

SARAH DUNNE  
LEGAL DIRECTOR

LA ROND BAKER  
NANCY TALNER  
VANESSA TORRES -  
HERNANDEZ  
STAFF ATTORNEYS

MARGARET CHEN  
FLOYD AND DELORES JONES  
FAMILY FELLOW



April 28, 2014

Honorable Justices of the Washington Supreme Court  
ATTN: Denise Foster  
P.O. Box 40929  
Olympia, WA 98504-0929  
VIA EMAIL to [denise.foster@courts.wa.gov](mailto:denise.foster@courts.wa.gov)

**Re: Proposed Revision to RAP 10.2(f) (Amicus Brief Deadlines)  
Comment Deadline 4/30/14**

AMERICAN CIVIL  
LIBERTIES UNION  
OF WASHINGTON  
FOUNDATION  
901 FIFTH AVENUE #630  
SEATTLE, WA 98164  
T/206.624.2184  
F/206.624.2190  
WWW.ACLU-WA.ORG

JEAN ROBINSON  
BOARD PRESIDENT

KATHLEEN TAYLOR  
EXECUTIVE DIRECTOR

Dear Honorable Justices of the Supreme Court,

A proposed revision of the court rule governing filing deadlines for amicus briefs in the appellate courts (RAP 10.2(f)) has been published for comment. The published version differs from the version that was approved by the Washington State Bar Association (WSBA) after an extensive review process. For ease of reference, we have attached the two versions, labeled accordingly. We urge the Court to reject the version published for comment and adopt instead the version approved by the WSBA.

We very much appreciate the Justices having raised a concern that the existing due date for amicus briefs (30 days prior to argument) does not leave adequate time for the Court to consider the briefs and responses to them. We believe the WSBA proposed version of the rule is a successful compromise which addresses the concerns of the Court, its staff, the parties and potential amici. As such, we urge the Court to adopt the WSBA version of the proposed revision to RAP 10.2(f).

#### Reasons for Adopting the WSBA Version of the Proposed Rule

The proposed version of RAP 10.2(f) approved by the WSBA, and that we urge the Court to adopt, would make Supreme Court amicus briefs due 45 days prior to oral argument instead of 30 days before argument. Friend of the court briefs play a critical role in providing the Court full information on issues that significantly impact the public interest and rule of law. Assuming that Court practices for scheduling oral arguments will generally provide time for amici to learn about a pending case, prepare an amicus brief, and file it by 45 days prior to oral argument, the WSBA proposed version of RAP 10.2(f) would achieve the following benefits:

- Allow adequate time for the appellate courts to consider amicus briefs
- Allow adequate time for the appellate courts to consider parties' response to amicus briefs

- Allow potential amici adequate time to learn about significant issues of public interest before the Supreme Court and prepare an amicus brief that does not unduly duplicate arguments of the parties, including arguments discussed in the parties' supplemental briefs
- Allow adequate time for parties to respond to amicus briefs without interfering with attorneys' preparation time for oral argument
- Continues to apply a rule in which the deadline is clear and workable.

The WSBA version of the proposed rule received strong support from the WSBA Rules of Appellate Procedure Subcommittee and Court Rules Committee, and was endorsed and approved by the WSBA Board of Governors. In the Bar's process for vetting the proposed rule, the various competing interests were fully considered, resulting in a broad consensus that the WSBA version best satisfied the competing interests involved.

The WSBA version of the proposed rule is also supported by a diverse group of attorneys, including those who frequently represent parties on appeal and those who frequently participate as amicus in appeals, attorneys in criminal and civil practice, attorneys representing the prosecution and defense in criminal cases, and attorneys representing private and governmental parties in civil cases. A diverse group of organizations that often participate as amicus and offer important perspectives on the issues pending on appeal previously expressed their support for adoption of the WSBA version of the proposed rule, while it was being considered by the Bar.<sup>1</sup> This broad consensus of support for the WSBA version confirms that it is a workable solution to concerns the Court and others have raised about the amicus brief deadline under the existing rule.

#### Reasons for Rejecting the Version of the Rule Published for Comment

In contrast to the WSBA version of the proposed rule, the version published for comment includes an alternative method for calculating the deadline for Supreme Court amicus briefs: "the earlier of 90 days after review has been granted or 45 days before oral argument or consideration on the merits." There are several reasons why this version is problematic and should not be adopted.

Our primary concern is that the language of the published version would introduce confusion and uncertainty about the deadline for Supreme Court amicus briefs. Potential amici would need to be able to calculate both the 90 days from the Court's review grant deadline, and also the 45 days before oral argument deadline, in order to determine which is earlier and therefore when the brief is due. The concept of two alternative deadlines and having to reconcile them by determining the earlier one adds

---

<sup>1</sup> Including ACLU-WA, Columbia Legal Services, Disability Rights Washington, Legal Voice, Northwest Justice Project, Washington Defender Association, Washington Association of Criminal Defense Lawyers, Washington State Association for Justice Foundation, and Washington Employment Lawyers Association.

far more confusion than the current rule or the WSBA version, and risks creating litigation and disputes over the correct deadline.

The deadline calculation under the published version of the proposed rule is further complicated by the fact that information about the grant of review date and the oral argument date is available at widely disparate times, introducing considerable uncertainty into determining the actual amicus brief filing deadline. Information about oral argument dates is publicly posted when the Court posts the new calendar for the upcoming Term. The ready availability of the Court's argument calendar, in combination with the rule calculating the amicus brief deadline from oral argument (as the WSBA version does), has worked clearly and well in the past and supports a single deadline calculation determined by the oral argument date, although with the change to 45 days prior to argument instead of 30.

In contrast, information about the Court's rulings granting review is presently less accessible. While Department rulings on petitions for review are publicly posted within a few days of those particular rulings, for many other types of review grants, potential amici do not have notice that the court has granted review until the court's issue statement is posted. This has occurred as late as three to six weeks after review is granted. Cases that fit this description include petitions for review granted on the En Banc calendar, direct review cases, interlocutory or discretionary reviews, Personal Restraint Petitions, certified questions, and other types of proceedings. Often these are cases involving issues of significant public interest, with a corresponding significant interest in amicus participation.

There is an additional problem created by the version of the proposed rule published for comment. In cases where the amicus brief was due 90 days from the grant of review, those briefs would sometimes be due prior to the parties' filing of supplemental briefs, creating an increased risk of duplicative or irrelevant amicus briefs. An example of this is a Spring Term case for which review was granted in early to mid-October 2013 and which will be argued on May 8, 2014. Both parties' supplemental briefs were filed months after the 90-days-from-review deadline for amicus briefs would have passed. The Court may wish to consider making amicus briefs due after filing of supplemental briefs, in cases where the due date for the parties' supplemental briefs is later than the amicus brief due date.

#### Remaining Concerns and Conclusion

While we support the adoption of the Bar version of the proposed rule, we hope the Court will consider the following concerns in implementing the proposed rule. Many recent Supreme Court cases have been set for argument so quickly after the grant of review, or with such little time between the notice of argument and the due date for amicus briefs, that amicus participation was made virtually impossible. One case during the Winter Term 2014 had review granted in early January, with the argument occurring on March 20, leaving very little time for amicus filing. In another case, direct review was granted on April 14 and oral argument is now scheduled for June

April 28, 2014

Page 4

26, 2014; there is neither a 45-day period before argument for amicus filing nor a 90-day period following grant of review. In another case which was placed on the Winter Term argument calendar by direct review grant, the issues list was posted February 20 and the argument date was March 13, again leaving no opportunity for the filing of amicus briefs.

We urge the Court to consider at a minimum earlier public posting of all review grants (not just the Department rulings on petitions for review), as well as earlier posting of the oral argument dates and issues lists if possible. This would reduce the number of cases where amicus participation is impossible and would make for a smoother transition to the new rule on amicus brief filing deadlines.

For all of the foregoing reasons, we urge the Court to adopt the WSBA version of proposed RAP 10.2.

Sincerely,

A handwritten signature in cursive script that reads "Nancy L. Talner".

NANCY L. TALNER  
Staff Attorney

VERSION POSTED FOR COMMENT

(f) **Brief of Amicus Curiae.** ~~Unless the court sets a different date, or allows a later date upon a showing of particular justification, a brief of amicus curiae should be filed as follows:~~

(1) **Supreme Court.** ~~A brief of amicus curiae should be received by the court and counsel of record for the parties and any other amicus curiae the earlier of 90 days after review has been granted or 45 days before oral argument or consideration on the merits.~~

(2) **Court of Appeals.** ~~A brief of amicus curiae should be received by the court and counsel of record for the parties and any other amicus curiae not later than 45 days after the due date for the last brief of respondent permitted under this rule.~~

~~Deleted: A brief of amicus curiae not requested by the appellate court should be received by the appellate court and counsel of record for the parties and any other amicus curiae not later than 30 days before oral argument or consideration on the merits.~~

~~Deleted: later~~

~~Formatted: Underline~~

~~Deleted: by the applicant.~~

~~Formatted: Indent: Left: 0", Hanging: 0.5"~~

~~Deleted: not later than~~

~~Formatted: Indent: Left: 0.5"~~

~~Deleted: 102(b)~~

WSBA VERSION OF PROPOSED RULE



Board of Governors Meeting
September 26-27, 2013
WSBA Conference Center
Seattle, WA

AGENDA

(Please note - times listed are tentative)

Thursday, September 26, 2013

GENERAL INFORMATION ..... 2
1. AGENDA ..... 12

8:00 A.M.

2. EXECUTIVE SESSION
A. Approval of July 25-26, 2013, Executive Session Minutes (action) .....E-2
B. President's Report
C. Change of Task Force Membership (action)
D. Litigation Report - Jean McElroy.....E-8
E. Executive Director's Report - Paula Littlewood
F. Executive Director Evaluation.....E-19

10:00 A.M.

3. PUBLIC SESSION - INTRODUCTIONS and WELCOME
A. Approval of July 25-26, 2013, Public Session Minutes (action) ..... 18
B. Report on Executive Session
C. President's Report
D. Executive Director's Report ..... 35
4. CONSENT CALENDAR ..... 68
A. 2014 Keller Deduction Schedule ..... late materials
B. Proposed Amendments to Law Clerk Program Regulations ..... 69
C. Proposed BOG Admissions Policies re Deadlines ..... 114
D. Recommendations from Court Rules and Procedures Committee re RAP 10.2,
GR 30/CR 5, and ER 901..... 128



Office of the General Counsel

Elizabeth A. Turner  
Assistant General Counsel

direct line: 206-239-2109  
fax: 206-727-8314  
e-mail: elizabetht@wsba.org

To: President Michele Radosevich, President Elect Patrick Palace, Immediate Past President Stephen Crossland, and WSBA Board of Governors

From: Court Rules & Procedures Committee: Hillary Evans Graber, Chair; Elizabeth Turner, Assistant General Counsel, Staff Liaison

Re: Recommendations from Court Rules & Procedures Committee – (Action – Consent Calendar)

Date: September 19, 2013

**ACTION REQUESTED: Approve the Committee's recommendations. On Consent Calendar.**

The Court Rules & Procedures Committee's recommendations were on for first read at the July 2013 BOG meeting. At that meeting, the BOG moved to waive first read and approved many of the Committee's recommendations as submitted. The remaining items are now on the Consent Calendar for action. The materials that are attached are the materials that were provided at the July meeting with the exception of the cover memo from Committee Chair Hillary Evans Graber, which has been edited to delete the items voted on at the July meeting, as well as additional correspondence supporting the Committee's proposal.

**ATTACHMENTS:**

1. Cover Memo from Committee Chair Hillary Evans Graber
2. Committee's Proposed Amendment to RAP 10.2
  - a. Proposed GR 9 cover sheet

- 
- b. Proposed Rule Text**
    - c. WALA's proposal**
    - d. WALA's letter supporting Committee's proposal (from July Late Materials)**
    - e. Additional correspondence supporting Committee's proposal [NEW]**
  - 3. Materials regarding GR 30/CR 5:**
    - a. Committee's proposed response**
    - b. Materials received from Court on King County Bar Association's proposals**
  - 4. Committee's proposed response to comments received on ER 901:**
    - a. Committee's draft response to Court**
    - b. Comments received by Court**
    - c. Original GR 9 cover sheet and rule text submitted to Court**

MEMO

TO: WSBA Board of Governors

FROM: Hillary Evans Graber, WSBA Court Rules and Procedures Committee Chair  
Elizabeth Turner, WSBA Assistant General Counsel

SUBJECT: Court Rules and Procedures Committee Annual Report and Recommendations  
Items on for vote at September 2013 BOG meeting

DATE: September 18, 2013

At its July 2013 meeting the Board of Governors took action on many of the Court Rules and Procedures Committee's recommendations. This memo has therefore been edited to include only the items which have not yet been voted upon. The attachments were previously provided at the July 2013 BOG meeting.

Recommendations Requiring BOG Action

A. RAP 10.2: Amendment Recommended by the Committee Now Supported by WALA

RAP 10.2: The Washington Appellate Lawyers Association (WALA) initially proposed changes to RAP 10.2, regarding the time for filing amicus curiae briefs. An alternative proposal was then submitted by a group of organizations that regularly file amicus curiae briefs ("amici group"). The proposals differed in the timeframe for filing an amicus brief with the Supreme Court in RAP 10.2(f). WALA's proposal makes an amicus brief due 45 days after the date review is granted. The amici group's proposal makes an amicus brief due 45 days before the date of oral argument.

Given that the typical briefing cycle is 90 days, both proposals create approximately the same due date for amicus briefs. Generally, the pre-hearing memo is circulated 30 days before oral argument. WALA recommends 45 days after review is accepted to ensure that both the amicus brief and the litigant's response would be filed prior to circulation of the pre-hearing memo. WALA objects to counting backwards from oral argument because they feel the litigant's response may not be fully considered for the pre-hearing memo and also that it takes away from counsel's oral argument preparation time. The amici group reported difficulties for amici to learn of a case, coordinate a brief-writer, and draft a brief in a 45 day period; thus their proposal allows for them to have as much time as possible before filing their brief. The amici state their proposal would allow the amicus brief and the response to be considered by the Court prior to the pre-hearing memo. It was the unanimous vote of this Committee to adopt the amici group's proposal; however, we included WALA's proposal for your review as well.

Update: Shortly before the July BOG meeting, WALA notified us that they had voted to

endorse the WSBA's proposal and were withdrawing their proposal. That letter (presented in July Late Materials) is attached. In addition, on September 10, 2013, Disability Rights Washington notified us that they support the Committee's proposal; that letter is also attached.

#### **B. Other: Requests from the Court**

**GR 30/CR 5: Recommend amended versions.** This pair of proposed changes came from the King County Bar Association. The proposed amendments would allow any county with a local rule mandating electronic filing to adopt a rule mandating electronic service. The Committee's recommended language consolidates GR 30(b)(4) and (5) into one paragraph and slightly modifies the proposed amendment to CR 5.

**ER 901: Recommended response to comments.** In 2012, Karl Tegland submitted a suggested amendment to ER 901 which would add an illustration regarding email authentication. The Committee recommended, and the BOG approved, the proposed amendment, which was published for comment by the Court. The Court received several comments on the proposed amendment, including a new proposal from Mr. Tegland. The Court asked us to respond to the comments received.

Substantively, ER 901 does not directly address authentication of e-mails and text messages, but it does contain a series of "illustrations" for authenticating other evidence, such as voice identification and telephone conversations. After discussion, the Committee unanimously voted to recommend Mr. Tegland's newer proposed language, as follows:

... By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Rule:

...  
(10) *Electronic Mail (E-mail).* Testimony by a person with knowledge that (i) the e-mail was purports to be authored or created by the particular sender or the sender's agent; (ii) the e-mail was purports to be sent from an e-mail address associated with the particular sender or the sender's agent; and (iii) the appearance, contents, substance, internal patterns, or other distinctive characteristics of the e-mail, taken in conjunction with the circumstances, are sufficient to support a finding that the e-mail in question is what the proponent claims. [Bold indicates Mr. Tegland's amendments to his initial proposal.]

The comments received by the Court, and a draft letter responding to the comments, is attached, as well as the original GR 9 cover sheet, rule text, and excerpt from the 2012 Committee Report.

#### **ATTACHMENTS:**

1. Committee's Proposed Amendment to RAP 10.2
  - a. Proposed GR 9 cover sheet
  - b. Proposed Rule Text
  - c. WALA's proposal
  - d. WALA's letter supporting Committee's proposal (from July Late Materials)
  - e. Additional correspondence supporting Committee's proposal [NEW]

2. **Materials regarding GR 30/CR 5:**
  - a. **Committee's proposed response**
  - b. **Materials received from Court on King County Bar Association's proposals**
  
3. **Committee's proposed response to comments received on ER 901:**
  - a. **Committee's draft response to Court**
  - b. **Comments received by Court**
  - c. **Original GR 9 cover sheet and rule text submitted to Court**

**GR 9 COVER SHEET**

**Suggested Change  
RULES OF APPELLATE PROCEDURE (RAP)  
Rule 10.2 – TIME FOR FILING BRIEFS**

**Submitted by the Board of Governors of the Washington State Bar Association**

---

**A. Name of Proponent:** Washington State Bar Association.

**B. Spokespersons:**

Michele Radosevich, President, Washington State Bar Association, 1325 4<sup>th</sup> Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 206-757-8124)

Hillary Evans, Chair, WSBA Court Rules and Procedures Committee, Washington State Bar Association, 1325 4<sup>th</sup> Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 425-388-7365)

Elizabeth A. Turner, Assistant General Counsel, Washington State Bar Association, 1325 4<sup>th</sup> Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 206-239-2109)

**C. Purpose:** The current rule for determining the deadline for an amicus curiae brief does not differentiate between cases in the Supreme Court and Court of Appeals, and, in both instances, primarily ties the amicus brief deadline to the oral argument date set by the appellate court. This approach has caused problems for both parties and the courts.

At the Supreme Court level, timely amicus curiae brief submissions do not always leave parties with sufficient time to submit an answering brief, or provide the court itself with sufficient time to fully consider amicus-related submissions in advance of oral argument. Under RAP 10.6, the Supreme Court does not set a date for filing the parties' answers to amicus briefs until the expiration of five business days after the amicus motion and accompanying amicus brief have been filed. The proposed amendment is designed to allow the Supreme Court adequate time to consider not just the amicus brief, but also the parties' answer to an amicus brief, before circulation of the Court's pre-hearing memorandum.

At the Court of Appeals level, letters setting oral argument are sometimes issued relatively close to the oral argument date, creating unreasonable time constraints for amicus curiae, parties submitting answering briefs, and for the court itself in fully considering amicus-related submissions in advance of oral argument. These same difficulties also may occur in those Court of Appeals cases where the court determines

to consider the case on the merits without oral argument.

The proposed amendments set deadlines for amicus curiae briefs with due regard for these problems, and the differences between Supreme Court and Court of Appeals practice. The amendment is designed to minimize uncertainties regarding amicus curiae brief deadlines, increase the time available after an amicus curiae brief is submitted for the parties to file answering briefs, and allow the court more time to fully consider amicus-related submissions in advance of oral argument.

- D. **Hearing**: A hearing is not requested.
- E. **Expedited Consideration**: Expedited consideration is not requested.
- F. **Supporting Material**: Suggested rule amendment.

**SUGGESTED AMENDMENT**  
**RULES OF APPELLATE PROCEDURE (RAP)**  
**RULE 10.2 – TIME FOR FILING BRIEFS**

1           **(a) Brief of Appellant or Petitioner.** The brief of an appellant or petitioner should be  
2 filed with the appellate court within 45 days after the report of proceedings is filed in the trial  
3 court; or, if the record on review does not include a report of proceedings, within 45 days after  
4 the party seeking review has filed the designation of clerk's papers and exhibits.

5           **(b) Brief of Respondent in Civil Case.** The brief of a respondent in a civil case should  
6 be filed with the appellate court within 30 days after service of the brief of appellant or  
7 petitioner.

8           **(c) Brief of Respondent in Criminal Case.** The brief of a respondent in a criminal case  
9 should be filed with the appellate court within 60 days after service of the brief of appellant or  
10 petitioner.  
11

12           **(d) Reply Brief.** A reply brief of an appellant or petitioner should be filed with the  
13 appellate court within 30 days after service of the brief of respondent unless the court orders  
14 otherwise.

15           **(e) [Reserved; see rule 10.10]**

16           **(f) Brief of Amicus Curiae.** ~~A brief of amicus curiae not requested by the appellate~~  
17 ~~court should be received by the appellate court and counsel of record for the parties and any~~  
18 ~~other amicus curiae not later than 30 days before oral argument or consideration on the merits;~~  
19 ~~uUnless the court sets a later different date, or allows a later date upon a showing of particular~~  
20 ~~justification by the applicant, a brief of amicus curiae should be filed as follows:~~  
21

**SUGGESTED AMENDMENT**  
**RULES OF APPELLATE PROCEDURE (RAP)**  
**RULE 10.2 -- TIME FOR FILING BRIEFS**

1       **(1) Supreme Court.** A brief of amicus curiae should be received by the court and  
2       counsel of record for the parties and any other amicus curiae not later than 45 days  
3       before oral argument or consideration on the merits.

4       **(2) Court of Appeals.** A brief of amicus curiae should be received by the court and  
5       counsel of record for the parties and any other amicus curiae not later than 45 days after  
6       the due date for the last brief of respondent permitted under rule 10.2(b).

7       **(g) Answer to Brief of Amicus Curiae.** A brief in answer to the brief of amicus curiae  
8       may be filed with the appellate court not later than the date fixed by the appellate court.

9       **(h) Service of Briefs.** At the time a party files a brief, the party should serve one copy  
10       on every other party and on any amicus curiae, and file proof of service with the appellate court.  
11       In a criminal case in which the defendant is the appellant, appellant's counsel shall serve the  
12       appellant and file proof of service with the appellate court. Service and proof of service should  
13       be made in accordance with rules 18.5 and 18.6.  
14

15       **(i) Sanctions for Late Filing and Service.** The appellate court will ordinarily impose  
16       sanctions under rule 18.9 for failure to timely file and serve a brief.  
17