

July 21, 2017

Hon. Susan L. Carlson
Clerk of the Supreme Court
415 12th Avenue Southwest
Olympia, Washington 98501-2314
Sent via email to: supreme@courts.wa.gov

Re: RAP 10.2 Rulemaking Comment by Allied Daily Newspapers of Washington

Dear Clerk:

Allied Daily Newspapers of Washington (“Allied”), a trade association representing 25 daily newspapers across the state, frequently acts as a voice for the general public in cases involving open government. The published proposal to amend RAP 10.2(f)(2), which governs the timing of amicus briefs in the Court of Appeals, may reduce opportunities to effectively advocate for the public interest. Accordingly, Allied respectfully submits this comment to explain why the proposal should be modified.

RAP 10.2(f)(2) presently allows interested groups to review all appellate briefing by the parties in a case, including the reply brief, before submitting amicus briefs. The proposal would require amicus briefs to be filed at the same time as (or prior to) the appellant’s reply, instead of 15 days later.¹ This inability to respond to the appellant’s reply would make it harder for a potential amicus party to effectively assist the Court.

First, there is a greater risk of duplicating arguments if an amicus brief must be written before all of the underlying parties’ arguments are available. Duplicative arguments are disfavored² and do little more than inform the Court about the alignment of interest groups on one side or the other.

Second, the quality of amicus briefing is enhanced if the author has reviewed and evaluated all of the underlying parties’ arguments, including replies. In fact, in deciding whether to accept an amicus brief, the Court considers the applicant’s “familiarity with the issues involved in the review and with the scope of the argument presented or to be presented by the parties.” See RAP 10.6(b)(2). Such familiarity suffers if amicus applicants must write

¹ Under RAP 10.2(d), a reply brief is due 30 days after service of the respondent’s brief. Under RAP 10.2(f)(2), an amicus brief is due 45 days after the due date for the respondent’s brief which, ordinarily (barring an extension of time), would be 15 days after the reply brief is filed. The proposed rule change would require amicus briefs to be filed 30 days after the filing of the respondent’s brief – the same due date as the reply.

² Under RAP 10.6(b)(4), a motion for leave to file an amicus brief must address why additional argument - beyond the underlying parties’ briefing - is necessary.

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briefs before the underlying parties have finished their briefing. Also, sometimes an appellant's theories are crystallized, if not discussed for the first time, in a reply brief. This may lead a potential amicus party to expand or alter arguments (or forego briefing altogether.) The amicus party's independent perspective on reply arguments may assist the Court in deciding issues of broad importance beyond the immediate interests of the parties.

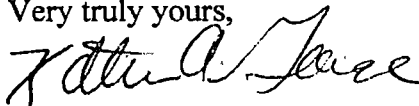
Finally, shortening the time for amicus briefs in the Court of Appeals increases the risk that important opportunities to assist the Court will be missed. Unlike the Supreme Court, which publishes a list of issues to be heard,³ the Court of Appeals identifies cases by party names or case numbers and not by issue. Thus, amicus participation depends to a large extent on outreach from the parties, which may occur late in the appellate process.

Allied is interested in appeals which may affect the ability of newspapers to gather information of interest to the public. Such appeals are not always readily identifiable in the Court of Appeals. Sometimes an open government issue is secondary to some other issue. Parties may seek amicus support belatedly, or not at all. Sometimes a case may seem benign until the respondent's brief or a reply is filed. For a variety of reasons, Allied often has limited time after learning about a controversy to analyze the implications, develop a position and prepare a brief. Accordingly, any reduction of the amicus filing period is a concern.

Frequently over the years, appellate courts have invited Allied to participate as amicus curiae after reviewing all of the parties' briefs (including replies) and determining that additional arguments are needed. This sensible practice underscores that the need for amicus participation is best assessed after the parties finish their briefing.

For the reasons above, Allied opposes a shorter deadline for amicus briefs. However, Allied supports the second part of the proposal for amicus deadlines to depend on the actual filing date of the respondent's brief, rather than "the due date for the last brief of respondent permitted under rule 10.2(b)." The filing date is easier to identify. Thus, the proposal should be modified to read as follows (showing proposed changes in underlined or strike-through text): A brief of amicus curiae should be received the court and counsel of record for the parties and any other amicus curiae not later than 45 days after the ~~due date for~~ filing of the last brief of respondent permitted under rule 10.2(b) or 10.2(c).

Very truly yours,



Katherine A. George

³ See, e.g., http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/casesNotSetAndCurrentTerm.pdf.

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, July 21, 2017 3:45 PM
To: Tracy, Mary; Chandler, Desiree
Subject: FW: rulemaking comment (RAP 10.2)
Attachments: Allied Dailly Newspapers comment on rulemaking 7 21 1707212017_0002.pdf

Des-I think this is for Mary? Let me know if it's something I should process up front.

Thanks. Faye

From: Katherine A. George [mailto:kathy@johnstongeorge.com]
Sent: Friday, July 21, 2017 3:40 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: 'anewspaper' <anewspaper@aol.com>
Subject: rulemaking comment (RAP 10.2)

Dear Clerk,

Please find attached a letter on behalf of Allied Daily Newspapers of Washington in response to the March 2017 Proposed Rules Published For Comment.

Thank you,

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