NO SUPP(lemental Briefing) FOR YOU: Why the Supreme Court Should Clarify the Purpose of Additional Authorities Under RAP 10.8.

By Jonathan Collins

"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 that limits its practice to civil appeals and related trial court motions practice.

When asked for final wisdom on his deathbed, Karl Marx famously responded that "last words are for fools who haven't said enough." Marx didn't have lawyers in mind (probably), but many in the profession exhibit a similar pathology—desperately seeking the last word, never believing they have said enough.

The Supreme Court may have underestimated just how many lawyers fall into this category when it recently amended RAP 10.8, which allows parties to submit additional authorities any time before their case is decided. Rather than simply notifying the court of new case law, some parties seem to think the amended rule allows supplemental briefs—additional argument on authorities that were available before merits briefs were filed.

Under the old rule, parties could provide citation to additional authorities, but additional *argument* was prohibited. In practice, this meant that RAP 10.8 submissions typically included, at most, a citation with a short quote and a brief statement highlighting the relevant legal issue—for example, "*see Johnson v. Smith*, regarding personal jurisdiction." Given this limit on advocacy, parties (well, most parties) tended to submit additional authorities only when they were recently decided and particularly relevant.

But some judges and practitioners were dissatisfied with the rule. Courts noticed that RAP 10.8 submissions were inconsistent, and some judges found the argument

prohibition unhelpful—without further explanation, many citations lacked the necessary context to illustrate authorities' relevance in a particular case.[1]

In some ways, the proposed amendment seemed like a solution in search of a problem. It's true that parties submitted irrelevant authorities under the old rule, but inviting those parties to expound upon irrelevant authority with further explanation is unlikely to have the helpful effect the amendment presumes. If you read a particular case and cannot see how it supports a party's argument, that means it probably doesn't.

After all, courts typically receive statements of additional authority after the merits briefs, after oral argument, and most likely after the panel has conducted an initial vote on the result—the kind of authority that might shift the outcome at that point would not require any further explanation. By prohibiting argument, the old rule encouraged parties to submit additional authorities only when their relevance and persuasive value would be obvious.

In any event, to remedy this "problem," the amended rule requires parties (or amici curiae) to include up to 350 words of argument "explaining the reasons for the additional authorities" and authorizes any other party to submit its own 350-word response. In a typical case—one with only two parties and no amicus curiae—a court might receive up to 1,400 words in additional authorities and argument: one statement and one response from each party.

If that sounds a lot like supplemental briefing, that's because—functionally—it is. During the six months since the new rule first became effective, the consequences have been predictable. While the amendment was intended to assist judges by allowing parties to provide more context for their additional authorities, inviting additional argument has incentivized parties to use RAP 10.8 as a vehicle for supplemental briefing.

At this point you might be thinking that RAP 10.8 is intended for *newly decided* authorities and that this purpose will serve as a natural limit on the number of submissions courts receive. But it turns out Washington courts have provided mixed guidance on this question.

Divisions One and Three have consistently held that "the purpose of RAP 10.8 is to provide parties with an opportunity to bring to the court's attention cases decided *after* the parties submitted their briefs."[2] Division One just recently re-affirmed that this remains true under the new version of the rule.[3] Division Two, on the other hand, has not explicitly held that the rule is limited to new authorities and has implied that it will still consider older cases.[4]

Meanwhile, the Supreme Court also seems to believe that older cases can be submitted under RAP 10.8. The Court implied as much in 2008, noting that "nothing in the rule limits its application to newly created law."[5] And the amendment history reveals the Supreme Court may have intended to keep it that way.

The original proposed amendment provided that any statement of additional authorities submitted later than seven days before the date of oral argument (or the date when the case would be decided without argument) would be limited to authorities decided *after* that deadline.[6] But the Supreme Court declined to include this limitation on authorities and instead included only the provisions allowing for additional argument in the amended rule.

Of course, the old rule contained no limitation on authorities either. But the lack of any express limit on old authorities—and the courts' mixed guidance on whether parties may submit them—was mitigated by the old rule's prohibition against argument. There is

little incentive to dig through old cases you may have initially overlooked when you can't weave them into your case and instead can only cite to them.

Now that parties have space to provide substantive argument, whether old authorities are allowed under the new rule is a crucial question. If any authority is permitted, the "argument" contemplated under the new rule is no different than argument in substantive briefing.

The incentive to submit an additional substantive brief—even a 350-word, mini-brief—is obvious. Every attorney has experienced that feeling of post-brief, post-argument regret that can arise after some reflection and a judge's questions—if only I'd argued that point differently, or emphasized this issue and not that one.

Rather than notify the Court of new authority truly demanding its attention, many attorneys will instead use RAP 10.8 to remedy these regrets under the guise of "discovering" additional authorities—essentially getting a do-over on arguments in merits briefing, or even raising new ones.[7] Litigation maximalists will undoubtedly "discover" additional authorities in every case, to paper over whatever flaws emerge between filing their merits brief and the court's decision.

And who can blame them? The rule invites additional authority and argument without limitation, and the courts do not seem to agree on the scope of what is permitted. To some, foregoing an opportunity to bolster your claims or correct a misstatement during oral argument would be unilateral disarmament. And there is little downside given the worst that can happen is the court simply shrugs the additional authorities away.

Given this new incentive, it's possible the amended rule is even less helpful to judges than the old one. Rather than receiving RAP 10.8 submissions without argument, leaving some judges perplexed as to whether the cited authority is relevant at all, courts

are likely to receive a higher frequency of submissions that—while providing more context—cite minimally-relevant authority only to reiterate arguments already briefed or improperly attempt to raise new ones. An increase in these low-value RAP 10.8 submissions will provide little insight despite increasing litigation costs and creating more work for judges and court staff.

Of course, these concerns may be overstated. The increased burden on courts might turn out to be minimal, and supplemental briefing can be beneficial when the panel raises an important issue during argument that the parties overlooked. Reasonable minds can disagree on how to weigh these pros and cons. Federal courts, for example, have a similar rule allowing parties to explain supplemental authorities in a 350-word letter, though they disagree on whether those authorities must be new.[8]

Nevertheless, the Supreme Court could mitigate any unintended consequences by explicitly clarifying the rule's purpose. If RAP 10.8 is meant to allow for additional argument even regarding old authorities, then all appellate courts and practitioners should be prepared for an additional round of post-argument mini-briefs to become routine.

But if Divisions One and Three are correct that RAP 10.8 is meant to allow only for new authorities, then the Supreme Court should make that clear and, if necessary, amend the rule to discourage parties from submitting improper supplemental briefs.

Either way, you can always avoid becoming one of the "fools" Marx imagined by recognizing when you have said enough.

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[11] Suggested Amendment, RAP 10.8 (Oct. 2021) available at: https://tinyurl.com/4dzhm9k6

[2] *Whitehall v. Wash. State Emp. Sec. Dep't.*, No. 83299-9-I, ¶12 n.3 (Jan. 30, 2023) (internal quote omitted, emphasis added); *Eugster v. Wash. State Bar Ass'n*, 198 Wn. App. 758, 771, 397 P.3d 131 (2017).

[3] *Id.*

[4] *See State v. Olsen*, 175 Wn. App. 269, 290, 309 P.3d 518 (2013).

[5] *Futurewise v. Wn. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 242, 248 n.2, 189 P.3d 161 (2008).

[6] *Supra*, n.1.

[7] RAP 10.8(a). Courts generally do not consider issues raised for the first time during oral argument or in a statement of additional authorities. Of course, that doesn't mean parties won't try to raise them.

[8] Fed. R. App. P. 28(j); *compare Underwood v. City of Bessemer*, 11 F.4th 1317, 1321 n.1 (11th Cir. 2021), *with Cunico v. Pueblo Sch. Dist. No. 60*, 917 F.2d 431, 434 n.1 (10th Cir. 1990).