Our Unsung Appellate Hero — RAP 17.6(b)

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RAP 17.6(b) provides that although "[o]rdinarily the judges decide a motion by an order," they may also "decide a motion by an opinion." Over the past three years the Court of Appeals has issued eight opinions under RAP 17.6(b) deciding motions — almost half of the opinions issued under the rule during its 47-year existence. This article documents the history of RAP 17.6(b) and explains why the Court of Appeals' increased reliance on the rule is a welcome trend for practitioners.

RAP 17.6(b), to my surprise, was part of the RAPs when they were originally enacted in 1976.1 The rule has never been amended and, unlike many of the RAPs, was not accompanied by any drafters' comments when enacted.2 It was not until 2001 — 25 years after the rule's enactment — that a case relied on the rule to issue an opinion deciding a motion and in total 17 opinions have been issued under the rule.3 Three of the first four opinions to cite the rule were rulings on the now defunct motions on the merits process and are thus of little relevance today.4

More recently, however, opinions issued under RAP 17.6(b) have addressed aspects of the appellate process that typically are not addressed in opinions on the merits. For example, in State v. Waits,5 the Court of Appeals denied a motion to modify a commissioner's ruling requiring appellate counsel to prepare a narrative or agreed report of proceedings under RAP 9.3 or 9.4 because the verbatim transcript contained 1,500 notations of "inaudible." The Court of Appeals explained that it decided to issue an opinion under RAP 17.6(b) "[b]ecause this court has seen similar issues in other cases and anticipates more to come."6 Similarly, in Matter of Moncada the Court of Appeals issued an opinion granting a

“motion to modify a commissioner’s ruling refusing to strike hearsay from a declaration filed in support of a personal restraint petition,” stating that it exercised its “discretion under RAP 17.6(b) to explain our ruling by published opinion” “[i]n order to provide guidance to other petitioners.”7

Whether to grant discretionary review under RAP 2.3(b) has also been addressed in four opinions published under RAP 17.6(b).8 The earliest of these decisions, Minehart, was frequently cited as a leading authority on the standard for granting discretionary review.9 Other topics addressed via a RAP 17.6(b) opinion include standing under RAP 3.1,10 appealability,11 reconsideration,12 submission of additional evidence under RAP 9.11,13 the timeliness of a personal restraint petition,14 vacation of an award of appellate costs,15 and the standard of review an appellate court applies when reviewing a trial court order setting the amount of a supersedeas bond under RAP 8.1.16

As these decisions illustrate, and as the Court of Appeals itself has noted, RAP 17.6(b) is a valuable tool for allowing appellate courts to provide guidance (and potentially citable authority) on aspects of the appellate process that typically avoid meaningful discussion in opinions on the merits either because they must be addressed before an opinion is issued, e.g., supersedeas and discretionary review, after an opinion is issued, e.g., reconsideration and appellate costs, or because they are tangential to the merits of the appeal, e.g., record issues. Opinions addressing these topics are thus critical because without them important issues are either addressed only in orders that practitioners cannot easily search and access or, if they are addressed in an opinion, are typically regulated to footnotes that provide little context and analysis. For example, IBEW is, to my knowledge, the only published case addressing the standard of review under RAP 8.1.

Accordingly, the Court of Appeals should be lauded for its increased use of RAP 17.6(b) and I greatly hope this trend continues.17 While it is certainly more work for the Court of Appeals to draft and issue opinions under RAP 17.6(b), the guidance they provide should keep practitioners from “stumbling around in the dark” on important issues and ultimately ease the Court of Appeals’ workload. So let’s have it — three cheers for the Court of Appeals and our unsung appellate hero, RAP 17.6(b).

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1 See 86 Wn.2d at 1263.

2 Elizabeth Turner, 3 Wash. Prac., Rules Practice RAP 17.6 (9th ed. July 2023 Update).

3 See Beard v. Chevron Chem. Co., 106 Wn. App. 1016, 2001 WL 518326, at *3 n.2 (2001). In the interests of brevity, I have not included a citation to all 17 cases, but many of the cases are discussed in this article.

4 Each Division of the Court of Appeals has issued a general order electing not to use motions on the merits, as permitted by RAP 18.14(k).

5 20 Wn. App. 2d 800, 802, 502 P.3d 878, aff'd in part, rev'd in part and remanded, 200 Wn.2d 507 (2022).

6 20 Wn. App. 2d at 802.

7 197 Wn. App. 601, 602–03, 391 P.3d 493 (2017).

8 State v. Alpert, 21 Wn. App. 2d 1062, 2022 WL 1210528, at *1 n.1 (2022), opinion after grant of review, 25 Wn. App. 2d 1027 (2023); Gen. Constr. Co. v. Pub. Util. Dist. No. 2 of Grant Cnty., 12 Wn. App. 2d 1042, 2020 WL 1028096, at *2 (2020); City of Spokane v. Wardrop, 165 Wn. App. 744, 745, 267 P.3d 1054 (2011); Minehart v. Morning Star Boys Ranch, Inc., 156 Wn. App. 457, 460, 232 P.3d 591 (2010).

9 See, e.g., Judge Stephen J. Dwyer, Leonard J. Feldman, Hunter Ferguson, The Confusing Standards for Discretionary Review in Washington and A Proposed Framework for Clarity, 38 Seattle U. L. Rev. 91, 104 (2014).

10 Banta v. Emp. Sec. Dep't of State, 115 Wn. App. 1056, 2003 WL 733011, at *1 (2003).

11 State v. Abrams, No. 39050-1-III, 2023 WL 5361460, at *1 (Wash. Ct. App. Aug. 22, 2023)

12 Umpqua Bank v. Gunzel, 19 Wn. App. 2d 16, 18, 501 P.3d 177 (2021), rev. denied 198 Wn.2d 1038 (2022).

13 Umpqua Bank, 19 Wn. App. 2d at 18.

14 Matter of Blanks, 14 Wn. App. 2d 559, 561, 471 P.3d 272 (2020); Matter of Millspaugh, 14 Wn. App. 2d 137, 142, 469 P.3d 336 (2020).

15 State v. White, 11 Wn. App. 2d 1074, 2020 WL 1893588, at*3 (2020).

16 IBEW Health & Welfare Tr. of Sw. Washington v. Rutherford, 195 Wn. App. 863, 864 n.1, 381 P.3d 1221 (2016).

17 Other topics I believe would benefit from discussion in a RAP 17.6(b) opinion are the standard for granting or denying a motion to recall the mandate under RAP 12.9, the standard for accelerated review under RAP 18.12, and when it is appropriate to condition a party's right to participate in further review on payment of an award to the other party under RAP 18.9(a).