

# Editing Appellate Briefs

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. . . And Other Appellate Tidbits

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# Caveat

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- This presentation and the opinions expressed in it are solely those of the presenter.
- No one at the Washington State Court of Appeals, aside from the presenter, has reviewed or approved this presentation.



# Key Takeaways

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- Know your audience: judges and law clerks
- Removing page limits opens new avenues for improving briefs and increasing your persuasiveness
- Always edit your briefs
- Appendices are a useful and increasingly common tool
- The rule for statements of additional authorities has changed

# Roadmap

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- Know Your Audience
- Improving Your Briefs
- Visual Rhetoric
- Other Appellate Tidbits
- Appendices
- Statements of Additional Authorities

# Know Your Audience

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# Know Your Audience – Judges

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- Judges sit on 30 cases per docket
  - 30 Appellant's Briefs
  - 30 Respondent's Briefs
  - +/- 15 Reply Briefs
  - 30 Research Memos
- All this reading equals: 4 or 5 full length novels, in the span of two weeks
  - 4 or 5 novels *before* looking at the record

# Your Job for Judges

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- **Minimize:** the number of pages the judges have to read
- **Minimize:** the amount of record the judges need to read
- **Write clear enough:** so that the judges do not have to re-read your brief
- **Write clear enough:** so that the judges want to use your brief as the starting draft of their opinion



# Know Your Audience – Law Clerks

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- Less educated in Washington law
- Minimal knowledge of appellate procedure and error preservation
- May not be comfortable with independent research
- May be overly reliant on case law/lack confidence
- Swayed by emotional appeals – pathos



# Your Job for Clerks

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- **Disarm:** emotional appeals with ethos and logos
- **Educate:** law clerks on your statutory scheme and history, esp. admin law
- **Gain:** trust by providing case citations for legal propositions, even if it should be self-evident or widely known

# Improving Your Briefs

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# Improving Your Briefs

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- Without page limits you can:
  - Improve your audience's reading speed
  - Improve your audience's reading comprehension



# Font Size and Type

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- Do not use all caps, ever
- Avoid small caps headings
- Limit title case headings
- Do not use boldface type
- Give headings a slightly larger font size, maybe a different font type



# Font Size and Type

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- Use a proportionally spaced serif font
  - Century Schoolbook; Baskerville, Bookman, Caslon, Garamond, Georgia, Times
- A sans serif font may be appropriate for headings
  - Helvetica, Arial, Eurostile, Trebuchet, Univers, Verdana

# White Space

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- White space can improve comprehension and reading speed
  - Use frequent section and paragraph breaks
  - Give each item in a list its own line
  - Use block quotes for quotations >40 words
- Beware: too much white space can have the opposite effect
  - Indent paragraphs  $\frac{1}{4}$ " not  $\frac{1}{2}$ "
  - Do not justify your margins



# White Space

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- Ideally we would use
  - Smaller font size
  - Uniform 1½" margins
  - 1.3 line spacing
- RAP 18.17 prohibits these changes

# White Space Example

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To assure careful, case-by-case analysis of a closure motion, the trial court must perform a weighing test consisting of five criteria: (1) The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right. (2) Anyone present when the closure motion is made must be given an opportunity to object to the closure. (3) The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests. (4) The court must weigh the competing interests of the proponent of closure and the public. (5) The order must be no broader in its application or duration than necessary to serve its purpose.



# White Space Example

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2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.



# Visual Rhetoric

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# Visual Rhetoric

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- Definition: conscious arrangement of elements on the page to increase persuasive value
- Use visual rhetoric tools to:
  - Improve your persuasiveness
  - Improve your audience's reading comprehension



# Headings and Organization

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- An organized brief is a persuasive brief
- Make liberal use of headings, subheadings, sub-subheadings
  - Subheadings improve persuasiveness, comprehension, and reading speed



# Headings and Organization

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- Have a “roadmap” paragraph immediately following your 2nd order headings (e.g. issue 1 heading)
- Have a “roadmap” paragraph immediately following your 3rd order headings
  - if you will be using 4th order headings, or
  - if the 3rd order discussion will be more than a couple pages

## 3rd, 4th, and 5th order headings improve reading comprehension

**1. The superior court erred as a matter of law when it decided that crossing a gore does not violate RCW 46.61.670 (wheels off roadway) and RCW 46.61.050 (failure to obey a traffic control device).**

**a. The superior court erred as a matter of law by finding RCW 46.04.500 (roadway) ambiguous.**

At the trial court level, the district court found that driving over the gore point was a violation of both RCW 46.61.670 (wheels off roadway) and RCW 46.61.050 (failure to obey a traffic control device). CP 133. The parties do not dispute whether the solid white lines that form the gore are a traffic control device. That is indisputable given the definition of traffic control devices found in RCW 46.04.611. Rather, the dispute is over what that traffic control device means.

### **i. Lower court's ruling**

The State and the district court believe those lines delineate the edge of the roadway (i.e. an internal shoulder), the crossing of which is prohibited. Ms. Brooks disagrees, arguing that the lines do not delineate an internal shoulder and furthermore that the crossing of those lines is permissible under RCW 46.61.140. The superior

# Charts and Tables

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- Charts and tables can help explain facts that are difficult to verbalize
- Charts provide a useful visual summary



The superior court entered an order disposing of the Maslonkas’ remaining claims by finding that the PUD was vested with a prescriptive easement up to 2041 feet. At the hearing where the court announced its decision, it stated that the prescriptive easement vested “no later than 1999” but did not explain how it reached that conclusion.

The table below highlights the trial court’s basis for dismissing each claim, combining the order on partial summary judgment, order on reconsideration, and second order on summary judgment.

	Insufficient Evidence		Subsequent Purchaser		Statute of Limitations		Public Duty Doctrine		Prescriptive Easement	
	P1	P2	P1	P2	P1	P2	P1	P2	P1	P2
Condemnation	D	N/A	G	G	N/A	N/A	N/A	NA/	N/A	N/A
Trespass	D	N/A	NA/	D	D	D	N/A	N/A	G	G
Nuisance	D	N/A	N/A	D	D	D	N/A	NA/	G	G
Negligence	D	N/A	N/A	N/A	D	G	G	D	N/A	N/A

G = grant summary judgment to dismiss; D = denied summary judgment to dismiss; N/A not argued by PUD. Claims for Parcel 1 = P1 and claims for Parcel 2 = P2.

ANALYSIS

A. STANDARD OF REVIEWING SUMMARY JUDGMENT

“When reviewing an order for summary judgment, the appellate court engages in the same inquiry as the trial court.” *Mountain Park Homeowners Ass’n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994) (citing *Syrovoy v. Alpine Ress, Inc.*, 122 Wn.2d 544, 548-49 n.3, 859 P.2d 51 (1993)). “This court will affirm summary judgment if no genuine issue of any material fact exists and the moving party is entitled to judgment as a

58. The Court Monitor also presented data on inpatient competency restoration performance. The following table captures twenty-four months of data from April 2021 through April 2023.

Month Under Review	Number of Orders	Complete W/In 7 Days of Signature	Complete W/In 7 Days of Receipt	Average Number Days
		Table 10/13	Table 10/13	
April 2021	135	12%/14%	13%/15%	34.8
May	115	14%/14%	14%/14%	27.5
June	109	2%/3%	5%/6%	34.0
July	152	6%/5%	6%/5%	36.1
August	155	7%5%	7%/5%	33.3
September	184	12%/5%	13%/7%	38.9
October	186	5%8%	6%/9%	48.3
November	169	10%/9%	11%/9%	49.0
December	190	7%/8%	7%/8%	50.9
January 2022	171	5%/5%	8%/7%	48.2
February	187	6%/5%	6%/5%	55.4
March	171	6%/6%	6%/6%	61.1
April	196	3%/3%	2%/3%	57.9
May	185	7%/5%	8%/5%	53.9
June	181	11%/7%	11%/7%	65.1
July	145	3%/3%	3%/3%	77.1
August	205	6%/7%	7%/5%	69.1
September	166	5%/4%	7%/4%	82.1
October	140	3%/5%	3%/5%	96.3
November	130	5%/8%	5%/3%	95.6
December	159	1%/2%	2%/1%	95.6
January 2023	120	2%/8%	2%/5%	106.7
February	138	5%/7%	5%/6%	133.5
March	160	6%/6%	6%/5%	119.1
April 1 <sup>st</sup> look	129	5%/6%	5%/5%	130.4

59. From September 2022 through April 2023, the number of inpatient competency restoration orders stretched from between 120 and 166 each month. Wait times over this same period of time rose from 82.1 to 133.5 days with wait times in April 2023 at 130.4 days. Timely provision of restoration services has been poor—ranging between 1% and 8% when measured



### Appendix: Continuances Table

Date Extension Filed	New Trial Date Set	Defense posture	Clerk's Papers	Transcript
Thursday, June 27, 2019	Monday, August 19, 2019	Initial date setting	CP 17	
Thursday, August 8, 2019	Monday, October 14, 2019	Defense agrees	CP 25	
Thursday, October 3, 2019	Monday, December 9, 2019	Defense agrees	CP 28	
Wednesday, November 27, 2019	Monday, January 13, 2020	Defense agrees	CP 32	
Thursday, January 2, 2020	Monday, February 3, 2020	No agreement or objection noted	CP 35	
Thursday, January 30, 2020	Monday, March 9, 2020	Defense agrees	CP 38	
Thursday, February 27, 2020	Monday, April 6, 2020	Defense agrees	CP 40	
Friday, March 20, 2020	Thursday, June 11, 2020	Defense motion	CP 42-44	
Unaccounted period: June 11, 2020-July 9, 2020				
Thursday, July 9, 2020	Reset for def. failure to appear	Defendant FTA; Att'y notes Defendant objection	CP 70	RP (July 9, 2020) 4-6
Thursday, July 16, 2020	Monday, September 21, 2020	Defendant objection	CP 71	RP (July 16, 2020) 10-14
Thursday, September 10, 2020	Monday, November 9, 2020	Continuing def. objection (7/16)	CP 72	
Thursday, October 29, 2020	Monday, December 28, 2020	Continuing def. objection (7/16)	CP 78	
Thursday, December 17, 2020	Monday, March 1, 2021	Continuing def. objection (7/16)	CP 79	
Thursday, February 18, 2021	Monday, March 29, 2021	Defense request	CP 80	RP (Feb. 18, 2021) 16-17
Thursday, March 18, 2021	Monday, April 19, 2021	Defense agrees	CP 82	RP (March 18, 2021) 19-20
Thursday, April 1, 2021	Monday, June 7, 2021	Defense request	CP 83	RP (April 1, 2021) 10-11
Thursday, May 13, 2021	Sunday, June 20, 2021	Defense request	CP 84	RP (May 13, 2021) 12
Thursday, June 3, 2021	Monday, July 12, 2021	Defense request	CP 86	RP (June 3, 2021) 3-4
Friday, July 2, 2021	Monday, August 30, 2021	Defense counsel agrees; Defendant objects RP 23.	CP 102	RP (July 2, 2021) 18-21
Monday, August 23, 2021	Saturday, September 11, 2021	Defense request	CP 137-40	RP (Aug. 23, 2021) 48-52
Friday, September 10, 2021	Monday, October 11, 2021	Joint request for September 27; Joint acceptance of revised date. RP 56	CP 152-56	RP (Sept. 10, 2021) 55-59



finding that Harvard uses race to “track[] how each class is shaping up relative to previous years with an eye towards achieving a level of racial diversity”); 2 App. in No. 20–1199, at 821–822.

The results of the Harvard admissions process reflect this numerical commitment. For the admitted classes of 2009 to 2018, black students represented a tight band of 10.0%–11.7% of the admitted pool. The same theme held true for other minority groups:

Share of Students Admitted to Harvard by Race			
	African-American Share of Class	Hispanic Share of Class	Asian-American Share of Class
Class of 2009	11%	8%	18%
Class of 2010	10%	10%	18%
Class of 2011	10%	10%	19%
Class of 2012	10%	9%	19%
Class of 2013	10%	11%	17%
Class of 2014	11%	9%	20%
Class of 2015	12%	11%	19%
Class of 2016	10%	9%	20%
Class of 2017	11%	10%	20%
Class of 2018	12%	12%	19%

Brief for Petitioner in No. 20–1199 etc., p. 23. Harvard’s focus on numbers is obvious.<sup>7</sup>

<sup>7</sup> The principal dissent claims that “[t]he fact that Harvard’s racial shares of admitted applicants varies relatively little . . . is unsurprising and reflects the fact that the racial makeup of Harvard’s applicant pool also varies very little over this period.” *Post*, at 351 (opinion of SOTOMAYOR, J.) (internal quotation marks omitted). But that is exactly the point: Harvard must use precise racial preferences year in and year out to maintain

# Photos and Exhibits

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- Reproduce graphics and exhibits within your brief
  - Would you rather read a meets and bounds description or look at a plat map?
- Reproducing images within your brief is becoming common practice
  - Color is prohibited by GR 14(a), but soon allowed under RAP 10.4(c).

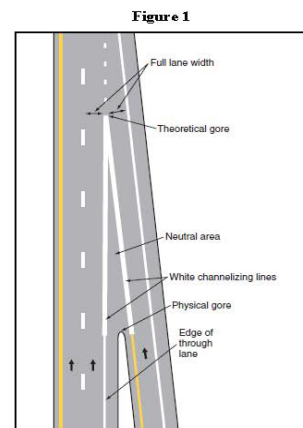


Nos. 35002-9-III; 35003-7-III

*State v. Brooks*

#### BACKGROUND

While merging onto westbound U.S. Route 97 from U.S. Route 2 in Chelan County, Jena Brooks's car crossed over a portion of the highway designated as a "neutral area." A neutral area is a paved triangular space separating an entrance or exit ramp from an adjacent lane of highway. The neutral area between Route 97 and its merger with westbound Route 2 is marked on each side by thick white channelizing lines. Figure 1 is a depiction of a neutral area similar to the one crossed by Ms. Brooks.<sup>1</sup>



A Washington State Patrol trooper observed Ms. Brooks's vehicular activity and performed a traffic stop. Ms. Brooks was ultimately arrested for driving on a suspended license and other misdemeanor offenses.

During proceedings in district court, Ms. Brooks filed a motion to suppress, arguing her vehicle had been stopped without cause. The motion was denied. Pertinent

<sup>1</sup> FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES FOR STREETS AND HIGHWAYS fig.3B-9, at 360 (2009 ed., rev. May 2012).



No. 37747-4-III  
*Maslonka, et al v. PUD No. 1, et al*

following image is taken from the County's GIS<sup>1</sup> database and is a reproduction of Clerk's Papers (CP) at 130.

The Pend Oreille River forms the eastern border of Parcel 2. The Maslonkas' property abuts the river for approximately a mile. When purchasing the property in 1993, Mr. Maslonka was aware that the lower portion of Parcel 2 flooded periodically.

When the water is high for a day or two, it has little impact, but it has a substantial negative impact on Mr. Maslonka's farming operations when it is high for a month or two. According to Mr. Maslonka, the flooding that occurred when he purchased the property was of the former character. He contends that since about 1999, the flooding has increasingly taken on the latter character. He believes that the cause of this increased frequency and duration of flooding is the result of changes in the PUD's operations following an amendment to its license in 1999, granted by the Federal Energy Regulatory Commission (FERC). The history of that license amendment is detailed below in our discussion of the Tribal Litigation.

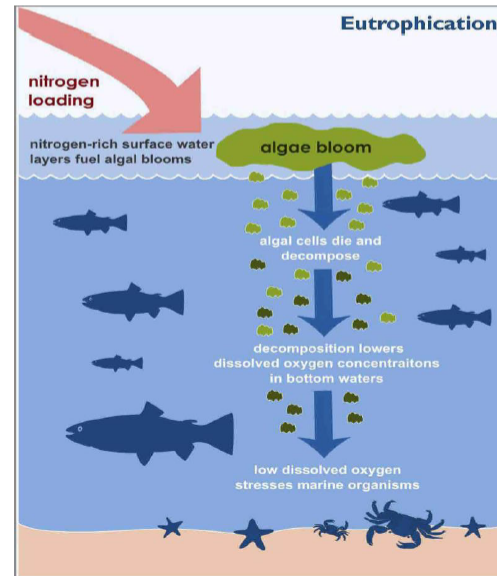


<sup>1</sup> Geographic information system.

Some WWTPs in Washington already incorporate nitrogen removal, such as the Spokane Regional Water Reclamation Facility and the Budd Inlet Treatment Plant. Despite having been technologically feasible for several decades, tertiary treatment is not yet required for all WWTPs.

One of the primary impediments to wider adoption of tertiary treatment is cost. In 2017, the Chambers Creek Regional Wastewater Treatment Plant in Pierce County finished installation of a nitrogen removal system at a cost of \$342 million. Individual plants may also be impeded by a lack of available land on which to construct new infrastructure or insufficient access to additional electricity. Other impediments are gaps in our knowledge.

Nitrogen, while commonly thought of as a beneficial nutrient, is also a pollutant. Simplified, excess nitrogen results in excess algal growth. Algae generate organic carbon. When carbon decomposes, it consumes



# Other Appellate Tidbits

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# Eliminate Lawyerisms

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- Avoid ambiguous titles: appellant/respondent, plaintiff/defendant
  - Judges sometimes forget who won/lost below
- Use short declarative statements, not hedging words or word clusters
  - “the fact that” “as to whether” “you will find” “pursuant to” “by virtue of” “in accordance with” “rather catastrophic” “a bit malevolently”

# Footnotes

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- Minimize footnotes
  - If you are ok leaving it in a footnote, you can probably delete it
  - Ask yourself: would a parenthetical work instead?
- Footnotes should never be more than a sentence or two and never contain argument or analysis
- Only use a footnote if you can explain how it helps the reader
  - When citing lengthy web addresses that would interrupt reading flow
  - For quick clarification that does not sensibly fit within the body

# Concluding Section

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- Do not neglect your conclusion
  - Your brief must include “A short conclusion stating the precise relief sought.” RAP 10.3(a)(7)
- Summarize your recommendations for each issue and sub-issue
  - Say exactly what remedy you want
  - Say what instructions you want the appellate court to give to the trial court



# Save Time for Editing

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- “You cannot imagine how disquieting it is to find several spelling or grammatical errors in an otherwise competent brief. It makes the judge go back to square one in evaluating the counsel. It says—worst of all—the author never bothered to read the whole thing through, but she expects us to.”
  - Judge Patricia Wald, D.C. Circuit Court of Appeals

# Editing Tips

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- Print it and read it
- Mark edits in pen; incorporate changes later
- Ask yourself:
  1. Does your brief have a heading or subheading devoted to each assignment of error and each issue pertaining to assignments of error?
  2. Does your organization make sense?
  3. Did you address every issue?
  4. Have you removed extraneous facts?
  5. Do you use too much passive voice?
  6. Can the court understand the case if they start with your brief?

# Appellate order of operations

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1. Address error preservation (when appropriate)
2. Identify standard of review (appellate and substantive)
3. Apply standard of review to find if error occurred
4. If error: was it constitutional or non-constitutional?
5. If constitutional: was it structural or harmless beyond a reasonable doubt?
6. If non-constitutional: was it harmless?



# Appendices

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# Appendices

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- RAPs 9.10 and 9.11 govern supplementing the record with additional evidence (i.e. adjudicative facts)
  - Do not simply attach additional evidence as an appendix to your brief. RAP 10.3(a)(8)
- Appendices may include:
  - Copies of statutes and rules. RAP 10.4(c)
  - Exhibits, if properly designated under RAP 9.6
  - Nonadjudicative facts, including “legislative facts” and other matters capable of judicial notice

# Appendices

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- Legislative facts are “background information a court may take into account when determining the constitutionality or proper interpretation of a statute, or when extending or restricting common law rule.”
  - *Cameron v. Murray*, 151 Wn. App. 646, 658-59 (2009) (internal citation and quotation marks omitted).
- Legislative facts include scholarly works, scientific studies, and social facts.
  - *Wyman v. Wallace*, 94 Wn.2d 99, 102 (1980).



# Appendices

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- If seeking judicial notice, you are strongly encouraged to bring a separate motion
  - Your definition of a matter capable of judicial notice, might not meet the court's definition or might not be admissible in your context
  - *E.g. City of Everett vs. Pub. Employment Relations Comm'n*, 11 Wn. App. 2d 1, fn. 1 (2019) (rejecting filing of various studies and “other new evidence” not reviewed by the administrative agency).

# Appendices

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- *City of Seattle v. Seattle Police Officers' Guild*, 17 Wn. App. 2d 21, 60 (2021)
  - Appendix containing public agency report intended for use as substantive evidence not considered because appellant failed to obtain prior permission to supplement under RAP 9.11
- *Canal Station North Condo. Ass'n v. Ballard Leary Phase II, LP*, 179 Wn. App. 289, 306 (2013)
  - Law review articles are considered “legislative facts” and may be appended to a brief
- *State ex rel. T.B. v. CPC Fairfax Hosp.*, 129 Wn.2d 439, 453–54 (1996)
  - Refusing to strike scholarly articles attached in appendices
- *McKee v. Dep't of Corr.*, No. 37870-5-III (Unpublished Op. 2023)
  - Appellant may not attach prior briefing as appendix in order to circumvent page limits

# Statement of Additional Authorities

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# Additional Authorities, RAP 10.8

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- Old Rule: Should contain no argument, and at most a single sentence telling the court what issue the new authority applies to.
- New Rule (9-1-22): “The statement must include argument explaining the reasons for the additional authorities and must include a pinpoint citation either to the pertinent page of the brief or to a point argued orally.”
  - Limited to 350 words

# Additional Authorities

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- “We view [RAP 10.8] as being intended to provide parties an opportunity to cite authority decided after the completion of briefing. We do not view it as being intended to permit parties to submit to the court cases that they failed to timely identify when preparing their briefs.”
  - *O’Neill v. City of Shoreline*, 183 Wn. App. 15, 23 (2014); *Eugster v. Wash. St. Bar. Ass’n*, 198 Wn. App. 758, 771 (2017); *Gull Industries, Inc. v. Granite St. Ins. Co.*, 18 Wn. App. 2d 842, 857 n. 11 (2021).

# Additional Authorities

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- “[N]othing in the rule limits its application to newly created law.”
  - *Futurewise v. Western Wash. Growth Mgmt. Hrgs. Bd.*, 164 Wn.2d 242, 248 n. 2 (2008).



# Additional Authorities

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- Not a backdoor supplemental brief
  - *SEIU Healthcare Northwest Training Partnership v. Evergreen Freedom Foundation*, 5 Wn. App. 2d 496, 514-15 (2018) (loss of rebuttal time due to panel questioning was not grounds to file additional briefing as additional authorities)
  - Concern now resolved by 350 word limit

# Additional Authorities

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- Not a way to supplement the record
  - *Brewer v. Fibreboard Corp.*, 127 Wn.2d 512, 531 (1995) (rejecting attempt to file 368 pages of documents from the record in a federal case).

# Recap

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# Recap

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- Know your audience: judges and law clerks
- No page limits = new avenues for improved briefs
- Always edit your briefs
- Appendices are a useful and increasingly common tool
- The rule for additional authorities has recently changed

# Questions?

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- You can reach Andrew at:

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