From: OFFICE RECEPTIONIST, CLERK
To: Linford, Tera
Subject: FW: Comment to proposed changes to RAP 18.9
Date: Friday, February 4, 2022 4:47:42 PM

From: Andrew Van Winkle [mailto:avanwinkle8@gmail.com]
Sent: Friday, February 4, 2022 4:36 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment to proposed changes to RAP 18.9

Good Afternoon,

I am writing to comment on the proposed changes to RAP 18.9, published for comment December 2021. I write in my private capacity and not as a representative of any court or organization. I write to highlight a few typos in the proposed rule and to recommend a substantive amendment to the proposal.

The proposal published on the court rules website erroneously changes “commissioner or clerk” to “commissioner of clerk.” The proposal adds a numeral 0 after the numeral 1 in subsection (b)(1). The preposition “in” contained in the proposed new subsection (b)(2) should be “if.”

I support the proposal’s intent to track along with RAP 18.9(c) and to make explicit the courts’ existing practice. However, the courts should also take this opportunity to define abandonment. Dismissal is an extreme remedy. In my experience dismissal for abandonment is a remedy that is applied most often to pro se litigants. Pro se litigants are overwhelmingly unschooled in the law and usually lack the ability to track down obscure case law defining abandonment. While the appellate courts’ commissioners and clerks undoubtedly have established benchmarks they apply when dismissing appeals as abandoned, these benchmarks are not knowable to the general public, and they are not known by the parties until they are under threat of dismissal and receive notice of such threat. In order to promote access to justice and to promote the public’s perception of the courts as fair, the courts should clearly define what criteria they apply when imposing the extreme sanction of dismissal due to abandonment.

Currently, Washington’s case law applies two standards for dismissing appeals as abandoned. A high standard applies in criminal cases by virtue of Art. I, § 22, of the Washington Constitution. A lower standard applies to civil appeals. Neither standard has ever been clearly defined.

In *Ashbaugh*, the Supreme Court held that inaction alone is insufficient to dismiss a criminal appeal as abandoned. Instead, there must be evidence that the criminal appellant, personally, made a knowing voluntary, and intelligent waiver of their constitutional right to appeal. *State v. Ashbaugh*, 90 Wn.2d 432, 439, 583 P.2d 1206 (1978) (5 months of attorney inaction insufficient to dismiss criminal appeal). In *Tomal*, the Supreme Court re-affirmed *Ashbaugh*, and held that 4 years of inaction was also insufficient to dismiss a criminal appeal as abandoned when there was no evidence that the appellant personally abandoned their appeal. *State v. Tomal*, 133 Wn.2d 985, 948 P.2d 833 (1997). In *Tomal*, the Supreme Court was actually reviewing dismissal of a RALJ appeal. Under RALJ 10.2(a), an appeal is considered

abandoned after 90 days of no action. *Tomal* invalidated the presumption of abandonment contained in RALJ 10.2(a) to the extent that it has been applied to criminal appellants represented by counsel.

Following *Ashbaugh* and *Tomal*, gross neglect by counsel will never justify dismissing a criminal appeal as abandoned. Where the appellant is pro se, the appellate court may infer a knowing and voluntary abandonment of the right due to inaction. *In re Pers. Restraint of Clements*, 125 Wn. App. 634, 106 P.3d 244 (2005), *rev'w den*. 154 Wn.2d 1020 (2005). In *Clements*, the petitioner filed a PRP attacking the dismissal of his direct appeal due to abandonment. The court of appeals denied the PRP, noting that the petitioner's appeal had been dismissed due to his failure to file his opening brief after receiving several extensions.

Since *Ashbaugh* and *Tomal*, no appellate opinion has defined what evidence is necessary to find a knowing and voluntary abandonment of appeal in a criminal case where the party is represented by counsel. With regard to civil cases, *Ashbaugh* implied that appellate courts could continue to apply a presumption of abandonment whenever there is lengthy inaction. Again, no opinion has clarified what type or degree of inaction in a civil case will result in dismissal for abandonment (e.g. Failure to timely perfect the record? Failure to timely file a brief? 30 days delay? 90 days delay? 180 days delay?). To ameliorate this gap in public information, the proposed amendment should be withdrawn and resubmitted with a definition of abandonment.

The following is a re-write of the proposed rule that incorporates *Ashbaugh*, *Tomal*, and *Clements*, and partially mirrors RALJ 10.2(a):

RAP 18.9
VIOLATION OF RULES

(a) [Unchanged.]

(b) Dismissal on Motion of Commissioner or Clerk. The commissioner or clerk, on 10 days' notice to the parties, ~~may~~ (1) may dismiss a review proceeding as provided in section (a), (2) may dismiss a review proceeding for want of prosecution if the party seeking review has abandoned the review proceeding, and (~~2~~3) except as provided in rule 18.8(b), will dismiss a review proceeding for failure to timely file a notice of appeal, a notice for discretionary review, a motion for discretionary review of a decision of the Court of Appeals, or a petition for review. A party may object to the ruling of the commissioner or clerk only as provided in rule 17.7.

(c) – (d) [Unchanged.]

(e) "Abandoned" defined. The appellate court will apply the following criteria when determining whether a party has abandoned the review proceeding:

(1) In criminal cases where the defendant is the party seeking review, no review proceeding will be dismissed as abandoned for want of prosecution unless the defendant has made a knowing, voluntary, and intelligent waiver of their right to review.

(A) The defendant will be deemed to have made a knowing, voluntary, and intelligent waiver of their right to review if the defendant fails to complete the actions required in the notice mailed under subsection (e)(1)(B) of this rule within 30 days of the court mailing the notice.

(B) If at least 90 days have passed since the defendant or the defendant's attorney has taken any action of record in the proceeding, the court may mail the defendant notice of (1) the court's intent to dismiss the review proceeding due to abandonment, (2) the reasons why the court believes the defendant has abandoned the review proceeding, (3) and the actions the

defendant must take to continue the review proceeding.

(C) The court will mail the notice provided under subsection (e)(1)(B) of this rule to the defendant's current mailing address on file with the appellate court; if no address has been provided to the appellate court, then the court will mail the notice to the defendant's last known address at the trial court. The court will also mail the notice to the attorneys of record on the case.

(2) In all other cases not governed by subsection (e)(1) of this rule, the court may deem a review proceeding abandoned when the party seeking review has failed to comply with an applicable timeline for filing or service of any required document and the party has not taken any action of record in the 90 days prior to (A) the court giving the 10 days' notice under subsection (b) of this rule or (B) the respondent filing a motion to dismiss under subsection (c) of this rule.