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April 28, 2014

Washington State Supreme Court Rules Committee
Attention: Justice Charles Johnson, Chair
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

Re: Proposed Changes to the Amicus Rule, RAP 10.2

Dear Justice Johnson & Members of the Committee:

We write to encourage you to adopt the new version of RAP 10.2(f) currently published for comment. This proposal is the product of a great deal of work by appellate lawyers from around the state, together with this Court's own work. While it is certainly a compromise, it is a great improvement over the existing rule.

The genesis of this proposal began in a meeting between the Washington Appellate Lawyers Association (represented by its co-presidents, Howard Goodfriend and Ken Masters) several years ago, in which many Justices expressed concerns about the way the existing amicus rule worked. We heard that both amicus briefs and responses were arriving too late for the Court's proper consideration. WALA therefore put together a committee consisting of numerous appellate lawyers from both the institutional amici (such as WAPA, WSAJ, WDTL, ACLU, etc.) and those of us who usually represent parties, including the undersigned.

The WALA proposal suggested that amicus briefs be due 45 days after the Court grants a Petition for Review or accepts a Motion for Discretionary Review, and made some additional suggestions for cases coming up in a different fashion. For the Court of Appeals, WALA suggested 45 days after the due date for the last brief of respondent permitted by RAP 10.2(b).

In the WSBA Court Rules and Procedures Committee, an alternative proposal arose, sponsored most strongly by institutional amici, which would make the due date 45 days prior to oral argument. The WSBA Board of Governors approved that proposal, and sent it on to the Court. The Court then published for comment a proposal making the amicus due date 90 days after review is granted, or 45 days before oral argument or consideration on the merits, whichever is sooner. The pending proposed rule also adopts the original WALA proposal to make amicus briefs due in the Court of Appeals 45 days after the due date for the last brief of respondent.

Given the Court's current docket, in many cases the due date for amicus submissions will work out roughly the same - that is, 90 days after review is granted will be roughly 45 days before argument. But when the time from grant to argument is longer, which historically would include a substantial number of cases, the Court will have the benefit of receiving both the amicus briefs and the responses

Washington State Supreme Court
Attention: Justice Charles Johnson
Chair of the Supreme Court Rules Committee
April 28, 2014
Page 2

at least a month before oral argument. We believe that it is beneficial for the Court to have longer with the amicus briefs, and particularly to have longer with the responses.

As attorneys who usually represent parties in your courtroom, we have been particularly concerned that the Court does not have sufficient time to consider responses to amicus briefs under the existing rule making amicus briefs due just 30 days before argument. Parties' counsel have no choice but to write a response to an amicus brief while preparing for oral argument, and without regard to other briefing deadlines and argument commitments in other cases. In many cases, the response to amicus cannot be circulated to the Court before the prehearing memo is completed. Making amicus briefs due at least 45 days before argument lessens these concerns.

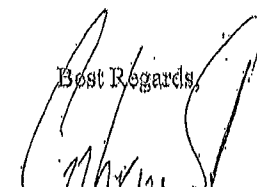
The institutional amici apparently believe that if there is extra time in the briefing process, they should get the benefit. But amicus briefs are limited to 20 pages. In practice, many of them are really aimed at letting the Court know that a group is concerned about the case, focusing less on the merits. There are exceptions, but amicus briefs are not supposed to rehash arguments already made by the parties, so there is relatively little opportunity for an amicus brief to go into detail on the merits.

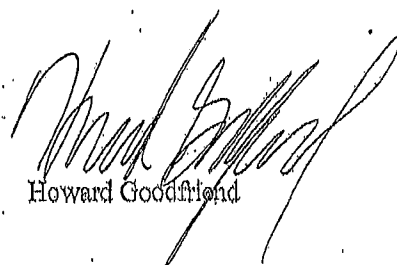
Moreover, the undersigned are aware of some institutional amici's practice of intentionally waiting until the 30-day deadline to file, specifically to gain a tactical advantage. We have each been involved in cases in which institutional amici have deliberately held off on filing briefs in order to prevent "the other side" from having more time to respond to the amicus submission. It is often very difficult for counsel who need to focus on preparing for argument (and on their obligations to other clients) to instead be called upon to respond to issues raised by amici--issues often not directly relevant to the specific issues the Court is likely to ask about during argument--in two weeks or less. We believe that pushing back the time for amicus briefs will result in both better written briefs and stronger oral arguments. The Court should maintain its proposal at 90 days from grant, or 45 days before argument, whichever is earlier.

In sum, there is little doubt that the current rule is not working well. While we might prefer having even more time before oral argument in which to file our responses to amici, we are certainly satisfied with the Court's compromise proposal. We encourage the Court to adopt it. We also ask the Court to make the rule effective for all cases in September, permitting amici whose cases fall outside the 90-day provision to ask for more time.



Kenneth W. Masters

Best Regards,

Catherine Smith



Howard Goodfriend