

WSR 21-09-025
RULES OF COURT
STATE SUPREME COURT
[April 7, 2021]

IN THE MATTER OF THE) ORDER
SUGGESTED AMENDMENTS TO) NO. 25700-A-1342
RAP 5.3—CONTENT OF NOTICE—)
FILING; RAP 10.2—TIME FOR)
FILING BRIEFS; RAP 10.10—)
STATEMENT OF ADDITIONAL)
GROUND FOR REVIEW)

The Washington State Office of Public Defense, having recommended 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, and the Court having approved the suggested amendments for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested amendments as shown below are to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites in January 2022.

(b) The purpose statement as required by GR 9(e), is published solely for the information of the Bench, Bar and other interested parties.

(c) Comments are to be submitted to the Clerk of the Supreme Court by either U.S. Mail or Internet E-Mail by no later than April 30, 2022. Comments may be sent to the following addresses: P.O. Box 40929, Olympia, Washington 98504-0929, or supreme@courts.wa.gov. Comments submitted by e-mail message must be limited to 1500 words.

DATED at Olympia, Washington this 7th day of April, 2021.

For the Court

Gonzalez, C.J.

CHIEF JUSTICE

GR 8 COVER SHEET

Suggested Amendments
Rules of Appellate Procedure

RAP 10.2—Time for Filing Briefs
RAP 10.10—Statement of Additional Grounds for Review
RAP 5.3—Content of Notice—Filing

- A. Proponent: Washington State Office of Public Defense
B. Spokesperson: Gideon Newmark, Appellate Program Manager
C. Purpose: RAP 10.2(h) requires defense attorneys in criminal

appeals to serve their clients with a copy of the appellant's brief and file proof of service in the appellate court. This rule is unnecessary because ethical and contractual rules already require attorneys to provide clients with a copy of critical filings such as briefs. And the rule is an aberration in legal procedure that inserts the appellate courts into the attorney-client relationship and puts the health and safety of clients at risk. While RAP 10.2(h) currently serves a role in the Statement of Additional Grounds (SAG) process by confirm-

ing the date that the client was sent the appellant's brief, minor amendments to RAP 10.10(c) could ensure that the SAG process continues to function smoothly. These amendments would also make unnecessary RAP 5.3(c)'s requirement for counsel in criminal cases to keep the Court of Appeals informed of the client's current address.

Ethical and contractual rules already require attorneys to provide clients with copies of critical filings such as the appellant's brief. RPC 1.4 requires attorneys to consult with clients about the means by which the client's objectives are to be accomplished, and to keep the client reasonably informed about the status of the case. There is no plausible reading of this rule that would excuse counsel from providing the client with copies of critical filings such as the appellant's brief. Moreover, indigent defense contracts with the Office of Public Defense, covering the great majority of criminal appeals, require appointed counsel to provide the client with copies of all briefs. These ethical duties and contractual obligations make it unnecessary for a court rule directing attorneys to formally serve their clients with the appellant's brief.

Not only is RAP 10.2(h)'s service requirement unnecessary, it is a legal aberration insofar as it requires attorneys to serve documents on their own clients. Service is generally reserved for other parties. See CR 5 (requiring service of pleadings, motions, discovery, and other documents on other parties). And service of documents other than a complaint is normally accomplished by serving a represented party's attorney, not the client. CR 5 (b)(1). There is no need for attorneys to serve their own clients in civil cases, and there is no obvious distinction between criminal and civil cases that justifies the client-service requirement of RAP 10.2(h). Like civil attorneys, criminal attorneys should be trusted to competently and professionally handle the attorney-client relationship without a court rule micromanaging aspects thereof.

Furthermore, RAP 10.2(h) is potentially dangerous to the health and safety of clients. Some criminal clients are convicted of notorious crimes, for which they could be at risk of physical violence in prison. Or they may be subject to a loss of housing or social support if friends or family learn about their convictions. Hence, some clients do wish not to receive the appellant's brief, or any other documents from counsel detailing their convictions, because those documents could be read by cellmates or household members. Clients should be able to decide which documents they wish to receive from counsel; RAP 10.2(h) takes authority away from clients in a way that has the potential to directly threaten their health and safety.

RAP 10.2(h)'s primary purpose seems to be facilitating the SAG process. Per RAP 10.10(d), the SAG deadline may not run until the client has received the appellant's brief, as well as notice from the appellate court of the SAG procedures. By requiring attorneys to serve their clients and provide the court with proof of service, the court is assured that the client has received the brief and that the SAG deadline may start running. This is the practice in only two of the three Court of Appeals divisions, however.

OPD is informed that, in Division I, the court sends the required SAG notice to counsel, who forwards it to the client along with the appellant's brief. Division I starts the SAG deadline running when notice is mailed to counsel, without requiring proof of service to show when the client received it. Appellate attorneys practicing in Division I report that this process works flawlessly and has done so for years. This process simplifies matters for both attorneys and the

courts; the courts have no need to closely track a client's whereabouts to ensure the client receives the SAG notice, and the attorneys have no need to file proof of service when providing the client with the appellant's brief.

The Office of Public Defense therefore suggests that RAP 10.2(h) be amended to eliminate the requirement to serve the client with a copy of the brief, and that RAP 10.10(c) be amended to provide that the appellate court will send notice of SAG procedures to the attorney, who must promptly forward it to the client. With the need for the appellate courts to send the SAG notice directly to clients eliminated, RAP 5.3(c) should also be amended to drop the requirement that appellate counsel in criminal cases keep the courts apprised of the client's current address.

To avoid any prejudice to the client, the proposed amendment to RAP 10.10 adds five days to the SAG deadline. This should allow sufficient time for the attorney to forward the court's notice of SAG procedures without impinging on the client's time to file the SAG. Given that the case's briefing will not be completed for at least 90 days after the appellant's brief is filed, these additional five days should not impact case resolution time.

D. Hearing: A hearing is not requested

E. Expedited Consideration: Expedited consideration is not requested

F. Supporting Material: Suggested rule amendments

Reviser's note: The typographical error in the above section occurred in the copy filed by the agency and appears in the Register pursuant to the requirements of RCW 34.08.040.

SUGGESTED AMENDMENT

RULES OF APPELLATE PROCEDURE (RAP)

RULE 10.2—TIME FOR FILING BRIEFS

(a) Brief of Appellant or Petitioner. The brief of an appellant or petitioner should be filed with the appellate court within 45 days after the report of proceedings is filed in the appellate court; or, if the record on review does not include a report of proceedings, within 45 days after the party seeking review has filed the designation of clerk's papers and exhibits in the trial court.

(b) Brief of Respondent in Civil Case. The brief of a respondent in a civil case should be filed with the appellate court within 30 days after service of the brief of appellant or petitioner.

(c) Brief of Respondent in Criminal Case. The brief of a respondent in a criminal case should be filed with the appellate court within 60 days after service of the brief of appellant or petitioner.

(d) Reply Brief. A reply brief of an appellant or petitioner should be filed with the appellate court within 30 days after service of the brief of respondent unless the court orders otherwise.

(e) [Reserved; see rule 10.10]

(f) Brief of Amicus Curiae. Unless the court sets a different date, or allows a later date upon a showing of particular justification, a brief of amicus curiae should be filed as follows.

(1) Supreme Court. A brief of amicus curiae should be received by the court and counsel of record for the parties and any other amicus curiae not later than 45 days before oral argument or consideration of the merits.

(2) Court of Appeals. A brief of amicus curiae should be received by the court and counsel of record for the parties and any other ami-

cus curiae not later than 45 days after the filing of the last brief of respondent permitted under rule 10.2(b) or 10.2(c).

(g) Answer to Brief of Amicus Curiae. A brief in answer to the brief of amicus curiae may be filed with the appellate court not later than the date fixed by the appellate court.

(h) Service of Briefs. At the time a party files a brief, the party should serve one copy on every other party and on any amicus curiae, and file proof of service with the appellate court. ~~In a criminal case in which the defendant is the appellant, appellant's counsel should serve the appellant's brief on appellant and file proof of service with the appellate court. Service and proof of service should be made in accordance with rules 18.5 and 18.6.~~

(i) Sanctions for Late Filing and Service. The appellate court will ordinarily impose sanctions under rule 18.9 for failure to timely file and serve a brief.

SUGGESTED AMENDMENT

RULES OF APPELLATE PROCEDURE (RAP)

RULE 10.10—STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

(a) Statement Permitted. In a criminal case on direct appeal, the defendant may file a pro se statement of additional grounds for review to identify and discuss those matters related to the decision under review that the defendant believes have not been adequately addressed by the brief filed by the defendant's counsel.

(b) Length and Legibility. The statement, which shall be limited to no more than 50 pages, may be submitted in handwriting so long as it is legible and can be reproduced by the clerk.

(c) Citations; Identification of Errors. Reference to the record and citation to authorities are not necessary or required, but the appellate court will not consider a defendant's statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors. Except as required in cases in which counsel files a motion to withdraw as set forth in RAP 18.3 (a) (2), the appellate court is not obligated to search the record in support of claims made in a defendant's statement of additional grounds for review. Only documents that are contained in the record on review should be attached or referred to in the statement.

(d) Time for Filing. The statement of additional grounds for review should be filed within ~~35~~ 30 days after ~~service upon the defendant of the brief prepared by defendant's counsel and the mailing of a notice from the clerk of the appellate court advising the defendant of the substance of this rule.~~ If the defendant is represented by counsel, the clerk will mail the notice to the defendant's counsel, who should promptly forward the notice to the defendant with a copy of the opening brief. The clerk will advise all parties if the defendant files a statement of additional grounds for review.

(e) Report of Proceedings. If within 30 days after ~~service of the brief prepared by defendant's counsel~~ the mailing of the notice referenced in subsection (d) above, defendant requests a copy of the verbatim report of proceedings from defendant's counsel, counsel should promptly mail ~~serve~~ a copy of the verbatim report of proceedings on to the defendant and should file in the appellate court ~~proof of such service~~ a certificate of mailing, which need not state the address the report of proceedings was mailed to. The pro se statement of additional grounds for review should then be filed within 35 30 days after the certificate of mailing is filed ~~after service of the verbatim report~~

of proceedings. The cost for producing and mailing the verbatim report of proceedings for an indigent defendant will be reimbursed to counsel from the Office of Public Defense in accordance with Title 15 of these rules.

(f) Additional Briefing. The appellate court may, in the exercise of its discretion, request additional briefing from counsel to address issues raised in the defendant's pro se statement.

SUGGESTED AMENDMENT

RULES OF APPELLATE PROCEDURE (RAP)

RULE 5.3—CONTENT OF NOTICE—FILING

(a) Content of Notice of Appeal. A notice of appeal must (1) be titled a notice of appeal, (2) specify the party or parties seeking the review, (3) designate the decision or part of decision which the party wants reviewed, and (4) name the appellate court to which the review is taken.

The party filing the notice of appeal should attach to the notice of appeal a copy of the signed order or judgment from which the appeal is made, and, in a criminal case in which two or more defendants were joined for trial by order of the trial court, provide the names and superior court cause numbers of all codefendants. In a criminal case where the defendant is not represented by counsel at trial, the trial court clerk shall attach a copy of the judgment and sentence, the order of indigency, if applicable, and any service documents with the notice as provided in rule 5.3(j).

(b) Content of Notice for Discretionary Review. A notice for discretionary review must comply in content and form with the requirements for a notice of appeal, except that it should be titled a notice for discretionary review.

A party seeking discretionary review of a decision of a court of limited jurisdiction should include the name of the district or municipal court and the cause number for which review is sought.

(c) Identification of Parties, Counsel, and Address of Defendant in Criminal Case. The party seeking review should include on the notice of appeal the name and address of the attorney for each of the parties. ~~In a criminal case the attorney for the defendant should also notify the appellate court clerk of the defendant's address, by placing this information on the notice. The attorney for a defendant in a criminal case must also keep the appellate court clerk advised of any changes in defendant's address during review.~~

(d) Multiple Parties Filing Notice. More than one party may join in filing a single notice of appeal or notice for discretionary review.

(e) Notices Directed to More Than One Case. If cases have been consolidated for trial, or have been tried together even though not consolidated for trial, separate notices for each case or a single notice for more than one case may be filed. A single notice for more than one case will be given the same effect as if a separate notice had been filed for each case. If cases have not been consolidated for trial or have not been tried together, separate notices must be filed.

(f) Defects in Form of Notice. The appellate court will disregard defects in the form of a notice of appeal or a notice for discretionary review if the notice clearly reflects an intent by a party to seek review.

(g) Notices Directed to More Than One Court. If a notice of appeal or a notice for discretionary review is filed which is directed

to the Court of Appeals and a notice is filed in the same case which is directed to the Supreme Court, the case will be treated as if all notices were directed to the Supreme Court.

(h) Amendment of Notice Directed to Portion of Decision. In order to do justice, the appellate court may, on its own initiative or on the motion of a party, permit an amendment of a notice to include (i) additional parts of a trial court decision, or (ii) subsequent acts of the trial court that relate to the act designated in the original notice of discretionary review. If the amendment is permitted, the record should be supplemented as provided in rule 9.10. The appellate court may condition the amendment on appropriate terms, including payment of a compensatory award under rule 18.9. An amendment extends the time allowed to seek cross review only of those additional parts of the decision or subsequent acts, and such notice seeking cross review must be filed within the later of (1) 14 days after service of the amended notice filed by the other party, or (2) the time within which notice must be given as provided by rule 5.2 (a), (b), (d), or (e).

(i) Notice by Fewer Than All Parties on a Side—Joinder. If there are multiple parties on a side of a case and fewer than all of the parties on that side of the case timely file a notice of appeal or notice for discretionary review, the appellate court will grant relief only (1) to a party who has timely filed a notice, (2) to a party who has been joined as provided in this section or (3) to a party if demanded by the necessities of the case. The appellate court will permit the joinder on review of a party who did not give notice only if the party's rights or duties are derived through the rights or duties of a party who timely filed a notice or if the party's rights or duties are dependent upon the appellate court determination of the rights or duties of a party who timely filed a notice.

(j) Assistance to Defendant in Criminal Case or Party Entitled to Review at Public Expense. Trial counsel for a defendant in a criminal case or party entitled to review at public expense is responsible for filing any appropriate notice of appeal, notice for discretionary review, and motion for order of indigency under rule 15.2. If such a defendant or party is not represented by counsel at trial, the trial court clerk shall, if requested by a defendant or party in open court or in writing, supply a notice of appeal form, a notice for discretionary review form, or a form for a motion for order of indigency, and file the forms upon completion by the defendant or party. The clerk shall transmit the forms and all related orders to the appellate court.