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Subject: FW: Comment to proposed changes to RAP 108
Date: Friday, February 4, 2022 4:48:05 PM

From: Andrew Van Winkle [mailto:avanwinkle8@gmail.com]
Sent: Friday, February 4, 2022 4:46 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment to proposed changes to RAP 108

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Good Afternoon,

I am writing to comment on the proposed changes to RAP 10.8, published for comment October 2021. I write in my private capacity and not as a representative of any court or organization. I write in support of the stated purpose behind the proposed amendments to RAP 10.8, but also to recommend changes to the proposal that I believe will better achieve those goals and to recommend changes that comply with the intent behind RAP 18.17. My comments are addressed at the subsections of the proposed rule, not as the rule is currently written.

Subsection (a): no comment.

Subsection (b): 1 page/350 words is a reasonable length. However, 250 words would be more consistent with RAP 18.17. Most (but not all) of the word limits in RAP 18.17 were based on a ratio of 1 page = 250 words.

Delete the word “body” from subsection (b). The word “body” is undefined, ambiguous, and does not appear anywhere else in RAP formatting rules. Notably, the word “body” was not used in the length limitations in subsection (d) of the proposed rule. Inclusion of the word “body” in subsection (b) creates needless inconsistency with subsection (d).

Preferably, subsection (b) would simply refer readers to RAP 18.17 and RAP 18.17 would be amended to include statements of additional authorities. The RAPs no longer contain page requirements within the various rules; instead, all the old references to page limits refer the reader to RAP 18.17. The court should maintain this consistency throughout the RAPs.

Subsection (c): The purpose of RAP 10.8 has been informally debated for years. Some attempt to use it as an unauthorized supplemental brief, bypassing RAP 10.1(h). *E.g. SEIU Healthcare Northwest Training Partnership v. Evergreen Freedom Foundation*, 5 Wn. App. 2d 496, 427 P.3d 688 (2018). The word count specification puts that part of the debate to rest by making it clearly impractical to use as a device for supplemental briefing.

For others, including Divisions I and III, RAP 10.8 is also limited to new authorities—not authorities that the parties could have found through the exercise of diligence. *O'Neill v. City of Shoreline*, 183 Wn. App. 15, 23, 332 P.3d 1099 (2014); *Eugster v. Wash. St. Bar. Ass'n*, 198 Wn. App. 758, 771, 397 P.3d 131 (2017). Contrary to *O'Neill* and *Eugster*, the Supreme Court has held that RAP 10.8 implies no limitation on the types of additional authorities that may be filed. *Futurewise v. Western Wash. Growth Mgmt. Hrgs. Bd.*, 164 Wn.2d 242, 248 n. 2, 189 P.3d 161 (2008). No court has acknowledged this split of

authorities.

The proposed amendment advances a reasonable middle ground between these two positions: additional authorities of any type are allowed up to 7 days before arguments, and within that 7-day window only new authorities may be cited. I write in support of adopting this middle ground. Limiting the types of additional authorities that may be cited further reduces the incentive to use RAP 10.8 as an improper supplemental brief. It also helps to limit the parties' attorney fees and costs. If parties are now going to be allowed limited argument, the opposing party is going to feel compelled to respond. Responding to arguments in statements of additional authorities will take time, even when limited to 350 words, and will increase attorney fees. If the additional authority is a secondary authority, such as a law review article or the Restatement of Torts, the time it takes to research and respond, and associated costs, will quickly become substantial, regardless of the word limit. Thus, I support some limitation on the types of additional authorities that may be cited.

However, the middle ground in the proposed rule should be modified. As currently drafted, the proposed rule is ambiguous on the type of authorities that may be filed after argument, but before a decision on the merits. The proposal should be amended to clarify that only newly published authorities may be cited beyond a certain point. The cutoff for filing additional authorities of any variety should be tightened to further disincentivize use of RAP 10.8 as a surrogate for supplemental briefing. When parties have more to say, they should be steered toward RAP 10.1(h).

Subsection (d): same RAP 18.17 issue with subsection (b). Subsection (d) also fails to require service of the response and the filing deadline is based on the date of filing, not the date of service like RAP 10.2(b) and RAP 17.4(e). These holes and inconsistencies with other RAPs should be filled.

The following is a re-write of the proposed rule that incorporates the concerns and suggestions addressed above:

RAP 10.8 ADDITIONAL AUTHORITIES

(a) Generally. A party or amicus curiae may file a statement of additional authorities. ~~The statement should not contain argument, but should identify the issue for which each authority is offered. The additional authorities must relate to a point made in the briefing or at oral argument.~~

(b) Contents. ~~The statement must include argument explaining the additional authorities' relevance and must include a pinpoint citation to the page of the brief or portion of oral argument that the supplemental authority addresses. The statement should comply with the formatting requirements of RAP 18.17.~~

(c) Timing. ~~The statement must be served on every other party and on amicus curiae at the time of filing, and filed prior to the filing of the decision on the merits or, if there is a motion for reconsideration, prior to the filing of the decision on the motion. The statement should comply with the formatting requirements of RAP 18.17. Statements of additional authorities may be submitted at any time prior to the filing of the decision on the merits, provided: no statement of additional authorities may be filed more than 30 days after filing of the last brief authorized by RAP 10.1(b) – (g) or RAP 13.7(d) except a statement citing newly published authority.~~

(d) Response. ~~Any response to the statement of additional authorities must be filed and served on every other party and on any amicus curiae no later than seven (7) days after the statement is served on the responding party. The response should comply with the formatting requirements of RAP 18.17.~~

RAP 18.17

**WORD
LIMITATIONS,
PREPARATION,
AND FILING OF
DOCUMENTS**

**SUBMITTED
TO THE COURT
OF APPEALS AND
SUPREME COURT**

(a) [Unchanged.]

(b) [Unchanged.]

(c) (1) – (18) [Unchanged.]

(19) Statements of additional authorities (RAP 10.8) and responses: 250 words (word processing software) or 1 page (typewriter or handwritten)