

Why the Wash. Supreme Court's Docket Has Been Shrinking

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When the Washington State Supreme Court met April 9 to consider its monthly slate of cases to review, justices could have decided to set new case law in a dispute over contractual royalty payments or when county governments need to turn over public records.

They passed on those cases and 32 others. They took up just three, concerning an alleged unlawful property search, supervised release conditions for a rapist and questionable evidence obtained in a DUI arrest.

Washington appellate attorneys say the limited number of cases the state Supreme Court took up last month is part of a trend that leaves important legal questions unsettled, on issues ranging from the state's duty of care in child abuse investigations to contract issues.

Over the last decade, the court has been taking on fewer cases and penning fewer opinions, with the number of opinions issued per year falling from 129 in 2014 to 59 last year.

Philip A. Talmadge of the Seattle appellate law firm Talmadge/Fitzpatrick was one of the lawyers whose case did not get accepted, a real estate investment trust's challenge to a no-bid contract for a University of Washington research center.

Talmadge said his case raised questions about the scope of the state's public-bidding statute, which a lower appellate court said the university was not bound to strictly adhere to in what could become a test case for a \$3 billion campus development.

But despite concerns from diverging interest groups about the potential to weaken how competitive-bidding and prevailing wage laws are applied to public-private development projects across the state, Talmadge said he was surprised when the Supreme Court denied review, saying it adds to his concern about the court's declining opinion count.

The diminishing docket means there are fewer sure bets for review, said Talmadge, who started his appellate practice after years of serving as a Supreme Court justice.

Talmadge said the UW case brought by his client the life science real estate company Alexandria Real Estate Equities Inc. "ticked off all the boxes" justifying review.

"Everybody is saying, 'What's the law in this area and can the University of Washington do this?'" said Talmadge. "It's a case that screams out for Supreme Court resolution, and they walked away from it."

While the dropoff long predates the pandemic, the effects of COVID-19 certainly accelerated it.

Chief Justice Steven C. González told Law360 that he agreed that COVID-19 put a crimp on the court's pipeline of cases, but said he didn't agree with the assertion that the Supreme Court was leaving important issues unresolved. He said he expects the court to take up more cases as new cases that were hindered by COVID are filed.

"My feeling is we are working just as hard as we ever were," Chief Justice González said.

There has been a decline in cert petitions to the court, especially during the pandemic. But according to the court's records of its monthly petition decisions, justices are also taking a smaller slice of them. The court has not granted review to more than 11% of petitions since 2014. Grants dipped to nearly 6% in 2022, but rebounded to just above 8% in 2023.

Appellate lawyers said they worry the court's lower opinion count has limited justices' ability to put their stamp on issues of public policy.

"The development of the common law and the interpretation of statutes and constitutional questions are, I will use the words, shriveling up," said Michael B. King of Carney Badley Spellman PS.

King and other attorneys said the hangover still lingers from COVID, when courthouse closures and other pandemic-related disruptions cut down on the number of cases going to court.

King said he understands the court concluding it doesn't need to hear as many cases, but believes 60 to 80 is too low. King said he would like to see the court bump it up to at least 90 a year, which the court was hitting in the years before the pandemic.

Chief Justice: Criticism "Doesn't Square"

When he joined the court 12 years ago, Chief Justice González said justices were taking about 120 cases a year. That's about the same as the caseload in 2014, the last year before the recent decline. But the following year it was down to 113. Between 2020 and 2022, the court averaged about 70 opinions a year. In 2023, it was down to 59.

In recent years, Justice González said there have been fewer cases in the pipeline.

"The assertion that we are leaving important issues unresolved doesn't square with my understanding of how the law works," Justice González said. "I think it presumes something that might not be in evidence, as you'd say, under the evidentiary rules."

Chief Justice González said when the Supreme Court declines to accept review, litigants get a final answer quicker, because they don't need to wait for a Supreme Court ruling.

He also said that justices a few years ago stopped the practice of asking the courts of appeal to directly send some of their cases to the Supreme Court when the high court's caseload was light.

"I think that artificially increased the number of cases that we would hear, because if the parties aren't asking to be here, I'm not sure that we should be deciding for them that they are going to come here," Chief Justice González said.

Civil cases are also down, Chief Justice González said, because more disputes are being settled by binding arbitration, either because of a contract clause or because both sides opted for it.

Chief Justice González said Washington's Supreme Court is still one of the most cited high courts in the nation by other supreme courts and federal courts.

And he said Washington's Supreme Court also is drawing national recognition for its work on legal reforms, including bringing more diversity to jury selection and eliminating barriers for some people in marginalized groups who want to practice law in the state.

Justice Debra L. Stephens similarly told Law360 the court's smaller case load is not because the Supreme Court is trying to "shirk work."

Justices are not going to take a case just to fill a docket, she said.

"If it's not a good case, it doesn't get any better today than it was 10 years ago when we had several times more cases." Justice Stephens said.

Justice Stephens and Chief Justice González said they expect caseloads to grow again post-pandemic. Justice Stephens said cases and trials are picking up and the lower courts are slammed.

The total number of cases filed 2023 in King County Superior Court—which includes Seattle—was 10% higher than in 2022, according to court statistics. Last year, the court had 17 more jury trials and 78 more non-jury trials compared to 2022.

"We're the long tail of that swing, so it just doesn't hit us until a couple of years after it hits the others," Justice Stephens said.

Supreme Court Surprises

Talmadge, who was on the court from 1995 to 2001, said the petition counts were markedly higher back then.

"How did we handle them? We just did the work," Talmadge said, noting that there wasn't a remarkable change in the volume of cases the court handled before his tenure and afterward.

"We kind of carried on from the tradition," Talmadge said.

"It's a tough situation to get a Supreme Court review, as it should be. Not every case is a Supreme Court case," Talmadge said. "But there are certain cases that you just scratch your head over."

Howard Goodfriend of Smith Goodfriend PS said a good example was the Supreme Court's recent decision to pass on reviewing a state trial court ruling over who controls the Pac-12 Conference after most of the schools split to join other conferences.

Goodfriend said the case, which focused on an interpretation of a complex contract, was a big deal, and not just for sports fans, because it involved the finances of the state's two largest public universities.

"The court just said, 'Well, looks good for now, we're not going to wade into this,'" Goodfriend said. "I think that surprised a lot of people."

Paul Lawrence of Pacifica Law Group said part of the reason for the smaller docket may come down to an aligning of political and judicial philosophies at the appellate level.

Lawrence said Gov. Jay Inslee, a Democrat, has filled a significant number of slots on the appellate courts with judges with similar judicial philosophies.

"So you are getting fewer cases with dissents coming out of the court of appeals," said Lawrence, who added that the newer lower appellate judges are more likely in sync with justices on the Supreme Court than maybe a decade ago.

Lawrence said many of his cases do go to the Supreme Court because he does a lot of work on the constitutionality of statutes, which remains a prime area where the state high court is willing to jump in because the court understands it's a fundamental duty.

Lawrence said appellate attorneys always have to be mindful of the criteria in the rules of appellate procedure about what types of cases are appropriate to seek review, and highlight conflicts at the lower appellate courts or conflicts with a prior Supreme Court ruling.

"I do feel like there's more of a need to try to elevate the broader public interest in a case than just simply identifying a conflict that should be resolved," Lawrence said.

--Editing by Michael Watanabe.