Questions and Answers

about

Civil Appeals in the Washington State Court of Appeals

Introduction:

These questions and answers about civil appeals in the Washington State Court of Appeals are meant to give both parties and attorneys a readily accessible overview of a handful of key issues. In no way do they offer a substitute for close study of the relevant Rules of Appellate Procedure (the "RAPs"), nor are they meant to compete with the two excellent comprehensive secondary sources on appellate practice in Washington: 1) The Washington State Bar Association's *Appellate Practice Desk Book*; and 2) volume 2A of Karl B. Tegland's *Washington Practice: Rules Practice*.[1] Although both of these works should be available in county law libraries, and the latter can be found on Westlaw, neither is freely accessible on the web. The relatively condensed analysis that follows occasionally takes issue with these two standard works, but anyone with any doubts about the right answer to a question about the application of the RAPs to their case is well advised to consult them.

To keep this document reasonably concise, it focuses on questions posed by appeals from the Washington State Superior Courts to the Washington State Court of Appeals. Accordingly, it says little to nothing about appellate review of decisions by District or Municipal Courts, about special problems of review of decisions of administrative agencies, about criminal appeals or personal restraint petitions, or about procedures in the Washington State Supreme Court.

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[1] The RAPs are available on the web at: http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=app&set=RAP. The "General Orders" of each of the three divisions of the Court of Appeals, which supplement the RAPs in a limited number of areas, are on the web at: http://www.courts.wa.gov/court_rules/?fa=court_rules.state&group=app. The Washington State Courts website also offers a useful "Appellate Case Processing Guide", complete with links to forms, at: http://www.courts.wa.gov/appellate_trial_courts/div1/caseproc/

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BASIC VOCABULARY OF THE APPEAL PROCESS

"Appellant":	the party seeking review by the Court of Appeals of a decision by a Washington State Superior Court.
"Brief":	The written presentation of argument on the merits of the appeal to the Court of Appeals, the form and contents of which are regulated by RAPs 10.3 and 10.4. Normally, Appellant's Opening Brief is followed by Respondent's Brief, which in turn is followed by Appellant's Reply Brief.
"Motion":	A written presentation of argument to the Court of Appeals, typically on a subordinate matter such as a request for an extension of time or a request to strike part of an opponent's brief (but see the discussion of "motions on the merits" below). Regulated by RAP 17.1 through RAP 17.7.
"Oral Argument":	The in-person presentation of arguments to either a panel of judges or a commissioner. The appellant goes first, followed by respondent, and appellant may make a concluding reply she has reserved part of her time for that purpose. There may be oral argument on motions as well as briefs, but in most cases it is dominated by questions from the judges or commissioner. See RAP 11.1 through RAP 11.4, and RAP 17.5.
"RAPs":	The Rules of Appellate Procedure, available on the web at: http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=app&set=RAP
"Respondent:	the party defending a decision or action of a Washington State Superior Court against an appeal.
"Supersedeas Bond":	a bond posted with the trial court in order to stay the judgment creditor's execution on the judgment during the pendency of the appeal

TO APPEAL OR NOT TO APPEAL

What will the appeal cost?

Each party to an appeal typically hires an attorney, and someone has to pay them. In the standard case, each party pays for his or her own attorney (but see the discussion of "fee shifting" in the next paragraph). If you are paying for your attorney by the hour, your bill for his or her services will be equal to the number of hours they spend on your case, times their hourly rate. Hours worked will depend on the extent of the record that must be reviewed and mastered, as well as on the complexity of the legal issues that must be analyzed and argued. For an appellant, the required work in a typical case can be divided into four stages: 1) Gathering and analyzing the record on review; 2) preparing appellant's opening brief; 3) reviewing respondent's brief and preparing appellant's reply brief; and 4) preparing for and giving oral argument. In my experience, performing all of these tasks rarely takes less than 100 hours (for a case with a small record to master, and simple legal issues), and can take many times that. If either party is likely to seek further review at the State Supreme Court, that will add a substantial amount of time.

The time required to represent a respondent should typically be less (in my experience, 20-30% less), primarily because respondents do not submit reply briefs. Any attorney you consider hiring should spell out their fees and their billing policy in an "engagement letter" they will ask you to sign at the start of the representation. As with any legal document, be sure you understand the engagement letter before you sign it.

A party also needs to consider how its bills for attorney's fees will be spaced over time. Again, each attorney has her own policy, but it is common for attorneys to ask the client to pay a retainer up front, and then to pay each month's bill as it comes due. The retainer is typically placed in the attorney's trust account to secure payment of the last bill, but it may be tapped by the attorney if the client falls behind in monthly payments. In a typical appeal, this will lead to a pattern of expenditures for the appellant that starts with payment of the retainer right up front, passes through one or two months of relatively small attorney's fees as the record on review is gathered (but these months will often require a substantial payment for the transcript of the trial court proceedings), and then peaks with the bill for the month(s) in which the opening brief is prepared. Preparation of the reply brief (typically begun one month after the opening brief) will lead to another, albeit smaller, spike in the bill, which will then often be followed by many months of negligible bills as the parties wait for oral argument. Preparation for, and giving, oral argument will lead to another substantial bill. Bills then revert to basically zero as the parties wait for six months to a year for the Court of Appeals to render its decision. For respondents, the pattern differs mainly in that there should be low bills during the first several months, as the appellant carries the burden of moving the appeal forward. A respondent's bills will focus on preparation of respondent's brief and oral argument. Because of the typical variability in monthly bills, both appellants and respondents may want ask their attorneys if they will agree to payment plans to smooth the bills over time.

In some cases, a contract between the parties will require the losing party in any litigation to reimburse the prevailing party for its attorney's fees. There are also statutes that provide for "fee shifting" in certain areas of the law (prominent among them are claims brought under the Consumer Protection Act,

civil rights claims, claims for unpaid wages or overtime, and family law matters where one party has a demonstrated financial need and the other has the ability to pay). In addition, the appellate rules allow the Court to impose sanctions—which can include attorney's fees—for filing a frivolous appeal. RAP 18.9(a). If you happen to benefit from ruling requiring the other side to pay your attorney's fees, congratulations! Such a ruling, however, comes only at the end of the appeal, and does not enforce itself. As with any judgment, it may prove difficult or impossible to actually collect the fee award.

In addition to attorney's fees, an appellant must pay a filing fee of $250, the costs of copying the paper record on review, the cost of a transcript of the proceeding being reviewed (if such a transcript is used)[2], and for copies of his or her briefs made by the Court of Appeals. If the appellant wants to prevent the respondent from collecting on a judgment pending appeal, he will also typically have to incur the cost of posting a "supersedeas bond." If you are the "substantially prevailing" party on appeal, you may recoup all of these costs from the other side, along with a "statutory attorney fee" of $200. RAP 14.2, RCW 4.84.080(2).

The discussion here has focused exclusively on monetary costs. In many cases, however, pursuing an appeal creates (or keeps alive) emotional burdens that might be avoided by not appealing. Sometimes, it is just better to move on.

Will the benefits exceed the costs?

As a general rule, you should only appeal if the benefits you expect to receive from doing so exceed your expected costs. To illustrate the logic of this claim with a simple monetary example, note that it wouldn't make sense to spend $10,000 to get judicial relief worth $5,000. Indeed, it wouldn't make sense to spend $10,000 to get judicial relief worth $9,999. In both cases, the potential appellant would be better off holding on to her money. Conversely, it *would* make sense to spend $10,000 to get a decision worth $15,000 (or even $10,001).

The foregoing examples rely heavily on the twin implicit assumptions that the costs and benefits of an appeal are purely monetary and known with certainty in advance. *Neither* of these assumptions applies in the case of an actual appeal. Although the costs of an appeal are largely monetary, there are often also psychological or institutional costs from prolonging a matter after trial. Expected benefits from an appeal may have a dimension that is hard to reduce to "cash value." How should a party value overturning an injunction, or—more dramatically—a restoration of parental rights to a beloved minor child? What price should the party be willing to pay for vindication of a principle? These difficulties in quantifying the value of various outcomes are compounded by the fact that in any actual appeal, the outcomes are not certain, but instead can only be assigned inherently subjective probabilities.

Despite these issues, comparing expected benefits with expected costs is surely the best place to start an evaluation of whether it makes sense to appeal. The costs of appeal may be relatively easy to

[2] Transcripts from the King County Superior Court in 2011 cost approximately $900 per day of hearing transcribed. These costs depend on how much testimony was given per day, and the complexity of the subject matter

quantify, at least when there is no chance of being ordered to pay the other side's attorney's fees. The potential benefits should also be quantifiable if the main issue is a money judgment that may be reversed, or remanded for reconsideration at a new trial. As for the probabilities, careful analysis of the case and the relevant law should lead to reasonable estimates.

To see how this focus on comparing expected costs and benefits could work in practice, consider the following hypothetical example.

A potential appellant ("client") sued a corporate defendant for breach of contract and related claims, but the matter was dismissed on summary judgment after the client inexcusably failed to submit a timely response to defendant's motion. The client—and not his trial counsel—was simultaneously sanctioned $50,000 under Rule 11 for filing a frivolous complaint. The complaint was not signed by the client, but only by his attorney. Moreover, the complaint did not misrepresent any facts, but may have been unduly aggressive in asserting legal claims that supposedly flowed from the alleged facts. There is at least a colorable argument that the opposing party failed to provide a required warning before seeking sanctions, that the trial court failed to make required findings and conclusions in support of the sanctions, did not consider if either the client or his trial counsel conducted a reasonable inquiry into the law before filing the complaint, and did not consider alternative sanctions. Some of these possible claims of error were not raised below, but there is federal case law holding that this this sort of failure will be overlooked if it may have been due to trial counsel's conflict of interest.

Based on a preliminary study of the case, the attorney estimates that she can do it for a total cost $20,000 (the relevant record on review is short, but the legal issues are somewhat novel in Washington). There is no contractual or legal provision for fee shifting, except for RAP 18.9(a), and the attorney is convinced the appeal is not frivolous.

Should this appeal go forward? The following table first lists possible decisions by the Court, assigns them probabilities, and briefly attempts to justify them. It then does the same for possible costs. Probabilities for potential outcomes and costs must each sum to one.

Potential decisions and costs	**Estimated Probability**	**Explanation**
Potential Decisions:		
Reversal of summary judgment *and* reversal of sanctions (together worth some "big" number to the client).	0	Trial court has considerable discretion to grant summary judgment when one side fails to file timely opposition without plausible excuse. Also, the attorney believes overall argument on appeal will be strengthened by not contesting grant of summary judgment.
Reversal of $50,000 in sanctions	0.5	The attorney believes it is

in form that prohibits re-imposition of sanctions on client on remand.		obviously unfair to impose substantial CR 11 sanctions on client for sins of attorney alone, *and* there is strong supporting federal case law. However, this is a new issue in Washington, and some of the claims of error may not have been raised below.
Reversal of sanctions that allows possible re-imposition of some sanctions on client after further proceedings in trial court (for net gain to client after trial court expenses of $10,000)	0.2	Trial court's failure to conduct required inquiry and make required findings opens possibility of purely procedural justification for remand that might allow some sanctions to be re-imposed; taking this path would allow court of appeals to avoid making new law on issue of client vicarious liability for CR 11 sanctions.
Affirmance (worth nothing to client)	0.3	Relatively low level of probability for affirmance is consistent with attorney's belief that punishing client for sins of attorney in CR 11 context is wrong as a matter of both law and common sense. Probability of affirmance is as high as 0.3 as a hedge against overlooking something.
	Expected Benefit therefore equals: 0*(some big number) + 0.5*($50,000) + 0.2*($10,000) + 0.3*($0) = $27,000	
Potential Costs		
Client must pay the other side's fees as well as his own, at total cost of $50,000	0	There is no fee shifting provision in the contract, and the appeal of the sanction award is not frivolous (an appeal of summary judgment might be frivolous)
Client must pay for his own fees and costs of $20,000	1.0	There is no fee shifting agreement, and the appellant will have to pay his attorney's fees.
	Expected Costs: 0*($50,000) + 1.0*($20,000) = $20,000	

What the foregoing analysis shows (if you are persuaded by the probability estimates) is that it would make *economic sense* to appeal in this case. The client is not certain to gain more than he spends, but he can reasonably expect to. Indeed, this would be true even if the probability of having the sanctions completely thrown out was reduced from 0.5 to 0.4, and the probability of affirmance increased to 0.4 (because 0.4*$50,000 + 0.2*$10,000 > $20,000). If the client is not risk-averse, the fact that the expected gain exceeds the expected cost means that pursuing the appeal is a reasonable chance to take. If the reversible sanction were only $30,000, however, it would *not* make economic sense to appeal given the estimated probabilities.

Obviously, this sort of analysis is only as accurate as the outcome valuations and probability estimates used to implement it. In light of the "high" probabilities assigned in the hypothetical above, it is worth noting that a distinguished Washington appellate practitioner has argued that "it is probably malpractice for an attorney to advise a client that their chance of prevailing is better than 50%, even if the attorney believes the issues are sure winners." [3] This is too conservative. The fact that *on average* only around 30% of all civil appeals result in outright reversal (approximately an additional 8 % are modified) is definitely worth mentioning to all prospective appellant clients shortly after they walk in your door.[4] However, it says very little about the probability of reversal you should assign to a particular case after you have had some chance to study it—unless one thinks the Court of Appeals decides cases by pulling opinions out of a hat in which 2/3 of the options are marked "affirm." Trial courts do sometimes make obvious, reversible errors, and the Court of Appeals appears to take its error-correcting function seriously.[5] An appellate attorney who gives a client an inflated estimate of the chance of success in order to induce the client to continue with an appeal is clearly acting unethically, but an appellate attorney who gives an unreasonably low estimate to protect herself from a potential malpractice claim is also not serving the client's best interest. An attorney who believes that the record, applicable law, and the rules of appellate procedure give her client a greater than 50% chance of succeeding should tell her so.[6]

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[3] Howard M. Goodfriend**, "**Practical Aspects of the Appellate Process: Counseling the Parties on Whether to Appeal", available on the web at: http://www.essglaw.com/appellate_process.html

[4] These data are derived from a table showing "2003 Disposition Rates" for all Washington Appellate Courts, reprinted in "Washington Appeals: New Rules and Expert Guidance through the State Appellate Process", WSBA-CLE dated December 1, 2010.

[5] For cases finding "obvious error" by the trial court, see, e.g., *LaPlant v. Snohomish County*, 2011 WL 1744441 (Div. 1) (granting discretionary review based on "obvious error," and reversing trial court); *Macias v. Mine Safety Appliances Co*., 158 Wn. App. 931, 244 P.3d 978 (2010) (Div. 2) (same); and *In re Dependency of P.P.T.*, 2010 WL 532444 (Div. 1) (holding trial court committed obvious error in interpreting statute). When the Court of Appeals describes an error as "obvious", it would surely have been reasonable for an attorney to assign a greater than 50% probability to reversal. For reference to the Court of Appeals as an "error correcting" court, see, e.g. *State v. Harris*, 154 Wn. App. 87, 101, 224 P.3d 830 (2010) (Judge Quinn-Brintnall, dissenting). By contrast, under RAP 13.1(a) and 13.4(b), the Supreme Court is not an error correcting court.

[6] It is also obvious good practice to inform clients that any probability assessment is subject to revision as one learns more about the case. Reading the respondent's brief is typically an excellent test of one's assessment of the case.

INITIATING REVIEW

Who may appeal a decision of a Washington State Superior Court?

"Only an aggrieved party may seek review by the appellate court." RAP 3.1. Normally, only a person or entity that was either a plaintiff or a defendant in the trial court action is a "party." However, an attorney for a party who was personally sanctioned by the trial court will be considered a "party" for the purpose of seeking review.[7] Although being a party is a necessary condition for seeking review, it is not sufficient: the party must also be "aggrieved." A party is "aggrieved" only if their "proprietary, pecuniary, or personal rights are substantially affected."[8]

What are the deadlines for filing for review?

The Court of Appeals will accept review of a Superior Court decision only if an aggrieved party files either a timely Notice of Appeal or a timely Notice for Discretionary Review. RAP 5.1(a). Generally, a Notice of Appeal is timely *only* if it is filed in the Superior Court *within 30 days of the decision you seek to have reviewed, or within 30 days of entry of the trial court order on certain post-decision motions*.[9] RAP 5.2(a) and (e). Generally, a Notice for Discretionary Review is timely *only* if it is filed in the Superior Court *within 30 days of the decision you seek to have reviewed, or within 30 days of entry of the trial court order on a timely motion for reconsideration*. RAP 5.2(b)[10] If a statute sets a different (usually shorter) deadline for filing a Notice, the statutory period governs. RAP 5.2(d).[11] There is a special rule that governs the onset of the 30 day period in cases where a party wants to appeal an order that resolves only part of the claims raised in the trial court. RAP 2.2(d). Although the Court of Appeals frequently grants extensions of other deadlines related to appeals, it will hardly ever grant an extension of the 30 day deadline to file a Notice. RAP 18.8(b).

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[7] An attorney who has been personally sanctioned by the trial court will be treated as a "party," and allowed to appeal. *See, e.g., Splash Design, Inc. v. Lee*, 104 Wn. App. 38, 44, 14 P.3d 879 (2000).

[8] See *Breda v. B.P.O. Elks Lake City 1800 So-620,* 120 Wn. App. 351, 353, 90 P.3d 1079 (2004).

[9] In civil matters, the most common motion that extends the deadline for filing a Notice of Appeal is a motion for reconsideration. To have this effect, the motion for reconsideration itself must have been timely filed, which means within ten days of the trial court judgment, order, or decision. CR 59(b).

[10] In other words, there are more post-decision motions the timely filing of which will delay the deadline for filing a Notice of Appeal than there are post-decision motions the timely filing of which will delay the deadline for filing a Notice for Discretionary Review.

[11] A partial list of statutes that provide distinct deadlines for filing a notice of appeal includes 1) RCW 8.04.098 (regarding orders of public use and necessity in condemnation matters); 2) RCW 8.16.130 (regarding eminent domain by school districts); 3) RCW 29A.68.120 (regarding election contests); 4) RCW 29A.72.190 (regarding appeals to the Supreme Court of initiative and referendum matters); 5) RCW 29A.56.270 (concerning recall elections); 6) RCW 35.44.260 and RCW 36.94.260 (review of assessments for local improvements by cities and counties, respectively); 7) RCW 47.32.060 (appeal of order removing obstruction from state highway); 8) RCW 54.16.160 (appeal of public utility district assessments); 9) RCW 57.16.090 (appeal of assessments by water-sewer districts); 10) RCW 85.08.440 (appeal of assessments by diking and drainage improvement districts); 11) RCW 87.56.225 (review of matters involving insolvent irrigation districts); and 12) RCW 90.03.200 (review of water rights determinations). Except for the last two, each of these listed statutes substantially *shortens* the period in which an appeal may be taken.

If a party files either sort of Notice *too soon* (after the decision has been announced but before the decision has been officially "entered"), the Court of Appeals will treat the Notice as having been timely filed. RAP 5.2(g).

What if another party has already filed a timely Notice?

"If a timely notice of appeal or a timely notice for discretionary review is filed by a party, any other party who wants relief from the decision must file a notice of appeal or notice for discretionary review with the trial court clerk within the later of (1) 14 days after service of the notice filed by the other party, or (2) the time within which [the party originally filing had to provide Notice]." RAP 5.2(f). If a party against whom an appeal has been taken simply wants the Court of Appeals to uphold the trial court decision, it need not file its own Notice. However, if it wants the Court of Appeals to grant it affirmative relief from the trial court decision, it must generally file its own Notice.[12] RAP 5.2(f) allows a party who wants to appeal only if another party appeals first a short period of time to wait to see what the other parties will do.

What sort of Notice is required?

For trial court actions that are "reviewable as a matter of right," the aggrieved party files a Notice of Appeal. RAP 5.1(a). For all other actions, the aggrieved party files a Notice for Discretionary Review. RAP 2.2 lists trial court actions which may be reviewed "as a matter of right,"[13] the two most important of which for civil matters are "final judgments" and "decision[s] determining action[s]."

Figuring out whether a particular trial court action qualifies for review as a matter of right under RAP 2.2 can be fairly tricky. For example, the courts have held that the denial of a motion to compel arbitration is reviewable as a matter of right because it "affect[s] a substantial right."[14] However, the grant of a motion to compel arbitration is typically not reviewable as a matter of right.[15]

Fortunately, if you mistakenly file a Notice of Appeal when a Notice for Discretionary Review was required (or vice versa), it shouldn't matter. Under RAP 5.2(c), the Court of Appeals treats an improperly designated Notice as if it were the proper sort of Notice (provided, of course, that it was timely filed).

The required contents of each type of Notice are spelled out by RAP 5.3(a) and (b). Defects in the form of the Notice will be disregarded "if the notice clearly reflects an intent by a party to seek review." RAP

[12] There is a narrow exception to this rule: Under RAP 2.4(a), an appellate court will grant a respondent affirmative relief even if it did not file its own Notice "if demanded by the necessities of the case."
[13] Strictly speaking, only a "review as a matter of right" is properly referred to as an "appeal." RAP 2.1(a)(1). All other types of review by an appellate court are properly referred to as "discretionary review." RAP 2.1(a)(2). In practice, both types of review are commonly referred to as "appeals."
[14] See, e.g., *Verbeek Properties, LLC v. GreenCo Environmental, Inc.*, 159 Wn. App. 82, 86, 246 P.3d 205 (2010).
[15] See, e.g., *Herzog v. Foster & Marshall, Inc.,* 56 Wn. App. 437, 783 P.2d 1124 (1989). But see *Grant & Associates v. Gonzales*, unpublished, 2006 WL 3004093 (Div. 2 2006) (apparently allowing appeal of grant of motion to compel arbitration).

5.3(f). The Notice is a short, simple document that should take less than a half hour to prepare. Sample forms for both types of Notice are available at:
http://www.courts.wa.gov/appellate_trial_courts/div1/caseproc/

Where must the Notice be filed?

Both types of Notice must be filed in the trial court, not the Court of Appeals. RAP 5.1(a). The Notice must be accompanied by a filing fee, which is currently $250. See:
http://apps.leg.wa.gov/RCW/default.aspx?cite=36.18.018 and

Does filing a Notice of Appeal have different consequences from filing a Notice for Discretionary Review?

Yes. Under RAP 6.1, "[t]he appellate court 'accepts review' of a trial court decision upon the timely filing in the trial court of a notice of appeal from a decision which is review able as a matter of right." Acceptance of review, in turn, triggers certain limitations on the trial court's authority, which limitations are spelled out in RAP 7.1, 7.2, and 7.3.

A properly and timely filed Notice for Discretionary Review, on the other hand, does not automatically lead to acceptance of review. The Court of Appeals has the discretion to accept or deny such review, and the party seeking discretionary review must follow the Notice for Discretionary Review with a Motion for Discretionary Review, which presents an argument as to why the Court of Appeals should accept review. RAP 6.2. Any party objecting to acceptance of review may submit a response to the motion. RAP 17.4(e). The criteria governing acceptance of discretionary review are spelled out in RAP 2.3(b). The Motion for Discretionary Review must be filed with the Court of Appeals within 15 days of filing the Notice for Discretionary Review. RAP 6.2(b). A Motion for Discretionary Review may be ruled upon in the first instance by the commissioner or clerk of the court. RAP 17.2(a). A party aggrieved by a commissioner's ruling may submit a motion to modify the ruling that will be ruled on by a judge or judges. RAP 17.7.

CASE SCHEDULING IN THE COURT OF APPEALS

What is the standard timeline after the Court of Appeals accepts review?

Once it accepts review, the Court of Appeals typically sends each of the parties a letter spelling out deadlines for perfecting the record and submitting briefs. These deadlines are set by the RAPs, so one need not wait for the Court of Appeals letter to figure out what they are:

- Within 30 days of the acceptance of review, the party seeking review must file 1) a Designation of Clerk's Papers *with the trial court* (RAP 9.6(a)), and 2) a Statement of Arrangements *with the Court of Appeals* (RAP 9.2(a)). Recall that review is "accepted", and triggers the application of these deadlines, when either a proper Notice of Appeals is filed, or when the Court to Appeals

grants a Motion for Discretionary Review. The required contents of the Designation and Statement of Arrangements are provided by Rap 9.2 and 9.6, and suggested forms are available at: http://www.courts.wa.gov/appellate_trial_courts/div1/caseproc/. The Designation of Clerk's papers serves to inform the trial court clerk which paper documents and physical exhibits should be sent to the Court of Appeals to form part of the record on review. RAP 9.6. Fortunately, a party may supplement the designation of clerk's papers at any time prior to or with the filing of that party's last brief (though care must be taken to also file a supplemental designation with the trial court, so that the documents will be properly transmitted to the Court of Appeals). RAP 9.6. The Statement of Arrangements describes the agreement that has been reached with the trial court reporter to prepare a verbatim transcript of the relevant trial court proceedings. Possible alternatives to a verbatim transcript are described in RAP 9.2, 9.3, and 9.4.

- Within 60 days after the filing of the Statement of Arrangements, the trial court reporter must file a transcript with the clerk of the trial court. RAP 9.5. Timely compliance with this requirement is typically not in the control of the party requesting the transcript, and the RAPs provide for sanctions on the court reporter if the deadline is not met. RAP 9.5(b). However, if the delay is caused by non-payment by the requesting party, the requesting is subject to sanctions. RAP 9.2(d). In any event, the party requesting the transcript bears the burden of filing a motion for extension of time if the court reporter is unable to comply with the 60 day deadline. RAP 9.5(b).
- Within 45 days of the filing in the trial court of the "report of proceedings" (typically, the verbatim transcript prepared by the court reporter), or within 45 days of filing the designation of clerk's papers, if no transcript has been requested, the appellant must file its opening brief. RAP 10.2(a).
- The brief of the respondent is due 30 days after the appellant's opening brief has been served. RAP 10.2(b).
- The appellant may file a reply brief within 30 days of the service of the brief of respondent. RAP 10.2(d).

Once the briefing is completed, the timing of the completion of the case is largely out of the parties' hands. The Court of Appeals will typically schedule oral argument for some four-to-six-months after the briefs are completed (though the Court occasionally decides cases without granting oral argument). Once oral argument is completed, it can take as much as nine or ten months for the Court to issue its decision.

What can disrupt the standard timeline?

A common source of delays in appellate case processing is requests for extension by one of the parties. All of the deadlines for perfecting the record and submitting briefs—unlike the deadline for filing a Notice of Appeal or Notice for Discretionary Review—are subject to the stricture of RAP 1.2(a) that the rules "be liberally interpreted to promote justice and facilitate the decision of cases on the merits."

Compare RAP 18.8(b) (generally requiring strict enforcement of the deadline to file a Notice of Appeal or Notice for Discretionary Review). Accordingly, a party's first timely motion for extension of deadlines for completing the record or briefing will almost always be granted. Within limits, subsequent motions are also likely to be granted, provided that they have some reasonable basis. It is surely wise practice, however, not to abuse this leniency by the Court of Appeals. Judicial good will is a precious commodity, and it is foolish to waste it unnecessarily.

The Court of Appeals itself can also change the standard timeline. Under RAP 18.12, the Court has the discretion to "set a review proceeding for accelerated disposition."[16] RAP 18.14, regarding "motions on the merits," also gives the Court a way of accelerating review (see next entry for more on "motions on the merits"). In addition, the Court may decide a case without oral argument. RAP 11.4(j). On the other hand, it can also request additional briefing, either before or after oral argument. RAP 10.1(h).

Can a motion on the merits accelerate review?

Under RAP 18.14, a party may submit a "motion on the merits" after the other party has submitted its initial brief.[17] Such a motion can ask the Court to affirm or reverse all or part of the trial court decision on review.[18] A motion on the merits to affirm "will be granted in whole or in part if the appeal or any part thereof is determined to be clearly without merit." RAP 18.14(e)(1). A motion on the merits to reverse "will be granted in whole or in part if the appeal or any part thereof is determined to be clearly with merit." RAP 18.14(e)(2). A commissioner may decide a motion on the merits to affirm, and may deny a motion on the merits to reverse (see RAP 18.14(d)), but *typically* only a panel of judges will grant a motion on the merits to reverse.[19]

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[16] Per RAP 18.13A, juvenile dependency orders and orders terminating parental rights "shall be heard as expeditiously as possible."

[17] A court can also note a motion on the merits on its own initiative. RAP 18.14(a).

[18] Division III prohibits motions on the merits to reverse, as well as any motion on the merits that would leave some part of the appeal pending. See: http://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=012&div=III

[19] The rules allocating authority to rule on motions on the merits are complex. RAP 17.2(a) provides the starting point by listing five types of motion that must be determined by the judges. "All other motions may be determined initially by a commissioner or the clerk of the appellate court." RAP 17.2(a). Since motions on the merits are not included on RAP 17.2(a)'s list, it appears to follow that they may be decided by a commissioner. However, RAP 18.4(d) suggests that there is a dichotomy between motions on the merits *to affirm* (which by the express terms of the rule may be "determined" by a commissioner) and motions on the merits *to reverse* (the rule says these may be denied by a commissioner, but is silent on whether they may be granted by a commissioner). On the other hand, RAP 18.14(3) appears to contemplate a commissioner "making the[] determinations" necessary to grant or deny a motion on the merits to reverse. A look at published and unpublished cases involving motions on the merits to reverse in Divisions 2 and 3 suggests, however, that standard practice for commissioners in those Divisions who believe that a motion to reverse should be granted is to refer the matter to a panel of judges, as per RAP 18.14(d). See, e.g., *Sales Creators, Inc. v. Little Loan Shoppe, LLC*, 150 Wn. App. 527, 208 P.3d 1133 (2009) (Div. 3); *In re Guardianship of Cobb,* 2011 WL 3332148 (Div. 2); and *Crow-Cyr v. Cyr*, 2008 WL 565707 (Div 2). Case law does not shed much light on the typical practice in Division 1, but a useful article by Commissioner Verellen, Ryan McBride, and James Feldman suggests that Commissioners in Division 1 will in an appropriate case grant a

In principle, a successful motion on the merits can accelerate the review process. Such a motion can focus attention on a single critical legal issue, and perhaps obviate the need for the Court to undertake a detailed review of the factual record. Moreover, it should take less time for a single judge or commissioner to decide a motion than for a three person panel to issue an opinion. However, "[a] ruling or decision granting a motion on the merits by a single judge or commissioner is subject to review . . ." (RAP 18.15(i)). That review process can undo any time savings from a successful motion. Also, making a motion on the merits will increase the amount of briefing due (at least if the motion fails), and thereby increase costs. It is good practice to reserve motions on the merits for unusual or egregious cases.

What if the defendant in the trial court files for bankruptcy protection during the appeal?

If a defendant or cross claim defendant in the trial court action files for bankruptcy protection during an appeal, the automatic bankruptcy stay offered by 11 U.S.C. § 362(a) will at least arguably stop any appellate proceedings in the case until the bankruptcy court grants relief from the stay. See, e.g., *Ingersoll Rand Financial Corp. v. Miller Mining Co.*, 817 F.2d 1424, 1426 (9th Cir 1987) (noting that "[i]n our view, section 362 should be read to stay all appeals in proceedings that were originally brought against the debtor, regardless of whether the debtor is the appellant or appellee. Thus, whether a case is subject to the automatic stay must be determined at its inception. That determination should not change depending on the particular stage of the litigation at which the filing of the petition in bankruptcy occurs") (citing to *Cathey v. Johns-Manville Sales Corp.*, 711 F.2d 60, 62 (6th Cir.1983), cert. denied, --- U.S. ----, 106 S.Ct. 3335, 92 L.Ed.2d 740 (1986)). If the Court of Appeals adopts this argument—which seems likely—it will stay any appeal in which the debtor was the defendant, regardless of whether the debtor is the appellant or respondent.

PERSUADING THE COURT OF APPEALS

How does the Court of Appeals understand its job on review?

In theory, how the Court of Appeals defines its job in a particular case should depend on the interplay between the "scope of review" and the applicable "standard of review." Roughly, the scope of review establishes the set of issues before the court, and the standard of review establishes the criteria that are applied in reviewing an issue within that set. Different issues within the scope of review are commonly subject to different standards of review.

Scope of Review: The scope of the review undertaken by the court of appeals is governed by RAP 2.4, RAP 2.5, and RAP 10.3(a)(4). Generally, the party seeking review has the burden of informing the Court of Appeals which parts of the decision it believes are erroneous. The appellant begins this process by listing the decisions it wishes to have reviewed in the Notice of Appeal or the Notice for

motion on the merits to reverse. See http://www.lanepowell.com/wp-content/uploads/2009/04/mcbride_001.pdf

Discretionary Review. RAP 2.4(a). Seeking review of orders on certain timely posttrial motions will automatically bring up the final judgment for review, even if the final judgment was not designated in the Notice. RAP 2.4(c). Moreover, if the party seeking review fails to designate a trial court order or ruling in its Notice, the Court of Appeals will review it if "(1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review." RAP 2.4(b). This expansion of the scope of review is undercut by the express qualification that an appeal of a decision relating to attorney fees and costs does not bring up for review a previously entered final judgment (appeal from a final judgment, however, does bring up a subsequent award of attorney fees—compare RAP 2.4(b) and 2.4(g)).

The appellant's burden of alerting the Court of Appeals to assignments of error and issues that correspond to them also shapes the appellant's opening brief. RAP 10.3(a)(4). Appellant's failure to make proper assignments of error in its opening brief can lead the Court of Appeals to refuse to consider the alleged errors, although the Court may excuse compliance with this rule where "the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the court is not greatly inconvenienced and the respondent is not prejudiced."[20]

Standards of Review: The applicable standard of review tells the court whether it is scrutinizing the record on an issue within the scope of review with completely fresh eyes ("de novo" review), or is instead granting some degree of deference to the trial court's decision. Case law and statutes determine that different types of decision below are subject to different standards of review. The table below summarizes the standard of review for a few important types of trial court decisions in civil matters. Of course, one appeal may bring up multiple issues each subject to a different standard of review.

Type of Trial Court Decision	**Standard of Review applied**	**Source**	**Comment**
Grant of summary judgment	De novo *(but see discussion of injunctive relief below)* *Note: a ruling denying summary judgment is not reviewable as a matter of right.* *Note: a grant of partial summary judgment is only reviewable*	*Washington Imaging Services, LLC v. Washington State Dept. of Revenue*, 171 Wn.2d 548, 555, 252 P.3d 885 (2011).	This is the most favorable standard of review for appellants. At least in theory, the Court of Appeals gives no deference to the trial court's decision. Based on the same record presented to the trial court, the Court of Appeals makes its own decision as to whether

[20] *See State v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629 (1990). See also RAP 10.3(g) (stating that "[t]he appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto").

	pursuant to RAP 2.2(d) and CR 54(b).		there are genuine issues of material fact that prevent summary judgment. It also makes its own decision as to whether the moving party was entitled to judgment as a matter of law. The trial court's decision can be affirmed on the basis of any argument supported by the record.
Dismissal under CR 12(b)(6)	De novo	*Citizens for Rational Shoreline Planning v. Whatcom County*, --- P.3d ----, 2011 WL 3612312	
Denial of motion to compel arbitration	De novo	*Otis Housing Ass'n v. Ha,* 165 Wn.2d 582, 586–87, 201 P.3d 309 (2009)	
Final Judgment with findings of fact and conclusions of law.	Findings of fact are reviewed for "substantial evidence;" conclusions of law are reviewed "de novo."	*Rainier View Court Homeowners Ass'n, Inc. v. Zenker,* 157 Wn.App. 710, 719, 238 P.3d 1217 (2010).	"Substantial evidence" is evidence which would convince a reasonable person of the truth of the matter asserted. This is a deferential standard, because the court of appeals does not have to agree with the trial court's (or jury's) conclusions of fact to affirm. It just has to believe that those conclusions are not unreasonable. If there is conflicting evidence in the record on a point, the record is reviewed in the light most favorable to the

			party in whose favor the findings were entered. *In re Marriage of Gillespie*, 89 Wn. App. 390, 948 P.2d 1338 (1997).
Amount of damages awarded by jury	Substantial evidence. But note that a judge's denial of a motion for remittitur is reviewed for abuse of discretion. If remittitur is granted, but the party which benefits from remittitur nonetheless appeals, the grant of remittitur is reviewed *de novo* as per RCW 4.76.030.	*Collins v. Clark County Fire Dist. No. 5,* 155 Wn. App. 48, 231 P.3d 1211 (2010)	
Decisions in marital dissolution actions regarding division of property, child support, and residential placement of child	Abuse of discretion	*Pollock v. Pollock,* 7 Wn. App. 394, 399, 407, 499 P.2d 231 (1972); *In re Marriage of Kovacs,* 121 Wn.2d 795, 801, 854 P.2d 629 (1993); *In re Marriage of Foley,* 84 Wn. App. 839, 842-43, 846, 930 P.2d 929 (1997)	
Evidentiary rulings (i.e., allowing or prohibiting testimony or evidence)	Abuse of discretion	*Univ. of Wash. Med. Ctr. v. Wash. Dep't of Health,* 164 Wn.2d 95, 104, 187 P.3d 243 (2008).	A trial court abuses its discretion when the ruling is "manifestly unreasonable or based upon untenable grounds or reasons." An error is harmless, and will not lead to reversal, if it is "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected

			the final outcome of the case." *Mackay v. Acorn Custom Cabinetry, Inc.,* 127 Wn.2d 302, 311, 898 P.2d 284 (1995).
Injunctive relief	Abuse of discretion	*Brown v. Voss,* 105 Wn.2d 366, 372-73, 715 P.2d 514 (1986). Example: an order of specific performance is reviewed for abuse of discretion, even if it is issued at summary judgment: *Cornish College of the Arts v. 1000 Virginia Ltd. Partnership*, 158 Wn. App. 203, 221 n. 10, 242 P.3d 1 2010). This is an area where the law may continue to develop.	
Attorney's fee award	Abuse of discretion	*Progressive Animal Welfare Soc. v. Univ. of Wash.,* 114 Wn.2d 677, 688, 790 P.2d 604 (1990).	
Rule 11 Sanctions	Abuse of discretion	*Biggs v. Vail,* 124 Wash.2d 193, 197, 876 P.2d 448 (1994)	

How does the Court of Appeals apply the "substantial evidence" standard of review to factual findings that had to be established by "clear, cogent, and convincing" evidence at trial?

The standard burden of proof in civil trials is by a preponderance of the evidence. However, there are a number of factual issues that must be established by "clear, cogent, and convincing evidence," including fraud, undue influence in making a will, and the best interest of the children and parental failure to

perform duties in termination matters.[21] Once a trial court makes such findings, the court of appeals reviews them—like all other findings of fact—for "substantial evidence." [22] However, the state Supreme Court has noted that when facts "must be established by clear, cogent and convincing evidence . . . the question to be resolved [on review] is not merely whether there is 'substantial evidence to support the trial court's determination of the factual issue but whether there is substantial evidence to support such findings in light of the highly probable test."[23] As a respected commentary puts it, there is "considerable ambivalence" in published opinions as to how (or even whether) this heightened "substantial evidence" standard is applied.[24] Although the Supreme Court's language seems fairly clear at first glance, at least one division of the Court of Appeals has argued that any heightening of the "substantial evidence" standard is incompatible with the prohibition on Courts of Appeals evaluating credibility or weighing evidence.[25] Since this continues to be an unsettled area of law, Appellants who need to challenge findings of fact that had to be proven by "clear, cogent, and convincing evidence" may find it worthwhile to develop arguments supporting a stricter standard of review.

Will the Court of Appeals consider new evidence on appeal?

The Court of Appeals in theory has the power to order the trial court to consider new evidence before it renders a decision. RAP 9.11. However, this power is applied very sparingly. Six criteria must be met before the trial court will order the taking of new evidence. Generally, if a party or its attorney could have presented the "new" evidence at trial, but failed to do so through no fault of the opposing party, the Court of Appeals will not consider or order the consideration of new evidence. In practice, this means that the Court of Appeals almost always reviews the same evidentiary record as was available to the trial court.

Will the Court of Appeals revisit a trial court's decisions about witness credibility?

No. The "[c]redibility of parties and witnesses, and the weight to be given to evidence, is for the trial court."[26] If your case on appeal depends on convincing the Court of Appeals that the trial court made the wrong choice about which live testimony to believe, save your (or your client's) money, and don't appeal.

Even if the only evidence bearing on an issue takes the form of affidavits or declarations, the Court of Appeals will defer to the trial court's credibility determinations. See, e.g., *In re Marriage of Rideout*, 150 Wn.2d 337, 351-52, 77 P.3d 1174 (2003) (applying substantial evidence review to trial court's determination in family law matter based on warring affidavits submitted by ex-spouses); and *Dolan v.*

[21] A more complete list of factual issues subject to the "clear, cogent, and convincing" burden of proof is offered by 5 Wash. Prac., Evidence Law and Practice § 301.3 (5th ed.).
[22] *In the Matter of Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973).
[23] *Id.*
[24] 5 Wash. Prac., Evidence Law and Practice § 301.3 (5th ed.). See also 21 Wash. Prac., Family And Community Prop. Law, § 51.29
[25] *In re Welfare of Ott*, 37 Wn. App. 234, 237 n. 2, 679 P.2d 372 (1984).
[26] *Brauhn v. Brauhn*, 10 Wn. App. 592, 593, 518 P.2d 1089 (1974).

King County,---P.3d---, 2011 WL 3612148 (Wa. 2011) (holding that "where competing documentary evidence must be weighed and issues of credibility resolved, the substantial evidence standard is appropriate").

Will the Court of Appeals consider new arguments on appeal?

Under RAP 2.5(a), "the appellate court *may* refuse to review any *claim of error* which was not raised in the trial court" (italicized emphasis added). What is the relationship between a "claim of error," an "argument," and "authority"? Clearly "[t]here is no rule preventing an appellate court from considering case law [or other "authority"] not presented at the trial court level."[27] Indeed, RAP 10.8 allows a party to file a "statement of additional authorities" at any time prior to the decision on the merits, and surely such a statement may include authorities not cited to the trial court. What about new "arguments" in support of a previously claimed error? The case law seems to be rather hostile toward allowing new theories or contentions in support of reversal, even if they can be construed as supporting a more general "claim of error" that was raised below.[28] However, the court of appeals *has the discretion* to either reject or consider claims of error that were not raised below, and it does not commit error by doing either.[29] Moreover, a party has the right to raise the following claims of error for the first time on appeal: "(1) lack of trial court jurisdiction; (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right." RAP 2.5(a). Finally, there is an asymmetry between new arguments offered for reversal (generally frowned upon), and new arguments offered to support the trial court's ruling: "[a] party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground." RAP 2.5(a).

Tips for writing persuasive briefs.

[27] See also *Walla Walla County Fire Protection Dist. No. 5 v. Washington Auto Carriage, Inc.*, 50 Wn. App. 355, 357 n. 1, 745 P.2d 1332 (1987) (noting that "[t]here is no rule preventing an appellate court from considering case law not presented at the trial court level").

[28] See, e.g., *Green v. Normandy Park*, 137 Wn. App. 665, 687, 151 P.3d 1038 (2007).

[29] *See, e.g*., *Bennett v. Hardy*, 113 Wn.2d 912, 918-19, 784 P.2d 1258 (1990). The author believes that there is a particularly compelling argument for using this discretion to consider new arguments (or even new "claims of error") when the reason the argument was not made below may have been due to a conflict of interest by trial counsel. This situation may arise when the trial court imposes CR 11 sanctions *on a represented party*, and trial counsel does not argue that he or she should bear sole liability for the sanction. See, e.g., *White v. General Motors Corp.,* 908 F.2d 675, 687 (10th Cir. 1990) (noting that "[t]here is an obvious conflict of interest between [plaintiffs], on the one hand, and their counsel, on the other, on the issue of who should be liable for the sanctions imposed by the district court" and considering the issue *sua sponte* even though it was neither briefed for the appeals court nor raised in the trial court). *See also Calloway v. The Marvel Entertainment Group*, 854 F.2d 1452, 1456 (2nd Cir. 1988)) (noting that the attorney and his firm representing Calloway "had a blatant conflict of interest and should have withdrawn as Calloway's counsel in defending the motions for sanctions. Because of this representation, no argument was made on Calloway's behalf that [the attorney] was solely responsible for pursuit of the [unfounded] claim . . . . Nor was an argument made that even if sanctions should be imposed on Calloway, [the attorney] and his firm should be jointly and severally liable for them," and raising this issue *sua sponte* on appeal). Washington appellate courts have not yet ruled on this issue.

- Read and follow RAPs 10.3 ("Content of Brief") and 10.4 ("Preparation and Filing of Brief"). These rules dictate the overall structure of the briefs, and prescribe format and citation requirements. Of particular importance for setting the right tone for an opening brief is the requirement that it provide "a *fair* statement of the facts . . . *without argument*." RAP 10.3(a)(5) (emphasis added).
- For an appellant's opening brief, focus on errors of the trial court, as opposed to errors by respondent. The Court of Appeals is reviewing the decision made by the trial court, not the arguments made by the respondent below. To win, the appellant needs to show that the trial court erred—it does no good to show that respondent made bad arguments unless the trial court adopted them.
- For respondent's opening brief, and for appellant's reply brief, it is acceptable and effective to point out errors made by the opposing party in a preceding brief. For respondents, however, the ultimate goal is to show that the trial court was right, not that the appellant is wrong. And in an appellant's reply brief, the bottom line remains showing that the trial court was wrong in a way that requires reversal.
- Do not assume that the Court of Appeals will become emotionally involved on your side of the case. It is common sense that judges at all levels would be overwhelmed if they routinely became emotionally invested in the cases before them. The best way for a judge to avoid the stress caused by making hundreds of emotional commitments each year is to look hard for a dispassionate legal and/or logical approach to a case. The party that offers the most direct and persuasive path to resolution of the case based on the law has a huge advantage. Of course if the law on a particular point is unclear, an argument about fairness (couched as necessary as an argument about legislative intent or public policy) can be critical. Generally, however, attempted tugs at the heartstrings are best relegated to a secondary role, supporting or possibly framing the main legal argument.
- Do not waste your client's credibility by making bad arguments. If you make sloppy or unsupported claims, you can't complain if the Court of Appeals becomes annoyed. That annoyance may translate into an unwillingness to read your good arguments in the favorable light they need to carry the day. If you only have bad arguments, consider if you can ethically proceed with the representation in light of CR 11 and RAP 18.9(a) (if your definition of "bad argument" coincides with the court's definition of "frivolous," you should definitely not proceed).

Does oral argument matter?

Oral argument gives the judges their one chance to associate live people with the arguments made in the briefs. Do not waste your chance to give your case an appealing personal face. If you can offer persuasive answers to the judge's questions while coming across as professional and polite, it may tip a close case in your client's favor. Conversely, appearing confused or—worse—being rude may alienate

judges whom the briefs left sitting on the fence. The heavy lifting in your argument, however, has to be done in the briefs.

AFTER THE COURT OF APPEALS ISSUES ITS OPINION

What should you do if you've won?

Apart from briefly savoring your victory, take the necessary steps to secure any award of fees or costs granted by the Court of Appeals. If you have been awarded fees, you need to file and serve an affidavit of fees and expenses within 10 days of the decision. RAP 18.1(d). If you "substantially prevailed" on review you will also typically be entitled to "costs" as per RAP 14.3 (for such things as transcripts, filing fees, and copying expenses), and will need to file and serve a cost bill within 10 days of the decision. RAP 14.4. To enforce an award of fees or costs, you will need to reduce it to judgment in the trial court. However, you cannot implement the Court of Appeals' decision in the trial court until the Court of Appeals issues its "mandate," as described in RAP 12.5. The mandate issues thirty days after the decision was filed, unless a motion for reconsideration, a motion to publish the opinion, a motion to modify a commissioner's ruling, or a petition for review in the Supreme Court has been timely filed, in which case the mandate is delayed until these matters are resolved. RAP 12.5(b).

If the opinion sets a favorable precedent for your client, you will want to consider moving for publication if the decision was unpublished. RAP 12.3(b). Any such motion should be served and filed within 20 days of the decision. Be aware, however, that filing such a motion serves to extend the time the other party has to petition for review to the State Supreme Court. RAP 13.4(a).

What should you do if you've lost?

If you have lost in the Court of Appeals, you have to make a new cost-benefit calculation. Based on the reasoning in the opinion, is it worthwhile to seek further review? You have to make up your mind quickly, since a petition for review to the State Supreme Court is due 30 days after the decision by the Court of Appeals. RAP 13.4(a). You can buy yourself more time by filing either a motion for reconsideration or a motion to publish. If you file either of these two motions, the deadline for filing a petition for review to the State Supreme Court is pushed back to 30 days after such motion is decided. If your motion for reconsideration is granted, you still may not be happy with the ultimate outcome. See RAP 12.4(g). In that case you have to proceed directly to a petition for discretionary review—you can only file one motion for reconsideration per case, unless the Court of Appeals withdraws its opinion. See RAP 12.4(h).

A motion for reconsideration is generally a relatively low cost affair. In particular, since the other side is not supposed to file an answering brief unless asked to do so by the Court, filing a motion for reconsideration will typically not result in your having to pay additional attorneys' fees to the other side. RAP 12.4(d). Also, every sort of significant error made by the Court of Appeals is fair game in a motion

for reconsideration, unlike in a petition for review. If you believe the Court of Appeals made a significant error which nonetheless does not fall within the limited categories set by RAP 13.4(b), a motion for reconsideration is your only hope, and hence may merit considerable effort. However, the vast majority of motions for reconsideration fail. Indeed, the author suspects that most motions for reconsideration are handled on a "we pretend to ask for reconsideration, and they pretend to give it" model, with the real goal being understood by all involved to be gaining time for a more thorough petition for review.

The direct cost of preparing a petition for review is typically substantial, on the order of preparing a reply brief, or possibly more. In addition, if the Court of Appeals ordered you or your client to pay the other side's attorney's fees in its decision, there is a very good chance you will have to pay the other side's fees for answering the petition for review, if the petition is denied. RAP 18.1(j). The great majority of petitions for review are denied, so think carefully about whether you have a strong case that the Court of Appeals erred in a way that fits within the criteria set forth in RAP 13.4(b). The required content of a petition for review is set out by RAP 13.4(c). If the Supreme Court accepts review, within 30 days of that acceptance any party may file a supplemental brief of up to 20 pages, as governed by RAP 13.7.

COLLECTING ON A JUDGMENT DURING THE APPEAL—OR STAYING ANY COLLECTION EFFORT

Does acceptance of review by the Court of Appeals prevent a party from executing on a judgment obtained in the trial court?

No. The Civil Rules provide for an automatic 10 day stay on the execution of any judgment, commencing with the entry of the judgment. With the filing of a Notice of Appeal, this automatic stay is extended to 14 days. CR 62(a). In order to stay execution on a money judgment during the entire appeal process, the appellant must *either* deposit cash in the amount of the judgment, plus interest and likely attorney's fees to be awarded on appeal, *or* post a bond (referred to as a "supersedeas bond") in the same amount. RAP 8.1(c)(1). The amount of the bond or cash deposit required to stay execution on a judgment affecting title to real or personal property is given by RAP 8.1(c)(2). Qualifications of who may serve as the surety on a bond are set forth in RAP 8.4.

What happens if execution on the judgment is not stayed, and the judgment is eventually reversed?

If the judgment is not stayed, the party that prevailed in the trial court can execute on the judgment. If the judgment is then overturned on appeal, the trial court is authorized to "enter orders and authorize the issuance of process appropriate to restore to the [ultimately prevailing] party any property taken from that party, the value of the property, or in appropriate circumstances, provide restitution." RAP 12.8. If the party that previously executed on the judgment no longer has the money or property in

question, the party that prevailed on appeal may be left holding the bag. This risk can be averted by staying the execution of the judgment as set forth in RAP 8.2. If a party fails to stay execution of the original judgment, the courts will not be sympathetic to claims for special relief if the money (or property) has disappeared by the time the judgment is reversed.