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## **A Guide to Appellate Motions on the Merits**

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Parties to an appeal often feel they have little choice but to follow Washington's ordinary appellate procedure. Briefs are filed, a panel is selected, oral argument is heard and a decision is ultimately handed down. By its nature, the process can be protracted and expensive. In appropriate cases, however, there may be an alternative.

The "motion on the merits" procedure is intended to provide prompt and economical review of a trial court decision where the issues raised on appeal are clear. This note gives practitioners an overview of the rules governing motions on the merits and offers some advice to consider in deciding whether to file a motion on the merits and in preparing (and arguing) such a motion.

### **Standard for Decision: Cases Clearly With or Without Merit**

Rule 18.14 (entitled Motion on the Merits) of the Rules of Appellate Procedure (RAP) authorizes appellate courts to decide a case on the merits by way of motion. Such a motion is denominated a "motion on the merits" (RAP 18.14(a)) and can originate in one of two ways. First, a party may file such a motion to either affirm or reverse a decision of the trial court. Second, the court can decide an appeal on its own motion. The latter occurs through the court's internal screening process. Once the appellant's and respondent's briefs are filed, a staff attorney at Division I screens the appeal for oral argument, no oral argument, a motion on the merits or certification to the Supreme Court.

For 2007, Division I is on pace to hear roughly 125 motions on the merits. Of those, approximately 80% are generated by the court's screening process and at least 75% of the motions are in criminal appeals.

The standard for decision on any such motion is clearly laid out in the rule itself:

1. A motion to affirm will be granted if the appeal is "clearly without merit." RAP 18.14(e). In determining whether to affirm on this basis, the appellate court will consider whether the issues "(a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly within the discretion of the trial court or administrative agency." RAP 18.14(e)(1).
2. Similarly, in determining whether to reverse because an issue is "clearly with merit," the appellate court will consider whether the issues "(a) are clearly controlled by settled law, (b) are factual and clearly not supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly an abuse of discretion." RAP 18.14(e)(2).

For either type of motion, the foregoing factors are not necessarily dispositive. Instead, the factors are broadly applied to determine whether there is some proper basis to conclude that the appeal is clearly with or without merit.

Finally, a motion on the merits should be distinguished from a motion to dismiss a frivolous appeal under RAP 18.9(c). The fact that an appeal may be clearly without merit under RAP 18.14 does not mean it is frivolous under RAP 18.9.2 Although the standard for dismissal under RAP 18.9 is tougher, it carries a bigger dividend. Sanctions are available to the prevailing party under RAP 18.9, but not under RAP 18.14. Thus, where an appeal appears frivolous, the moving party should consider filing a motion to dismiss rather than a motion on the merits.

## **Contents and Timing**

A motion on the merits is much like any other motion brought in the appellate court. The motion should be a separate document and comply with RAP 17.3(a), except it may be as long as 25 pages and, as noted below, incorporate by reference material contained in a merits brief. RAP 18.14(c). Although a motion may be granted whenever an appeal is clearly with or without merit (as the case may be), every effort should be made to address one or more of the relevant factors listed in RAP 18.14(e)(1) and (2).

The timing of when a party can file a motion on the merits depends on the relief it seeks. A respondent filing a motion to affirm may do so at any time after the appellant's brief has been filed. RAP 18.14(b). As a practical matter, a respondent can consider doing so in conjunction with the filing of a brief on the merits, which it can incorporate by reference in the motion, a practice specifically contemplated by the rules. RAP 18.14(c).

An appellant may file a motion on the merits to reverse any time after the respondent's brief has been filed. RAP 18.14(b). Thus, the motion procedure does not allow the appellant to short-cut its obligation to prepare and file a full brief on the merits.

A motion on the merits to reverse may be denied by a commissioner or a judge, but it must be referred to a panel of three judges if it is to be granted. RAP 18.14(d). A meritorious motion on the merits to reverse typically results in a ruling setting the appeal before a panel of three judges for consideration without oral argument. As a result, and also because it may be more difficult for appellants to satisfy the "clearly with merit" standard, orders granting motions to reverse are rare.

After the motion is filed and served pursuant to RAP 17.4, the opposing party may submit a response, also incorporating material by reference, if necessary. RAP 17.4(e); RAP 18.14(c). Although RAP 18.14 does not specifically authorize a reply brief in support of a motion on the merits, a reply brief can be submitted under RAP 17.4(e), which addresses motions generally.

## **The Commissioner's Role in Deciding Motions on the Merits**

A motion on the merits ordinarily is decided by a commissioner of the appellate court, although a commissioner may refer a motion to a panel of judges for decision. RAP 17.2(b); 18.14(d), (i). At Division I, each motion on the merits is sent to a commissioner for screening. The commissioner will deny the motion without oral argument if the case obviously requires full appellate review; otherwise the motion will be set for oral argument (which may be waived by the parties if they so choose). RAP 17.5; RAP 18.14(f).

If the motion is denied, the commissioner must issue a written ruling that includes a statement of the reason for the decision. RAP 17.6(a); RAP 18.14(g). If the motion is granted, the commissioner must issue a concise written ruling that includes a description of the facts sufficient to place the issues in context, a statement of the issues and a resolution of the issues with supportive reasons. RAP 18.14(h).

The commissioners enjoy the opportunity to address well-considered motions on the merits. The biggest challenge for the commissioners is to balance priorities with their other assignments.

As with any other appeal, it is helpful to the commissioner if litigants: (a) provide clear and concise briefing that includes pertinent legal authority and (b) confirm that the trial court record has been received at the court (especially any exhibits ordered as part of the clerk's papers). If the latter is not the case, counsel should be sure to include relevant portions of the trial court record as attachments to their motion or brief.

A decision denying a motion on the merits is not subject to review. RAP 18.14(i). A ruling granting such a motion, on the other hand, is subject to review by a panel of judges in the same manner as any other ruling of a commissioner. RAP 18.14(i). That is, the losing party may file a motion to modify the commissioner's ruling under RAP 17.7.

It is important to note in this regard that if no motion to modify is filed, the commissioner's ruling will stand and appellate review is terminated. RAP 13.3(e) (commissioner's ruling not subject to review by Supreme Court). If timely filed, however, the judges will decide whether to grant or deny the motion to modify based on a de novo review of the commissioner's ruling.<sup>3</sup> If the motion to modify is granted, the matter is returned to the regular appellate docket. If denied, the appeal is over unless the Supreme Court grants discretionary review.

### **When Do Motions on the Merits Make Sense?**

At first glance, the motion on the merits procedure would seem to provide parties with a quick and cost-effective means of bypassing ordinary appellate review where the issues are clear. As a practical matter, however, the benefits may be slight. If, for instance, a motion on the merits is filed in conjunction with a merits brief or is filed first but later denied, a litigant will ultimately prepare two sets of briefs instead of just one. Rather than streamlining the appeal, the process would be both more expensive and more prolonged than had the parties proceeded directly to the merits. Thus, it is important to make the *right* call in deciding whether to file a motion on the merits. Specifically, counsel should consider the following questions:

1. ***How obvious is it that the factors stated in RAP 18.14(e)(1) or (2) are satisfied?*** Obviously, if all the issues on appeal present close questions, a motion on the merits does not make sense. And, although the RAP 18.14 permits a party to move for affirmance or reversal as to *part* of a trial court decision that is clearly with or without merit, there seems to be no good reason to do so because the party must prepare a full merits brief on the other aspects of the decision in any event; filing a partial motion on the merits would only add work and complicate the process. On the other hand, where the only issues on appeal seem clear, and fall within one or more of the relevant factors set forth in RAP 18.14(e)(1) or (2), a motion on the merits should be considered, subject to the other factors discussed below.
2. ***How much additional briefing is required to file a motion on the merits?*** As noted, a motion on the merits must be filed separately. The question of cost-effectiveness thus turns on whether a party can file a motion *in lieu* of a brief on the merits. From the perspective of a party seeking reversal, the answer is always no. An appellant must file a motion after its merits brief is filed; creating an additional document only adds cost. As a result, motions to reverse are understandably rare. From the perspective of a respondent, the answer depends on how much work is necessary to prepare a motion on the merits. If the issues are numerous, complicated, and/or fact-intensive, then it will be difficult to prepare the motion without doing almost all the same work necessary to prepare a full-blown merits brief. When that is the case, the motion process creates few efficiencies and probably should be avoided. Conversely, if the motion rests on relatively concise, predominantly legal, arguments, it may well be worthwhile to file the motion instead of a merits brief. The benefits of this strategy must, of course, be weighed against the risk that the motion will be denied, forcing the respondent to thereafter prepare and file a full merits brief.
3. ***Is it important that the appeal be resolved expeditiously?*** Regardless of cost, there is often a benefit to the motion on the merits procedure in terms of speed, although there is no significant backlog at Division I. Ordinarily, from the time the appellant's and respondent's briefs are filed, the parties can expect the appeal to be set before a panel of three judges for oral argument or for consideration without oral argument within the next two to three months followed by a decision in most appeals two to three months after that. A motion on the merits is usually set for hearing before a commissioner within three to four weeks with a decision on the merits by a commissioner within another three to four weeks. Even if one considers the time it takes the panel to review the

commissioner's ruling on a motion to modify, a final decision can be expected within approximately three months. Thus, the possibility of reaching finality sooner may provide a powerful incentive to explore the motion on the merits procedure. On the other hand, if the commissioner denies the motion or is reversed by the panel, a motion on the merits may have the effect of prolonging, rather than shortening, the appellate process.

Every case is unique and each may suggest a different analysis in deciding whether a motion on the merits (or a motion to dismiss) is warranted. But the above considerations are certainly relevant in any appeal, and should — hopefully — help practitioners reach the right result.

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1 See *State v. Bagwell*, 68 Wn. App. 891, 892–93 (1993) (even though harmless error is not listed in rule, motion proper “so long as an appeal is clearly without merit”).

2 See *State v. Rolax*, 104 Wn.2d 129, 141 (1985) (Dore, J., concurring and dissenting) (“Since the power to dismiss frivolous appeals was already codified in RAP 18.9, the promulgation of the motion on the merits rule reflects a desire to eliminate some form of non-frivolous appeals.”).

3 See *id.* at 133.