Seeking Supreme Court Review – Who Gets the Last Word?

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Always Appealing" is a column addressing current issues in appellate practice and recent appellate cases written by the lawyers of Smith Goodfriend, PS, a Seattle law firm in Seattle that limits its practice to civil appeals and related trial court motions practice.

Unlike the cadence of a merits appeal — opening brief, response brief, reply brief — a party that files a petition for review with the Washington Supreme Court is not permitted to file a reply unless "the answering party seeks review of issues not raised in the petition for review." RAP 13.4(d). Although this language appears straightforward, whether a respondent's answer has triggered the petitioner's right to file a reply by "seeking review" of an issue has generated a surfeit of motions practice, with motions to strike a reply to a (real or imagined) "new" issue generating a whole other round of pleadings. In almost every monthly Departmental calendar, there is usually at least one case in which the Department also rules on a motion to strike a claimed unauthorized reply.

This surely was not what was intended when RAP 13.4(d) was promulgated prohibiting most replies in support of a petition for review. But because petitions for review are resolved through summary orders with no explanation, little case law exists on what it means to "seek review" of an

issue under RAP 13.4(d). However, the Supreme Court's disposition of recent motions to strike replies provides some hints to the proper interpretation of RAP 13.4(d).

As an initial matter, it is perhaps easiest to explain when a reply is not authorized. A reply is not authorized simply because the respondent has discussed arguments or authorities not addressed in the petition. In other words, "argument" is not synonymous with "issue." Because of repeated confusion on this point, the Supreme Court amended RAP 13.4(d) in 2006, which previously authorized a reply if "the answer raise[d] a new issue." The current "seeks review" formulation was used in the hopes of preventing "abuse by petitioning parties who attempt to cast an answering party's arguments in response to a petition for review as 'new issues' in order to reargue issues raised in the petition." See Tegland, 3 Wash. Prac., Rules Practice RAP 13.4 (8th ed.) (quoting Drafter's Comment, 2006 Amendment to RAP 13.4).

Despite this amendment, petitioners continue to justify filing replies by conflating "argument" with "issue." For example, in Bayley Constr. v. Dep't of Labor & Indus, 195 Wn.2d 1004, 458 P.3d 788 (2020), the Supreme Court denied review and struck a reply, rejecting the petitioner's assertion that the respondent's argument relying on dictionary definitions was a new issue because the petition had not addressed those definitions.1

Another problem of interpretation arises when a respondent "conditionally" raises an issue in its answer, i.e., asks that the Court only review the issue if it first accepts review of an issue raised by the petitioner, while resisting review altogether as the preferred result. The Supreme Court recently addressed this issue in Coogan, et al. v. Genuine Parts Co., et al., __ Wn.2d __, 466 P.3d 776 (2020), where the petitioner filed a reply addressing several issues the respondent conditionally raised. The respondent asked the Supreme Court to strike the reply, arguing that it did not "seek review" of any issues, because "it did not want [the] Court to grant review," and had "merely ask[ed] the Court to take up additional issues if it grants review as requested by the petitioner." The Supreme Court denied the motion to strike — and, perhaps not coincidentally, accepted review of the issues raised by both petitioner and respondent.

Although the Supreme Court's order in Coogan contains no reasoning, it is clear from the Court's denial of the motion to strike that it believed the petitioner had done nothing wrong in filing a reply. This makes sense because RAP 13.4(d) allows each party to address an issue once and, unlike a reply rearguing issues raised in the petition, a reply addressing conditional issues raised by the respondent will be the only opportunity for the petitioner to address those issues.

So, what lessons can be learned from Bayley and Coogan? First, counsel should not file replies based on a creative interpretation of what constitutes an "issue." In the July and August 2020 terms the Supreme Court struck a total of six replies — five at the Clerk's request and another

based on a motion from the respondent. More to the point, the Court did not grant review in any of the cases in which it struck an unauthorized reply. Although it is always tempting to get in the last word, filing an unauthorized reply the Court is unlikely to consider — and may strike on its own motion — does nothing to help a client and risks distracting from potentially meritorious issues raised in the petition. Moreover, if the Court does grant review, a petitioner can always respond to new arguments in its supplemental brief.

Second, respondents should consider carefully whether to raise new issues in the answer, either conditionally or unconditionally, because doing so will permit the petitioner to file a reply. Raising new issues, even conditionally, also increases the likelihood the Supreme Court will grant review by providing additional grounds for review. If a respondent is content with the result in the Court of Appeals, it may be better to focus on why the petition fails to meet the criteria of RAP 13.4(b), rather than raising additional issues that might pique the Court's interest.

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1 The motions to strike and related pleadings cited in this article are posted on the Supreme Court's website, https://www.courts.wa.gov/appellate_trial_courts/supreme/?fa=atc_supreme.petitions.