review By Supreme Court of Court of Appeals Decision

RAP 13.4. Discretionary Review of Decision Terminating Review

(a) How to Seek Review.A party seeking discretionary review by the Supreme Court of a Court of Appeals decision terminating review must file a petition for review or an answer to the petition that raises new issues. A petition for review should be filed in the Court of Appeals. If no motion to publish or motion to reconsider all or part of the Court of Appeals decision is timely made, a petition for review must be filed within 30 days after the decision is filed. If such a motion is made, the petition for review must be filed within 30 days after an order is filed denying a timely motion for reconsideration or determining a timely motion to publish. If the petition for review is filed prior to the Court of Appeals determination on the motion to reconsider or on a motion to publish, the petition will not be forwarded to the Supreme Court until the Court of Appeals files an order on all such motions. The first party to file a petition for review must, at the time the petition is filed, pay the statutory filing fee to the clerk of the Court of Appeals in which the petition is filed.

(b) Considerations Governing Acceptance of Review.A petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

(c) Content and Style of Petition. The petition for review should contain under appropriate headings and in the order here indicated:

(1) *Cover.*A title page, which is the cover.

(2) *Tables.*A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with reference to the pages of the brief where cited.

(3) *Identity of Petitioner.*A statement of the name and designation of the person filing the petition.
(4) *Citation to Court of Appeals Decision.*A reference to the Court of Appeals decision which petitioner wants reviewed, the date of filing the decision, and the date of any order granting or denying a motion for reconsideration.
(5) *Issues Presented for Review.*A concise statement of the issues presented for review.
(6) *Statement of the Case.*A statement of the facts and procedures relevant to the issues presented for review, with appropriate references to the record.
(7) *Argument.*A direct and concise statement of the reason why review should be accepted under one or more of the tests established in section (b), with argument.
(8) *Conclusion.*A short conclusion stating the precise relief sought.
(9) *Appendix.*An appendix containing a copy of the Court of Appeals decision, any order granting or denying a motion for reconsideration of the decision, and copies of statutes and constitutional provisions relevant to the issues presented for review.

(d) Answer and Reply.A party may file an answer to a petition for review. If the party wants to seek review of any issue that is not raised in the petition for review, including any issues that were raised but not decided in the Court of Appeals, the party must raise those new issues in an answer. Any answer should be filed within 30 days after the service on the party of the petition. A party may file a reply to an answer only if the answering party seeks review of issues not raised in the petition for review. A reply to an answer should be limited to addressing only the new issues raised in the answer. A reply to an answer should be filed within 15 days after the service on the party of the answer. An answer or reply should be filed in the Supreme Court. The Supreme Court may call for an answer or a reply to an answer.

(e) Form of Petition, Answer, and Reply. The petition, answer, and reply should comply with the requirements as to form for a brief as provided in rules 10.3 and 10.4, except as otherwise provided in this rule.

(f) Length. The petition for review, answer, or reply should not exceed 20 pages double spaced, excluding appendices.

(g) Reproduction of Petition, Answer, and Reply. The clerk will arrange for the reproduction of copies of a petition for review, an answer, or a reply, and bill the appropriate party for the copies as provided in rule 10.5.

(h) Amicus Curiae Memoranda. The Supreme Court may grant permission to file an amicus curiae memorandum in support of or opposition to a pending petition for review. Absent a showing of particular justification, an amicus curiae memorandum should be received by the court and counsel of record for the parties and other amicus curiae not later than 60 days from the date the petition for review is filed. Rules 10.4 and 10.6 should govern generally disposition of a motion to file an amicus curiae memorandum. An amicus curiae memorandum or answer thereto should not exceed 10 pages.

(i) No Oral Argument. The Supreme Court will decide the petition without oral argument.

CREDIT(S)

[Adopted 1976. Amended 1983, 1990, 1992, 1994, 1998, 1999, 2002, 2006, 2009, 2010.]
Standardized forms (at back of Rules of Appellate Procedure) Form 5, Title Page for All Briefs and Petition for ReviewForm 9, Petition for Review **AUTHOR'S COMMENTS**

1 In general

RAP 13.4 defines the procedure for seeking discretionary review of a decision terminating review in the Court of Appeals. The rule specifies the time for seeking review and the considerations governing acceptance of review, and contains more mechanical provisions relating to the format of the petition, answer, and reply.

2 How to seek discretionary review

Generally. Under RAP 13.4(a), a party seeking discretionary review of a decision terminating review in the Court of Appeals must file a petition for review within 30 days after the decision.

The rule's use of the term "must" means that a violation of the time limit may result in more severe than usual sanctions, including dismissal. See RAP 1.2 and the commentary following that rule.

Contrary to instinct, the petition is filed in the Court of Appeals rather than in the Supreme Court. The reason for filing in the Court of Appeals is to alert the clerk of that court to send the record and briefs to the Supreme Court, along with the petition itself.

The manner in which the petition is drafted may affect the scope of errors reviewable in the Supreme Court. See the commentary following RAP 13.7, below.

Motion for reconsideration or to publish, effect. If a party has filed a motion for reconsideration or a motion to publish, the petition for review must be filed within 30 days after an order denying reconsideration, or an order determining the motion to publish. If the petition is filed prematurely—before the Court of Appeals rules on the motion for reconsideration or the motion to publish—the Court of Appeals will not forward the petition to the Supreme Court until it has ruled on the motion. RAP 13.4(a).

Filing fee. The first party to file a petition for review must, at the time the petition is filed, pay the statutory filing fee to the clerk of the Court of Appeals in which the petition is filed. RAP 13.4(a). The filing fee is established by RCWA 2.32.070 and as of this writing is $200.00.

Intervention by third party. In an unusual situation, the Supreme Court allowed a third party to intervene at the Supreme Court level. In Sutton v. Hirvonen, 113 Wash. 2d 1, 775 P.2d 448 (1989), a decision by the Court of Appeals purported to affect the liability of an insurer that was not a party to the trial court proceedings. The insurer then sought and was granted permission to intervene for the purpose of petitioning for review by the Supreme Court. The court acknowledged that the Rules of Appellate Procedure do not provide for intervention, but the court said it would allow the insurer to intervene "in the interest of justice," by analogy to CR 24(a).

3 Considerations governing acceptance of review

Under RAP 13.4(b), a petition for review will be granted by the Supreme Court only:
(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
(3) If a significant question of law under the Constitution of the State of Washington or of the United States is

involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

These provisions are similar to the provisions for direct review of a trial court decision by the Supreme Court. See RAP 4.2.

The court has not generally expressed reasons for granting discretionary review. Typically, the opinion merely has recited that discretionary review was granted. See, e.g., Bitzan v. Parisi, 88 Wash. 2d 116, 558 P.2d 775 (1977). Nor do the cases present any strong pattern that would fit the rule provisions. For example, Bitzan v. Parisi, above, is merely a case considering the sufficiency of the evidence supporting some challenged instructions.

Likewise, no reasons were given in Elliott v. Peterson, 92 Wash. 2d 586, 599 P.2d 1282 (1979) (effect on statute of limitations of an erroneous denial of voluntary dismissal); Layman v. Ledgett, 89 Wash. 2d 906, 577 P.2d 970 (1978) (issue of rights to timber); Childers v. Childers, 89 Wash. 2d 592, 575 P.2d 201 (1978) (child support for education after age of majority); Goodell v. ITT-Federal Support Services, Inc., 89 Wash. 2d 488, 573 P.2d 1292 (1978) (tort liability); State v. Agee, 89 Wash. 2d 416, 573 P.2d 355 (1977) (whether findings and conclusions required for suppression hearings under CrR 4.5); Vern J. Oja & Associates v. Washington Park Towers, Inc., 89 Wash. 2d 72, 569 P.2d 1141 (1977) (effect of dismissal of agent on defense personal to agent on liability of principal).

The Supreme Court has granted a petition for review when, although affirming decisions below, it disagreed with the reasoning below. State v. Johnson, 96 Wash. 2d 926, 639 P.2d 1332 (1982) (overruled on other grounds by, State v. Calle, 125 Wash. 2d 769, 888 P.2d 155 (1995)).

4 Content and purpose of petition

RAP 13.4(c) specifies to the content and arrangement of the petition. The petition has many of the earmarks of an appellate brief but, under RAP 13.4(f), is limited to 20 pages double-spaced.

The petition does not contain assignments of error, as would be found in a brief. Instead, subdivision (c) requires a "a concise statement of the issues presented for review."

It should be remembered that the primary purpose of a petition for review is to persuade the Supreme Court to accept review, by reference to the considerations specified in subdivision (b) of the rule. The petition should demonstrate why one or more of those considerations point towards acceptance of review.

The purpose is not to reargue the appeal on the merits, though the merits of the appeal often become intertwined to some extent with the arguments for or against acceptance of review. On the merits of the appeal, the Supreme Court will consider—in addition to the petition for review—the briefs already filed with the Court of Appeals, plus any additional briefs filed in the Supreme Court. See RAP 13.7 and the commentary following that rule.

5 Answer and reply

RAP 13.4(d) allows, but does not require, the filing of an answer to a petition for review. Any answer should be filed within 30 days after service of the petition for review.

An answer need not be limited to answering the contentions in the petition. Subdivisions (a) and (d) make it clear that additional issues may be raised in the answer. In fact, in order to raise an issue that was not raised in the petition for review, an answer must be filed. Otherwise, the issues reviewed by the Supreme Court will normally be limited to those raised in the petition. See the commentary following RAP 13.7, below.

RAP 13.4(d) allows the filing of a reply to the answer, but only if the answer raises a new issue for review. Any

reply should be filed within 15 days after service of the answer.

Contrary to the practice of filing the petition in the Court of Appeals (see above), an answer or reply is filed in the Supreme Court.

6 Form of petition, answer, and reply; length

A petition for review should be in the form specified by RAP 13.4(c). Although subdivision (c) is highly detailed, the rule is largely self-explanatory and should be consulted as necessary.

The formal requirements for a brief, as specified by RAP 10.3 and 10.4 apply to a petition for review, except as modified by RAP 13.4. The principal modification found in RAP 13.4 is that a petition for review need not contain assignments of error.

Mechanical details such as fonts, line spacing, margins, citation form, and the like are governed by RAP 10.4, which should be consulted as necessary.

A standardized form, Form 9, can be found at the back of the Rules of Appellate Procedure.

Under RAP 10.3(f), the petition for review, answer, or reply is limited to 20 pages, double-spaced. Appendices may be attached and are not included when counting pages.

Longer documents are usually unnecessary because, as mentioned, the petition for review is not a brief on the merits. It is simply intended to persuade the Supreme Court to accept review, so that the merits may be addressed after review is accepted. Subsequent briefing on the merits is permitted. See RAP 13.7 and the commentary following that rule.

7 Service and reproduction of petition, answer, and reply

A party who files a petition, answer, or reply must serve a copy upon every other party and upon any other person entitled to notice. RAP 18.5.

The clerk of the appellate court will make the necessary number of copies for in-house use and bill the appropriate party. RAP 13.4(g).

8 Amicus curiae memoranda

RAP 13.4(h), relating to amicus curiae, was added to the rule in 1990. An amicus memorandum may be filed in support of, or opposition to, a petition for review, but only with permission from the Supreme Court. The memorandum should normally be filed and served at least 20 days prior to the date set for consideration of the petition for review.

According to the drafters' comments reproduced under heading 10, below, the drafters did not intend to imply any restriction on the ability to subsequently file an amicus brief if review is granted.

9 No oral argument

RAP 13.4(h) specifies that the Supreme Court will decide the petition without oral argument.

10 History of RAP 13.4

RAP 13.4 was originally adopted in 1976 as part of the original set of RAP rules. When the rule was first proposed to the Supreme Court in 1974, it was accompanied by the following drafters' comment:

Task Force Comment to RAP 13.4 [1]

> The procedural requirements of Rule 13.4 are substantially the same as under the old rules, except the petition under the new rules will be filed only in the Court of Appeals and the answer to the petition takes on added importance. Under the old rules, only issues raised in a petition would be considered—the new rules permit a party to raise an issue in an answer to a petition. A party does not have to answer a petition unless that party wants to raise an issue not presented in the petition.
>
> Section (f) limits the length of a petition, answer, or reply. The considerations governing acceptance of review remain unchanged. The time for filing is the same as the time for filing a motion for discretionary review. The petition is reproduced by the clerk in the manner provided in Rule 10.5.
>
> Under current practice, a petition for review is determined by at least 5 judges. The record and briefs filed in the Court of Appeals are reviewed by the Supreme Court when considering the petition for review. A decision terminating review is a final decision and deserves judicial consideration.

1983 Amendments. RAP 13.4(a) was amended in 1983 to adjust to the elimination of the requirement of a motion for reconsideration in the Court of Appeals before seeking review by the Supreme Court. The amendment simply added a sentence at the end of subdivision (a), stating that if no motion for reconsideration is made, a petition for review must be filed within 30 days after the decision is filed.

1990 Amendments. In 1990, RAP 13.4 was amended in a number of relatively minor ways. In subdivision (a), the words "of all or any part" were added to the first sentence. The words "of all or part of the Court of Appeals decision" were added to the second sentence. According to the drafters comments reproduced below, the purpose of the amendments was to clarify when the time for filing a petition begins to run when one party moves for reconsideration of only a part of the decision by the Court of Appeals, and another party seeks Supreme Court review of a different part of that decision.

In subdivision (d), the time for filing an answer was extended from 15 to 30 days after service of the petition. New provisions prohibited a reply unless the answer raised a new issue, and provided that a reply should be filed within 15 days after service of the answer.

In subdivision (f), an earlier provision allowing 11/2 spacing was deleted, and the words "excluding appendices" were added.

Subdivision (h), relating to amicus curiae, was added by the 1990 amendments.

The 1990 amendments were drafted and recommended by the Washington State Bar Association. When the amendments were first proposed to the Supreme Court, they were accompanied by the following drafters' comment:

Drafters' Comment, 1990 Amendments

> *(1) Background:* The amendments to RAP 13.4 were initiated by suggestions submitted by the appellate courts.

(2) Purpose: The amendment to section (a) is intended to clarify when the time for filing the petition for review begins to run, in the situation where one party moves for reconsideration of only a part of the appellate court decision and another party seeks Supreme Court review of a different part of that decision.

The Committee clarified rule 13.4(d), relating to answers and replies to a petition for review. The current rule sets forth a time limit for filing an answer raising a new issue, but contains no time requirement for filing either an answer not raising a new issue or a reply. The Committee determined that 30 days should be allowed for the filing of an answer, whether or not it raises a new issue. Further, the Committee agreed that a reply to an answer should be allowed only if the answer raises a new issue, and that the time limit for filing the reply should be 15 days.

The proposed amendments to rule 13.4(f) are intended for consistency with other recent amendments to Title 10. The Washington Supreme Court recently adopted amendments that revised the page limitations for briefs. In addition, those amendments excluded appendices from the page count and eliminated provisions allowing for 1 ½ spacing.

Finally, the amendment inserting a new section (h) sets forth a procedure regarding motions to file amicus curiae memoranda in support of petitions for review. The Supreme Court has been receiving more of these motions in recent years, and the proposal would clarify the practice. It also sets a presumptive time for filing the motion. In its discussion, the Committee agreed that even if such a motion is granted, an amicus should still have the opportunity to file an amicus brief if the review is granted. An amicus who properly confines the memorandum to an argument supporting the grant of review should be able to address the merits in a subsequent brief. Additionally, an amicus who wishes to argue in support of review by the Supreme Court, because of the general importance of the issue, may have a viewpoint on the merits significantly different from the party petitioning for review.

1992 Amendment. RAP 13.4 was amended in 1992 by adding to subdivision (a) the sentence reading, "If the petition for review is filed prior to the Court of Appeals determination on the motion for reconsideration or on a motion to publish, the petition will not be forwarded to the Supreme Court until the Court of Appeals files an order on all such motions." The amendment was accompanied by the following drafters' comment. (The comment states that the amendment was "initiated by the Court of Appeals," but the actual drafters were not identified, and no additional information was given.)

Drafters' Comment, 1992 Amendment

(1) Background. The amendment to RAP 13.4 was initiated by the Court of Appeals in coordination with proposed amendments to RAP 12.3 and RAP 17.2. The proposed changes were suggested by the Supreme Court Commissioner.

(2) Purpose. The purpose of this proposed rule change and the proposed change to RAP 12.3 is to outline procedures for filing a Motion to Publish and to ensure that the motion is decided by the Court of Appeals before a Petition for Review is forwarded to the Supreme Court. The proposed change to RAP 17.2 adds Motions to Publish to the motions determined by judges.

The current rule states a petition for review must be filed within 30 days after an order is filed denying a timely

motion for reconsideration or, if no motion is filed, within 30 days after the decision is filed. The proposed amendment would clarify the status of a petition for review if it is filed before the Court of Appeals decides either a motion for reconsideration or a motion to publish. Adoption of the amendment would ensure that the petition for review would not be sent to the Supreme Court until the Court of Appeals decides a motion for reconsideration or a motion to publish.

(3) Washington State Bar Association Action. None.

1994 Amendments. Several changes were made in RAP 13.4 in 1994. In subdivision (a), an amendment added at the end of the first sentence and at the beginning of the second sentence the words, "or an answer to the petition which raises new issues. The petition for review must be filed." Although the amendment might have been drafted more clearly, the drafters' comment (above) makes it clear that the intent of the amendment was to allow new issues to be raised in an answer to a petition for review.

In subdivision (c), an amendment deleted the words, "in the trial court and in the Court of Appeals." In subdivision (d), amendments made it clear, again, that new issues may be raised in the answer, and that any answer or reply should be filed in the Supreme Court, not the Court of Appeals.

The 1994 amendments were drafted and recommended by the Washington State Bar Association. When the amendments were first proposed to the Supreme Court, they were accompanied by the following drafters' comment:

Drafters' Comment, 1994 Amendments

(1) Background: The amendments to sections (a) and (d) were proposed by Seattle attorney Malcolm Edwards. The amendment to section (c) was proposed by the Office of the Attorney General. It is part of a series of proposals addressing appellate court review of state administrative agency decisions. Note: the Attorney General's Office has also proposed a new, special set of rules governing superior court review of administrative agency decisions. Those rules have not been addressed by the Court Rules and Procedures Committee and are not part of any of the Committee's recommendations.

(2) Purpose: The committee was informed that the deputy clerk of the Supreme Court is interpreting the petition for review rules by ruling, in essence, that if one party files a petition for review the other party may not seek review by the Supreme Court unless that other party files a petition for review within 30 days of the decision of the Court of Appeals. The committee disagreed with this interpretation, and has recommended several clarifying amendments.

The amendment to rule 13.4(a) would explicitly provide that a party may seek review in the Supreme Court by filing an answer to a petition for review "which raises new issues." A companion amendment to RAP 13.3(b) is also proposed. Rule 13.4(d) now provides that if an answering party wants to raise an issue not raised in the petition for review, the party must raise that new issue in an answer. The amendment to that section would change the language from "raise an issue" to "seek review of any issue." It also makes clear that an answer to a petition, or a reply to an answer, should be filed in the Supreme Court.

The amendment to section (c) is one of a series of proposals that address appellate court review of administrative agency "adjudicative" decisions. Title 13 governs review by the Supreme Court of decisions of the Court of

Appeals. Currently, rule 13.4(c)(6) requires that the statement of the case contained in the petition for review include a "statement of facts and procedure in the trial court and in the Court of Appeals relevant to the issues presented for review." When the case involves an adjudicative order of an administrative agency, the statement should also discuss procedures at the agency level and in the superior court sitting as an appellate court. To avoid making this section wordy and unwieldy, the committee elected to strike the phrase "in the trial court and in the Court of Appeals," leaving it to the petitioner to set forth all relevant "facts and procedures ... with appropriate references to the record."

(3) Washington State Bar Association Action: The Board of Governors recommends the amendments.

1998 Amendment. RAP 13.4(a) was amended in 1998 by adding what is now the last sentence in subdivision (a), referring to the filing fee. The amendment was proposed by the Court Rules and Procedures Committee of the Washington State Bar Association. When the proposed amendment was first published for public comment, it was accompanied by the following drafters' comment:

Drafters' Comment, 1998 Amendment

(1) Background: The amendment was developed by the Court Rules and Procedures Committee in response to a letter from Seattle attorney John Strasburger.

(2) Purpose: There is currently no reference in the appellate rules concerning the requirement of paying a filing fee to seek discretionary review in the Supreme Court of a Court of Appeals decision terminating review. Such a fee is authorized by statute; see RCW 2.32.070. The proposed amendment borrows language from rule 5.1(b) to alert practitioners of this requirement, although under rule 13.4 the fee is paid to the clerk of the appropriate Court of Appeals rather than of the superior court.

(3) Washington State Bar Association Action: The Board of Governors recommends the amendment.

1999 Amendment. RAP 13.4(h), relating to memoranda submitted by amicus parties, was revised extensively in 1999. The amended rule specifies procedures to be followed when an amicus party seeks to support (or oppose) a petition for review in the Supreme Court.

The amendment was not accompanied by any explanatory comment, except a brief statement by the Supreme Court that the amendment was proposed by the Washington State Bar Association.

2002 Amendment. In 2002, a new provision added to RAP 13.4(a) sought to clarify the timing of a petition for review when a motion for publication is filed in the Court of Appeals. Also, new language was added to RAP 13.4(b) to allow a conflict of decisions *within the same division* of the Court of Appeals to be considered in deciding whether the Supreme Court will grant discretionary review.

The 2002 amendment was proposed by the Washington State Bar Association. When the amendment was first recommended to the Supreme Court, it was accompanied by the following drafters' comment:

Drafters' Comment, 2002 Amendment

The amendment to section (a) adds denial of a timely motion to publish as a triggering point for filing a petition for discretionary review. If a party loses an appeal in the Court of Appeals, the decision to seek discretionary

review may hinge upon whether the decision will be published. The party may believe that publication of the decision would create a bad precedent and wish to make a final attempt at avoiding that result. Other changes to this section are structural. The committee believed that in the average situation no motions are filed; thus, the part of the rule addressing this circumstance should come first.

The amendment to section (b) would make a conflict of decisions *within* a division of the Court of Appeals a ground for discretionary review, in addition to conflicts *between* divisions. In some respects, the former are more difficult for the practitioner than the latter. With a conflict between divisions, a lawyer can at least know the governing law depending on the county he or she is in. Given the lack of a mechanism for the Court of Appeals to harmonize decisions between different panels, the committee believed sound public policy supported the amendment.

2006 Amendments. In 2006, subdivision (d), concerning the answer and reply, was largely re-written. In the same year, other, relatively minor, changes were made throughout the rule. When the amendments were proposed by the Washington State Bar Association, they were accompanied by the following drafters' comment:

Drafters' Comment, 2006 Amendment

Purpose: The suggested amendment to RAP 13.4(d) has two purposes. First, the amendment clarifies the procedure for raising new issues in an answer to a petition for review. RAP 13.4(d) states that if a party wishes to seek review of any issue that is not raised in the petition for review, "that party must raise that new issue in an answer." A related rule, RAP 13.7(b), provides, in part: "If the Supreme Court reverses a decision of the Court of Appeals that did not consider all of the issues raised which might support that decision, the Supreme Court will either consider and decide those issues or remand the case to the Court of Appeals to decide those issues." These provisions have been interpreted to mean that, if a party responding to a petition for review wishes to raise any issue that is not raised in the petition for review, that party must raise the issue in the answer to the petition for review, even if it was raised in the Court of Appeals and was not decided there. *See* State v. Barker, 143 Wash. 2d 915, 919-20, 25 P.3d 423 (2001). Although this result is consistent with the language of the rules, it is not the only reasonable interpretation. One could reasonably conclude that an issue raised but not decided in the Court of Appeals need not be raised in an answer to a petition for review, assuming that an appellate court may affirm a trial court decision on any basis supported by the record. The consequence of this plausible but erroneous interpretation is severe, i.e., issues raised at trial and on appeal, but not decided by the Court of Appeals, are lost to a party who does not again assert them in answer to a petition for review. The suggested amendment eliminates this potential trap.

Second, the amendment limits the scope of a reply to an answer to petition for review. Under the current rule, a party may not file a reply to an answer to a petition for review unless "the answer raises a new issue." This provision has been subject to abuse by petitioning parties who attempt to cast an answering party's arguments in response to a petition for review as "new issues" in order to reargue issues raised in the petition. The proposed amendment is intended to clarify the rule's purpose by more clearly prohibiting a reply to an answer that is not strictly limited to responding to an answering party's request that the Court review an issue that was not raised in the initial petition for review.

The suggested amendment to RAP 13.4(g) deletes an obsolete reference to RAP 10.5 relating to service of papers on the parties by the appellate court clerk. Rule 10.5 was amended in 1998 to remove the obligation of the clerk to serve briefs on parties, making such references superfluous. The language is amended to reflect the current practice of the clerk to serve such papers when a party has failed to do so. Concurrent suggested amendments to RAP 10.5 and RAP 16.16 make similar changes.

Additionally, the suggested amendment replaces "which" with "that" for purposes of grammatical clarity.

2009 Amendment. RAP 13.4 was amended in 2009 to shift responsibility for serving the parties. Under the amended rule, the party filing a paper with the court is responsible for serving the paper on other parties.

The amendment was proposed by the Supreme Court Clerk. When the proposed amendment was first published for public comment, it was accompanied by the following drafters' comment.

Drafters' Comment, 2009 Amendment to RAP 13.4

Purpose: The purpose of the proposed amendment is to require that the parties serve a petition for review, answer, and reply on other parties. Currently, the rule provides that these pleadings will be served by the Clerk's office. In practice, most attorneys serve the other party with their petition for review, answer, and reply. Requiring service by the party, instead of by the Clerk's office, is consistent with the requirements in the RAPs for parties to serve the opposing party with a motion (including a motion for discretionary review), answer to a motion, or reply to answer (RAP 17.4(a) and (f), see also RAP 13.5(c) and 13.5A(c)); notice of appeal or notice for discretionary review (RAP 5.4(a)); statement of grounds for direct review (RAP 4.2(b) and RAP 4.3(b)); statement of arrangements (RAP 9.2(a)); designation of clerk's papers (RAP 9.6(a)); and any brief (RAP 10.2(h) and RAP 13.7(e)).

The only other place in the RAPs where the party does not make service is in the case of a Petitioner filing a personal restraint petition. See RAP 16.8(c). In that situation it makes sense to require the Clerk to make service because the rule also provides that the Clerk makes a determination as to who is the appropriate respondent(s). Often times the Petitioner in a personal restraint petition is mistaken as to who is the appropriate respondent.

2010 Amendment. RAP 13.4 was amended in 2010 to delete an obsolete reference to service by the clerk. Under RAP 13.4 and 18.5, the parties are responsible for serving copies of documents upon other parties.

When the 2010 amendment was first proposed by the Washington State Bar Association, it was accompanied by the following drafters' comment:

Drafters' Comment, 2010 Amendment

Purpose: Subsection (g)'s current provision, allowing the clerk to serve the parties with a petition, parallels former RAP 10.5, which provided that the clerk, and not the parties, should serve appellate briefs. The current version of RAP 13.4(g) is an anachronism as it places an unnecessary burden on the appellate court and leads to confusion and delay regarding the date of service. Petitions, answers to petitions, and replies, when authorized by RAP 13.4(d), should be served by the party filing the document.

Washington Decisions

1. In general

Supreme Court's refusal to proceed with discretionary review of decision of Court of Appeals affirming conviction, in absence of defendant, did not raise constitutional issue, since defendant had already completed his appeal by obtaining review as matter of right in Court of Appeals, and review of Court of Appeals decision was only discretionary. State v. Koloske, 100 Wash. 2d 889, 676 P.2d 456 (1984) (overruled on different point by, State v. Brown, 113 Wash. 2d 520, 782 P.2d 1013, 80 A.L.R.4th 989 (1989)).

2. Timeliness

State's petition for review of Court of Appeals' conclusion that arrest of defendant was unlawful was timely, even though it was filed more than 30 days after Court's order denying state's motion for reconsideration as to that issue; state also requested, in same motion, reconsideration of Court's reversal of defendant's exceptional sentence, Court's order denying state's motion as to arrest issue, which called for further answer on sentencing issue, did not terminate its review, but, rather, subsequent order denying reconsideration of sentencing issue did so, and state's petition for review was filed within 30 days of subsequent order. State v. Solberg, 122 Wash. 2d 688, 861 P.2d 460 (1993).

3. Form and content of petition

Supreme Court would not consider issue raised in petition for review where petitioners made no arguments to support issue in either their petition for review, or their supplemental brief. In re Detention of A.S., 138 Wash. 2d 898, 982 P.2d 1156 (1999).

4. Answer and reply

A respondent must raise in an answer to the petition for review any issue that the respondent wants the Supreme Court to address. The court ordinarily will not review issues not presented in the petition for review or the answer. State v. Barker, 143 Wash. 2d 915, 25 P.3d 423 (2001) (court declined to address issue not raised in answer to petition).

Insurer's failure to cross appeal Court of Appeals holding that bankruptcy trustee had authority to assign escrow agent's rights under fidelity bond to customers of agent and that customers had standing to bring action on bond and failure to address assignability issue in its answer to customers' petition for review of Court of Appeals decision precluded review of assignability issue by Supreme Court. Estate of Jordan by Jordan v. Hartford Acc. and Indem. Co., 120 Wash. 2d 490, 844 P.2d 403 (1993).

5. Specific instances

Under its authority to grant review and consider a Court of Appeals opinion if it involves an issue of substantial public interest that should be determined by the Supreme Court, the Supreme Court would review a Court of Appeals opinion holding that a memorandum by the county prosecuting attorney to all county superior court judges, announcing that, as a general policy, the prosecuting attorney's office would no longer recommend drug offender sen-

tencing alternative (DOSA) sentences, was an ex parte communication with the trial court, even though no party was aggrieved. State v. Watson, 155 Wash. 2d 574, 122 P.3d 903 (2005).

[FNa0] Of The Washington Bar.

[FN1] The Task Force Comments were written by the advisory task force that drafted the Rules of Appellate Procedure and recommended their adoption. These explanatory comments were written before the rules were adopted in 1976. Because some of the rules have since been amended, the original comments may no longer be accurate. For a general description of the task force and its work, see the Chairman's Introduction preceding RAP 1.1.

3 WAPRAC RAP 13.4

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Marilyn Zimmerman
Office Administrator/Paralegal
Marilyn@benbarcus.com
253-752-4444 phone
253-752-1035 fax