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THE FINALITY OF UNMODIFIED APPELLATE COMMISSIONER RULINGS IN WASHINGTON STATE

Aurora R. Bearse*

Abstract: In Washington appellate courts, unelected court commissioners handle most of the motion practice. Some motions are minor and mostly procedural, but other motions touch on the scope of the appeal or its merits. Because commissioners have the power to shape the course of an appeal, the Washington Rules of Appellate Procedure allow parties to internally appeal any commissioner decision to a panel of elected judges, via what is called a “motion to modify” under RAP 17.7. If a panel modifies a commissioner’s ruling, the panel’s decision becomes the final decision of the court on that issue. Similarly, multiple opinions recognize that an unmodified commissioner ruling also becomes the final decision on issues raised in a motion. Nevertheless, at times, appellate panels have ignored or amended earlier unmodified commissioner motion rulings, often without detailed explanation. This Essay explores opinions in which panels considered the court bound by unmodified commissioner rulings and when they did not. It reviews in detail those opinions where panels ignored or altered unmodified commissioner rulings and the reasons panels gave for doing so, if any. And it concludes with a recommendation that absent a clearly articulated and compelling reason, an appellate panel should follow the rule that a commissioner’s unmodified ruling is the court’s own—a concept that this Essay calls “the rule of ruling finality.”

INTRODUCTION

In the Washington State Court of Appeals, appellate commissioners handle most of the motion practice. Although they are unelected creatures of the appellate court rules,¹ their decisions on motions can have a significant effect on the outcome of an appeal. So to preserve the right to

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1. *Wolfe v. Wolfe*, 99 Wash. 2d 531, 534–35, 663 P.2d 469, 471 (1983) (describing the creation of the commissioner position) (“The Supreme Court established the position of Commissioner in 1976 by the Rules of Appellate Procedure [(RAP)] and defined it further in Court of Appeals Administrative Rule (CAR) 16(c). The Commissioner has broad authority to hear and decide motions authorized by RAP 17.2 and 18.9(b) as well as any additional motions that may be assigned to that officer by the Court of Appeals. CAR 16(c)(1). The Court of Appeals Administrative Rules also provide that the duties of the Commissioner may be increased or altered by the Court of Appeals and that all duties carried out by the Commissioner are for the benefit of the court as a whole. CAR 16(c)(7).”).

review by a panel of elected judges,² a party can request that a panel review any commissioner decision by timely filing a motion to modify.³ If modified, the panel decision is the final decision on the motion.

But what about an unmodified⁴ commissioner decision? Myriad opinions support that the commissioner's decision should be the court's final decision⁵—but some do not,⁶ and they rarely explain why. This gray area in appellate practice should be eliminated in all but the rarest, and clearly delineated, circumstances.

This Essay provides an overview of the appellate commissioners' duties.⁷ It discusses how appellate panels treat earlier commissioner rulings⁸ and provides examples of when panels considered the court bound by these rulings and when they did not. It categorizes those opinions in which panels ignored or altered unmodified commissioner rulings. And it concludes with a recommendation that absent a clearly articulated reason, an appellate panel should follow the existing rule that a commissioner's unmodified ruling is the court's own—a concept that this Essay calls “the rule of ruling finality.”

I. APPELLATE COMMISSIONERS AND THEIR RULINGS

Appellate commissioners can rule on all motions filed under the Washington Rules of Appellate Procedure (RAPs),⁹ except for those that the rules refer to a panel of three elected judges of the court of appeals.¹⁰ Functionally, this means that court commissioners have the authority to

2. *Id.* at 535, 663 P.2d at 471 (“[I]f a losing party does not like the Commissioner’s ruling, one is not forced to accept it. Upon making a motion to modify pursuant to RAP 17.7, petitioner is entitled to and receives, as a matter of right, a de novo review of the Commissioner’s ruling by a three-judge panel.”).

3. WASH. R. APP. P. 17.7.

4. Either because a party does not file a motion to modify or because a panel denies the motion to modify.

5. *See infra* section II.B.1.

6. *See infra* section II.B.2.

7. The Washington State Supreme Court also has a commissioner’s office. Although this Essay focuses on the intermediate appellate court, it also references some supreme court decisions.

8. Commissioner decisions are called “rulings,” to distinguish them from full appellate opinions or orders. WASH. R. APP. P. 17.6(a).

9. *See* WASH. R. APP. P. 17.2(a), 17.6.

10. RAP 17.2(a) provides:

The judges determine (1) a motion in a brief, (2) a motion to modify a ruling by a commissioner or the clerk, (3) a motion for reconsideration of a decision, (4) a motion to recall the mandate, except for a motion made to correct an inadvertently issued mandate, and (5) a motion to publish. All other motions may be determined initially by a commissioner or the clerk of the appellate court.

WASH. R. APP. P. 17.2(a).

rule on all sorts of appellate motions, from minor procedural motions, such as extension requests,¹¹ to motions that decide the merits of an appeal, such as motions for accelerated review¹² and motions on the merits.¹³

Three additional types of motions, all confusingly called “motions for discretionary review,” require commissioners to serve as gatekeepers to the court of appeals. A commissioner’s decision granting discretionary review, thereby allowing a discretionary appeal to go to a panel for a decision on the merits, can significantly affect the course of an appeal. Given the effect that a discretionary review ruling may have on the development of an appeal, this Essay highlights how appellate panels treat these decisions by appellate commissioners.

The first type of motion for discretionary review is a motion for interlocutory review.¹⁴ In these motions, a party is requesting that the court of appeals review a superior court’s decision before the trial court action is over.¹⁵ The second is a motion for the court of appeals to hear an

11. See WASH. R. APP. P. 10.2(i), 18.8(a).

12. See WASH. R. APP. P. 18.13 (accelerated review of juvenile dispositions); WASH. R. APP. P. 18.13A (accelerated review of dependency and termination orders); WASH. R. APP. P. 18.15 (accelerated review of adult sentences).

13. See WASH. R. APP. P. 18.14(a), (d). Currently, all three divisions of the court of appeals have suspended this rule. See WASH. GEN. ORDS. DIV. II 2016-1.

14. RAP 2.3(b) provides:

[D]iscretionary review may be accepted only in the following circumstances:

- (1) The superior court has committed an obvious error which would render further proceedings useless;
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
- (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
- (4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

WASH. R. APP. P. 2.3(b). The federal standard for interlocutory review tracks RAP 2.3(b)(4), but without allowing the parties to agree to a certification. 28 U.S.C. § 1292(b). Section 1292(a) also allows interlocutory appeals of injunctive orders, orders on receiverships, and certain admiralty orders. *Id.* § 1292(a).

For a full discussion of the operation of RAP 2.3(b), see Stephen J. Dwyer, Leonard J. Feldman & Hunter Ferguson, *The Confusing Standards for Discretionary Review in Washington and a Proposed Framework for Clarity*, 38 SEATTLE U. L. REV. 91, 105 (2014); and Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 WASH. L. REV. 1541, 1545 (1986). See also *State v. Howland*, 180 Wash. App. 196, 321 P.3d 303 (2014) (discussing WASH. R. APP. P. 2.3(b)(2)), *disc. rev. denied*, 182 Wash. 2d 1008 (2015).

15. Generally, a trial court must have entered a final judgment in a case before someone can appeal. WASH. R. APP. P. 2.2(a)(1); see also WASH. R. APP. P. 2.2(a)(2)–(6) (listing specific appealable

appeal of a limited jurisdiction court¹⁶ judgment.¹⁷ In these motions, a superior court first hears the appeal before the losing party asks the court of appeals to proceed with a second-level appeal.¹⁸ Because one court reviews a judgment before the appeals court exercises its “discretion” to further review, this second type of motion resembles a petition for a writ of certiorari to the United States Supreme Court or a petition for review to the Washington State Supreme Court.¹⁹ And the third discretionary review motion is a motion for direct review in the court of appeals of an administrative decision, skipping initial review in the superior court.²⁰

Under the discretionary review procedures, the petitioner files a motion for discretionary review, which is heard by a commissioner. If the commissioner grants review, a panel of three judges decides the merits of the appeal.²¹

But between these two steps—the commissioner’s grant of discretionary review and the panel reaching the merits of the appeal—a party who disagrees with the grant of review or its scope may move to modify the commissioner’s ruling. The motion to modify gives parties the

orders). Interlocutory review is disfavored because

[p]retrial review of rulings confuses the functions of trial and appellate courts. A trial court finds facts and applies rules and statutes to the issues that arise in the course of a trial. An appellate court reviews those rulings for legal error and considers the harm of the alleged error in the context of its impact on the entire trial.

Minehart v. Morning Star Boys Ranch, Inc., 156 Wash. App. 457, 462, 232 P.3d 591, 593–94 (2010).

16. District and municipal courts. *See generally* WASH. REV. CODE § 3.02.010.

17. These are commonly referred to as “RALJ” motions because the superior court’s appellate procedures are governed by the Rules for Appeal of Decisions of Courts of Limited Jurisdictions, cited as “RALJ” rules.

18. RAP 2.3(d) provides:

Discretionary review of a superior court decision entered in a proceeding to review a decision of a court of limited jurisdiction will be accepted only:

- (1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or
- (2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (3) If the decision involves an issue of public interest which should be determined by an appellate court; or
- (4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

WASH. R. APP. P. 2.3(d).

19. *See* WASH. R. APP. P. 13.3.

20. Like the RALJ procedures, a party aggrieved by an administrative agency’s final decision may file an appeal in the superior court. WASH. R. APP. P. 6.3. *But see generally* S.B. 5225, 2021 Leg., 67th Sess. (Wash. 2021) (allowing direct appeal to court of appeals of certain land use decisions).

21. The sole exception is a grant of discretionary review in a child welfare case. The RAPs now allow court commissioners to retain the grant of review and issue a ruling on the merits. WASH. R. APP. P. 18.13A(a).

right to internally appeal any commissioner’s decision,²² thus preserving the losing party’s right to have their issue heard by a panel of elected appellate judges.²³ On the other hand, a commissioner’s ruling may remain unmodified, either because the losing party did not file a motion to modify or because a panel denied the motion to modify.

However, even if the commissioner’s ruling remains unmodified, losing parties may still attempt to adjust the scope of review or challenge the commissioner’s grant of review altogether. The next section of this Essay discusses how the court treats the commissioner’s unmodified decision in the face of such attempts.

II. THE RULE OF RULING FINALITY

If a commissioner’s ruling remains unmodified, then the losing party’s right to internally appeal the commissioner’s decision has passed; thus, the court commissioner’s final decision should be the decision of the court.²⁴ Multiple opinions recognize this rule, reasoning that by providing an explicit modification procedure, RAP 17.7 is the exclusive means to overturn a commissioner’s ruling.²⁵

Essentially, then, courts have acknowledged that a “rule of ruling finality” exists to enforce the motion to modify procedure. But this rule is applied inconsistently. For example, when an appellant attempts to add issues to an appeal after a commissioner accepts discretionary review, courts consistently will not alter the commissioner’s ruling. In contrast, when a respondent attempts to limit review, some courts follow the commissioner’s ruling while others ignore it.

This next section focuses on opinions addressing unmodified grants of discretionary review. But because how panels treat unmodified commissioner rulings in other types of motions informs how the rule of ruling finality is enforced in all circumstances, the next section also discusses opinions in other contexts.

22. RAP 17.7 sets out that an aggrieved party may object to a commissioner’s ruling “by a motion to modify the ruling directed to the judges of the court.” WASH. R. APP. P. 17.7.

23. *Wolfe v. Wolfe*, 99 Wash. 2d 531, 535–36, 663 P.2d 469, 471–72 (1983) (citing WASH. REV. CODE § 2.06.040 (requiring review by three-judge panels) and Court of Appeals Administrative Rule 16(c) (Duties of Commissioner)) (“Upon making a motion to modify pursuant to RAP 17.7, petitioner is entitled to and receives, as a matter of right, a de novo review of the Commissioner’s ruling by a three-judge panel.”).

24. *See infra* section II.B.1.

25. *Id.*

A. *Expanding the Scope of Review*

Several opinions explicitly apply the rule of ruling finality when an appellant later seeks to *add* issues to an appeal that a commissioner did not include in their grant of discretionary review.²⁶ These opinions consistently hold²⁷ that an appellant cannot add issues to an appeal after a commissioner accepts review and the commissioner's decision is not modified. This category of decision, therefore, consistently applies the rule of ruling finality.

B. *Attempts to Limit Review*

In contrast, the court is more inclined to ignore the rule of ruling finality when the respondent argues that a panel should later decline to decide issues that a commissioner included in an unmodified grant of review or otherwise amend an unmodified commissioner's ruling. Only a few opinions squarely address this issue, but panels are split between those that follow the commissioner's ruling and those that ignore it. This next section examines these decisions by division.²⁸

26. Laughlin v. Allstate Ins. Co., No. 31612-9-II, 2005 WL 2981685, at *2, (Wash. Ct. App. Nov. 8, 2005) (rejecting appellant's argument to review all the issues raised in a motion for discretionary review when the commissioner only granted review of one issue); *see also In re Det. of Broer v. State*, 93 Wash. App. 852, 857, 957 P.2d 281, 284 (1998) (citing *Kramer v. J.I. Case Mfg. Co.*, 62 Wash. App. 544, 547, 815 P.2d 798, 801 (1991) (stating that if no motion to modify is filed, "the ruling becomes a final decision of the court")), *amended by Broer v. State*, 973 P.2d 1074 (1999).

In re Detention of Broer implicates both appealability and the scope of review. In that matter, the commissioner considered whether appeals of four orders entered in a civil commitment proceeding were properly before the court. 93 Wash. App. at 857, 957 P.2d at 284. The commissioner ruled that one order, a contempt order, was appealable, and also apparently granted discretionary review of an order directing a mental examination. *Id.* In its opinion, the panel noted that neither party moved to modify the ruling on the scope of review and therefore, the court "confine[d]" itself to reviewing only the two orders before it. *Id.*

Also, multiple other decisions that do not specifically cite RAP 17.7 or reference the finality of a commissioner's decision also refused to take up additional issues on review. *See State v. Kosewicz*, 174 Wash. 2d 683, 691 n.2, 278 P.3d 184, 189 n.2 (2012); *Frank Coluccio Constr. Co. v. King County*, 3 Wash. App. 2d 504, 517, 416 P.3d 756, 762, *rev. denied*, 192 Wash. 2d 1005 (2018); *In re Marriage of Ruff and Worthley*, 198 Wash. App. 419, 424 n.6, 393 P.3d 859, 862 n.6 (2017).

27. *See supra* note 26.

28. The court of appeals is one court divided into three divisions. WASH. REV. CODE § 2.06.010; WASH. REV. CODE § 2.06.020; *see also* WASH. CONST. art. 4, § 30. For a discussion about how the court of appeals handles conflicting decisions from different divisions, *see In re Personal Restraint of Arnold*, 190 Wash. 2d 136, 147–54, 410 P.3d 1133, 1138–41 (2018).

1. *Panel Follows the Commissioner’s Ruling*

a. *Division Three*

*Cornu-Labat v. Hospital District No. 2 Grant County*²⁹ is one of the clearest recent opinions to address a panel’s authority to avoid issues included in an unmodified commissioner’s ruling granting review. In *Cornu-Labat*, the plaintiff sued a public hospital for failing to comply with a public records request. The superior court certified for review the issue whether certain records were exempt from public disclosure. The appellate commissioner accepted review, and the respondent never moved to modify.³⁰

In the opinion on review, all three judges agreed that discretionary review was improper. But even though a concurring judge wished to avoid reaching the merits by holding that review was improvidently granted, the majority disagreed. Quoting RAP 17.7, the majority said that the commissioner’s grant of review was not modified and, therefore, was final. Consequently, it reached the merits, affirming the trial court’s denial of summary judgment.³¹

Division Three similarly rules when addressing unmodified commissioner rulings in other contexts. For example, in *In re Marriage of Miksch*,³² Division Three again deferred to the unmodified commissioner’s ruling.³³ In *Miksch*, the commissioner denied the respondent’s motion to dismiss a (non-interlocutory) appeal as moot.³⁴ The respondent failed to move to modify this ruling. Applying *Cornu-Labat*, the court declined to address the mootness issue in its opinion.³⁵ And in the recent opinion in *Estate of Torres v. Kennewick School District*,³⁶ Division Three once again adhered to its commissioner’s unmodified ruling on a motion to supplement the appellate record,³⁷ even though the panel believed that “[t]he issue was debatable.”³⁸

29. No. 32436-2-III, 2015 WL 4740492 (Wash. Ct. App. Aug. 11, 2015).

30. *Id.* at *6.

31. *Id.* (applying the law of the case doctrine and affirming denials of summary judgment).

32. No. 35220-0-III, 2018 WL 6002929 (Wash. Ct. App. Nov. 15, 2018).

33. *Id.* at *4.

34. *Id.* at *2.

35. *Id.*

36. No. 36886-6-III, 2021 WL 5000144 (Wash. Ct. App. Oct. 28, 2021).

37. RAP 9.11(a) allows the court of appeals to accept additional evidence on review under limited circumstances if the moving party satisfies six factors. WASH. R. APP. P. 9.11(a)(1)–(6).

38. *Est. of Torres*, 2021 WL 5000144, at *8.

b. *Division Two*

In an opinion that issued on the same day as *Cornu-Labat*, Division Two also refused to alter its commissioner's ruling granting discretionary review. In *State v. Dickjose*,³⁹ the commissioner accepted review of a denial of a motion to suppress post-arrest statements.⁴⁰ But on appeal, the State argued "that the commissioner improvidently granted review."⁴¹ The court rejected this argument because the State had not moved to modify the grant of review under RAP 17.7. "Thus, the commissioner's ruling granting discretionary review [was] final."⁴²

This tracks the reasoning of an earlier Division Two opinion in *Hough v. Ballard*,⁴³ which addressed appealability.⁴⁴ In *Hough*, the respondent moved to dismiss an appeal, arguing that the matter was not ripe for review.⁴⁵ The commissioner denied the motion. Respondent never moved to modify. Respondent raised the same issue in merits briefing but the court rejected the argument because the commissioner's ruling was final.⁴⁶

c. *Division One*

Division One also follows the rule of ruling finality, although its

39. No. 43659-1-II, 2015 WL 4755525 (Wash. Ct. App. Aug. 11, 2015).

40. *Id.* at *2.

41. *Id.* at *2 n.4. Interestingly, Judge Dwyer's article criticizes the basis for *Dickjose*'s grant of review, although it notes that RAP 2.3(b)(1) supported granting review. Dwyer et al., *supra* note 14, at 98. This is because the March 2014 opinion in *State v. Howland*, 180 Wash. App. 196, 207, 321 P.3d 303, 308 (2014), concluded that to satisfy RAP 2.3(b)(2), a petitioner has to show the superior court's decision had an effect outside of the litigation. Before that decision and the corresponding analysis in the law review article, this was not a clearly recognized or uniformly applied requirement. *See, e.g.*, *GMAC v. Everett Chevrolet, Inc.*, No. 68374-8-I, 2012 WL 3939863, at *6 (Wash. Ct. App. Aug. 16, 2012) (accepting review of summary judgment denial under RAP 2.3(b)(2)).

The Washington State Supreme Court recently accepted discretionary review in a case that raises the issue of the proper scope of RAP 2.3(b)(2) and the Supreme Court's companion rule, RAP 13.5(b)(2). *In re the Welfare of N.G.*, No. 100008-1 (Wash. Sept. 21, 2021) (order granting review).

42. *Dickjose*, 2015 WL 4755525, at *2 n.4 (citing *Hough v. Ballard*, 108 Wash. App. 272, 277, 31 P.3d 6, 9 (2001)). Similarly, in *Michelbrink v. Washington State Patrol*, Division Two refused to reach the issue on whether the commissioner erred in accepting review. 180 Wash. App. 656, 661, 323 P.3d 620, 623 (2014). *Michelbrink*, however, recognized that the court had already rejected the same argument when it denied a motion to modify. *Id.* at 661, 323 P.3d at 623. For this reason, it does not provide much guidance on the issue of finality of an unmodified commissioner ruling granting review.

43. 108 Wash. App. 272, 31 P.3d 6 (2001).

44. *Id.* at 277, 31 P.3d at 9.

45. *Id.*

46. *Id.*

opinions largely arise outside of the discretionary review context.⁴⁷ They instead focus on other threshold issues. For example, in *Hickel Corp. v. Richardson*,⁴⁸ Division One refused to readdress an earlier commissioner’s decision on appealability because the losing party failed to move to modify the ruling.⁴⁹

In *Kramer v. J.I. Case Manufacturing Co.*,⁵⁰ the respondent believed that the appellant’s partial record on review was inadequate. Respondent moved to dismiss, and the commissioner ruled that the appeal could proceed on the record provided unless a panel later determined it was inadequate.⁵¹ Respondent did not move to modify but rather “attack[ed]” this ruling in its response brief.⁵² The panel rejected the challenge, citing RAP 17.7.⁵³

Also, in *Gould v. Mutual Life Insurance Co.*,⁵⁴ the commissioner entered a ruling that a partial appeal could proceed because the superior court entered a certification under Civil Rule (CR) 54(b).⁵⁵ The respondent challenged the sufficiency of the CR 54(b) certification on appeal, but the court rejected the argument because the commissioner’s

47. But see *supra* note 26 and accompanying text for a discussion of *In re Det. of Broer*, in which Division One refused to let either party expand the scope of review.

48. No. 78416-1-I, 2019 WL 3555091 (Wash. Ct. App. Aug. 5, 2019).

49. *Id.* at *4.

50. 62 Wash. App. 544, 547, 815 P.2d 798, 801 (1991). *Kramer* is often cited by other divisions when discussing RAP 17.7 and the finality of commissioner decisions. See generally Est. of Torres v. Kennewick Sch. Dist., No. 36886-6-III, 2021 WL 5000144, at *8 (Wash. Ct. App. Oct. 28, 2021).

51. *Kramer*, 62 Wash. App. at 547, 815 P.2d at 801.

52. *Id.*

53. *Id.* The court also independently determined that the record was sufficient. *Id.*

54. 37 Wash. App. 756, 683 P.2d 207 (1984). Two Division One opinions also address the finality of commissioner rulings issued in earlier appeals that were related to the later appeal before the panel. In *Fluor Enterprises, Inc. v. Walter Construction, Ltd.*, 141 Wash. App. 761, 172 P.3d 368 (2007) (published in part), the court addressed the effect of a commissioner’s decision dismissing an earlier appeal as nonfinal. Although the court concluded that the earlier commissioner decision was not the law of the case because the issue it addressed was not identical to an issue raised in the later appeal, the court recognized the general rule that “[a] commissioner’s ruling becomes a final decision of this court if an aggrieved party fails to seek modification of the ruling within the time permitted by RAP 17.7.” *Id.* § III of unpublished portion of the opinion. And in *In re Marriage of Daly*, No. 39818-1-I, 1998 WL 62863 (Wash. Ct. App. Feb. 17, 1998), a commissioner ruled in a motion on the merits to affirm the superior court’s order in a dissolution action that ordered the sale of the family home and directed how to distribute the proceeds. Neither party moved to modify. *Id.* at *1. The husband later moved to enforce the decree of dissolution and house sale and the superior court modified the post-sale distribution calculation. *Id.* at *2. He appealed the superior court’s alteration of the distribution calculation. *Id.* In the opinion rejecting the superior court’s distribution modification, the court noted that the appellate commissioner’s earlier affirmance of the distribution plan was “the final decision of the court.” *Id.* at *1 (citing *Kramer*, 62 Wash. App. at 547, 815 P.2d at 801).

55. See *Gould*, 37 Wash. App. at 758, 683 P.2d at 208. CR 54(b) allows a superior court to certify a partial final judgment for immediate review.

appealability determination was not modified.⁵⁶

2. *Panel Ignores the Commissioner's Ruling*

As just shown, many opinions uphold the rule of ruling finality. But there are plenty of opinions that functionally modify a previously unmodified commissioner's ruling for all sorts of reasons. The following sections will first review appeals that squarely raise the issue of ruling finality and the role of RAP 17.7, but do not adhere to the commissioner's ruling. The Essay will then examine appeals in which the court issued opinions that functionally modified earlier commissioner rulings but did not cite RAP 17.7 or discuss ruling finality. Again, the focus is on opinions modifying the scope of a commissioner's grant of discretionary review, but these sections also include other opinions that give insight into the court's treatment of commissioner rulings.

a. *State v. Kibbee*

Despite Division Two's clear statement in *Dickjose* that an unmodified commissioner ruling granting review is final,⁵⁷ the court in *State v. Kibbee*⁵⁸ narrowed the commissioner's unmodified grant of discretionary review.⁵⁹ The procedural history of this matter is unique, but the opinion is examined in detail here because the petitioner raised the ruling finality issue in a motion for reconsideration and in a petition for review to our supreme court.

In *Kibbee*, the commissioner granted discretionary review under RAP 2.3(d) of a judicial bias and appearance of fairness issue because the motion raised an issue of public interest.⁶⁰ The commissioner also

56. *Id.*

57. *See State v. Dickjose*, No. 43659-1-II, 2015 WL 4755525, at *2 n. 4 (Wash. Ct. App. Aug. 11, 2015) (citing *Hough v. Ballard*, 108 Wash. App. 272, 277, 31 P.3d 6, 9 (2001)) (“[T]he State did not file a motion to modify the commissioner’s ruling Thus, the commissioner’s ruling granting discretionary review is final.”).

58. No. 50633-5-II, 2019 WL 5188613 (Wash. Ct. App. Oct. 15, 2019).

59. *See id.* at *2–3.

60. *State v. Kibbee*, No. 50633-5-II, at 7 (Wash. Ct. App. Feb. 26, 2018) (commissioner ruling granting review) (citing RAP 2.3(d)(3)). The appearance of fairness issue arose from statements the judge made at arraignment that Marine Corps veterans cannot control themselves (the defendant was a veteran), plus these post-sentencing events:

After completion of [his video sentencing] hearing, Kibbee walked out of view of the camera. A corrections officer then walked into the view of the camera. As the officer walked back out of view, the court stated, “You better say goodbye.” The officer then returned and pulled down a sign which read “goodbye” above a big, yellow smiley face. The court laughed and clapped and said, “Bravo.”

Kibbee, 2019 WL 5188613, at *2 (citations omitted).

accepted review of a previously unraised sufficiency of the evidence issue under RAP 2.3(e),⁶¹ without conducting a separate analysis of this issue under RAP 2.3(d).⁶² The ruling granting review highlighted that the challenging party may raise a sufficiency of the evidence issue for the first time on review.⁶³ The State never moved to modify this ruling.⁶⁴

Nevertheless, in its response brief in the merits appeal, the State challenged the commissioner’s grant of review on the sufficiency of the evidence issue.⁶⁵ In its opinion, the court agreed that the commissioner improvidently granted review because the issue was not eligible for review under RAP 2.3(d).⁶⁶ The opinion did not cite RAP 17.7 or distinguish other Division Two opinions, such as *Dickjose*, that applied the rule of ruling finality.

The appellant moved for reconsideration. The reconsideration motion squarely argued that the unmodified commissioner ruling was the final decision of the court of appeals and, therefore, the panel had an obligation to reach the sufficiency of the evidence issue.⁶⁷ The State responded that the appellant could have raised this argument in his reply brief, but did not file one.⁶⁸ And because he failed to bring this argument to the court’s attention, the State asserted that RAP 12.4, the reconsideration rule, did

61. WASH. R. APP. P. 2.3(e).

62. *Kibbee*, No. 50633-5-II, at 7–8 (commissioner ruling granting review). Recall that in motions for discretionary review of limited jurisdiction court decisions under RAP 2.3(d), the petitioner has already had their appeal as of right heard by a county superior court. *See* WASH. R. APP. P. 2.3(d) (discussing discretionary review of “a superior court decision entered in a proceeding to review a decision of a court of limited jurisdiction”).

63. *Kibbee*, No. 50633-5-II, at 8 (commissioner ruling granting review) (citing WASH. R. APP. P. 2.5(a)(2)).

64. WASH. R. APP. P. 17.7.

65. Brief of the Respondent at 6–8, *Kibbee*, No. 50633-5-II, 2019 WL 5188613.

66. *Kibbee*, 2019 WL 5188613, at *2. The court, therefore, conducted its own analysis of the sufficiency issue under RAP 2.3(d) and rejected review. *Id.* at *3.

Although the opinion seemingly rejected review of the sufficiency of the evidence issue, the court ultimately partially reached the merits of the issue and remanded for the superior court to strike the domestic violence designations from the judgment and sentence, because in its briefing to the panel, the State conceded that there was no evidence that the convictions involved domestic violence. *Id.* at *3–4 (citing WASH. R. APP. P. 1.2(a)). The State had not conceded this issue in its four-page answer to the petitioner’s motion for discretionary review. *See* Brief of Respondent in Opposition to Motion for Discretionary Review, *Kibbee*, No. 50633-5-II, 2019 WL 5188613.

In addition, the opinion implicitly assumed RAP 2.3(e) did not permit the commissioner to add issues on review once they determined at least one issue satisfied RAP 2.3. The operation of RAP 2.3(e) and whether it allows a commissioner to add issues on review once they conclude at least one issue satisfies RAP 2.3(b) or (d) is outside the scope of this Essay.

67. Motion for Reconsideration at 5–7, *Kibbee*, No. 50633-5-II, 2019 WL 5188613 (citing WASH. R. APP. P. 17.7).

68. Respondent’s Reply to Appellant’s Motion for Reconsideration at 2–3, *Kibbee*, No. 50633-5-II, 2019 WL 5188613 (citing WASH. R. APP. P. 12.4).

not support the motion.⁶⁹ The court denied the motion for reconsideration.⁷⁰

The appellant then petitioned our supreme court to review whether the panel could refuse to consider his sufficiency of the evidence argument.⁷¹ The court denied review.⁷²

Although *Kibbee* never resulted in an order or opinion accepting or rejecting the rule of ruling finality, the post-opinion briefing squarely raised the issue. And had the finality issue been raised before the reconsideration stage, the *Kibbee* panel may have had to explain why it ignored the rule of ruling finality in altering—specifically, limiting—the scope of an unmodified grant of discretionary review.

b. Child Welfare Caption

A 2019 ruling from Division One in a child welfare matter also calls into question the finality of unmodified commissioner rulings. Like *Kibbee*, this ruling also involved post-decision briefing squarely presenting the finality issue.

In *In re Dependency of A.S.*,⁷³ a child welfare appeal with no pending motion to modify, Division One sua sponte ordered the withdrawal of a commissioner ruling.⁷⁴ In that matter, the commissioner had granted a mother’s motion to correct a case title to remove her full name from the caption.⁷⁵ No party moved to modify. But shortly after granting the motion to change the caption, the commissioner entered a short order that stated that, at the direction of the chief judge, the court was withdrawing the

69. *Id.* RAP 12.4(c) requires that a reconsideration motion “state with particularity the points of law or fact which the moving party contends the court *has overlooked or misapprehended*, together with a brief argument on the points raised.” WASH. R. APP. P. 12.4(c) (emphasis added).

At least one (unpublished) opinion addresses whether a motion for reconsideration is proper when the moving party did not raise the reconsideration argument in its merits briefing. In *State v. Cruz Tellez*, No. 33552-6-III, 2016 WL 5415963 (Wash. Ct. App. July 19, 2016), Division Three granted a motion for reconsideration on the issue of legal financial obligations, over a partial dissent. *Id.* at *1. The dissenting judge argued, “This court could not possibly have overlooked or misapprehended any point of law or fact bearing on the State’s right to request an award of costs, because our discretion to deny costs was never mentioned or suggested by anything in Mr. Cruz Tellez’s briefing.” *Id.* at *3 (Siddoway, J., dissenting).

70. *State v. Kibbee*, No. 50633-5-II (Wash. Ct. App. Dec. 4, 2019) (order denying motion for reconsideration).

71. Petition for Review at 7–9, *Kibbee*, No. 50633-5-II, 2019 WL 518863 (citing WASH. R. APP. P. 17.7 and *Kramer v. J.I. Case Mfg. Co.*, 62 Wash. App. 544, 546–47, 815 P.2d 798, 800–01 (1991)).

72. *State v. Kibbee*, 195 Wash. 2d 1013, 460 P.3d 180 (2020) (order denying review).

73. No. 80713-7-I, 2020 WL 4284614 (Wash. Ct. App. July 27, 2020).

74. *In re Dependency of A.S.*, No. 80713-7-I (Wash. Ct. App. Dec. 5, 2019) (commissioner ruling granting motion to correct the case title).

75. *Id.* (citing WASH. R. APP. P. 3.4).

previous ruling and denying the motion to change the caption.⁷⁶ Ultimately, the caption issue reached our supreme court on a motion for discretionary review.⁷⁷

The mother's supreme court motion argued in part that no rule allows a court on its own accord to modify a commissioner's ruling.⁷⁸ The supreme court took review and remanded to remove the mother's name from the caption, citing RAP 3.4.⁷⁹ Granted, this dispute arose in the context of an isolated incident arising from a (now settled) inter-divisional dispute about proper captions in child welfare matters. Nevertheless, the rule of ruling finality provided the mother with a strong argument in her petition for review. And because our supreme court remanded, the outcome may support a conclusion that the rule of ruling finality required this outcome.

c. Improvidently Granted

This Essay has not yet addressed in detail the primary reason our state's courts use to pare down the scope of review: that discretionary review was improvidently granted. Unlike some of the opinions discussed earlier, none of these decisions cite RAP 17.7 or squarely address the rule of ruling finality.⁸⁰ For these reasons, they are of limited use in attempting to

76. *In re* Dependency of A.S., No. 80713-7-I (Wash. Ct. App. Dec. 6, 2019) (commissioner ruling denying motion to correct the case title).

77. *In re* Dependency of A.S., No. 98403-4 (Wash. July 8, 2020) (order granting review). And in *In re Welfare of K.D.*, 198 Wash. 2d 67, 491 P.3d 154 (2021), the Supreme Court of Washington held that the court of appeals should not add parents' full names to the case title in child welfare appeals. *Id.* at 70.

78. Motion for Discretionary Review at 7, *In re* A.S., No. 80713-7-I, 2020 WL 4284614 (citing WASH. R. APP. P. 17.7(a)).

79. *In re* A.S., No. 98403-4 (order granting review). Post-remand and under the revised caption, Division One issued a decision affirming the termination of the mother's parental rights. No. 80713-7-I, 2020 WL 4284614, at *1. Then, the state supreme court again took discretionary review and remanded for further proceedings consistent with *In re Dependency of Z.J.G.*, 196 Wash. 2d 152, 471 P.3d 853 (2020), an opinion setting out the requirements of the Indian Child Welfare Act. *In re* Dependency of A.S., No. 98403-4 (Wash. Dec. 2, 2020) (order granting review).

80. There are approximately twenty intermediate appellate opinions that do this. *See, e.g.*, Wash. State Dep't of Transp. v. Seattle Tunnel Partners, No. 51025-1-II, 2019 WL 453763, at *7-8 (Wash. Ct. App. Feb. 5, 2019) (reversing denial of summary judgment on contract statute of limitations but refusing to decide related argument on indemnity claims); Vargas *ex rel* Dussault v. Inland Wash., LLC (*Vargas I*), No. 76717-8-I, 2018 WL 4414639, at *1 (Wash. Ct. App. Sept. 17, 2018) (declining to hear grant of review under RAP 2.3(b)(4) due to intervening Washington State Supreme Court decision) (*see infra* note 93 on additional history of *Vargas I*); Vargas *ex rel* Dussault v. Ralph's Concrete Pumping, Inc. (*Vargas II*), No. 76893-0-I, 2018 WL 4408985, at *1 (Wash. Ct. App. Sept. 17, 2018) (same); Triplett v. Wash. State Dept. of Soc. & Health Servs., 193 Wash. App. 497, 532-33, 373 P.3d 279, 296 (2016) (concluding RAP 2.3(b) discretionary review of one issue was improvidently granted); State v. Gishuru, No. 72142-9-I, 2015 WL 7722995, at *1-2 (Wash. Ct. App.

determine why the panel ignored the rule of ruling finality. But because they functionally reject the rule, they are categorized and discussed.

Two Washington State Supreme Court opinions reference an improvident grant of discretionary review by a commissioner or take issue with a related commissioner motion ruling.⁸¹ In *State v. Halstien*,⁸² our supreme court determined that its commissioner improvidently granted an appellant's motion to supplement its petition for review.⁸³ The Court added that the appellant never presented the supplemental issue to the

Nov. 30, 2015) (rejecting RAP 2.3(d) review as improvidently granted because the issue was not preserved, but noting the commissioner sent the preservation issue to the panel); *City of Lakewood v. Willis*, No. 45034-8-II, 2015 WL 1552179, at *1 (Wash. Ct. App. Apr. 7, 2016) (concluding that the court improvidently granted review of an equal protection issue), *rev'd on First Amendment grounds*, 186 Wash. 2d 210, 375 P.3d 1056 (2016); *Eastman v. Puget Sound Builders NW., Inc.*, No. 42013-9-II, 2012 WL 5349186, at *1 (Wash. Ct. App. Sept. 11, 2012) (dismissing appeal because the court improvidently granted review); *Kantola v. Juvinal*, No. 37537-1-II, 2009 WL 1212270, at *3-5 (Wash. Ct. App. May 5, 2009) (dismissing interlocutory appeal as improvidently granted because there was no obvious or probable error but also reaching the merits of the discovery dispute and concluding the trial court did not abuse its discretion); *State v. Mills*, No. 31786-9-II, 2005 WL 3048020, at *2 (Wash. Ct. App. Nov. 15, 2005) (refusing to hear one issue on discretionary review); *Brundridge v. Fluor Hanford, Inc.*, No. 22058-3-III, 2004 WL 898279, at *1 (Wash. Ct. App. Apr. 27, 2004) (dismissing appeal because review was improvidently granted); *Taplett v. Major Mktg. Servs., Inc.*, No. 20112-1-III, 2002 WL 398492, at *1 (Wash. Ct. App. Mar. 14, 2002) (same); *Mensch v. Pollard*, No. 43687-2-I, 2000 WL 62968, at *1 (Wash. Ct. App. Jan. 24, 2000) (same); *State v. Smith*, 90 Wash. App. 856, 862, 954 P.2d 362, 366 (1998) (same).

In addition, the previously discussed opinion in *Kibbee* also uses the phrase "improvidently granted." *State v. Kibbee*, No. 50633-5-II, 2019 WL 5188613, at *3 (Wash. Ct. App. Oct. 15, 2019). But this Essay addresses *Kibbee* separately because the appellant, on reconsideration, argued against rejecting review for this reason, which squarely presented the RAP 17.7 issue to the panel, albeit after it issued its merits opinion. *See Motion for Reconsideration at 5-6, Kibbee*, No. 50633-5-II, 2019 WL 5188613 (citing WASH. R. APP. P. 17.7).

81. These discretionary review cases need to be distinguished from the occasional decisions by our supreme court that decline to rule on appeals that come before it on a grant of a petition for review, as opposed to those that come to the court on a motion for discretionary review heard by the supreme court commissioner. *See, e.g., In re Det. of Sease*, 366 P.3d 438, 438 (Wash. 2016) (mem.) (dismissing petition for review as improvidently granted). For petitions for review to our supreme court, a commissioner does not grant review; rather, a division of the court, made up of four justices and the chief justice, decides whether to grant review. *See State v. Bueno*, 288 P.3d 328, 328 (Wash. 2012) (mem.). Because these cases do not involve the finality of a commissioner ruling, they are outside the scope of this Essay.

For a discussion of United States Supreme Court orders dismissing review as improvidently granted, see Stephen L. Wasby, Steven Peterson, James Schubert & Glendon Schubert, *The Supreme Court's Use of Per Curiam Dispositions: The Connection to Oral Argument*, 13 N. ILL. U. L. REV. 1 (1992). Unlike our state supreme court, the United States Supreme Court needs only four justices to accept review, but five to affirm or reverse once review is accepted. *Id.* at 21-22; *see also* Joan Maisel Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975, 987 (1957).

82. 122 Wash. 2d 109, 857 P.2d 270 (1993).

83. *Id.* at 130, 857 P.2d at 282. There is nothing in the opinion that shows the respondent moved to modify.

court of appeals and that it was also not ripe.⁸⁴ Conversely, in *Hojem v. Kelly*,⁸⁵ although the Court questioned whether discretionary review was improvidently granted, it affirmed on the merits.⁸⁶

Halstien could support ignoring the rule of ruling finality when a party later raises a justiciability issue, such as ripeness. However, because *Halstien* involved a preliminary procedural ruling and because the Court's underlying authority to review the supplemental issue was questionable,⁸⁷ it provides little guidance otherwise. In contrast, because the Court reached the merits of the appeal in *Hojem* even after questioning whether review was appropriate,⁸⁸ it arguably preserved the integrity of the commissioner's grant of review.

The myriad court of appeals decisions that reject discretionary review as improvidently granted⁸⁹ can be grouped into a few different categories. First, there are opinions that, like *Hojem*, discuss at least the merits of some of the issues on appeal while also questioning whether review was improvidently granted.⁹⁰ Some of these opinions ultimately appear to say there was no error and, as a result, the petitioner-appellant also failed to show that the superior court committed an obvious or probable error⁹¹ to support discretionary review. Others reached the primary issue on review but declined to reach minor subsidiary issues. Because these cases addressed the merits in some fashion, they do not provide much insight into the finality of the commissioner's grant of review.

Second, there are cases in which an intervening decision, a new statute, or subsequent events caused the court to later question the commissioner's

84. *Id.*

85. 93 Wash. 2d 143, 606 P.2d 275 (1980).

86. *Id.* at 144, 606 P.2d at 276.

87. It had not been preserved and was not ripe for review. *Halstien*, 122 Wash. 2d at 129–30, 857 P.2d at 282.

88. *Hojem*, 93 Wash. 2d at 147–48, 606 P.2d at 278.

89. See cases cited *supra* note 80 and accompanying text.

90. *Triplett v. Wash. State Dep't of Soc. & Health Servs.*, 193 Wash. App. 497, 532–33, 193 P.3d 279, 296 (refusing to address trial court's discovery decisions after reaching the merits of a qualified immunity issue); *Eastman v. Puget Sound Builders NW., Inc.*, No. 42013-9-II, 2012 WL 5349186, at *2–3 (Wash. Ct. App. Sept. 11, 2012) (noting the commissioner granted review of issue whether builders owed any duty to plaintiff, court determined that the builder may have had a contractual duty but because this issue was not addressed in the superior court and further proceedings were not useless, it dismissed the appeal and remanded); *Kantola v. Juvinal*, No. 37537-1-II, 2009 WL 1212270, at *4–5 (Wash. Ct. App. May 5, 2009) (finding no abuse of discretion in order limiting discovery and also concluding review should not have been granted); *State v. Smith*, 90 Wash. App. 856, 862, 954 P.2d 362, 366 (concluding that trial court did not abuse its discretion in lineup procedures and holding that motion for discretionary review was improvidently granted).

91. WASH. R. APP. P. 2.3(b)(1)–(2).

earlier grant of review. For example, in its two *Vargas (I & II)*⁹² decisions, Division One declined to hear a grant of review under RAP 2.3(b)(4) due to an intervening supreme court decision.⁹³ Likewise in *Kantola v. Juvinal*,⁹⁴ the court dismissed the appeal of a limitation on discovery because the appellant ultimately never engaged in the allowed discovery nor sought additional discovery.⁹⁵ Because a commissioner's grant of review can occur more than a year before a panel issues an opinion, it is understandable that intervening decisions or events would occasionally cause a panel to later reject review.

Third, there are two opinions that cite another court rule, RAP 7.3, to support a panel's power to reject a grant of discretionary review.⁹⁶

92. *Vargas ex rel Dussault v. Inland Wash., LLC (Vargas I)*, No. 76717-8-I, 2018 WL 4414639 (Wash. Ct. App. Sept. 17, 2018); *Vargas ex rel Dussault v. Ralph's Concrete Pumping, Inc. (Vargas II)*, No. 76893-0-I, 2018 WL 4408985 (Wash. Ct. App. Sept. 17, 2018).

93. *Vargas I*, No. 76717-8-I, 2018 WL 4414639, at *1 (citing *Afoa v. Port of Seattle*, 191 Wash. 2d 110, 421 P.3d 903 (2018)); *Vargas II*, 2018 WL 4408995, at *1. But the losing party in *Vargas I* still moved for discretionary review in our supreme court. *Vargas II*, 194 Wash. 2d 720, 727, 452 P.3d 1205, 1210 (2019). The Court took discretionary review of the dismissal and the underlying merits of the case. *Id.* at 727, 452 P.3d at 1210. The Court ultimately reached the merits because it determined that the *Vargas*'s discretionary review motion satisfied the Court's own discretionary review rule, RAP 3.5, which largely tracks RAP 2.3(b)(1)–(3). *Id.* at 728, 452 P.3d at 1211. In so doing, it rejected another request by Inland Washington to “dismiss this case as improvidently granted.” *Id.* But see *City of Seattle v. Weatherford*, No. 76352-1-I, 2018 WL 3122321, at *1 (Wash. Ct. App. June 25, 2018) (rejecting respondent's argument that a later statutory amendment settled the issue because the statute had not been amended at the time the appellant was sentenced).

94. No. 37537-1-II, 2009 WL 1212270 (Wash. Ct. App. May 5, 2009).

95. *Id.* at *5 (as previously mentioned, *supra* note 80, the *Kantola* court also touched on the merits of the discovery dispute); see also *Mensch v. Pollard*, No. 43687-2-I, 2000 WL 62968, at *1 (Wash. Ct. App. Jan. 24, 2000) (refusing to review a superior court's decision to bar expert testimony because it remained possible that lay testimony could open the door to expert testimony, and “because we are unable to predict and do not wish to presume what may happen at trial, we cannot address the issues on appeal adequately at this time”).

96. *Wash. State Dep't of Transp. v. Seattle Tunnel Partners*, No. 51025-1-II, 2019 WL 453763, at *8 (Wash. Ct. App. Feb. 5, 2019) (refusing to reach implied indemnity issues on appeal because the argument was not properly raised in the superior court); *Kantola*, No. 37537-1-II, 2009 WL 1212270, at *4–5 (noting that the record was not fully developed); cf. *Kramer v. J.I. Case Mfg. Co.*, 62 Wash. App. 544, 547, 815 P.2d 798, 801 (refusing to set aside commissioner's ruling that record was sufficient for review and also independently determining the record was sufficient). Note, however, in *Kramer*, that the commissioner's ruling explicitly allowed the panel to reassess the sufficiency of the record in its review. 62 Wash. App. at 547, 815 P.2d at 800–01.

Interestingly, in *Seattle Tunnel Partners*, the respondent actually had moved to modify the scope of review. *Seattle Tunnel Partners' Motion to Modify Commissioner's Ruling, Seattle Tunnel Partners*, No. 51025-1-II, 2019 WL 453763. One argument was that the trial court did not properly address the indemnity issues, so they should not be addressed on discretionary review. *Id.* at *4. It also argued that further proceedings were not rendered useless under RAP 2.3(b)(1) because the indemnity claims were not subject to the same statute of limitations as the tort claims. *Id.* at *11. The motions panel denied the motion to modify. *Wash. State Dep't of Transp. v. Seattle Tunnel Partners*, No. 51025-1-II (Wash. Ct. App. Sept. 5, 2018) (amended order denying motion to modify).

RAP 7.3 is a very broad rule:

The appellate court has the authority to determine whether a matter is properly before it, and to perform all acts necessary or appropriate to secure the fair and orderly review of a case. The Court of Appeals retains authority to act in a case pending before it until review is accepted by the Supreme Court, unless the Supreme Court directs otherwise.⁹⁷

And these two opinions read the expansive language in RAP 7.3 to grant appellate panels the ability to disregard unmodified commissioner rulings.⁹⁸ But because RAP 7.3 sets out a general rule, in that it does not directly address commissioner rulings or the modification process, it stretches logic and ignores the standards governing court rule interpretation to argue that it grants a panel unrestricted power to ignore RAP 17.7.⁹⁹ In addition, apart from these two cases, the court of appeals generally uses RAP 7.3 for case administration matters rather than to modify rulings.¹⁰⁰

Fourth, there is one opinion that uses the text of RAP 2.3(b) itself to

Interestingly, two of the three judges on the motions panel were on the merits panel, including the opinion's author. *Compare id.* (order by judges Worswick, Lee & Sutton), with *Seattle Tunnel Partners*, 2019 WL 453763 at *1, 8 (opinion by judges Sutton, Worswick & Melnick).

97. WASH. R. APP. P. 7.3.

98. *See Seattle Tunnel Partners*, 2019 WL 453763, at *8; *Kantola*, 2009 WL 1212270, at *5.

99. Washington courts use statutory interpretation principles to interpret court rules. *Jafar v. Webb*, 177 Wash. 2d 520, 527, 303 P.3d 1042, 1045 (2013). And these principles include that specific rules or statutes govern over general ones where they "pertain to the same subject matter and conflict to the extent they cannot be harmonized." *In re Est. of Kerr*, 134 Wash. 2d 328, 343, 949 P.2d 810, 817 (1998).

100. *See Major Prods. Co. v. Nw. Harvest Prods., Inc.*, 96 Wash. App. 405, 409, 979 P.2d 905, 907 (1999) ("The appointment [of counsel] falls within the scope of RAP 7.3 as an appropriate action to secure the fair and orderly review of this case."); *State v. Walker*, 153 Wash. App. 701, 708–09, 224 P.3d 814, 818 (2009) (finding that judicial economy favored remanding to allow superior court to enter factual findings on issue raised for the first time on review).

Ultimately, RAP 7.3 may support a panel's decision to limit review in narrow circumstances when administrative matters make review impossible, such as when the documents submitted in support of the motion for discretionary review supported review but the later-received formal record on review proved insufficient to reach the merits. *See Kantola*, No. 37537-1-II, 2009 WL 1212270, at *4–5 (noting that the record was not fully developed); *see also City of Lakewood v. Willis*, No. 45034-8-II, 2015 WL 1552179, at *5 (Wash. Ct. App. Apr. 7, 2015) (reaching First Amendment challenge but concluding equal protection challenge lacked an adequate record), *rev'd on First Amendment grounds*, 186 Wash. 2d 210, 375 P.3d 1056 (2016); *State v. Mills*, No. 31786-9-II, 2005 WL 3048020, at *2, 3 (Wash. Ct. App. Nov. 15, 2005) (addressing the merits of one issue but refusing to review two claims due to an insufficient record).

This is because motions to the appellate court are supported by documents attached as appendices to the motion, WASH. R. APP. P. 17.3(b)(8), while full appeals, including on grants of discretionary review, have the benefit of a full appellate record. WASH. R. APP. P. 9.1. Because a motion to modify generally needs to be filed within thirty days of the commissioner's ruling, WASH. R. APP. P. 17.7(a), both the commissioner and the modification panel do not have the benefit of the full record.

support that a panel can overrule a commissioner's grant of review. In *Boone v. City of Seattle*,¹⁰¹ a panel rejected a grant of review under RAP 2.3(b)(4).¹⁰² The opinion quotes the opening sentence of RAP 2.3(b), "discretionary review *may* be granted," in concluding that discretionary review was inappropriate because it was "not clear what benefits would result from immediate review."¹⁰³ While the reasoning is creative, this analysis ignores RAP 17.7¹⁰⁴ and the fact that commissioners handle discretionary review motion practice under RAP 2.3(b).

Finally, there are other cases that reject discretionary review as improvidently granted for a few different reasons but without much analysis.¹⁰⁵ They are mentioned here only because they do not clearly fall into any other category.

III. FINALITY IS PREFERRED

Under RAP 17.7, any party dissatisfied with a commissioner ruling can file a motion to modify. The necessary corollary is that unmodified

101. No. 73534-9-I, 2016 WL 1735487 (Wash. Ct. App. May 2, 2016).

102. *Id.* at *1.

103. *Id.* (emphasis in original). Although the opinion does not expand on this, it is well accepted that even if a petitioner satisfies RAP 2.3(b), the court is not required to take review. Washington courts use statutory interpretation principles to interpret court rules. *Jafar*, 177 Wash. 2d at 527, 303 P.3d at 1045. "May" in a statute means that the provision is permissive and not binding. *Scannell v. City of Seattle*, 97 Wash. 2d 701, 704, 648 P.2d 435, 438 (1982).

104. As discussed *supra* notes 99 and 103, Washington courts use statutory interpretation principles to interpret court rules and that means that specific rules or statutes govern over general ones where the rules conflict and cannot be harmonized. *See In re Est. of Kerr*, 134 Wash. 2d 328, 343, 949 P.2d 810, 817 (1998). Because RAP 2.3(b) refers to the initial request for review and RAP 17.7 specifically addresses how to object to a RAP 2.3(b) ruling, it is a stretch to conclude that RAP 2.3(b)'s use of "may" silently abrogates RAP 17.7 on interlocutory review.

105. *Brundridge v. Fluor Hanford, Inc.*, No. 22058-3-III, 2004 WL 898279, at *1 (Wash. Ct. App. Apr. 27, 2004) (concluding RAP 2.3(b)(2)'s effect prong was not satisfied in challenge to the exclusion of evidence pursuant to motions in limine); *Taplett v. Major Mktg. Servs., Inc.*, No. 20112-1-III, 2002 WL 398492, at *1 (Wash. Ct. App. Mar. 14, 2002) (refusing to render an advisory opinion on RAP 2.3(b)(4) review). *Taplett*, however, may fall into the same justiciability category as the supreme court's *Halstien* decision. *See State v. Halstien*, 122 Wash. 2d 109, 129-30, 857 P.2d 270, 282 (1993); *see also supra* notes 81-87 and accompanying text. Similarly, in a 2003 decision, *Blas v. Goethals*, No. 29047-2-II, 2003 WL 22333201, at *1 (Wash. Ct. App. Oct. 14, 2003), the panel actually rewrote the issue on RAP 2.3(d) review to avoid rendering an advisory opinion. *See id.* ("In our opinion, limiting our review of this case to the issue on which discretionary review was granted would result in an improper advisory opinion."). In *Blas*, it appears the parties presented the amended issue to the court. *See id.* ("[W]e address the dispositive issue in the case as it came before us, even though it differs from the issue raised during the motion for discretionary review."). Finally, it should be added that the *Boone* opinion rejecting review, *see supra* notes 101-104, touched on a justiciability issue, namely the statutory amount in controversy limitation for the court of appeals. *Boone*, 2016 WL 1735487, at *1 & n.2 (citing WASH. REV. CODE § 2.06.030).

commissioner rulings are final. And, except in very limited circumstances, they should be—for a number of reasons.

First, RAP 17.7 is unambiguous. It sets out how to request panel review of an issue decided by a commissioner. It does not have any listed exceptions or allow the commissioner’s ruling to be challenged in later merits briefing. The motion to modify procedures undergird the rule of ruling finality.

Second, and related to the above, the commissioner plays a vital role in our appellate courts.¹⁰⁶ By acting as gatekeepers for discretionary review motions and in ruling on other quasi-substantive threshold matters, such as appealability, the commissioner frees panels to focus on the merits of appeals. The rule of ruling finality supports this by preventing parties from re-raising already adjudicated threshold issues.

Third, inconsistent treatment of unmodified commissioner rulings by appellate panels creates inconsistent law and uncertainty for parties. A party who prevails before a commissioner and reaches a panel should have some confidence in the finality of any unmodified ruling. Absent this, the prevailing party is left in the position of having to predict arguments and proactively defend earlier commissioner rulings in later merits briefing, wasting the panel’s time and the litigants’ money.

Fourth, and related to the above, in the discretionary review context, the scope of an appeal is determined by the discretionary review ruling. If a party believes that certain issues should not be heard on the merits, it should raise these in a motion to modify before the extensive and expensive appellate record perfection process occurs and before the parties have to submit merits briefing on all of the issues before the court. If this does not happen, any respondent can ambush an ongoing appeal by trying to reshape its scope in its response brief.

Fifth, the commissioner motion process gives parties access to a relatively swift procedure for identifying material threshold appellate issues. In our courts, motion briefing and setting happens in a matter of weeks or months, but it can take a year or more to perfect and receive an appellate opinion. And outside the discretionary review context, if a party still would rather have a panel rule on an issue that would “preclude hearing the case on the merits,” they can present such a motion in their brief.¹⁰⁷

Sixth, and of particular importance to interlocutory appeals, any

106. *See* Wolfe v. Wolfe, 99 Wash. 2d 531, 534–37, 663 P.2d 469, 471–72 (1983); *see also supra* note 1.

107. WASH. R. APP. P. 17.4(d).

interlocutory appeal interferes with a pending superior court action.¹⁰⁸ If interlocutory review of some or all issues is unwarranted, this should be determined as early in the appellate process as possible. Hence, the discretionary review motion procedure puts the matter before a commissioner in a fairly expedited manner. And through the frontloaded commissioner's ruling and related modification procedure, parties can determine what issues, if any, require immediate appellate attention. Allowing a party to later argue that a commissioner should never have accepted discretionary review results in an avoidable delay in the superior court.¹⁰⁹

For these reasons, only in rare circumstances should a panel depart from the rule of ruling finality. Some circumstances may include when there is an intervening change in the law relied on by the commissioner,¹¹⁰ when the perfected appellate record shows that the grant of review was inappropriate,¹¹¹ or when the court encounters a previously unidentified justiciability concern.¹¹² And when a panel does not treat a commissioner's ruling as final, the opinion should squarely discuss the rule of ruling finality and set out clear reasons for departing from it.

CONCLUSION

Myriad opinions follow RAP 17.7 and enforce the rule of ruling finality. But some do not—often with little or no explanation. For the reasons just stated, this gray area in appellate practice should be eliminated in all but the rarest circumstances. When a panel disregards the rule of ruling finality, it essentially disregards RAP 17.7 and the line of cases enforcing that rule. In practice, the panel must distinguish these cases, and its opinion should include the reasons for rejecting the finality of an unmodified commissioner's ruling. In this way, our appellate court system can develop predictable and coherent appellate practice jurisprudence to support its unique and efficient commissioner system.

108. See *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wash. App. 457, 462, 232 P.3d 591, 593 (2010) (noting that piecemeal appeals should be avoided (citing *Maybury v. City of Seattle*, 53 Wash. 2d 716, 721, 336 P.2d 878, 883 (1959))).

109. See WASH. R. APP. P. 7.2 (limiting the superior court's power to act while an appeal is pending).

110. See *supra* notes 92–93 and accompanying text (*Vargas I & II*).

111. See *supra* note 100.

112. See *supra* notes 82–84, 105 and accompanying text.