always Appealing: RAP 17.7

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Bar Bulletin Blog: General

The clerks and commissioners of our state's appellate courts are responsible for much of the day-to-day operation of the court. Issues concerning, among others, perfection of the record, stays, extensions of time, overlength briefing, and the amount of cost and fee awards are handled by these "lower court" personnel in each of the three divisions of the Court of Appeals and in the state Supreme Court.

The "lower courts" generally do a wonderful job of keeping the wheels of appellate justice running smoothly. The commissioners also perform an important gate-keeping role in deciding whether discretionary review should be granted under RAP 2.3(b) of a trial court decision that is not appealable as a matter of right — a decision which requires close analysis of the substantive law governing the challenged decision.

Any appellate court commissioner or clerk ruling is subject to de novo review by a panel of elected judges, just as a commissioner's decision in the superior court is subject to de novo review by an elected superior court judge. The relevant rule is RAP 17.7. Unlike the revision provisions, which limit the record to that before the commissioner, there are no formal limitations on additional information being provided to the panel — although it is best practice, generally, to keep to the record before the commissioner.

When RAP 17.7 was first promulgated in 1976, a party had 10 days to move to modify a ruling of the clerk or commissioner, just as a motion for revision must be made within 10 days. Since 1994, however, "[a]n aggrieved person may object to a ruling of a commissioner or clerk . . . not later than 30 days after the ruling is filed." The reasons for this change are anachronistic, have long outlived their purpose, and the rule is ripe for change.

This time limit for filing a motion to modify was expanded to 30 days because of the suggestion of an attorney in Port Orchard. The WSBA Rules Committee agreed with the concerns raised that "[b]y the time the ruling is received by counsel, there may only be seven days to contact the client, prepare the motion to modify, and get it filed." The comments continued:

This places a difficult burden on counsel both in criminal cases (if the client is incarcerated) and in civil cases (if a business client, for example is out of town).

RAP 17.7 Drafters' Comment, 1994 Amendment, reproduced in 3 Washington Practice.

Although I had my doubts even at the time, at least on the civil side (we DID have fax machines in 1994!), these concerns may have been valid when the rule was changed in 1994. But they have long outlived their whatever deficiencies in the U.S. Mail system that was used for service in the mid-1990s may have been the reason for the rule change. Virtually all rulings are now transmitted instantaneously to the parties; lawyers admitted to practice in Washington must use the appellate courts' internet portal, and anyone can register and set up a free account for filing and service through the portal. And because a motion to modify is not subject to RAP 18.8's restrictions on extensions of time on notices of appeal and petitions for review, if for some reason a shorter time limit does not give a party sufficient time to prepare a motion to modify, a party could ask for additional time.

There are many good reasons to shorten the time in which a motion to modify must be filed. First, many of the rulings subject to the rule are purely administrative and do not affect a substantial right of a party. But because any ruling is subject to modification, and review de novo by a panel of judges, practitioners and parties intent on using the rules for improper purposes can effect at least some uncertainty about the ruling simply by filing a motion to modify within 30 days. The party opposing a motion to modify then has only 10 days to respond, and the moving party another three days to reply, adding another two weeks to the delay.

Further, there is no articulated mechanism for a panel's consideration of motions to modify. The appellate judges do not generally sit together on any sort of formal

motions calendar. Two months or more can go by before a motion to modify is denied — as they usually are.

In addition, when the ruling is one of some substantive significance, such as a grant of discretionary review, the long delay can cause the parties to be in the position of being obligated to perfect the record, and even brief on the merits, while there is some question whether review will in fact be accepted. And when review is denied, the same two-month period of uncertainty whether the case will go forward remains.

There is an easy fix to the rule, and one that could make the RAPs less complicated to follow. Recognizing that speedier resolution of disposition in juvenile offense and dependency proceedings was necessary, the rules governing those types of decisions, RAP 18.13 and RAP 18.13A, require any motion to modify a commissioner's decision terminating review be filed within 15 days. If the time to file all motions to modify were changed to 15 days, it is possible that not only RAP 17.7(b), but RAP 18.13(c)(1), RAP 18.13A(j)(2), could be rescinded.

I'll be proposing this rule change this month.

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