

RE: Order No. 25700-A-1342

In the Matter of the Suggested Amendments to RAP 5.3—Content of Notice—Filing; RAP 10.2—Time for Filing Briefs; RAP 10.10—Statement of Additional Grounds for Review

The Court of Appeals Rules Committee writes to comment on the proposed RAP rule changes submitted by the Washington State Office of Public Defense, namely RAP 10.2, RAP 10.10, and RAP 5.3. It is the position of the Rules Committee that the proposed changes are unnecessary and will impede access to justice by complicating a defendant/appellant's access to courts and ability to file a statement of additional grounds for review (SAG).

In a criminal case, the defendant/appellant is given the opportunity to file a statement of additional grounds (SAG) to identify those issues they believe were not adequately addressed in the appellant's brief. RAP 10.10(a). The timeline to file the SAG is established in RAP 10.10(d) at 30 days after service of the appellant's brief by the appellant's counsel and notice from the appellate court.

Under the current RAPs, the appellate courts advise defendant/appellant directly of their opportunity to file a SAG. To enable this type of direct communication, a valid address for the defendant/appellant is required.

Transferring the obligation to notify defendant/appellant of their ability to file a SAG from the court to defense counsel will prove problematic. It is not uncommon that the reason a defendant/appellant wishes to file a SAG is they do not agree with their attorney's handling of their case because their attorney is unable or unwilling to raise an issue the defendant/appellant wants to raise. While ethical and contractual¹ rules require attorneys to provide copies of critical documents to clients, it is not uncommon for defendants/appellants to claim their attorneys have not complied with their obligations. If the duty to notify defendants/appellants of their SAG rights and responsibilities falls on counsel, the court will inevitably have to deal with litigation over whether the obligation has been discharged.

One of the reasons cited for the proposed rule change is that some defendant/appellants have special circumstances, wherein they do not wish to have court documents mailed to them at their address. OPD and its contractors have been informed that such issues can be and have been handled through motions in individual cases. Motions practice is helpful because it creates a documented paper trail in case a defendant/appellant later complains that they were not provided necessary paperwork or information.

While the current service obligations set forth in RAP 10.2(h) is an "aberration" compared to other service rules, so is the defendant/appellant's right to file a SAG. Courts typically do not recognize pleadings or other documents filed by represented parties in their individual capacities. In many courts, including federal court, there is no such thing as a SAG. The SAG is a special

¹ Not all defendants/appellants in criminal cases are represented by contract attorneys. Thus, OPD contract oversight will not help ensure private counsel abides by SAG deadlines.

creature of Washington appellate procedure and contemplates that defendants/appellants will have direct access to courts, despite being represented by counsel. This access to courts will be undermined if the court is not provided a method for directly communicating with the defendant/appellant about their rights.

The current system for facilitating appeals and notices of SAGs through receipt of defendant/appellant addresses works well. There is no need for a fix. The changes proposed by OPD raise the potential of unnecessary litigation and decreased access to the courts. The Court of Appeals Rules Committee therefore opposes the proposed RAP amendments submitted by the Washington State Office of Public Defense.

Should the Supreme Court decide to adopt the proposed rule, the Court of Appeals Rules Committee would ask that the rule at least require defense counsel to notify the court if a mailing comes back as undeliverable.

From: [OFFICE RECEPTIONIST, CLERK](#)
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From: Maxa, Bradley
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To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: COA Rules Committee Comments - RAP 10.2, RAP 10.10, RAP 5.3

Attached are the comments of the Court of Appeals Rules Committee to the proposed amendments to RAP 10.2, RAP 10.10, and RAP 5.3. These proposed amendments were submitted by the Office of Public Defense.

Judge Bradley A. Maxa
Washington Court of Appeals, Division II

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