ORAP COMMITTEE 2020
Substantive Proposals
2/7/2020

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ORAP COMMITTEE 2020

PROPOSAL NO.: 1

PROPOSER: Charles Hinkle

AMENDING RULE(S): Proposal # 1 -- ORAP 3.05(1) -- Conform Text Regarding Record on Appeal to Statute

DATE SUBMITTED: December 5, 2019

EXPLANATION:

[Quoted from Charles Hinkle's email:]

> [Rule 3.05(1)] currently reads:
>
> > "In any appeal from a trial court, the trial court record on appeal shall consist of the trial court file, exhibits, and as much of the record of oral proceedings as has been designated in the notice or notices of appeal filed by the parties."
>
> In contrast, the opening sentence of ORS 19.365(2) reads as follows:
>
> > "The record on appeal consists of those parts of the trial court file, exhibits and record of oral proceedings in the trial court that are designated under ORS 19.250."
>
> Both the rule and the statute recognize three categories of things that can be part of the record on appeal: the trial court file, exhibits, and the record of oral proceedings.
>
> The statute makes it clear that only those parts of all three of those categories THAT ARE DESIGNATED by the appellant are part of the record on appeal. If you want some or all of the trial court file, or some or all of the exhibits, to be part of the record on appeal, you have to designate them – just as you have to designate which parts of "the record of oral proceedings" that you want to have as part of the record on appeal.
>
> But the rule says something different. Because of the structure of the sentence, it appears that the entirety of the trial court file and all exhibits are part of the record on appeal, regardless of whether the appellant has designated them. The rule says that the trial court file and the exhibits are part of the record on appeal, but not the

record of oral proceedings. It is only "as much of the record of oral proceedings as has been designated" that becomes part of the record on appeal.

If the rule is intended to mean the same thing as the statute, then the phrase "as much of" is out of place. It raises unnecessary questions as to the application of the "last antecedent" rule. See Brown v. City of Grants Pass, 291 Or App 8, 13 n 3 (2018). The rule should read: "the trial court record on appeal shall consist of as much of the trial court file, exhibits, and record of oral proceedings as has been designated ***."

Wouldn't it be easier if ORAP 3.05(1) simply repeated the wording of the statute? The normal rule is that when the legislature (or anyone else) departs from the wording of a statute, it intends to depart from the meaning of the statute. Why else would the author make a change? Did the authors of ORAP mean to say that that the record on appeal is different from what the legislature prescribed? (And would the courts have the power to modify what the legislature prescribed?)

But why should the question even arise? Why is the rule worded differently from the statute? The rule should be changed to track the statute exactly.

RULE AS AMENDED:

Rule 3.05
TRIAL COURT RECORD ON APPEAL;
SUPPLEMENTING THE RECORD

(1) In any appeal from a trial court, the trial court record on appeal shall consist of as much of the trial court file, exhibits, and ~~as much of the~~ record of oral proceedings as has been designated in the notice or notices of appeal filed by the parties.

(2) (a) Except as provided in this subsection, the record of oral proceedings shall be a transcript

(b) When the oral proceedings were recorded by audio or video recording equipment, on motion of a party showing good cause, the appellate court may waive preparation of a transcript and order that the appeal proceed on the audio or video record alone.

(c) When an audio or video recording is played in court, the recording is part of the record, but arrangements may be made for preparation of a transcript of the recording as provided in ORAP 3.33.

(d) The parties may file an agreed narrative statement in lieu of or in addition to a transcript, as provided in ORS 19.380 and ORAP 3.45.

(3) The appellate court, on motion of a party or on its own motion, may order that any thing in the record in the trial court whether or not designated as part of the record in the notice of appeal, be transmitted to it or that parts of the oral proceedings be copied or transcribed, certified and transmitted to it.[1]

---

[1] *See* ORS 19.365(4) regarding supplementation and correction of the record; *see also* ORAP 3.40 regarding correction of transcripts.

ORAP COMMITTEE 2020

PROPOSAL NO.: 2

PROPOSER: Appellate Commissioner James Nass (retired)

AMENDING RULE(S): Proposal# 2 -- ORAP 4.22 -- Correct Terminology regarding Agency Submission of Record

DATE SUBMITTED: January 10, 2019 (edited Feb 5, 2020)

EXPLANATION:

[Summarized from comment to prior ORAP amendments by Linda Maroko with Aderant and emails from Stephen Armitage and Jim Nass dated 1/10/2019]

A commentator on the prior rules, Maroko, had asked for clarification of what triggers the 15-day period for correcting the transcript or correcting the record:

* ORAP 4.20(8)(a) says the period starts on "transmission of the record to the Administrator and service."

* ORAP 4.22(1) states that the period starts when the record is "file[d]."

Commissioner Nass noted the terminological distinction between what an agency does to submit a document ("transmit") and what the court does to receive it ("file"). He concluded that ORAP 4.20(8)(a) correctly tracked the relevant statute.

Technically, the time period for moving to correct the record should begin when the parties are served with a copy of the agency record, not when the agency transmit the record to the court or when the court receives and files the record. But, since the Records does not issue a notice acknowledging receipt and filing of the agency record and a party can't know the record has been transmitted to the court until the party receives the copy of the record served on the party, the date of service is the de facto date that triggers the running of the period to move to correct the record.

Accordingly, Commissioner Nass proposed amending ORAP 4.22(1) to track the wording of ORAP 4.20(8)(a).

Commissioner Nass also suggests that the term "file" should be understood to have a limited meaning:

> "Historically, the legislature and the courts themselves have tended to use the word 'file' to refer to the act of a person submitting a document to a court for filing. But, technically, only the clerk of the court can 'file' a document; that is, place the document in the appellate file; all parties and others can do is submit, deliver, or transmit the document to the court clerk for filing. As we amend statutes and rules, we are trying to recognize that distinction and modify word usage accordingly."

Accordingly, he proposes replacing a number of occurrences of the word "file" with "submit."

Regarding the last sentence of paragraph (3) (in yellow highlighting below), Commissioner Nass suggests that that sentence probably should be deleted. He explains that the experience with briefs and electronic record in the Appellate Court Records Section is that it is not practical to receive for filing only a page or so of a document; rather, the entire corrected document should be submitted.

RULE AS AMENDED:

Rule 4.22
CORRECTING THE RECORD ON JUDICIAL REVIEW

Unless a statute prescribes a different procedure in particular cases, the record on direct judicial review of an agency order shall be corrected or added to as follows:

(1) Within 15 days after the agency ~~files~~ transmits and serves the record of agency proceedings, or such further time as may be allowed by the court, any party may ~~file with~~ submit to the agency a motion:

(a) To correct any errors appearing in the transcript or to have additional parts of the proceedings transcribed, if the record includes a transcript.

(b) To correct the record, other than the transcript, by removing material appearing in the agency record as filed that was not made part of the record before the agency, or by adding material that was made part of the record before the agency but was omitted from the record as filed. This paragraph does not authorize supplementing the

record on judicial review with evidence that never was part of the record before the agency.[1]

(2) The motion shall be captioned "Before the [name of agency to which the motion is directed]." The party shall ~~serve~~ submit to the court ~~with~~ a copy of the motion, which shall include on the title page the notation "Court ~~Service~~ Copy."

(3) The agency shall ~~file with~~ submit to the court a copy of its order disposing of the motion to correct the record or to correct or add to the transcript. If the agency grants the motion in whole or in part, the agency shall serve on the adverse party or parties and ~~file with~~ submit to the court a corrected record, a corrected transcript, or an additional transcript, as appropriate. When the agency ~~files a corrected~~ corrects a record or transcript, in the discretion of the agency, the agency may serve and ~~file~~ transmit for filing only those pages as have been corrected.

(4) Any party aggrieved by the agency's disposition of a motion to correct the record or to correct or add to the transcript, may request, by motion ~~filed~~ submitted for filing within 14 days after the date of ~~filing~~ service of the agency's disposition, that the court review the agency's disposition. The motion shall be captioned "In the Court of Appeals of the State of Oregon" or "In the Supreme Court of the State of Oregon," as appropriate, and shall be entitled "Motion for Review of Agency Order Under ORAP 4.22."

(5) (a) If no party ~~files~~ submits for filing a motion to correct the record or correct or add to the transcript, the court will deem the record settled 15 days after it is ~~filed~~transmitted for filing, and the period for ~~filing~~ submitting the petitioner's opening brief shall begin the next day.

(b) If a party ~~files~~ submits to the agency a motion to correct the record or correct or add to the transcript and the agency grants the motion in its entirety, the court will deem the agency record settled on the agency ~~filing~~ submitting its order to the court.

(c) If a party files a motion to correct the record or correct or add to the transcript and the agency denies the motion in whole or in part, the court will deem the agency record settled:

(i) On expiration of the time under subsection (4) of this rule to move for review of the agency's order or

(ii) If the party moves for review under subsection (4), on the court's disposition of the motion for review.

(d) On the record settling as provided in paragraphs (b) and (c) of this subsection, the court will notify the parties that the record is settled and that the period

for submitting ~~filing~~ the petitioner's brief has begun.

---

[1] *See* ORS 183.482(5) regarding an application for leave to present additional evidence that was never part of the record before the agency in the proceeding.

See ORS 183.482(4) regarding correcting the record on judicial review of orders in contested cases: "* * * The court may require or permit subsequent corrections or additions to the record when deemed desirable. * * *"

ORAP COMMITTEE 2020

PROPOSAL NO.: 3

PROPOSER: Laura Graser

AMENDING RULE(S): ORAP 5.40(8)(c) -- Make De Novo Review More Common in Court of Appeals

DATE SUBMITTED: December 31, 2019

EXPLANATION:

[Quoted from letter by Laura Graser:]

My appellate practice focuses on family law, specifically, cases under ORS chapter 106 to 109: divorce (support, property division, custody), domestic partnerships (same issues, slightly different rules), and related issues. This comment does not involve termination of parental rights, where the standard of review remains de novo. These cases, with the attorney general always a party, have a different set of issues that I am not addressing here.

I am concerned that the 2009 statutory shift, followed by ORAP 5.40(8)(c), from automatic de novo review, to almost-never de novo review, has frozen the law, in a manner that is not helpful to Oregon families, and to the development of the law.

The statute was passed with no input from the family law bar, and I believe the same was true for the ORAP. I respectfully ask the court to consider the difficulty the effective elimination of de novo review made in family law practice, and to make a modest change in the ORAP.

Oregon families are evolving, but the law cannot change with them, because the general statute provides no guidance, and the court's routine review only for errors of law provides little guidance. When Court of Appeals occasionally reviews de novo, by definition, that review is for outlier cases ("exceptional cases.") Family law rarely involves a pure question of law. We know what the range is for, say, reasonable spousal support, from fact-based cases. There are essentially none since 2009.

But more importantly (in my view) is that, while the law has stopped developing, Oregon

families are changing, in some cases drastically. Some of the changes are controversial. Nevertheless, the rules should be the same for a divorcing same-sex couple as they are for a heterosexual couple, and the rules should be the same in Multnomah County and in the most conservative county in the state. Without regular opinions from the Court of Appeals, after de novo review, we don't know if there is any difference.

Now, a judge on the Circuit Court (correctly) believes that the Circuit Court is the end of the line; that its ruling is essentially unreviewable. A consequence of that is that there is no mechanism to assure that decisions are uniform throughout the state.

[After setting out the proposed amendment shown below, Ms Graser added:]

I have contacted colleagues about this, and have received enthusiastic support. Appellate practitioners George Kelly and Margaret Leiberan authorized me to add their names.

Mr. Kelly wrote:

> As things presently stand, parties in family law matters receive very different results depending on what county they live in and what judge is assigned to their case. In the past, the court of appeals at least sometimes pushed the courts towards handing out more uniform decisions. Now it does not; some litigants are lucky and others are unlucky. The "range" of acceptable decisions is nowhere defined and known by no one. Your proposed change is a modest attempt at partially fixing the problem.

Ms. Leiberan told me she wished to sign the proposal.

As did Jack Lundeen, a recently-retired long-time family law trial lawyer.

Joel Fowlks, an active family lawyer added:

> I completely endorse your proposed changes. My eight years of family law trial practice has led me to feel that too often trial courts -- already feeling the pressure of too many matters coming in daily -- are finding incentive not to take harder looks at their initial impression of a situation, understanding that there is basically no risk of their discretion being scrutinized.
>
> This, in turn, feeds on itself. When I have a client who feels like they got the shaft and wishes to explore an appeal, I have to explain that abuse of discretion is a high bar that may only be cleared in very specific circumstances that may have no relationship to how poor the trial judge's decision was. Most often, these clients

give up their idea of appeal. If a client is still motivated to proceed in some way, it's usually in the direction of a modification. My assumption is that good opportunities to test exactly how high the bar is for abuse of discretion are lost because this.

[Other letters supporting proposal were submitted directly.]

RULE AS AMENDED:

Rule 5.40
APPELLANT'S OPENING BRIEF:
STATEMENT OF THE CASE

The appellant's opening brief shall open with a clear and concise statement of the case, which shall set forth in the following order under separate headings:

(1) A statement, without argument, of the nature of the action or proceeding, the relief sought and, in criminal cases, the indictment or information, including citation of the applicable statute.

(2) A statement, without argument, of the nature of the judgment sought to be reviewed and, if trial was held, whether it was before the court or a jury.

(3) A statement of the statutory basis of appellate jurisdiction and, where novelty or possible doubt makes it appropriate, other supporting authority.

(4) A statement of the date of entry of the judgment in the trial court register, the date that the notice of appeal was served and filed, and, if more than 30 days elapsed between those two dates, why the appeal nevertheless was timely filed; and any other information relevant to appellate jurisdiction.

(5) In cases on judicial review from a state or local government agency, a statement of the nature and the jurisdictional basis of the action of the agency and of the trial court, if any.

(6) A brief statement, without argument and in general terms, of questions presented on appeal.

(7) A concise summary of the arguments appearing in the body of the brief.

(8) (a) In those proceedings in which the Court of Appeals has discretion to try

the cause anew on the record and the appellant seeks to have the court exercise that discretion, the appellant shall concisely state the reasons why the court should do so.*

(b) In those proceedings in which the Court of Appeals has discretion to make one or more factual findings anew on the record and the appellant seeks to have the court exercise that discretion, the appellant shall identify with particularity the factual findings that the appellant seeks to have the court find anew on the record and shall concisely state the reasons why the court should do so.*

(c) The Court of Appeals will exercise its discretion to try the cause anew on the record or to make one or more factual findings anew on the record only when that is warranted by a need to clarify the scope of the trial court's discretion, or for another need as described by a party to the appeal or by *amicus*.~~in exceptional cases. Consistently with that presumption against the exercise of discretion, requests under paragraph (a) or (b) of this section are disfavored.~~

(d) The Court of Appeals considers the items set out below to be relevant to the decision whether to exercise its discretion to try the cause anew on the record or make one or more factual findings anew on the record. These considerations, which are neither exclusive nor binding, are published to inform and assist the bar and the public.

(i) Whether the trial court made express factual findings, including demeanor-based credibility findings.

(ii) Whether the trial court's decision comports with its express factual findings or with uncontroverted evidence in the record.

(iii) Whether the trial court was specifically alerted to a disputed factual matter and the importance of that disputed factual matter to the trial court's ultimate disposition of the case or to the assignment(s) of error raised on appeal.

(iv) Whether the factual finding(s) that the appellant requests the court find anew is important to the trial court's ruling that is at issue on appeal (*i.e.*, whether an appellate determination of the facts in appellant's favor would likely provide a basis for reversing or modifying the trial court's ruling).

(v) Whether the trial court made an erroneous legal ruling, reversal or modification of which would substantially alter the admissible contents of the record (*e.g.*, a ruling on the admissibility of evidence), and determination of factual issues on the altered record in the Court of Appeals, rather than remand to the trial court for reconsideration, would be judicially efficient.

(9) A concise summary, without argument, of all the facts of the case material to determination of the appeal. The summary shall be in narrative form with references to the places in the transcript, narrative statement, audio record, record, or excerpt where such facts appear.

(10) In a dissolution proceeding or a proceeding involving modification of a dissolution judgment, the summary of facts shall begin with the date of the marriage, the ages of the parties, the ages of any minor children of the parties, the custody status of any minor children, the amount and terms of any spousal or child support ordered, and the party required to pay support.

(11) Any significant motion filed in the appeal and the disposition of the motion. A party need not file an amended brief to set forth any significant motion filed after that party's brief has been filed.

(12) Any other matters necessary to inform the court concerning the questions and contentions raised on the appeal, insofar as such matters are a part of the record, with reference to the parts of the record where such matters appear.

---

[*] *See* ORS 19.415(3)(b) regarding discretion of the Court of Appeals to try the cause *de novo* or make one or more factual findings anew on appeal in some equitable proceedings; *see also* ORAP 5.45(5) concerning the identification of standards of review for each assignment of error on appeal.

From: jacklundee@aol.com
To: OJD ORAP Committee
Subject: Amending OEAP 5.40(8), the Statndard for Review for Family Law Cases
Date: Tuesday, December 31, 2019 1:46:36 PM

31 December 2019

Dear Mr. Armitage

I have been a family law trial attorney since 1979. When I was admitted legal research was done by the "paper chace," going to the law library, and researching issues by carefully tracking down factually similar appellate decisions for precedent applicable to the situation being researched. Times have changed, as have research techniques. Too many attorneys now skim electronic caselaw, looking for language in opinions apparently supportive of their position without reading the whole case, looking at the facts led to that language.

Before the gavel is dropped for a divorce trial judges frequently invite counsel to chambers to pitch the case they expect to make that day. During the conversation the trial court judge will often opine "well, if that's the way the evidence comes in, the ruling will likely be ..." He will then say something like, "but you can always try the case if you wish." Woe be it to the litigant who takes the judge up on that invitation. When the case comes out as the judge predicted, the challenger will often also be challenged with paying the compliant party's attorneys fees. One case i remember well was when a now retired Clackamas County judge stated, when I challenged his prediction of a way too low alimony figure, "the court of appeals will never overturn me."

A law school classmate, and my appellate attorney of choice, Laura Graser, has been mulling the issue of a return to a "trial de novo" standard of review with a number of our colleagues for some time. Laura sent me a copy of the draft of a letter she was sending to you, and I thoroughly endorse it. The balance of this letter is generally Laura's proposed communication with few edits.

The 2009 statutory shift, followed by ORAP 5.40(8)(c), from automatic de novo review, to almost-never de novo review, has frozen the law, in a manner that is not helpful to Oregon families, and to the development

of the law.

Te general divorce statute, Chapter 107, provides no substantive guidance as to what is "just and proper" or "equitable." The appellate court's current review only for errors of law provides no little guidance. When Court of Appeals occasionally reviews de novo, that review is for outlier cases, unlikely to be seen again. Family law rarely involves a pure question of law. We learn what the range is for, say, "reasonable" spousal support, from fact-based appellate decisions. There are essentially no new alimony cases since 2009.

As I note above, a circuit court judge can now believe that her circuit court decision is the end of the line; that its ruling is not going to be subjected to factual comparison. In addition to injustice in the case at hand, another consequence of the loss of regular de novo review is that there is no mechanism to assure that decisions are uniform throughout the state.

I join Laura when she proposes the following changes:

ORAP 5.40(8)

(8) (a) In those proceedings in which the Court of Appeals has discretion to try the cause anew on the record and the appellant seeks to have the court exercise that discretion, the appellant shall concisely state the reasons why the court should do so.

(b) In those proceedings in which the Court of Appeals has discretion to make one or more factual findings anew on the record and the appellant seeks to have the court exercise that discretion, the appellant shall identify with particularity the factual findings that the appellant seeks to have the court find anew on the record and shall concisely state the reasons why the court should do so.

Current:

(c) The Court of Appeals will exercise its discretion to try the cause anew on the record or to make one or more factual findings anew on the record ***only*** *in exceptional cases. Consistently with that presumption against the exercise of discretion, requests under paragraph (a) or (b) of*

*this section are disfavored. (**emphasis added**)*

Proposed:

c) The Court of Appeals will exercise its discretion to try the cause anew on the record or to make one or more factual findings anew on the record only when that is warranted by a need to clarify the scope of the trial court's discretion, or for another need as described by a party to the appeal or by amicus.

(d) The Court of Appeals considers the items set out below to be relevant to the decision whether to exercise its discretion to try the cause anew on the record or make one or more factual findings anew on the record. These considerations, which are neither exclusive nor binding, are published to inform and assist the bar and the public.

(i) Whether the trial court made express factual findings, including demeanor-based credibility findings.

(ii) Whether the trial court's decision comports with its express factual findings or with uncontroverted evidence in the record.

(iii) Whether the trial court was specifically alerted to a disputed factual matter and the importance of that disputed factual matter to the trial court's ultimate disposition of the case or to the assignment(s) of error raised on appeal.

(iv) Whether the factual finding(s) that the appellant requests the court find anew is important to the trial court's ruling that is at issue on appeal (i.e., whether an appellate determination of the facts in appellant's favor would likely provide a basis for reversing or modifying the trial court's ruling).

(v) Whether the trial court made an erroneous legal ruling, reversal or modification of which would substantially alter the admissible contents of the record (e.g., a ruling on the admissibility of evidence), and determination of factual issues on the altered record in the Court of Appeals, rather than remand to the trial court for reconsideration, would be judicially efficient.

I have not previously participated in rule change proceedings. I would

be pleased to help in the process, including reaching out to my fellow family law trial attorneys to see if more factual precedent would be helpful to them, and helpful to the development of family law in Oregon.

Sincerely,

John W. "Jack" Lundeen

From: Stephen Armitage
To: OJD ORAP Committee
Subject: FW: Appellate Review Standard in Family Law Cases
Date: Thursday, January 02, 2020 9:18:05 AM

Forwarded from personal mailbox.

Stephen

S.P. Armitage
Staff Attorney
Oregon Supreme Court

From: Saville Easley <saville@easleyfamilylaw.com>
Sent: Tuesday, December 31, 2019 12:11 PM
To: Stephen Armitage <Stephen.P.ARMITAGE@ojd.state.or.us>
Cc: jacklundee@aol.com; graser@lauragraser.com
Subject: Appellate Review Standard in Family Law Cases

Stephen P Armitage
Supreme Court Staff Attorney
Oregon Supreme Court
Supreme Court Bldg
1163 State St
Salem OR 97301

Re: ORAP 5.40(8)(c)

Dear Mr. Armitage:

As a family law attorney who has been practicing for over 25 years, I strongly support revising ORAP 5.40(8) to return to *de novo* review as the appellate review standard in family law cases. The revisions proposed by appellate attorney, Laura Grasser, will help Oregon family law remain relevant to the many Oregon families who rely on it. We do a disservice to Oregon's families when we allow family law to become stagnant. Family law should be permitted to evolve and change as Oregon and its families evolve and change. Since the review standard was changed in 2009, there has been little new legal precedent generated to guide the trial courts, attorneys and litigants in family law.

I am also concerned about the lack of uniformity between counties caused by a lack of new legal precedent. I practice in all Oregon counties, and I can attest that different counties have different cultures and practices. Oregon's trial courts benefit from other counties' trends, opinions, and practices as reflected in appellate decisions. All Oregonians should be treated the same under the law.

Please let me know if I can provide any further information or assistance. Thank you for your time.

Happy Holidays! ***Our offices will be closed beginning noon on Tuesday, December 31, 2019 through January 1, 2020. We will be open on Thursday, January 2, 2020.***

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From: rosehubbard@evanshubbardlaw.com
To: OJD ORAP Committee
Subject: De novo review in family law cases
Date: Tuesday, January 14, 2020 9:45:04 AM

January 14, 2020

It is critical that the appellate court accept more cases with de novo review. There is virtually no way to get any meaningful review of family law decisions. I am seeing more and more judges take a callous attitude that it doesn't matter whether they are legally correct or not, because there is no effective review of their decisions.

I support Laura Graser's proposed rule change.

Rose Hubbard

McLain Legal Services PC

Family Law, Criminal Defense, Child Welfare

December 30, 2019

Oregon Rules of Appellate Procedure Committee
BY EMAIL ONLY: ORAP.committee@ojd.state.or.us

Dear Members of the Committee,

I am a family law lawyer, and though I do not participate in appellate practice, the 2009 change to the standard of review for appeals of domestic relations cases has had a negative impact on my practice and, in my opinion, on Oregon's families. I experience judges who, expecting no consequences, depart more and more frequently from statutory mandates, in order to achieve what they *feel* is the "right result." Somehow, we have to move back toward the middle, in dissolution and child custody cases.

The 2009 statutory shift, followed by ORAP 5.40(8)(c), from automatic *de novo* review, to almost-never *de novo* review, has frozen the law, in a manner that is not helpful to Oregon families, and to the development of the law.

I respectfully ask the court to consider the difficulty the effective elimination of *de novo* review made in family law practice, and to make a modest change in the ORAP. My friend and colleague Laura Graser provided me with a proposed change to ORAP 5.40(8). We have been talking about for more than a year now, and I am increasingly convinced that this change is the least we can do, for Oregon's families.

For me, this is about providing consistency between judges and courts, so that courts are encouraged to apply the law to the facts they see in the same way, whether the forum is Multnomah County or any other county in our great state. But Laura pointed out another issue that needs to be addressed. Oregon's "new families" need an evolving law, not a static one that is frozen in 2009 (5 years before same-sex marriage became the law of the land). Same-sex partners need to know that they will too benefit from the guidance of the Courts of Appeals.

Lacking a path to *de novo* review degrades the evidentiary presentations in an already evidence-poor area of law. Appellate practitioners would be remiss in their duty if they did not advise potential clients that the Court of Appeals very, very rarely reviews factual issues or errors in domestic relations cases—meaning that not only is review not taking place, but cases that would potentially be granted *de novo* review even under today's standards, never make their way to the Court of Appeals because the rules all but say, "you're throwing good money after bad."

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The changes Ms. Graser is suggesting, and I am advocating, would move the court part of the way back to providing meaningful oversight because they would expand the pool of potential cases that might be filed with the Court of Appeals.

I propose the following.

ORAP 5.40(8)

(8) (a) In those proceedings in which the Court of Appeals has discretion to try the cause anew on the record and the appellant seeks to have the court exercise that discretion, the appellant shall concisely state the reasons why the court should do so.

(b) In those proceedings in which the Court of Appeals has discretion to make one or more factual findings anew on the record and the appellant seeks to have the court exercise that discretion, the appellant shall identify with particularity the factual findings that the appellant seeks to have the court find anew on the record and shall concisely state the reasons why the court should do so.

Current:

(c) The Court of Appeals will exercise its discretion to try the cause anew on the record or to make one or more factual findings anew on the record only in exceptional cases. Consistently with that presumption against the exercise of discretion, requests under paragraph (a) or (b) of this section are disfavored.

Proposed:

c) The Court of Appeals will exercise its discretion to try the cause anew on the record or to make one or more factual findings anew on the record only when that is warranted by a need to clarify the scope of the trial court's discretion, or for another need as described by a party to the appeal or by *amicus*.

(d) The Court of Appeals considers the items set out below to be relevant to the decision whether to exercise its discretion to try the cause anew on the record or make one or more factual findings anew on the record. These considerations, which are neither exclusive nor binding, are published to inform and assist the bar and the public.

(i) Whether the trial court made express factual findings, including demeanor-based credibility findings.

(ii) Whether the trial court's decision comports with its express factual findings or with uncontroverted evidence in the record.

(iii) Whether the trial court was specifically alerted to a disputed factual matter and the importance of that disputed factual matter to the trial court's ultimate disposition of the case or to the assignment(s) of error raised on appeal.

(iv) Whether the factual finding(s) that the appellant requests the court find anew is important to the trial court's ruling that is at issue on appeal (*i.e.*, whether an appellate determination of the facts in appellant's favor would likely provide a basis for reversing or modifying the trial court's ruling).

(v) Whether the trial court made an erroneous legal ruling, reversal or modification of which would substantially alter the admissible contents of the record (*e.g.*, a ruling on the admissibility of evidence), and determination of factual issues on the altered record in the Court of Appeals, rather than remand to the trial court for reconsideration, would be judicially efficient.

This is not a drastic change. When you consider, for example, *Bush and Bush*, 297 Or App 699 (2019), in which the Court of Appeals granted *de novo* review for a single narrow issue—the evidence did not support the court's calculation of child support—it seems clear the Court of Appeals needs to have the ability to correct errors even when the case is not an "exceptional case." For every *Bush* there are probably a dozen other cases in which an error goes uncorrected, because the Rules say that the facts are all but unreviewable. "Disfavoring" an appeal is the same as discouraging it, and that is not the message the Court of Appeals should be sending to Oregon's families.

Your consideration is appreciated.

Sincerely,

Andrew McLain
Principal Attorney
McLain Legal Services PC

ORAP COMMITTEE 2020

PROPOSAL NO.: 5

PROPOSER: Office of Public Defense Services, Appellate Division

AMENDING RULE(S): ORAP 5.70 -- Allow Reply Briefs as Matter of Right in Several Classes of Cases

DATE SUBMITTED: December 31, 2019

EXPLANATION:

Oregon Rule of Appellate Procedure 5.70 addresses reply briefs. The first subsection generally grants a party permission to file a reply brief to a respondent's answering brief or an answering brief of a cross-respondent. The second subsection addresses the form of the reply brief and indicates that it shall be similar to a respondent's answering brief. However, the third subsection creates exceptions to the general permissive rule under subsection (1) for a variety of case types including criminal, probation revocation, and juvenile court cases. Under subsection (3), the party must move the court and demonstrate a need for a reply brief before filing it.

This proposed amendment to ORAP 5.70 would grant a party in a criminal, probation revocation, or juvenile court case permission to file a reply brief without filing a motion. The proposed amendment would strike the terms "criminal," "probation revocation," "juvenile court" and "adoption cases and certain juvenile delinquency proceedings subject to ORAP 10.15" from subsection (3).

The amendment would eliminate unnecessary motion practice, be more efficient for the court and for practitioners, and would normalize the appellate rules based on case types.

RULE AS AMENDED:

CURRENT RULE

Rule 5.70

REPLY BRIEF

(1)(a) Except as provided in subsection (3) of this rule, a party may file a reply brief to a respondent's answering brief or an answering brief of a cross-respondent.

(b) A reply brief shall be confined to matters raised in the respondent's answering brief or the answering brief of a cross-respondent; reply briefs that merely restate arguments made in the opening brief are discouraged.

(c) The court encourages a party who decides not to file a reply brief as soon as practicable thereafter, to notify the court in writing to that effect.

(2) The form of a reply brief shall be similar to a respondent's answering brief. A reply brief shall have an index and shall contain a summary of argument.

(3)(a) Except on request of the appellate court or on motion of a party that demonstrates the need for a reply brief, reply briefs shall not be submitted in the following cases:

(i) traffic, boating, wildlife, and other violations;

(ii) criminal, probation revocation, habeas corpus, and post-conviction relief;

(iii) juvenile court;

(iv) civil commitment;

(v) forcible entry and detainer;

(vi) judicial review of orders of the Land Use Board of Appeals and Land Conservation and Development Commission in land use cases, as provided in ORAP 4.66(1)(c); and

(vii) adoption cases and certain juvenile delinquency proceedings subject to ORAP 10.15.

(b) A motion for leave to file a reply brief shall be submitted within 14 days after the filing of the brief to which permission to reply is sought. If a reply brief is submitted with the motion, then:

(i) if the court grants the motion, the date of filing for the reply brief relates backs to the date of the filing for the motion;

(ii) if the court denies the motion, the court will strike the reply brief.

"TRACK CHANGES" VERSION

Rule 5.70
REPLY BRIEF

(1)(a) Except as provided in subsection (3) of this rule, a party may file a reply brief to a respondent's answering brief or an answering brief of a cross-respondent.

(b) A reply brief shall be confined to matters raised in the respondent's answering brief or the answering brief of a cross-respondent; reply briefs that merely restate arguments made in the opening brief are discouraged.

(c) The court encourages a party who decides not to file a reply brief as soon as practicable thereafter, to notify the court in writing to that effect.

(2) The form of a reply brief shall be similar to a respondent's answering brief. A reply brief shall have an index and shall contain a summary of argument.

(3)(a) Except on request of the appellate court or on motion of a party that demonstrates the need for a reply brief, reply briefs shall not be submitted in the following cases:

(i) traffic, boating, wildlife, and other violations;

(ii) ~~criminal, probation revocation,~~ habeas corpus~~,~~ and post-conviction relief;

~~(iii) juvenile court;~~

(iii~~iv~~) civil commitment;

(iv~~v~~) forcible entry and detainer; and

(v~~i~~) judicial review of orders of the Land Use Board of Appeals and Land Conservation and Development Commission in land use cases, as provided in ORAP 4.66(1)(c)~~.; and~~

~~(vii) adoption cases and certain juvenile delinquency proceedings subject to ORAP 10.15.~~

(b) A motion for leave to file a reply brief shall be submitted within 14 days after the filing of the brief to which permission to reply is sought. If a reply brief is submitted with the motion, then:

(i) if the court grants the motion, the date of filing for the reply brief relates backs to the date of the filing for the motion;

(ii) if the court denies the motion, the court will strike the reply brief.

RULE AS AMENDED

Rule 5.70
REPLY BRIEF

(1)(a) Except as provided in subsection (3) of this rule, a party may file a reply brief to a respondent's answering brief or an answering brief of a cross-respondent.

(b) A reply brief shall be confined to matters raised in the respondent's answering brief or the answering brief of a cross-respondent; reply briefs that merely restate arguments made in the opening brief are discouraged.

(c) The court encourages a party who decides not to file a reply brief as soon as practicable thereafter, to notify the court in writing to that effect.

(2) The form of a reply brief shall be similar to a respondent's answering brief. A reply brief shall have an index and shall contain a summary of argument.

(3)(a) Except on request of the appellate court or on motion of a party that demonstrates the need for a reply brief, reply briefs shall not be submitted in the following cases:

(i) traffic, boating, wildlife, and other violations;

(ii) habeas corpus and post-conviction relief;

(iii) civil commitment;

(iv) forcible entry and detainer; and

(v) judicial review of orders of the Land Use Board of Appeals and Land Conservation and Development Commission in land use cases, as provided in ORAP 4.66(1)(c).

(b) A motion for leave to file a reply brief shall be submitted within 14 days after the filing of the brief to which permission to reply is sought. If a reply brief is submitted with the motion, then:

(i) if the court grants the motion, the date of filing for the reply brief relates backs to the date of the filing for the motion;

(ii) if the court denies the motion, the court will strike the reply brief.

ORAP COMMITTEE 2020

PROPOSAL NO.: 6

PROPOSER: Office of Public Defense Services

AMENDING RULE(S): ORAP 5.92 -- Extend Page Limits for Pro Se Supplemental Briefs

DATE SUBMITTED: December 31, 2019

EXPLANATION:

Oregon Rule of Appellate Procedure 5.92 establishes a five-page limit for *pro se* supplemental briefs. In addition, ORAP 16.15 requires all documents filed with the court to be submitted in a text-searchable PDF format.

The proposed amendment to ORAP 5.92 would increase the *pro se* page limit to ten pages and exempt *pro se* supplemental briefs from the text-searchable requirement.

The amendment would increase efficiency by easing the administrative burden on the Office of Public Defense Services (OPDS), which, in many cases, represents clients who are incarcerated and who can only send and receive documents through the mail. Furthermore, some institutions restrict telephone access to incarcerated clients, adding additional complications to preparing *pro se* supplemental briefs. If a client sends a brief to counsel that exceeds five pages, it must be returned in the mail with an explanatory letter. In turn, the client must send revised briefs, which results in additional extension requests and mailing expenses. The current procedure also leads to additional delays in the appeals process. If a client insists on filing an over length brief, counsel must also prepare a motion requesting leave for the over-length document to be filed. Finally, *pro se* litigants do not always have access to a word processor for purposes of making a document text-searchable.

RULE AS AMENDED:

CURRENT RULE

Rule 5.92
SUPPLEMENTAL PRO SE BRIEFS

(1) When a client is represented by court-appointed counsel and the client is dissatisfied with the brief that counsel has filed, within 28 days after the filing of the brief, either the client or counsel may move the court for leave to file a supplemental pro se brief.[1] If the client files the motion, in addition to serving all other parties to the case, the client shall serve counsel with a copy of the motion. If counsel files the motion, in addition to serving all other parties to the case, counsel shall serve the client with a copy of the motion. Whoever files the motion may tender the proposed supplemental pro se brief along with the motion.

(2) The client shall attempt to prepare a supplemental pro se brief as nearly as practicable in proper appellate brief form. The brief shall identify questions or issues to be decided on appeal as assignments of error identifying precisely the legal, procedural, factual, or other ruling that is being challenged.[2] The last page of the brief shall contain the name and signature of the client. Unless the court orders otherwise, the statement of the case, including the statement of facts, and the argument together shall be limited to five pages.

(3) If the supplemental pro se brief includes an excerpt of record, the excerpt must contain only the information included in ORAP 5.50(2),[3] and only if that material is not included in the appellant's opening brief. If the supplemental pro se brief includes an appendix, it must comply with the appendix rules in ORAP 5.52 and shall not contain any confidential material.

(4) A supplemental pro se brief is the client's product; therefore, if the client requests assistance in preparing the brief, counsel's obligation shall be limited to correcting obvious typographical errors, preparing copies of the brief, serving the appropriate parties, and filing the original brief with the court. If the client prepares and files the brief without the assistance of counsel, in addition to serving all other parties to the appeal, the client shall serve a copy of the brief on counsel.

_____

[1] "Pro se" means "for oneself" or "on one's own behalf." A supplemental pro se brief is the product of the party himself or herself, and not of the attorney representing the party.

[2] *See* ORAP 5.45, which describes requirements for assignments of error and argument.

[3] See ORAP 5.50(2) (indicating that an excerpt of record must contain "[t]he judgment or order on appeal or judicial review" and "[a]ny written or oral rulings by the lower tribunal or agency addressing the issues presented by the assignments of error").

"TRACK CHANGES" VERSION

Rule 5.92
SUPPLEMENTAL PRO SE BRIEFS

(1) When a client is represented by court-appointed counsel and the client is dissatisfied with the brief that counsel has filed, within 28 days after the filing of the brief, either the client or counsel may move the court for leave to file a supplemental pro se brief.[1] If the client files the motion, in addition to serving all other parties to the case, the client shall serve counsel with a copy of the motion. If counsel files the motion, in addition to serving all other parties to the case, counsel shall serve the client with a copy of the motion. Whoever files the motion may tender the proposed supplemental pro se brief along with the motion.

(2) The client shall attempt to prepare a supplemental pro se brief as nearly as practicable in proper appellate brief form. The brief shall identify questions or issues to be decided on appeal as assignments of error identifying precisely the legal, procedural, factual, or other ruling that is being challenged.[2] The last page of the brief shall contain the name and signature of the client. Unless the court orders otherwise, the statement of the case, including the statement of facts, and the argument together shall be limited to ~~five~~ 10 pages.

(3) If the supplemental pro se brief includes an excerpt of record, the excerpt must contain only the information included in ORAP 5.50(2),[3] and only if that material is not included in the appellant's opening brief. If the supplemental pro se brief includes an appendix, it must comply with the appendix rules in ORAP 5.52 and shall not contain any confidential material.

(4) A supplemental pro se brief is the client's product; therefore, if the client requests assistance in preparing the brief, counsel's obligation shall be limited to correcting obvious typographical errors, preparing copies of the brief, serving the appropriate parties, and filing the original brief with the court. If the client prepares and files the brief without the assistance of counsel, in addition to serving all other parties to the appeal, the client shall serve a copy of the brief on counsel.

(5) The provision of ORAP 16.15(1) requiring that all electronic filings be text-searchable does not apply to a brief filed under this rule.

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[1] "Pro se" means "for oneself" or "on one's own behalf." A supplemental pro se brief is the product of the party himself or herself, and not of the attorney representing the party.

[2] *See* ORAP 5.45, which describes requirements for assignments of error and argument.

[3] *See* ORAP 5.50(2) (indicating that an excerpt of record must contain "[t]he judgment or order on appeal or judicial review" and "[a]ny written or oral rulings by the lower tribunal or agency addressing the issues presented by the assignments of error").

RULE AS AMENDED

Rule 5.92
SUPPLEMENTAL PRO SE BRIEFS

(1) When a client is represented by court-appointed counsel and the client is dissatisfied with the brief that counsel has filed, within 28 days after the filing of the brief, either the client or counsel may move the court for leave to file a supplemental pro se brief.[1] If the client files the motion, in addition to serving all other parties to the case, the client shall serve counsel with a copy of the motion. If counsel files the motion, in addition to serving all other parties to the case, counsel shall serve the client with a copy of the motion. Whoever files the motion may tender the proposed supplemental pro se brief along with the motion.

(2) The client shall attempt to prepare a supplemental pro se brief as nearly as practicable in proper appellate brief form. The brief shall identify questions or issues to be decided on appeal as assignments of error identifying precisely the legal, procedural,

factual, or other ruling that is being challenged.[2] The last page of the brief shall contain the name and signature of the client. Unless the court orders otherwise, the statement of the case, including the statement of facts, and the argument together shall be limited to 10 pages.

(3) If the supplemental pro se brief includes an excerpt of record, the excerpt must contain only the information included in ORAP 5.50(2),[3] and only if that material is not included in the appellant's opening brief. If the supplemental pro se brief includes an appendix, it must comply with the appendix rules in ORAP 5.52 and shall not contain any confidential material.

(4) A supplemental pro se brief is the client's product; therefore, if the client requests assistance in preparing the brief, counsel's obligation shall be limited to correcting obvious typographical errors, preparing copies of the brief, serving the appropriate parties, and filing the original brief with the court. If the client prepares and files the brief without the assistance of counsel, in addition to serving all other parties to the appeal, the client shall serve a copy of the brief on counsel.

(5) The provision of ORAP 16.15(1) requiring that all electronic filings be text-searchable does not apply to a brief filed under this rule.

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[1] "Pro se" means "for oneself" or "on one's own behalf." A supplemental pro se brief is the product of the party himself or herself, and not of the attorney representing the party.

[2] *See* ORAP 5.45, which describes requirements for assignments of error and argument.

[3] *See* ORAP 5.50(2) (indicating that an excerpt of record must contain "[t]he judgment or order on appeal or judicial review" and "[a]ny written or oral rulings by the lower tribunal or agency addressing the issues presented by the assignments of error").

ORAP COMMITTEE 2020

PROPOSAL NO.: 7

PROPOSER: Wells O'Byrne

AMENDING RULE(S): ORAP 6.05(3): Permit Oral Argument Before Court of Appeals by Self-Represented Party

DATE SUBMITTED: February 11, 2019

EXPLANATION:

[Quoted from Wells O'Byrne's email:]

> Strike ORAP 6.05(3), so that self-represented litigants can present oral arguments to the Oregon Court of Appeals as a matter of standard procedure. Although ORAP 1.20(5) states that the Court can waive any rule at any time for good cause under a motion of the court or any party, self-represented litigants are typically not well-versed enough to know that this includes providing them a right to oral arguments when ORAP 6.05(3) currently specifically denies them this privilege. Similar to Oregon's extension of appellate-court eFiling privileges to attorneys but not to self-represented litigants as discussed above, our research indicates that Oregon is the only state in the U.S. Ninth Circuit jurisdiction whose appellate-court procedure rules deny self-represented litigants the opportunity to present oral arguments before the state's Court of Appeals while allowing attorneys to do so. And similar to Oregon's extension of appellate-court eFiling privileges to attorneys but not to self-represented litigants as discussed above, denying self-represented parties the opportunity to present oral arguments before the Oregon Court of Appeals while allowing attorneys to do so arguably also violates self-represented litigants' federal constitutional due-process and equal-protection rights. Such potential federal constitutional violations may be particularly substantial given the pivotal role that oral arguments can play in litigation. Given their possible constitutional violations, potential substantial detriments to self-represented litigants, and clear anomalies from other states' appellate-court procedure rules, Oregon's extension of appellate court eFiling and Court of Appeals oral-argument privileges to attorneys but not to self-represented litigants could suggest that the ORAP Committee lacks adequate fairness and impartiality towards self-represented litigants.

RULE AS AMENDED:

Rule 6.05
REQUEST FOR ORAL ARGUMENT;
SUBMISSION WITHOUT ARGUMENT

(1) This rule applies to proceedings in the Court of Appeals.

(2) (a) The Administrator will send the parties notice of the date that a case is scheduled to be submitted to the court ("the submission date"). Parties to the case may request oral argument by filing a "Request for Oral Argument" in the form illustrated in Appendix 6.05 and directed to the attention of the court's calendar clerk. If a party files a timely request for oral argument, the case will be argued on the submission date and all parties who have filed a brief may argue. If no party files a timely request for oral argument, the case shall be submitted on the briefs on the submission date without oral argument, unless the court directs otherwise.

(b) A party wanting oral argument must file the request for oral argument and serve it on every other party to the appeal within the number of days specified in this subsection after the date the notice from the Administrator:

(i) On appeal in juvenile dependency (including termination of parental rights) and adoption cases within the meaning of ORAP 10.15, and on judicial review in land use cases as defined in ORAP 4.60(1)(b), 14 days after the date of the notice;

(ii) In all other cases, 28 days after the date of the notice.

(3) ~~Notwithstanding subsection (2) of this rule, if a self-represented party files a brief, the case will be submitted without argument by any party. An attorney representing himself or herself is not considered to be a self-represented party for the purpose of this rule.~~

~~(4)~~ Notwithstanding subsection (2) of this rule, when a respondent submits an answering brief confessing error as to all assignments of error and not objecting to the relief sought in the opening brief, the respondent shall so inform the court by letter when the brief is filed or at any time thereafter. On receipt of respondent's notice that a brief confesses error, the case will be submitted without oral argument. The appellant may by letter bring to the court's attention that a respondent's brief appears to confess error. If the court concurs, the case will be submitted without oral argument.

ORAP COMMITTEE 2020

PROPOSAL NO.: 9

PROPOSER: Christa Obold Eshleman

AMENDING RULE(S): ORAP 7.35(2) -- Expand Notice Requirements for Emergency Motions in Juvenile Dependency Cases

DATE SUBMITTED: December 31, 2019

EXPLANATION:

[Quoted from Christa Obold Eshleman's email:]

> The rule currently does not clearly require notice to trial-level parties who are not "opposing" parties as designated by the appellant. In juvenile dependency cases, in which the parties are not all necessarily "opposing" each other, the common practice for a parent filing a notice of appeal is to name only the Department of Human Services as the opposing party, and not the other parent or the child, even if their positions are actually in opposition. Thus, ORAP 7.35 does not clearly require that any of the other parties, including the affected child, be notified or served with an emergency motion for a stay, for example. A child represented by my office in a dependency jurisdiction case at the trial level was recently affected by this problem, when a parent simultaneously paper-filed the notice of appeal and an emergency motion for a stay of an order that was to be implemented in two days. The movant did not notify my office of the motion, which, if granted, would have had a profound effect on the child's immediate future. Fortunately, DOJ did tell us, and I was able to do a same-day response to the motion.

[After setting out proposal, which requires extra notice within 21 days of filing notice of appeal, Eshleman added:]

> The reason for the 21-day limitation is that this gives the other parties time to file their notice of intent to participate pursuant to ORAP 2.25(3)(c), while limiting the duration of the impact of the additional requirement.

RULE AS AMENDED:

Rule 7.35
MOTIONS SEEKING EMERGENCY RELIEF

(1) If a party files a motion for substantive relief and requires relief in less than 21 days, the party shall include in the caption of the motion a statement that the motion is an "EMERGENCY MOTION UNDER ORAP 7.35." The motion should explain in the first paragraph the reason for the emergency and identify any deadline for action by the court.

(2) Before filing the motion, the movant shall make a good faith effort to notify the opposing counsel or opposing party, if the party is not represented by counsel. In juvenile dependency cases, before filing an emergency motion within 21 days of the filing of the notice of appeal, the movant shall make a good faith effort to notify counsel for each party and each self-represented party in the case from which the appeal was taken, if the party is among those listed in ORAP 2.22(1)(a). The motion shall state whether the other party has been notified and served, and the party's position on the motion.

(3) A motion seeking emergency relief, other than a motion for an extension of time, and any response to a motion seeking emergency relief may be served and filed by telephonic facsimile communication device,[1] provided that the material being transmitted does not exceed 10 pages and subject to the following conditions:

(a) Filing shall not be deemed complete until the entirety of the motion or response being transmitted has been received by the Administrator, but, as so filed, the facsimile transmission shall have the same force and effect as filing of the original.

(b) The party or attorney being served maintains a telephonic facsimile communication device at the party's address or at the attorney's office and the device is operating at the time service is made. The proof of service shall contain the facsimile number of any party or attorney served by facsimile transmission.[2]

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[1] The facsimile transmission number for the Administrator is (503) 986-5560.

[2] *See* ORCP 9 F.

ORAP COMMITTEE 2020

PROPOSAL NO.: 10

PROPOSER: Justice Meagan Flynn

AMENDING RULE(S): ORAP 7.55, 9.05 -- Clarify Rules Regarding Review of Appellate Commissioner Orders

DATE SUBMITTED: May 9, 2019

EXPLANATION:

I propose clarifying that most case-ending orders from the Appellate Commissioner cannot be challenged through a petition for review unless reconsideration has been requested in the Court of Appeals. I have seen both pro se litigants and represented parties miss that requirement, and I think the rules could be more clear.

RULE AS AMENDED:

Rule 7.55
COURT OF APPEALS
APPELLATE COMMISSIONER

(1) Except as otherwise provided in subsection (2) of this rule, the appellate commissioner for the Court of Appeals is delegated concurrent authority to decide motions and own motion matters that otherwise may be decided by the Chief Judge under ORS 2.570(6).[1] The appellate commissioner is delegated concurrent authority to decide any other matter that the Court of Appeals or Chief Judge lawfully may delegate for decision.

(2) The appellate commissioner does not have authority to decide a motion that would result in the disposition of a case on its merits, except as to:

(a) A joint or stipulated motion for a disposition on the merits, where the relief granted is consistent with the relief sought in the motion.

(b) Except as provided in paragraph(c) of this subsection, a motion to reverse and remand for new trial under ORS 19.420(3) due to loss or destruction of the trial court

record.

(c) A motion for summary affirmance to the same extent that the Chief Judge could decide the motion under ORS 30.647(3), ORS 34.712, ORS 138.225, ORS 138.660, ORS 144.335(6), or any other statute authorizing summary affirmance.

(3) The appellate commissioner shall have the authority to refer any matter to the Chief Judge or the Motions Department, as appropriate.

(4) (a) A party may seek reconsideration of a decision of the appellate commissioner as provided by ORAP 6.25, with the exceptions that

(i) the provision of ORAP 6.25(1)(e) disfavoring claims addressing legal issues already argued by the parties or addressed by the court shall not apply to petitions or motions for reconsideration of a decision of the appellate commissioner, and

(ii) only the original of the petition must be filed.

(b) If a party files a petition or motion for reconsideration of a ruling by the appellate commissioner, the appellate commissioner may consider the matter in the first instance. The appellate commissioner shall have the authority to grant a request for reconsideration and modify or reverse the result. However, if the appellate commissioner would deny the request or grant the request and affirm the result, the commissioner shall forward the request to the Chief Judge or the Motions Department, as appropriate, for decision.

(c) Except as provided in paragraph (d) of this subsection, a decision of the appellate commissioner is not subject to a petition for review in the Supreme Court, but the decision of the Chief Judge or the Motions Department on reconsideration of a ruling of the appellate commissioner is subject to a petition for review. ORAP 6.25(3) is not applicable to a ruling of the appellate commissioner.

(d) When the appellate commissioner makes a determination of appealability under ORS 19.235(3) and designates it as a "summary determination" as provided in ORAP 2.35(3)(a), the appellate commissioner's order is subject to a petition for review in the Supreme Court.

(5) As used in this rule, "own motion matter" includes but is not limited to an order to show cause why a case should not be dismissed for lack of jurisdiction or for lack of prosecution, an order of dismissal for lack of jurisdiction or lack of prosecution where the court has raised the ground for dismissal on its own motion, and an order for substitution of a public officer who is a

party to the case where a new person has duly assumed the public office.

(6) As used in these rules, "Motions Department" means the Court of Appeals Motions Department.

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[1] The Chief Judge of the Court of Appeals established the Appellate Commissioner Program by Chief Judge Order No. 08-04, dated March 5, 2008. That and related orders may be viewed on the Oregon Judicial Department's website at: <https://www.courts.oregon.gov/publications/other/Pages/misc.aspx>, "Archives," "Orders Establishing the Appellate Commission Program."

Rule 9.05
PETITION FOR SUPREME COURT REVIEW OF COURT OF APPEALS DECISION

(1) Reviewable Decisions

As used in this rule, "decision" means a decision of the Court of Appeals in the form of an opinion, per curiam opinion, or affirmance without opinion, or an order ruling on a motion, own motion matter, petition for attorney fees, or statement of costs and disbursements, including an order ~~of the appellate commissioner together with the decision~~ of the Chief Judge or Motions Department on reconsideration of a ruling of the appellate commissioner under ORAP 7.55(4)(c) or an order of the appellate commissioner if it is designated a "summary determination," as specified ~~under~~in ORAP 7.55(4)(d). Except as provided in ORAP 7.55(4)(d), a decision of the Appellate Commissioner may be challenged only by a petition or motion for reconsideration in the Court of Appeals as provided by ORAP 6.25.

(2) Time for Filing and for Submitting Petition for Review

(a) Except as provided in ORS 19.235(3) and ORAP 2.35(4), any party seeking to obtain review of a decision of the Court of Appeals shall file a petition for review in the Supreme Court within 35 days after the date of the decision of the Court of Appeals.[1] The Supreme Court may grant an extension of time to file a petition for review.

(b) (i) If a timely petition for reconsideration of a decision of the Court of Appeals is filed by any party, the time for filing a petition for review concerning that decision for all parties shall not begin to run until the Court of Appeals issues its written disposition of the petition for reconsideration. If a party obtains an extension of time to file a petition for reconsideration and does not file a petition

for reconsideration within the time allowed, the time for filing a petition for review shall begin to run on expiration of the extension of time.

(ii) If a petition for review is filed during the time in which a petition for reconsideration in the Court of Appeals may be filed, the petition for review will not be submitted to the Supreme Court until the time for filing a petition for reconsideration expires.

(iii) If a petition for review is filed after the filing of a timely petition for reconsideration, the petition for review will not be submitted to the Supreme Court until the Court of Appeals issues its written disposition of the petition for reconsideration.[2]

(c) (i) If a party files a petition for review after the appellate judgment has issued, the party must file with the petition a motion to recall the appellate judgment. The petition and the motion must be filed within a reasonable time after the appellate judgment has issued. The motion to recall the appellate judgment must explain why the petition for review was not timely filed. The party need not file a separate motion for relief from default.

(ii) A party filing a motion to recall the appellate judgment in a criminal case, in addition to serving all other parties to the appeal, shall serve a copy of the motion on the district attorney.

(3) Form and Service of Petition for Review

(a) The petition shall be in the form of a brief prepared in conformity with ORAP 5.05 and ORAP 5.35. For purposes of ORAP 5.05, the petition must not exceed 5,000 words or (if the certification under ORAP 5.05(2)(d) certifies that the preparer does not have access to a word-processing system that provides a word count) 15 pages. The cover of the petition shall:

(i) Identify which party is the petitioner on review, including the name of the specific party or parties on whose behalf the petition is filed, if there are multiple parties on the same side in the case.

(ii) Identify which party is the respondent on review.

(iii) Identify the date of the decision of the Court of Appeals.

(iv) Identify the means of disposition of the case by the Court of Appeals:

(A) If by opinion, the author of the challenged opinion and the other members of the court who concurred in or dissented from the court's decision;

(B) If by per curiam opinion, affirmance without opinion, or by order, the members of the court who decided the case.[3]

(v) Contain a notice whether, if review is allowed, the petitioner on review intends to file a brief on the merits or to rely on the petition for review and brief or briefs filed in the Court of Appeals.[4]

(vi) For a case expedited under ORAP 10.15, prominently display the words "JUVENILE DEPENDENCY CASE EXPEDITED UNDER ORAP 10.15," "TERMINATION OF PARENTAL RIGHTS CASE EXPEDITED UNDER ORAP 10.15," or "ADOPTION CASE EXPEDITED UNDER ORAP 10.15," as appropriate.

(vii) Comply with the requirements in ORAP 5.95 governing briefs containing confidential material.

(b) Any party filing a petition for review shall serve two copies of the petition on every other party to the appeal or judicial review, and file with the Administrator an original petition with proof of service.

(4) Contents of Petition for Review

The petition shall contain in order:

(a) A short statement of the historical and procedural facts relevant to the review, but facts correctly stated in the decision of the Court of Appeals should not be restated.

(b) Concise statements of the legal question or questions presented on review and of the rule of law that the petitioner on review proposes be established, if review is allowed.

(c) A statement of specific reasons why the legal question or questions presented on review have importance beyond the particular case and require decision by the Supreme Court.[5]

(d) If desired, and space permitting, a brief argument concerning the legal

question or questions presented on review.

(e) A copy of the decision of the Court of Appeals, including the court's opinion and any concurring and dissenting opinions.

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[1] S*ee generally* ORS 2.520. *See* ORAP 7.25(2) regarding information that must be included in a motion for extension of time to file a petition for review.

[2] Paragraph (2)(b) of this rule does not apply to a motion for reconsideration filed under ORAP 6.25(5).

[3] *See* Appendix 9.05.

[4] *See* ORAP 9.17 regarding briefs on the merits.

[5] *See* ORAP 9.07 regarding the criteria considered by the Supreme Court when deciding whether to grant discretionary review. An assertion of the grounds on which the decision of the Court of Appeals is claimed to be wrong, without more, does not constitute compliance with this paragraph.

See ORAP 5.90(5) regarding filing a petition for review where a "*Balfour*" brief was filed on behalf of the appellant in the Court of Appeals.

ORAP COMMITTEE 2020

PROPOSAL NO.: 11

PROPOSER: Lisa Norris-Lampe, Appellate Legal Counsel

AMENDING: ORAP 8.15 -- Amicus Curiae

DATE: December 19, 2019

EXPLANATION:

Currently, subsection (4) of ORAP 8.15 sets out deadlines for amicus briefs in the Court of Appeals; subsection (5) sets out deadlines for amicus briefs in Supreme SC cases on petitions for review (as to allowing the petition and then on the merits); and subsection (6) then states that all other Supreme Court cases (except ballot titles) follow the Court of Appeals deadlines set out in subsection (4). This proposal would create consistent deadlines for all Supreme Court cases, regardless of case type.

Summary of Issue and Proposed Changes:

The following issues have arisen respecting subsections (5) and (6):

- Recent case processing has shown that it is confusing to have two different timing rules for the Supreme Court, depending on whether the case is on a petition for review or on direct review -- there is no reason for that distinction. The preference is to create one single Supreme Court deadline, following the current timelines set out in subsection (5).

- The current default approach in subsection (6) also is confusing for amici who support or oppose a petition for writ of mandamus, because the Court of Appeals timing rules set out in subsection (4) are based on "briefing," and there are no briefs in the early part of a mandamus proceeding.

The proposed amendment therefore removes current subsection (6) and otherwise reworks subsection (5), so that it applies to petitions for review, initial mandamus filings, and all Supreme Court cases on the merits. The proposed amendment also removes an outdated cross-reference to filing copies and other extraneous wording.

RULE AS AMENDED:

Edited version (new text in **{braces/boldface/underscore}**; omitted text in [*brackets/italics*]:

Rule 8.15

AMICUS CURIAE

(1) A person FN 1 may appear as amicus curiae in any case pending before the appellate court only by permission of the appellate court on written application setting forth the interest of the person in the case. * * *

* * * * *

(2) The application shall be submitted by an active member of the Oregon State Bar. A filing fee is not required. The form of the application shall comply with ORAP 7.10(1) and (2)[*and the applicant shall file the original and one copy of the application*]. A copy of the application shall be served on all parties to the proceeding.

(3) In the Court of Appeals, the application to appear amicus curiae may, but need not, be accompanied by the brief the applicant would file if permitted to appear. In the Supreme Court, the application shall be accompanied by the brief sought to be filed. The form of an amicus brief shall be subject to the same rules as those governing briefs of parties. FN 2 If[*, consistently with this rule,*] a brief is submitted with the application, then:

(a) if the court grants the application, the date of filing for the brief relates back to the date of filing for the application; or

(b) if the court denies the application, the court will strike the brief.

(4) In the Court of Appeals, unless the court grants leave otherwise for good cause shown, an amicus brief shall be due seven days after the date the brief is due of the party with whom amicus curiae is aligned or, if amicus curiae is not aligned with any party, seven days after the date the opening brief is due.

(5) **{Except as provided in ORAP 11.30(7), with}**[*With*] respect to cases in the Supreme Court [*on petition for review from the Court of Appeals*]:

(a) A person wishing to appear amicus curiae may seek to appear in support of or in opposition to**{:}**

{(i)} a petition for review **{of a Court of Appeals decision}**, [*on*] the merits of the case on review, or both**{; or}**[.]

{(ii) a petition for a writ, the merits of the case on review, or both; or

(iii) the merits of any other case on appeal or review.}

(b) Unless the court grants leave otherwise for good cause shown, an application to appear amicus curiae in support of or in opposition to a petition for review **{or a petition for writ}** shall be filed within 14 days after the filing of **{the}**[*a*] petition [*for review*].

(c) Unless the court grants leave otherwise for good cause shown, an application to appear amicus curiae on the merits of a case [*on review*] shall be filed:

(i) On the date the brief is due of the party [*on review*] with whom amicus curiae is aligned**{;}**[,]

(ii) On the date the petitioner's brief on the merits **{or opening brief}** [*on review*] is due, if amicus curiae is not aligned with any party [*on review,*]**{;}** FN 3 or

(iii) Within 28 days after review is allowed, if **{a}** petitioner on review **{has not notified the court of intent}**[*has filed a notice that petitioner does not intend*] to file a brief on the merits[*or has filed no notice*], regardless of the alignment of amicus curiae.

(d) If a person filing an application to appear amicus curiae wishes to file one brief in support of or in opposition to a petition for review and on the merits of the case, the application and brief shall be filed within the same time that an application to appear in support of or in opposition to a petition for review would be filed. If a person has been granted permission to appear amicus curiae in support of or in opposition to a petition for review and the Supreme Court allows review, the person may file an amicus curiae brief on the merits without further leave of the court.

(e) If a party obtains an extension of time to file a petition for review, a response to a petition for review **{or writ,}** or a brief**{,}**[*on the merits*] and if an amicus curiae brief was due on the same date as the petition, response**{,}** or brief[*on the merits*], the time for filing the amicus curiae brief is automatically extended to the same date.

[*(6) Except as provided in ORAP 11.30(7), with respect to cases in the Supreme Court on direct review or direct appeal, or other proceedings not subject to subsection (5), amicus curiae briefs shall be due as provided in subsection (4) of this rule.*]

(**{6}**[*7*]) Amicus curiae may file a memorandum of additional authorities under the same circumstances that a party could file a memorandum of additional authorities under ORAP 5.85.

(**{7}**[*8*]) Amicus curiae shall not be allowed to orally argue the case, unless the court specifically authorizes or directs oral argument. FN 4

(**{8}**[*9*]) The State of Oregon may appear as amicus curiae in any case in the Supreme Court and Court of Appeals without permission of the court. The state shall comply with all the requirements for appearing amicus curiae, including the time within which to appear under subsections (4)**{and}**[,] (5)[, *and (6)*] of this rule. If the state is not aligned with any party, the state's amicus curiae brief shall be due on the same date as the respondent's brief.

_____

FN 1 As used in this rule, "person" includes an organization.

FN 2 See ORAP 5.05 to 5.30, ORAP 5.52, ORAP 5.77, ORAP 5.95, ORAP 9.05, ORAP 9.10, and ORAP 9.17 concerning requirements for briefs.

FN 3 See ORAP 9.17 concerning the due dates of briefs on review.

FN 4 See ORAP 6.10 concerning oral argument.

Clean Version:

Rule 8.15

AMICUS CURIAE

(1) A person FN 1 may appear as amicus curiae in any case pending before the appellate court only by permission of the appellate court on written application setting forth the interest of the person in the case. * * *

* * * * *

(2) The application shall be submitted by an active member of the Oregon State Bar. A filing fee is not required. The form of the application shall comply with ORAP 7.10(1) and (2). A copy of the application shall be served on all parties to the proceeding.

(3) In the Court of Appeals, the application to appear amicus curiae may, but need not, be accompanied by the brief the applicant would file if permitted to appear. In the Supreme Court, the application shall be accompanied by the brief sought to be filed. The form of an amicus brief shall be subject to the same rules as those governing briefs of parties. FN 2 If a brief is submitted with the application, then:

(a) if the court grants the application, the date of filing for the brief relates back to the date of filing for the application; or

(b) if the court denies the application, the court will strike the brief.

(4) In the Court of Appeals, unless the court grants leave otherwise for good cause shown, an amicus brief shall be due seven days after the date the brief is due of the party with whom amicus curiae is aligned or, if amicus curiae is not aligned with any party, seven days after the date the opening brief is due.

(5) Except as provided in ORAP 11.30(7), with respect to cases in the Supreme Court:

(a) A person wishing to appear amicus curiae may seek to appear in support of or in opposition to:

(i) a petition for review of a Court of Appeals decision, the merits of the case on review, or both; or

(ii) a petition for a writ, the merits of the case on review, or both; or

(iii) the merits of any other case on appeal or review.

(b) Unless the court grants leave otherwise for good cause shown, an application to appear amicus curiae in support of or in opposition to a petition for review or a petition for writ shall be filed within 14 days after the filing of the petition.

(c) Unless the court grants leave otherwise for good cause shown, an application to appear amicus curiae on the merits of a case [*on review*] shall be filed:

(i) On the date the brief is due of the party with whom amicus curiae is aligned;

(ii) On the date the petitioner's brief on the merits or opening brief is due, if amicus curiae is not aligned with any party; FN 3 or

(iii) Within 28 days after review is allowed, if a petitioner on review has not notified the court of intent to file a brief on the merits, regardless of the alignment of amicus curiae.

(d) * * * * *

(e) If a party obtains an extension of time to file a petition for review, a response to a petition for review or writ, or a brief, and if an amicus curiae brief was due on the same date as the petition, response, or brief, the time for filing the amicus curiae brief is automatically extended to the same date.

(6) Amicus curiae may file a memorandum of additional authorities under the same circumstances that a party could file a memorandum of additional authorities under ORAP 5.85.

(7) Amicus curiae shall not be allowed to orally argue the case, unless the court specifically authorizes or directs oral argument. FN 4

(8) The State of Oregon may appear as amicus curiae in any case in the Supreme Court and Court of Appeals without permission of the court. The state shall comply with all the requirements for appearing amicus curiae, including the time within which to appear under subsections (4) and (5) of this rule. If the state is not aligned with any party, the state's amicus curiae brief shall be due on the same date as the respondent's brief.

FN 1 As used in this rule, "person" includes an organization.
FN 2 See ORAP 5.05 to 5.30, ORAP 5.52, ORAP 5.77, ORAP 5.95, ORAP 9.05, ORAP 9.10, and ORAP 9.17 concerning requirements for briefs.
FN 3 See ORAP 9.17 concerning the due dates of briefs on review.
FN 4 See ORAP 6.10 concerning oral argument.

ORAP COMMITTEE 2020

PROPOSAL NO.: 13

PROPOSER: David Runner

AMENDING RULE(S): ORAP 9.10 -- Clarify When/If Replies Are Permitted to Responses to Petitions for Review

DATE SUBMITTED: December 3, 2019

EXPLANATION:

[Quoted from David Runner's email:]

> The ORAPs do not appear to address the filing of a reply to a response to a petition for Supreme Court review. If such a reply is permissible, then it would be helpful for the rules to acknowledge that and to address whether such a reply can be filed as a matter of right or only by motion. And if a reply is not permissible, then it would be helpful for the rules to so state.

RULE AS AMENDED:

[Not applicable for policy questions.]

ORAP COMMITTEE 2020

PROPOSAL NO.: 17

PROPOSER: Lisa Norris-Lampe, Appellate Legal Counsel

AMENDING: ORAP 11.30 -- Ballot Title Review -- Clarify Court Authority to Modify Timeline for Amicus Filing

DATE: December 19, 2019

EXPLANATION:

ORAP 11.30 governs filings in ballot title proceedings, including, in subsection (7), special rules for amicus filings. This proposal would clarify that the court has authority to alter the timeline for filing an amicus filing in a ballot title proceeding.

Summary of Issue and Proposed Changes:

Certain provisions of ORAP 11.30 that govern filing deadlines -- but not subsection (7) governing amicus filings -- set out express deadlines with the caveat of "unless a shorter time is ordered by the court." In at least one case processed over the last two years, the court initially set a shorter timeline for an amicus brief than the one provided for in subsection (7), but the amicus objected, reasoning that, because subsection (7) did *not* include the "unless" caveat, the court had no authority to shorten the timeline.

Of course, the court may waive any ORAP, including any timeline contained therein. *See* ORAP 1.20(5) (for good cause, court on its own motion or on party's motion may waive any rule). In that particular ballot title case, however, in the interest of moving things along, the court reverted to the original amicus timeline set out in ORAP 11.30(7), and then noted this issue for amendment.

An amendment could be accomplished in one of two ways:

- Insert the same "unless a shorter time is ordered by the court" caveat in ORAP 11.30(7), so that it aligns with other timeline provisions in ORAP 11.30; or

- Remove *all* the "unless" caveats from ORAP 11.30, and also where it appears in two other rules, on the theory that either appellate court may

waive any rule at any time (and, it follows, always has authority to change a timeline set out in the rules, unless the timeline is otherwise governed by statute).[1]

From the perspective of writing the rules, my preference is the second approach. However, in the event that the Committee is concerned that removing all the "unless" caveats may prompt some parties to think that the rules have removed authority that previously existed, it might wish to leave the "unless" caveats in place (which supports the first approach).

Below, I have set out an amendment that proposes the first approach (adding the caveat to ORAP 11.30(7)). If the Committee opts for the second approach, a new set of proposals can be prepared for the Committee's second meeting.[2]

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[1] Other rules with similar wording include ORAP 2.353(4) (summary determination of appealability; "unless a shorter time is ordered"); and ORAP 4.35(4) (agency withdrawal of orders; "unless the court allows additional time").

[2] Note: I am submitting a separate proposal that would move this rule to Chapter 12, such that it would be numbered 12.30.

RULE AS AMENDED:

Edited version (new text in **{braces/boldface/underscore}**; omitted text in [*brackets/italics*]:

Rule 11.30

BALLOT TITLE REVIEW

The practice and procedure governing a petition to the Supreme Court to review a ballot title shall be:

* * * * *

(6) The Attorney General has seven business days after the filing of the petition, unless a shorter time is ordered by the court, to:

(a) File the draft ballot title, the certified ballot title, the Attorney General's letter of transmittal to the Secretary of State and, if not overly lengthy, written comments received by the Secretary of State concerning the draft ballot title. * * *

(b) File an answering memorandum.* * *

* * * * *

(7) Any person who is interested in a ballot title that is the subject of a petition, including the chief petitioner of a measure, may file a motion in the form prescribed by ORAP 7.10, asking leave of the Supreme Court to submit a memorandum as an amicus curiae. * * * The motion and proposed memorandum must be filed and served on or before the date that the answering memorandum is due**{,unless a shorter time is ordered by the court}**. If a party seeks to appear as an amicus curiae after the Attorney General has filed a modified ballot title after referral from the Supreme Court, then the motion and memorandum must be filed with and actually received by the Administrator and must be served on and actually received by all parties within five business days after the date that a party has filed an objection**{, unless a shorter time is ordered by the court}**.

(8) The petitioner has five business days after the filing of the answering memorandum, unless a shorter time is ordered by the court, to file a reply memorandum. * * *

Clean Version:

Rule 11.30

BALLOT TITLE REVIEW

The practice and procedure governing a petition to the Supreme Court to review a ballot title shall be:

* * * * *

(6) The Attorney General has seven business days after the filing of the petition, unless a shorter time is ordered by the court, to:

(a) File the draft ballot title, the certified ballot title, the Attorney General's letter of transmittal to the Secretary of State and, if not overly lengthy, written comments received by the Secretary of State concerning the draft ballot title. * * *

(b) File an answering memorandum.* * *

* * * * *

(7) Any person who is interested in a ballot title that is the subject of a petition, including the chief petitioner of a measure, may file a motion in the form prescribed by ORAP 7.10, asking leave of the Supreme Court to submit a memorandum as an amicus curiae. * * * The motion and proposed memorandum must be filed and served on or before the date that the answering memorandum is due, unless a shorter time is ordered by the court. If a party seeks to appear as an amicus curiae after the Attorney General has filed a modified ballot title after referral from the Supreme Court, then the motion and memorandum must be filed with and actually received by the Administrator and must be served on and actually received by all parties within five business days after the date that a party has filed an objection, unless a shorter time is ordered by the court.

(8) The petitioner has five business days after the filing of the answering memorandum, unless a shorter time is ordered by the court, to file a reply memorandum. * * *

ORAP COMMITTEE 2020

PROPOSAL NO.:	18
PROPOSER:	Chief Justice Martha L. Walters; Lisa Norris-Lampe, Appellate Legal Counsel
AMENDING:	ORAP 12.05 -- Direct Appeal or Judicial Review in the Supreme Court
DATE:	December 19, 2019 (edited Jan 27, 2020)

EXPLANATION:

ORAP 12.05 sets out several default rules for direct review cases in the Supreme Court that are not governed by other rules. This proposal addresses a couple of issues relating to that rule.

Summary of Issue and Proposed Changes:

New Subsection (5):

Most notably, the proposal adds a new subsection (5) that applies to direct review cases in which the legislature has provided for direct review of one of its own enactments -- ordinarily, such challenges are limited to certain operative provisions of a recent enactment that may be challenged on one or more identified bases (*e.g.*, PERS-related changes, breach-of-contract and constitutional challenges; new legislation that arguably raises revenue, etc.) In those types of challenges, the legislature typically provides for the filing of a petition in the Supreme Court, with no development of a factual record below; the court then must develop its own factual record, usually completed with the assistance of a special master.

In processing those types of cases, the court has identified areas in which the parties would benefit from more direction -- specifically relating to the nature and contents of the initial case filings (typically, a petition and a response), and as to the development of a factual record that can serve as the basis for the court's consideration of the legal issues in the case. Proposed new subsection (5) would provide that type of direction. Generally speaking, the proposal is intended to clarify that the initiating documents in these types of proceedings are, in a way, akin to a complaint and an answer; it also allows for the scenario in which there was some sort of factual record developed below, but one or both parties think that the record is not sufficient for the court's purposes.

Other proposed changes:

The name of the rule has been updated to more accurately reflect the types of direct review cases that are filed in the Supreme Court (e.g., direct "appeals" -- ex: certain state appeals in criminal cases; direct "judicial reviews" -- ex: Energy Facility Siting Council site certificates and rulemaking; and "other direct review proceedings" -- *i.e.*, any other type of direct review case that is neither an "appeal" nor a "judicial review").

An "applicability" provision has been added as new subsection (1), which then permits removal of the repetitive recitation elsewhere in the rule that the cases are "to" or "by" "the Supreme Court."

Old subsection (4), the "expedited by statute" provision, has been removed, because it is unnecessary (it essentially stated that, when a statute requires expedited treatment, the court will comply).

Other minor wording and punctuation updates.

RULE AS AMENDED:

Edited version (new text in **{braces/boldface/underscore}**; omitted text in [*brackets/italics*]:

Rule 12.05

DIRECT APPEAL**{,}**[*OR*] JUDICIAL REVIEW**{, OR OTHER REVIEW}** IN THE SUPREME COURT

{(1) This rule governs direct appeal, direct judicial review, or other direct review proceedings in the Supreme Court.}

(**{2}**[*1*])**{When}**[*Where*] a statute authorizes a direct appeal from a court of law**{,}** [*to the Supreme Court,*] FN 1 except as otherwise provided by statute or [*by*] rule of appellate procedure, the appeal shall be taken in the manner prescribed in the rules of appellate procedure relating to appeals generally.

(**{3}**[*2*])**{When}**[*Where*] a statute authorizes direct judicial review of an agency order or a legislative enactment**{,}** [*by the Supreme Court,*] FN 2 except as otherwise provided by statute**{ or rule of appellate procedure}**, the judicial review shall be initiated and conducted in the manner prescribed in the rules of appellate procedure relating to judicial review of agency orders generally.

(**{4}**[*3*])The notice of appeal or petition for judicial review shall state the statutory authority under which a direct appeal or judicial review is taken to the Supreme Court. Filing fees shall be assessed as provided in ORS 21.010.

{(5) When the legislature provides for direct review of a statute, unless the law provides otherwise:

(a) The petition for review shall:

(i) To the extent practicable, allege a claim for relief under ORCP 18; and

(ii) State whether a lower tribunal has developed a factual record that establishes sufficient factual findings necessary for the court's resolution of the legal and procedural issues; and

(iii) If the petitioner contends that a lower tribunal's factual record is not sufficient, allege any additional fact necessary for the court's resolution of the legal and procedural issues; or

(iv) If no lower tribunal has developed a factual record, allege all facts necessary for the court's resolution of the legal and procedural issues.

(b) The responsive pleading shall:

(i) Agree to or deny any fact alleged in the petition and otherwise, to the extent practicable, follow the standards set out in ORCP 19; and

(i) State whether it agrees with a statement in the petition of sufficient factual findings under subparagraph (a)(ii); and

(iii) If any party contends that a lower tribunal's record is not sufficient, or if no lower tribunal has developed a factual record, include any additional fact necessary for the court's resolution of the legal and procedural issues.

(c) Following the filing of the responsive pleading, if any fact is disputed, the court may direct the parties to confer and develop joint stipulated facts or otherwise identify any fact that remains in dispute that is necessary for the court to resolve the legal issues.}

[*(4) When required to do so by statute, the court will expedite its disposition of the appeal or judicial review.[FN 3]*]

({**6**}[5])On motion of a party or on the court's own initiative, the court may establish a special briefing schedule for the appeal or judicial review.

FN 1 See, e.g., ORS 305.445 (tax court judgments and orders), ORS 662.120 (injunctions in labor dispute cases), and ORS 138.045(2) (certain pretrial orders in murder and aggravated murder cases).

FN 2 See, e.g., ORS 469.403(3) (nuclear facility siting certificates).

[*3 See, e.g., ORS 138.261(6) and ORS 138.045(2) (requiring expedited disposition on appeal to the Supreme Court of a pretrial order dismissing or setting aside the accusatory instrument or suppressing evidence in a murder case).*]

Clean Version:

Rule 12.05

DIRECT APPEAL, JUDICIAL REVIEW, OR OTHER REVIEW IN THE SUPREME COURT

(1) This rule governs direct appeal, direct judicial review, or other direct review proceedings in the Supreme Court.

(2) When a statute authorizes a direct appeal from a court of law, FN 1 except as otherwise provided by statute or rule of appellate procedure, the appeal shall be taken in the manner prescribed in the rules of appellate procedure relating to appeals generally.

(3) When a statute authorizes direct judicial review of an agency order or a legislative enactment, FN 2 except as otherwise provided by statute or rule of appellate procedure, the judicial review shall be initiated and conducted in the manner prescribed in the rules of appellate procedure relating to judicial review of agency orders generally.

(4) The notice of appeal or petition for judicial review shall state the statutory authority under which a direct appeal or judicial review is taken to the Supreme Court. Filing fees shall be assessed as provided in ORS 21.010.

(5) When the legislature provides for direct judicial review of a statute, unless the law provides otherwise:

(a) The petition for judicial review shall:

(i) To the extent practicable, allege a claim for relief under ORCP 18; and

(ii) State whether a lower tribunal has developed a factual record that establishes sufficient factual findings necessary for the court's resolution of the legal and procedural issues; and

(iii) If the petitioner contends that a lower tribunal's factual record is not sufficient, allege any additional fact necessary for the court's resolution of the legal and procedural issues; or

(iv) If no lower tribunal has developed a factual record, allege all facts necessary for the court's resolution of the legal and procedural issues.

(b) The responsive pleading shall:

(i) Agree to or deny any fact alleged in the petition and otherwise, to the extent practicable, follow the standards set out in ORCP 19; and

(i) State whether it agrees with a statement in the petition of sufficient factual findings under subparagraph (a)(ii); and

(iii) If any party contends that a lower tribunal's record is not sufficient, or if no lower tribunal has developed a factual record, include any additional fact necessary for the court's resolution of the legal and procedural issues.

(c) Following the filing of the responsive pleading, if any fact is disputed, the court may direct the parties to confer and develop joint stipulated facts or otherwise identify any fact that remains in dispute that is necessary for the court to resolve the legal issues.

(6) On motion of a party or on the court's own initiative, the court may establish a special briefing schedule for the appeal or judicial review.

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1 See, e.g., ORS 305.445 (tax court judgments and orders), ORS 662.120 (injunctions in labor dispute cases), and ORS 138.045(2) (certain pretrial orders in murder and aggravated murder cases).

2 See, e.g., ORS 469.403(3) (nuclear facility siting certificates).

ORAP COMMITTEE 2020

PROPOSAL NO.:	20 A & B
PROPOSER:	Justice Lynn Nakamoto; Justice Meagan Flynn; Jason Specht
AMENDING:	ORAP 12.10, 5.05(2) -- Automatic Review in Death Sentence Cases -- Revised Brief Length, Extensions of Time
DATE:	December 31, 2019 (edited Jan 28, 2020)

EXPLANATION:

The proposals would insert a new ORAP 12.10(6)(d) and amends the now-renumbered ORAP 12.10(6)(e).

AGENDA ITEM 20 A:

The amendment in ORAP 12.10(6)(d) addresses concerns raised by the court about bare bones motions for extension of time in capital cases. Parties frequently seek substantial extensions of time in capital cases. Bare bones motions do not include enough information to allow the court to decide how much additional time is needed to complete briefing. So the new ORAP 12.10(6)(d) would expressly require parties seeking additional time, beyond an initial 60 days, to generally describe the work completed and remaining on the brief.

A proposed cross-reference in ORAP 5.05(2) has also been added, to signal the specific deadlines for motions to extend time on automatic and direct review of death penalty cases.

AGENDA ITEM 20 B:

The new rule in ORAP 12.10(6)(e) addresses concerns raised by the court about the length of briefs in capital cases. The current rule imposes a 100-page limit. That is insufficient. As a result, parties always move to submit briefs beyond that limit, which means that the rules contain no effective page limit. Without an effective page limit, parties frequently submit overly long briefs that could have been shorter. The new rule would impose a 250-page limit, which should be sufficient in most cases. Parties will be expected to try to meet that limit.

A proposed cross-reference in ORAP 5.05(1) has also been added, to signal the specific word count limits for briefs in automatic and direct review of death penalty cases.

RULE AS AMENDED:

Rule 12.10
AUTOMATIC REVIEW IN
DEATH SENTENCE CASES

(1) Whenever a defendant is sentenced to death, the judgment of conviction and sentence of death are subject to automatic and direct review by the Supreme Court without the defendant filing a notice of appeal.

(2) If, in addition to a conviction for aggravated murder forming the basis for the death sentence, a defendant is convicted of one or more charges arising from the same charging instrument, the Supreme Court shall have jurisdiction to review any such conviction without the filing of a notice of appeal.

(3) Immediately after entry of the judgment of conviction and sentence of death, the trial court administrator shall prepare a packet consisting of the following:

(a) A copy of the judgment of conviction.

(b) A copy of the order of sentence of death unless that sentence is contained in the judgment of conviction.

(c) A certificate by the trial court administrator stating:

(i) the date of entry of each writing described above.

(ii) the names, mailing addresses, telephone numbers, and email addresses of the attorneys of record for the state and for the defendant at the date of entry of each writing described above.

(d) A cover sheet captioned "In the Supreme Court of the State of Oregon" and showing the court in which the judgment of conviction and sentence of death were made, the title of the case, the trial court case number, the name of the judge who imposed the sentence of death and the caption: "Automatic Death Sentence Review."

(4) The trial court administrator shall serve a true copy of the packet on the defendant and on each attorney and the transcript coordinator. The trial court administrator shall endorse proof of service on the original of the packet and send the original to the Administrator, who shall immediately notify the Chief Justice of receipt thereof.

(5) (a) Service of a copy of the packet on the transcript coordinator shall be deemed to be authorization for the transcript coordinator to arrange for preparation of a

transcript of all parts of the criminal proceeding, including all pretrial hearings and selection of the jury.

(b) A transcript shall meet the specifications of ORAP 3.35.

(c) A transcript shall be filed within 60 days after the date the packet is served on the transcript coordinator.

(d) Transcripts shall be settled in the same manner as on an appeal pursuant to ORS 138.015 and ORS 19.370, except that a first extension of time of 30 days to file a motion to correct the transcript or add to the record will be deemed granted if, within 15 days after the transcript is filed, a party files a notice of need for additional time to file such a motion.

(6) (a) If the defendant desires to file an opening brief, the brief is due 180 days after the transcript is settled.

(b) If the state desires to file an answering brief, the brief is due:

(i) When the defendant does not desire to file an opening brief, 180 days after the transcript is settled.

(ii) When the defendant files an opening brief, 180 days after the defendant serves and files the defendant's opening brief.

(c) If the defendant has filed an opening brief, the defendant may file a reply brief, which shall be due 90 days after the state serves and files its answering brief.

(d) Motions for extension of time shall be made in accordance with ORAP 7.25. Other than a first motion for an extension of time of 60 days or less to file a brief, a motion for extension of time shall include a statement generally describing the work completed and remaining on the brief.

(e) Specifications for briefs shall be those set forth in ORAP 5.05, except that, without filing a motion at least 14 days before the filing deadline for the brief and obtaining leave of the court for a longer brief,

(i) the maximum length of an opening or answering brief ~~without obtaining leave of the court for a longer brief is 28,000~~ is 70,000 words or, if the certification under ORAP 5.05(1)(d) certifies that the preparer does not have access to a word-processing system that provides a word count, 250 ~~100~~ pages~~.~~

(ii) the maximum length of a reply brief is 20,000 words or, if the certification under ORAP 5.05(1)(d) indicates that the preparer does not have

access to a word-processing system that provides a word count, 75 pages.

(7) Notwithstanding UTCR 6.120(1), the trial court administrator shall send the trial court file and exhibits to the Administrator.

(8) Preparation, service, and sending of the packet, the trial court file and exhibits offered, preparation of transcripts, preparation of briefs, and review by the Supreme Court shall be accorded priority over all other cases by all persons concerned.

Rule 5.05
SPECIFICATIONS FOR BRIEFS

(1) (a) Except as provided in paragraph (1)(c) of this subsection, an opening, answering, combined, or reply brief must comply with the word-count limitation in paragraph (1)(b) of this subsection.[1] Headings, footnotes, and quoted material count toward the word-count limitation. The front cover, index of contents and appendices, index of authorities referred to, excerpt of record, appendices, certificate of service, any other certificates, and the signature block do not count toward the word-count limitation.

(b) (i) In the Supreme Court, except for cases subject to ORAP 12.10 (automatic review of a death sentence):

(A) An opening brief may not exceed 14,000 words.

(B) An answering brief may not exceed 14,000 words.

(C) A combined respondent's answering brief and cross-petitioner's opening brief may not exceed 22,000 words, with the answering brief part of the combined brief limited to 14,000 words.

(D) A combined cross-respondent's answering brief and petitioner's reply brief may not exceed 12,000 words, with the reply brief part of the combined brief limited to 4,000 words.

(E) A reply brief may not exceed 4,000 words.

(ii) In the Court of Appeals:

(A) An opening brief may not exceed 10,000 words.

(B) An answering brief may not exceed 10,000 words.

(C) A combined respondent's answering brief and cross-

appellant's opening brief may not exceed 16,700 words, with the answering brief part of the combined brief limited to 10,000 words.

(D) A combined cross-respondent's answering brief and appellant's reply brief may not exceed 10,000 words, with the reply brief part of the combined brief limited to 3,300 words.

(E) A reply brief may not exceed 3,300 words.

(c) If a party does not have access to a word-processing system that provides a word count, in the Supreme Court, an opening, answering, or combined brief is acceptable if it does not exceed 50 pages, and a reply brief is acceptable if it does not exceed 15 pages; in the Court of Appeals, an opening, answering, or combined brief is acceptable if it does not exceed 35 pages, and a reply brief or reply part of a combined reply and cross-answering brief is acceptable if it does not exceed 10 pages.

(d) Except as to a supplemental brief filed by a self-represented party, an attorney or self-represented party must include at the end of each brief a certificate in the form illustrated in Appendix 5.05-2 that:

(i) The brief complies with the word-count limitation in paragraph (1)(b) of this subsection by indicating the number of words in the brief. The person preparing the certificate may rely on the word count of the word-processing system used to prepare the brief. If the attorney, or a self-represented party, does not have access to a word-processing system that provides a word count, the certificate must indicate that the attorney, or self-represented party, does not have access to such a system and that the brief complies with paragraph (1)(c) of this subsection.

(ii) If proportionally spaced type is used, the size is not smaller than 14 point for both the text of the brief and footnotes.

(e) A party's appendix may not exceed 25 pages.

(f) Unless the court orders otherwise, no supplemental brief may exceed five pages.

(2) (a) Except for cases subject to ORAP 12.10 (automatic review of a death sentence), ~~O~~on motion of a party stating a specific reason for exceeding the prescribed limit, the court may permit the filing of a brief or an appendix exceeding the limits prescribed in subsection (1) of this rule or prescribed by order of the court. A party filing a motion under this subsection must make every reasonable effort to file the motion not less than seven days before the brief is due. The court may deny an untimely motion under this paragraph on the ground that the party failed to make a reasonable effort to file

the motion timely.

(b) If the court grants permission for a longer appendix, if filed in paper form, the appendix must be printed on both sides of each page and may be bound separately from the brief.[3]

(3) As used in this subsection, "brief" includes a petition for review or reconsideration, or a response to a petition for review or reconsideration. All briefs must conform to these requirements:

(a) Briefs must be prepared such that, if printed:

(i) All pages would be a uniform size of 8-1/2 x 11 inches.

(ii) Printed or used area on a page would not exceed 6-1/4 x 9-12 inches, exclusive of page numbers, with inside margins of 1-1/4 inches, outside margins of 1 inch, and top and bottom margins of 3/4 inches.

(b) Legibility and Readability Requirements

(i) Briefs must be legible and capable of being read without difficulty. The print must be black, except for hyperlinks.

(ii) Briefs must be prepared using proportionally spaced type. The style must be Arial, Times New Roman, or Century Schoolbook. The size may not be smaller than 14 point for both the text of the brief and footnotes. Reducing or condensing the typeface in a manner that would increase the number of words in a brief is not permitted.

(iii) Briefs may not be prepared entirely or substantially in uppercase.

(iv) Briefs must be double-spaced, with a double-space above and below each paragraph of quotation.

(c) Pages must be consecutively numbered at the top of the page within 3/8 inch from the top of the page. Pages of an excerpt of record included with a brief must be numbered independently of the body of the brief, and each page number must be preceded by "ER," *e.g.*, ER-1, ER-2, ER-3. Pages of appendices must be preceded by "App," *e.g.*, App-1, App-2, App-3.

(d) The front cover must set forth the full title of the case, the appropriate party designations as the parties appeared below and as they appear on appeal, the case number assigned below, the case number assigned in the appellate court, designation of the party on whose behalf the brief is filed, the court from which the appeal is taken, the

name of the judge thereof, and the litigant contact information required by ORAP 1.30. The lower right corner of the brief must state the month and year in which the brief was filed.[4]

(e) The last page of the brief must contain the name and signature of the author of the brief, the name of the law firm or firms, if any, representing the party, and the name of the party or parties on whose behalf the brief is filed.

(f) If filed in paper form: [5]

(i) The paper must be white bond, regular finish without glaze, and at least 20-pound weight.

(ii) If both sides of the paper are used for text, the paper must be sufficiently opaque to prevent the material on one side from showing through on the other.

(iii) The brief must be bound either by binderclip or by staples. Binderclips are preferred.

(4) The court on its own motion may strike any brief that does not comply with this rule.

(5) (a) A party filing a brief in the appellate court must file one brief with the Administrator* and serve one copy of the brief on every other party to the appeal, judicial review, or other proceeding.

(b) The brief filed with the Administrator must contain proof of service on all parties served with a copy of the brief. The proof of service must be the last page of the brief or printed on or affixed to the inside of the back cover of the brief.

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[1] Briefs to which this restriction applies include, but are not limited to, a combined respondent's answering/cross-appellant's opening brief, a combined appellant's reply/cross-respondent's answering brief, and a brief that includes an answer to a cross-assignment of error.

[2] *See* ORAP 5.75 regarding setting out reply brief and cross-answering brief as separate parts of a combined reply and cross-answering brief.

[3] *See* ORAP 5.50 regarding the excerpt of record generally.

[4] *See* ORAP 5.95 regarding the title page of a brief containing confidential material.

[5] *See* ORS 7.250 and ORAP 1.45(b) regarding use of recycled paper and printing on both sides

of a page.

* *See* ORAP 1.35(1)(a)(ii)(B) for the filing address of the Administrator.

See Appendix 5.05-1.

ORAP COMMITTEE 2020

PROPOSAL NO.: 25

PROPOSER: Charles Hinkle

AMENDING RULE(S): ORAP Appendix 5.05-1: Whether the Illustration of Caption Format is Prescriptive

DATE SUBMITTED: December 5, 2019

EXPLANATION:

[Quoted from Charles Hinkle's email:]

I have a question about APPENDIX 5.05-1, which shows the following format for the cover page of a brief [see below].

Does the Court regard that illustration as prescriptive? Should the caption look more or less like a circuit court caption, with the parties' names listed on the left margin, bordered on the right with a perpendicular line of some kind, and the case numbers for the lower court and the Court of Appeals set out to the right of that perpendicular line? (The appendix to ORAP contains many other illustrations for other rules that follow the same format.)

Or should the cover page look more or less like the attached Notice [see page 4 below] that I recently received from the court, with the parties' names spread out across the page, with no perpendicular line boxing them in, and the case numbers set out below the names, rather than to the right of the names? If the latter is permissible, shouldn't the illustrations in the ORAP appendix indicate that either format is acceptable?

RULE AS AMENDED:

None provided. Current form is as follows:

APPENDIX 5.05-1
Illustration for ORAP 5.05

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

_____,	)	
Plaintiff-Appellant,	)	
(or Plaintiff-Respondent)	)	_____ County Circuit
	)	Court No. _____
	)	
v.	)	
_____,	)	CA A_____
Defendant-Respondent.	)	
(or Defendant-Appellant)	)	

APPELLANT'S OPENING BRIEF AND EXCERPT OF RECORD

Appeal from the judgment (order) of the Circuit Court for _____ County; Honorable _____, Judge.

_____
Attorney(s) for Appellant [if more than one appellant, identify which; include separate listing for each appellant represented by a different attorney]
[Mailing address, bar number, telephone number, and email address]

[or]

_____ [name of self-represented appellant; include separate listing for each self-represented appellant]
[Mailing address and telephone number]

_____
Attorney(s) for Respondent [if more than one respondent, identify which; include separate listing for each respondent represented by a different attorney]
[Mailing address, bar number, telephone number, and email address]

[or]

_____ [name of self-represented respondent; include separate listing for each self-represented respondent]
[Mailing address and telephone number]

_____
[Signature of attorney or unrepresented party]

_____
[Typed or printed name of attorney or unrepresented party]

Attached example notice is shown on the next page:

IN THE COURT OF APPEALS OF THE STATE OF OREGON

NANCY HERSEY and JULIE BUDEAU,
Plaintiffs-Appellants,

v.

CHRISTINE LEON; ADAM DOERN and KATHRYN DOERN, husband and wife; JEFFREY SHIVERS; CINDY SHIVERS; SANDRA EYMER; MICHAEL DEWITZ; MICHAEL STEFAN LEONIAK; JEFFREY OMMERT and CHRISTINE OMMERT, husband and wife; KENNETH BORSLIEN and ELIZABETH BORSLIEN, husband and wife; EDWARD JAHN and DEVON JAHN, husband and wife; KYLE KRAXBERGER and FALLON KRAXBERGER, Successors-in-Interest to PPI Consulting, LLC; ABIGAIL SMITH; TODD LOEWY and LEAH LOEWY, husband and wife; JIM SAMUELS; MOLLY LITTLE; BROCK INMAN and AMY GILLCRIST, husband and wife; CHARLES HINKLE; EARL SHAY and KATHLEEN SHAY; husband and wife; ROBERT WEAVER and JEAN HORN, husband and wife; BANK OF AMERICA, N.A.; DITECH FINANCIAL, LLC; WELLS FARGO HOME MORTGAGE; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,
Defendants-Respondents,

and

KEITH KUTLER, et al.,
Defendants.

Clackamas County Circuit Court
16CV13166

A169787

NOTICE

ORAP COMMITTEE 2020

PROPOSAL NO.: 26

PROPOSER: James Nass, Appellate Commissioner (retired)

AMENDING RULE(S): ORAP chs 1 & 16 -- Revise eFiling Rules into Chapter 1

DATE SUBMITTED: June 20, 2019

EXPLANATION:

[Quoted from Commissioner Nass's cover memo:]

When the appellate courts first adopted electronic filing and service, it was the exception and filing and service over the counter or by mail was considered the "conventional" way to file and service. Today, eFiling by attorneys is mandatory and, when the appellate courts adopt a new electronic court system in a year or so, self-represented persons will be able to electronically file, too. So, today, electronic filing and service is "conventional" and filing and service by traditional means is the exception.

The rules governing traditional means of filing and service of documents with the appellate courts are found in ORAP chapter 1; the rules governing eFiling and eService are found in ORAP chapter 16; the two sets of rules are not well-integrated. Attorneys, self-represented persons, and other persons who may have occasion to submit documents to the appellate courts for filing would be better served if the rules governing electronic filing and service were better integrated into the ORAP generally, which means moving those rules more toward the front of the ORAP.

Accompanying this memorandum is a draft of a partial reorganization of the ORAP in an effort to accomplish that goal. For the most part, my intent was not to change the substance of any rule. In some instance, the process of incorporating rules governing electronic filing and service into the rules governing other kinds of filing and service, or reorganizing the rules, required some wording changes. There are a few new proposals (noted below), but, for the most part, the intent is not to change the rules substantively.

Reorganization Generally

- I propose to repeal ORAP 1.35 (Filing and Service) in its entirety and the whole of ORAP chapter 16; break ORAP chapter 1 into two subchapters (Rules of General Applicability; and Filing and Service), and adopt five new rules that address various aspects of filing and service: Filing Generally; Filing Using Appellate Courts' eFiling System; Mandatory eFiling; Exceptions; Filing by U.S. Postal or Commercial Delivery Service; and Service of Copy of Document on Other Persons). See the Table of Contents.

- I propose to move the definitions currently found in the various rules within ORAP chapter 16 into ORAP 1.15. I also propose to move ORAP 1.15(1) and (2) into a separate rule -- proposed new rule ORAP 1.13 -- so that the numbering of the definitions in ORAP 1.15 is easier.

- I propose to reorganize ORAP 1.20 to achieve what I think is a more logical order (but others may differ and may prefer to retain the rule in its current form).

- Proposed new Rule 5.07 is the same as current and proposed-to-be-repealed ORAP 16.50.

  NOTE: Proposed new ORAP 1.50(2) and (3) incorporate the parts of ORAP chapter 16 dealing with electronic signatures and retention of documents containing electronic signatures. The current provisions, which I merely copied and inserted into the new rule, are based on UTCR 21.090 and 21.095. A subcommittee of the Law and Policy Work Group is considering amendments to UTCR 21.090 and 21.095. Presumably, when the subcommittee completes its work, the Law & Policy Work Group will consider the matter and likely will approve proposed amendments to those rules, which will then be referred to the UTCR Committee. If the UTCR Committee approves the proposed changes and the Chief Judge adopts them, the ORAP Committee should consider replacing ORAP 1.50(2) and (3) with the corresponding provisions of UTCR 21.090 and 21.095.

Proposed New Provisions

- I proposed to abandon the concept of "conventional" filing and service and, instead, use the terms "nonelectronic filing" and "nonelectronic service."

- There are two slightly different definitions of "initiating document" in the current rules because different rules apply to initiating documents depending on whether the document initiating a case is being filed electronically or nonelectronically, and depending on whether the particular kind of case is within the scope if ORS 19.260 authorizing filing and service of some initiating documents by mail or commercial delivery service. Some practitioners have reported to me being confused about these provisions. I propose to abandon the general definition of

"initiating document" and have the substantive rule provisions in proposed new Rule 1.70(1)(a) accomplish the same purpose for one of the current definitions. I proposed to retain the other definition, but confine its use to proposed new Rule 1.80

- ORAP 1.20(3), which addresses when a party fails to cause a transcript of proceedings designated in the notice of appeal to be prepared, concludes with this phrase: "the appellant shall file a statement of points relied on" with a footnote referring the reader to ORS 19.250(1)(e). However, the Motions Department decided as a matter of policy a number of years ago that the Court of Appeals should not be in the business on the court's own motion of enforcing ORS 19.250(1)(e), so I propose to replace the existing words with: "ORS 19.250(1)(e) requires the appellant to file a statement of points relied on."

- Footnote 3 of proposed new ORAP 1.50 relates to how one would eFile a confidential or sealed document. The footnote is based on a practitioner's suggestion.

- In proposed new Rule 1.60 (Filing and Service Generally), at subsection (2)(b), I propose to have the appellate courts adopt ORCP 9 B (pertaining to service generally), 9 F (pertaining to service by facsimile), and 9 G (pertaining to service by email) for documents not filed under ORS chapter 19. ORS 19.500 makes ORCP 9 B applicable to documents filed under ORS chapter 19 (governing appeals in civil cases). ORCP 9 B, in turn, makes 9 F and 9 G applicable to documents filed under ORS chapter 19. But those provisions do not apply to documents not filed under ORS chapter 19, such as original proceedings in the Supreme Court and, arguably, criminal appeals filed under ORS chapter 138. I propose that the appellate courts adopt ORCP 9 B, F, and G as rules of appellate procedure for documents not filed under ORS chapter 19. Footnote 3 is new and is intended to highlight that ORCP 9 B is actually the primary source of authority to serve documents by mail.

- Footnote 1 of proposed new ORAP 1.65 is new and informs readers that attorneys who are not active members of the Bar, and self-represented persons cannot be registered users and that the eFiling system is not designed to allow self-represented persons to eFile. Over the years, we've received a number of complaints from self-represented persons, particularly disabled persons, about not being able to eFile. Footnote 1 attempts to explain why and head off those complaints. Likewise, footnote 5 is intended to alert readers that the eFiling system cannot be used to file certain documents and cannot be used to serve certain attorneys.

- Footnote 4 of proposed new ORAP 1.65, pertaining to filing a document that requires payment of a filing fee but that is accompanied by a motion to waive or

defer court fees, is new. In effect, it is a practice tip, suggested by a practitioner.

- Footnote 1 of proposed new ORAP 1.70 is new and reminds readers that, because self-represented persons cannot be registered users of the system, they cannot be served using the eService function.

RULE AS AMENDED:

Oregon Rules of Appellate Procedure

1. GENERAL RULES

A. Rules of General Applicability

1.05 Scope of Rules
1.10 Citation to Appellate Rules; Effect Date; Temporary Amendments and Rules
1.13 Terminology
1.15 ~~Terminology~~ **Definitions** *(incorporates definitions from ORAP 16.05)*
1.20 Administrative Authority to Refuse Filings; Sanctions for Failing to Comply with Rules; Waiver of Rules
1.25 Computation of Time
1.30 Litigant Contact Information
1.32 Out-of-State Attorney and Self-Represented Party Contact Information; Changes in Contact Information for Attorney, Out-of-State Attorney, and Self-Represented Party
~~1.35 Filing and Service~~
1.40 Verification; Declarations; Adopting ORCP 17
1.45 Form Requirements **Generally**
1.50 Format of eFiled Documents; Signatures; Retention of Documents *(incorporates ORAP 16.15, 16.40, and 16.55)*

B. Filing and Service

1.60 Filing and Service Generally *(incorporates ORAP 1.35(1)(a) and (b)(i), (ii), (iv), and (v), and (2); 16.25(5), and 16.45(4))*
1.65 Filing Using Appellate Courts' eFiling System *(incorporates ORAP 16.10, 16.20(3) and (4),16.25, 16.30, and 16.45(1))*
1.70 Service Using Appellate Courts' eFiling System *(incorporates ORAP 16.45(2), (3), and (5))*
1.75 Mandatory eFiling; Exceptions (ORAP 16.25(4), 16.30(1), (2), (3), and 16.60)
1.80 Filing and Service by U.S. Postal Service or Commercial Delivery Service (ORAP 1.35(1)(b)(i), (iii))

5. PREPARATION AND FILING OF BRIEFS

* * * * * *

~~16. FILING AND SERVICE BY ELECTRONIC MEANS~~

~~16.55 Retention of Documents by eFilers and Certification of Original Signatures~~

Rule 1.13
TERMINOLOGY

(1) Headings in these rules do not in any manner affect the scope, meaning, or intent of the rules.

(2) Singular and plural shall each include the other, where appropriate.

Rule 1.15
~~*[TERMINOLOGY]*~~ **DEFINITIONS**
(incorporates definitions from ORAP 16.05)

~~*[(1) Headings in these rules do not in any manner affect the scope, meaning, or intent of the rules.]*~~

~~*](2) Singular and plural shall each include the other, where appropriate. In these rules, unless expressly qualified or the context or subject matter otherwise requires:]*~~

~~*[(3)]*~~ In these rules, unless expressly qualified or the context or subject matter otherwise requires:

(~~*[a]*~~**1**) "Administrator" means the Appellate Court Administrator or, as appropriate, the Appellate Court Administrator's designee.[1]

(~~*[b]*~~**2**) "Agreed narrative statement" means the parties' stipulated account of proceedings in lieu of a transcript or audio record.

(~~*[c]*~~**3**) "Appeal" includes judicial review.

(~~*[d]*~~***4***) "Appearing jointly" refers to two or more parties who together file single documents.

(~~*[c]*~~5) "Appellant" means a party who files a notice of appeal or petition for judicial review.

(~~*[f]*~~**6**) "Appellate court" means the Supreme Court, Court of Appeals, or both, as appropriate.

(~~*[g]*~~**7**) "Appellate judgment" shall have the meaning set out in ORAP 14.05(1)(a).

(~~*[h]*~~**8**) "Audio record" means the record of oral proceedings before a trial court or agency made by electronic means and stored or reproduced on audiotape or compact disc.

(*[i]***9**) "Business day" means Monday through Friday excluding legal holidays.

(*[j]***10**) "Cassette" means the cartridge containing the audio or video recording.

[~~*(k) (i) "Conventional filing" means the delivery of a paper document to the Administrator for filing via the United States Postal Service, commercial delivery service, or personal delivery.*~~

~~*(ii) "Conventional service" means the delivery of a copy of a document on another person via the United States Postal Service, commercial delivery service, or personal delivery.*~~]

(*[l]***11**) "Cross-appellant" means a party, already a party to an appeal, who files an appeal against another party to the case.

(*[m]***12**) "Cross-respondent" means a party who is adverse to a cross-appellant.

(*[n]***13**) "Decision" ~~shall have~~ **has** the **same** meaning **as** set forth in ORAP 14.05(1)(b).

(14) "Document" means a brief, petition, notice, motion, response, application, affidavit or declaration, or any other writing ~~that, by law, may be filed with an appellate court~~, including any exhibit or attachment referred to in that writing.

(*[o]***15**) "Domestic relations case" includes but is not necessarily limited to these kinds of cases: dissolution of marriage, dissolution of domestic partnership, filiation, paternity, child support enforcement, child custody, modification of judgment of dissolution of marriage or domestic partnership, and adoption.

(16) "Electronic filing" or "eFiling" means the process whereby a user of the eFiling system transmits a document directly from the user's computer to the electronic filing system to file that document with the appellate court.

(18) "Electronic filing system" or "eFiling system" means the system provided by the Oregon Judicial Department for a party to electronically submit a document for filing in the appellate courts via the internet. The system may be accessed at the Judicial Department's website.[2]

(18) "Electronic payment system" means the system provided by the Oregon Judicial Department for paying filing fees and associated charges electronically in the appellate court.

(19) An "eFiler" means a person registered with the eFiling system who submits a document for electronic filing with the appellate court.

(20) "Electronic service" or "eService" means the process for a user of the eFiling system to accomplish service via the electronic mail function of the appellate court eFiling system.

(21) "File" means delivery of a document to the Administrator for filing.

(22) "Hyperlink" means a navigational link in the electronic version of a document to another section of the same document or to another electronic document accessible via the internet.

~~**(23) "Initiating document" means any document that initiates a case, including but not limited to a notice of appeal; a petition for review;[3] a petition for judicial review; a petition for a writ of mandamus, habeas corpus or *quo warranto*; and a recommendation for discipline from the Oregon State Bar or the Commission on Judicial Fitness and Disability.**~~

(~~*[p]*~~**24**) "Judgment" means any judgment document or order that is appealable under ORS 19.205, ORS chapter 138, or other provision of law.

(~~*[q]*~~**25**) "Legal advisor" means an attorney in a criminal case assisting a defendant who has waived counsel, as provided in ORS 138.504(2).

(26) "Nonelectronically" means the filing or service of a document in paper form via the United States Postal Service, commercial delivery service, or personal delivery.

(~~*[r]*~~**27**) "Notice of appeal" includes a petition for judicial review and a notice of cross-appeal.

(~~*[s]*~~**28**) "Optical disk" means compact disk (CD), digital versatile disk (DVD), or comparable medium approved by the Administrator for use in filing an electronic version of a transcript or other part of a trial court or agency record.

(~~*[t]*~~**29**) "Original" in reference to any ~~*[thing]*~~ **document in paper form** to be served or filed shall mean the ~~*[thing]*~~ **document in paper form** signed by the appropriate attorney or party and submitted for filing.

(~~*[u]*~~**30**) "Out-of-state attorney" means an attorney admitted to the practice of law in another jurisdiction, but not in Oregon, who appears by brief or argues the cause under ORAP 6.10(4) or ORAP 8.10(4).

(31) "PDF" means Portable Document Format, an electronic file format.

(~~*[v]*~~**32**) "Petitioner" means a party who files a petition.

(~~[w]~~**33**) "Respondent" means the party adverse to an appellant or a petitioner.

(~~[x]~~**34**) "Transcript" means a typewritten, printed, or electronic transcription of oral proceedings before a trial court or agency.

(~~[y]~~**35**) "Trial court" means the court or agency from which an appeal or judicial review is taken.

(36) "Username" means the identifying term assigned to an eFiler by the court, used to access the appellate court eFiling system.

(~~[z]~~**37**) "Video record" means the audio and visual record of proceedings before a trial court or agency made by electronic means and stored or reproduced on videotape or compact disc.

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[1] *See* ORS 8.120 regarding duties of the State Court Administrator to act as court administrator for the Supreme Court and Court of Appeals, and authority of the State Court Administrator to delegate powers, by written designation, to officers and employees of the Oregon Judicial Department. Effective January 11, 2018, the State Court Administrator delegated, by written designation, to the current Appellate Court Administrator the duties to act as court administrator for the Supreme Court and Court of Appeals.

[2] **<https://courts.oregon.gov/services/online/Pages/appellate-efile.aspx>**

[3] ~~**ORAP 1.35 defines "initiating document" for the purpose of conventional filing. For that purpose, the term does *not* include a petition for review under ORAP 9.05. ORAP 1.35(1)(b)(i). ORAP 16.05 defines "initiating document" for the purpose of eService. For that purpose, the term *does* include a petition for review under ORAP 9.05, because the appellate courts' current eFiling system does not permit the party initiating a case, including a petition for review, to eServe any other party or person.**~~

Rule 1.20
ADMINISTRATIVE AUTHORITY TO REFUSE FILINGS; SANCTIONS FOR FAILING TO COMPLY WITH RULES; WAIVER OF RULES

~~*(1) The Administrator may refuse to file any thing delivered for filing that does not comply with these rules or applicable statutes.*~~

~~*(2) The court on its own motion or on motion of a party may strike, with or without leave to refile, any brief, excerpt of record, motion or other thing that does not conform to applicable statutes or these rules.*~~

(1) If a party does not comply with these rules or an applicable statute:

(a) If the noncompliance relates to a document:

(i) The Administrator may refuse to accept the document for filing; or

(ii) The court on its own motion or on motion of a party may, with or without leave to refile, strike the brief, excerpt of record, motion or other document.

(b) If the noncompliance relates to performing an act or performing an action within the time required, the Administrator may give the party notice of noncompliance and a reasonable opportunity to cure the noncompliance. If the party fails to respond to the notice or to cure the noncompliance, the court may:

(i) If the party is the appellant, dismiss the appeal for want of prosecution as provided in ORS 19.270(3);

(ii) If the party is the appellant or any other party, order other appropriate action.

[~~*(3)*~~]**(2)** If a party responsible for causing a transcript to be prepared and filed fails to do so, after notice and opportunity to cure the default, the court may direct that the appeal proceed without the transcript. If the court directs that the appeal proceed without the transcript and the party is the appellant, ~~*the appellant shall file a statement of points relied on.*~~[1] **ORS 19.250(1)(e) requires the appellant to file a statement of points relied**.

~~*(4) The court on its own motion or on motion of a party may dismiss an appeal for want of prosecution if:*~~

~~*(a) the appellant has failed to comply with applicable statutes or these rules;*~~

~~*(b) fourteen days' notice of the noncompliance has been given to each attorney of record and to parties not represented by counsel; and*~~

~~*(c) the court has not received a satisfactory response to the notice.*~~

~~*(5)*~~ **(3)** For good cause, the court on its own motion or on motion of any party may waive any rule.

[1] *See* ORS 19.250(1)(c)

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Rule 1.35
FILING AND SERVICE

(1) Filing

(a) Filing Defined: Delivery, Receipt, and Acceptance

(i) A person intending to file a document in the appellate court must cause the document to be delivered to the Appellate Court Administrator.

(ii) Delivery may be made as follows and otherwise as provided under subsection (2) of this rule:

(A) Unless an exception applies under ORAP 16.30 or ORAP 16.60(2), an active member of the Oregon State Bar must deliver any document for filing using the appellate courts' eFiling system.[1]

(B) Any other person must file any document in conventional form, by delivering the document to the Appellate Court Administrator, Appellate Court Records Section, 1163 State Street, Salem, Oregon 97301-2563.

(iii) The Administrator or the Administrator's designee must endorse upon any document delivered for filing the day and month, and the year the Administrator received the document.

(iv) Filing is complete when the Administrator has accepted the document. Except as otherwise provided by law or these rules, when the Administrator has accepted a document for filing, the filing date relates back to the date the Administrator received the document for filing.

(v) A correction to a previously filed document must be made by filing the entire corrected or amended document with the court. The caption of a corrected or amended document must prominently display the word "CORRECTED" or "AMENDED," as applicable.

(b) Manner of Filing

(i) As used in this rule, "case initiating document" means a document that initiates a new case in an appellate court, including but not necessarily limited to a notice of appeal; a

~~petition for judicial review; a petition for writ of mandamus, habeas corpus, or mandamus; and any other petition invoking the original jurisdiction of the appellate court.~~

~~(ii) Using Appellate Courts' eFiling System. Delivery for filing using the eFiling system is subject to Chapter 16 of these rules.~~

~~(iii) Using United States Postal Service or Commercial Delivery Service~~

~~(A) A person may deliver a case initiating document for filing via the U.S. Postal Service, and delivery is complete on the date of mailing if mailed or dispatched for delivery in accordance with ORS 19.260(1)(a). If the Administrator receives the case initiating document within the time prescribed by law, the person need not submit proof of the date of mailing. If the Administrator does not receive the document within the time prescribed law and the person must rely on the date of mailing as the date of delivery, the person must file with the Administrator acceptable proof from the U.S. Postal Service of the date of mailing. Acceptable proof from the U.S. Postal Service of the date of mailing must be a receipt for certified or registered mail or other class of service for delivery within three calendar days, with the mail number on the envelope or on the item being mailed, and the date of mailing either stamped by the U.S. Postal Service on the receipt or shown by a U.S. Postal Service postage validated imprint on the envelope received by the Administrator or the U.S. Postal Service's online tracking system.~~

~~(B) A person may deliver a case initiating document for filing via commercial delivery service, and the delivery is complete on the date of dispatch for delivery by the delivery service if dispatched for delivery in accordance with ORS 19.260(1)(a). If the Administrator receives the case initiating document within the time prescribed by law, the person need not submit proof of the date of delivery for dispatch. If the Administrator does not receive the document within the time prescribed by law and if the person must rely on the date of delivery for dispatch, the person must file with the Administrator proof from the commercial delivery service of the date of delivery for dispatch, which may include the commercial delivery service's online tracking service.~~

~~(C) A person involuntarily confined in a state or local government facility may deliver a case initiating document for filing via the U.S. Postal Service and the date of filing relates back to the date of delivery for mailing if the person complies with ORS 19.260(3). If the person relies on the date of delivery for mailing, the person must certify the date of delivery to the person or place designated by the facility for handling outgoing mail.~~

~~(D) Filing of any other document required to be filed within a prescribed time, including any brief, petition for attorney fees, statement of costs and disbursements, motion, or petition for review, is complete if mailed via the U.S. Postal Service or dispatched via commercial delivery service on or before the due date if the class of mail or delivery is~~

~~calculated to result in the Administrator receiving the document within three calendar days.~~

~~(iv) Conventional Filing Not Using U.S. Postal Service or Commercial Delivery Service~~

~~If a person does not deliver a document for filing via the eFiling system, the U.S. Postal Service, or commercial delivery service as provided in this paragraph, then the document is not deemed filed until the document is actually received by the Administrator.~~

~~(v) Delivery by email is not permitted unless specifically authorized elsewhere in these rules.~~

~~(2) Service~~

~~(a) (i) Except as provided in clause (2)(a)(ii) of this subsection, a party filing a document with the court must serve a true copy of the document on each other party or attorney for a party to the case[2].~~

~~(ii) A party filing a motion for waiver or deferral of court fees and costs under ORS 21.682 need not serve on any other party to the case a copy of the motion or any accompanying documentation of financial eligibility.[3] After the court has ruled on the motion, if another party to the case requests a copy of the motion or documentation of financial eligibility for the purpose of challenging the court's ruling, the filing party must comply with the request but may redact protected personal information as described in ORAP 8.50(1). As used in this clause, "documentation of financial eligibility" means a document showing eligibility for a government benefit based on financial need or an affidavit or declaration showing the income, assets, and financial obligations of a party and the party's household.~~

~~(b) Except as otherwise provided by law,[4] a party may serve a document on another person as provided in ORCP 9 or by commercial delivery service.~~

~~(i) If a party serves a copy of a document by the U.S. Postal Service or commercial delivery service, the class of service must be calculated to result in the person receiving the document within three calendar days.~~

~~(ii) Electronic service via the eFiling system is permitted only on attorneys who are authorized users of the eFiling system and as provided in ORAP 16.45. A person may not serve a case initiating document via the eFiling system, as set out in ORAP 16.45(3)(a).~~

~~(iii) Service by e-mail or facsimile communication is permitted only on an attorney as, and in the manner, provided by ORCP 9 G.~~

(c) Each service copy must include a certificate showing the date that the party delivered the document for filing.

(d) Any document filed with the Administrator must contain either an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service, and the names and addresses of the persons served, certified by the person who made service, except that:

(i) If a person was served by the appellate courts eFiling system, the certificate must state that service was accomplished at the person's email address as recorded on the date of service in the appellate eFiling system, and need not include the person's email address or mailing address.

(ii) If a person was served by email or by facsimile communication, the proof of service must state the email address or telephone number used to serve the person, as applicable, and need not include the person's mailing address.

(e) Service on Trial Court Administrators and Transcript Coordinators

(i) When a copy of a notice of appeal is required to be served on the trial court administrator, service is sufficient if it is mailed or delivered to the person serving in the capacity of trial court administrator for the county in which the judgment or appealable order is entered.

(ii) When a copy of a notice of appeal is required to be served on the transcript coordinator, service is sufficient if it is mailed or delivered to the office of the trial court administrator, addressed to "transcript coordinator."
(iii) An authorized user of the trial court electronic filing system may serve the trial court administrator and the transcript coordinator by using the "Courtesy Copies" e-mail function of that system, to send separate courtesy copies to the trial court administrator and to the transcript coordinator. The e-mail address for each judicial district's trial court administrator and transcript coordinator are available on the judicial district's website.

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[1] At this time, only an active member of the Oregon State Bar may become an authorized user of the appellate courts' eFiling system. Therefore, self-represented litigants and attorneys who are not active members of the Oregon State Bar may not file a document with the appellate court using the eFiling System.

[2] Whenever these rules authorize or require service of a copy of any document on the Attorney General, the copy must be served at this address: Attorney General of the State of Oregon, Office of the Solicitor General, 400 Justice Building, 1162 Court Street, NE, Salem, Oregon 97301-4096.

~~[3] *See* Chief Justice Order No. 07-056 (order adopted pursuant to ORS 21.682(4) prescribing standards and practices for waiver or deferral of court fees and costs).~~

~~[4] *See, e.g.*, ORS 183.482(2), relating to cases arising under the Administrative Procedures Act and ORS 197.850(4), relating to judicial review of Land Use Board of Appeals orders, each of which requires service of petitions for judicial review by registered or certified mail.~~

RULE 1.45
FORM REQUIREMENTS **GENERALLY**

(1) Any document intended for filing with an appellate court must be legible and include:

(a) A caption containing the name of the court; the case number of the action, if one has been assigned; the title of the document; and the names of the parties displayed on the front of the document.

(b) The name, address, and telephone number of the party or the attorney for the party, if the party is represented.

(2) As provided in ORAP ~~1.35(1)(a)(v)~~**1.60(1)(b),** the caption of a corrected or amended filing must prominently display the word "CORRECTED" or "AMENDED," as applicable, and the entire corrected or amended document must be filed with the court.

(3) ~~Except as otherwise provided in ORAP 5.05,~~ Parties may prepare any document to be filed in the appellate court using either uniformly spaced type (such as produced by typewriters) or proportionally spaced type (such as produced by commercial printers and many computer printers). Uniformly spaced type must not exceed 10 characters per inch (cpi) for both the text of the ~~thing~~ **document** filed and footnotes. **Except as otherwise provided in ORAP 5.05(3)(b)(ii)**, if proportionally spaced type is used, it must not be smaller than 13 point for both the text of the ~~thing~~ **document** filed and footnotes. This subsection does not apply to the record on appeal or review.

(4) Parties ~~conventionally~~ **nonelectronically** filing any document in the appellate courts are:

(a) Encouraged to print on both sides of each sheet of paper of the document being filed.

(b) Required to use recycled paper if recycled paper is readily available at a reasonable price in the party's community. Further, parties are encouraged to use paper containing the highest available content of post-consumer waste, as defined in ORS 459A.500(3), that is recyclable in the office paper recycling program in the party's

community. The court will not decline to accept any filing on the ground that the filing does not comply with paragraph (a) or (b) of this subsection.[1]

(c) Prohibited from using color highlighting on any part of the text.

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[1] See ORS 7.250.

Rule 1.50
FORMAT OF eFILED DOCUMENTS; SIGNATURES; RETENTION OF DOCUMENTS
(incorporates ORAP 16.15, 16.40, and 16.55)

(1) Format of Documents to be Filed Electronically

(a) General Requirements

(i) Any document to be filed via the eFiling system must be in a Portable Document Format (PDF) or Portable Document Format/A (PDF/A) that is compatible with the eFiling system requirements. The PDF document must allow text searching and copying and inserting text into another document.

(ii) Any document, when viewed in electronic format and when printed, shall comply, to the extent practicable, with the formatting requirements of ORAP 1.45 and any other applicable Oregon Rule of Appellate Procedure.

(iii) An eFiled document must not contain an embedded audio or video file.

(iv) Except as provided in subsection (2) of this rule, a document submitted electronically need not contain a physical signature.

(iv) An eFiled document must not exceed 25 megabytes. An eFiler should break down a document that exceeds the size limit into as few smaller separate documents as possible, which the filer may upload as supporting documents under paragraph (d) of this subsection.[1]

(b) When an eFiler electronically files a document that does not comply with an applicable Oregon Rule of Appellate Procedure, the Administrator will acknowledge the submission and give notice of noncompliance and a reasonable opportunity to cure the noncompliance as provided in ORAP 1.20.

(c) The court may direct a party to submit, in the manner and time specified by the court, an electronic version of a document in its original

electronic format.

(d) To the extent practicable, a party eFiling a document with multiple parts must submit the document as a unified single PDF file, rather than submitting it as separate documents or as a principal eFiled document with supporting documents attached through the eFiling system, except:[2]

(i) A document that exceeds the size limit prescribed in paragraph (a)(iv) of this subsection, in which event the part or parts of the document that exceed 25 megabytes must be filed as a supporting document to the principal eFiled document.

(ii) A memorandum of law accompanying a petition in a mandamus, habeas corpus, or quo warranto proceeding in the Supreme Court under ORAP 11.05 or ORAP 11.20, must be filed as a supporting document to the eFiled petition.

(iii) For document containing an attachment that is confidential or otherwise exempt from disclosure, the eFiler must file the attachment separately from the principal document, not as a supporting document attached through the eFiling system. For the principal document, the eFiler must include a comment that the related eFiling is a confidential attachment to the principal document. For the eFiled attachment, the eFiler must select the document name "Notice to Court Confidential Attachment."[3]

(iv) For a motion seeking approval to file another document, including an application to appear *amicus curiae* with an accompanying brief, where the eFiler intends to file the brief or other document at the same time, the brief or other document must be electronically filed separately from the motion or application to file the other document, rather than being filed as a supporting document attached to the motion or application. For each electronic submission under this clause, the eFiler must include the following comments:

(A) For the motion seeking approval or application to appear *amicus curiae*, a comment that the eFiler is submitting the brief or other document through a separate eFiling transaction; and

(B) For the brief or other document, a comment that the submission relates to the electronic submission of the motion or application to appear *amicus curiae*.

(e) Unless otherwise provided by these rules or directed by the court, a party must not file a paper copy of an eFiled document.

(2) Electronic Signatures

(a) The username and password required to file a document via the eFiling system constitute the signature of the eFiler for purposes of these rules and for any other purpose for which a signature is required.

(b) (i) In addition to information required by statute or rule to be included in the document, an eFiled document must include a signature block that includes the printed name of the eFiler and an indication that the printed name is intended to substitute for the eFiler's signature. The attorney's bar number and an indication of the party that the attorney represents must appear as part of or in addition to the signature block.

Example: *s/Attorney Name*
Attorney Name
Oregon State Bar No. _____
Attorney for _____.

(ii) The Administrator is authorized to provide notice on the Judicial Department's website[3] that eFilers may not include signature blocks generated by certain programs that are incompatible with the appellate electronic court systems.

(c) When a party eFiles a document in which an opposing party joins, that all such parties join in the document must be shown either by:

(i) submitting a scanned document containing the signatures of all parties joining in the document;

(ii) including a recitation in the document that all such parties consent or stipulate to the document; or

(iii) identifying in the document the signatures that are required and submitting each such party's written confirmation no later than three business days after the court's acceptance of the document for filing.

(d) A party eFiling a document signed by a person other than the eFiler, such as a declaration, must be in the form of a scanned image of the signature page showing the person's signature.

(3) Retention of Documents by eFilers and Certification of Original Signatures

(a) Unless the court orders otherwise, if a party electronically files an image of a document containing the original signature of a person other than the

eFiler, the eFiler must retain the document in the eFiler's possession in its original paper form until the Administrator issues the appellate judgment terminating the case.

(b) When an eFiler eFiles a document described in paragraph (a) of this subsection, the eFiler certifies by filing that, to the best of the eFiler's knowledge and after appropriate inquiry, the signature purporting to be that of the signer is in fact that of the signer.

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[1] *See* Appellate eFiling FAQ for more information about the technical requirements of eFiling: <https://www.courts.oregon.gov/services/online/Pages/appellate-faq.aspx>.

[2] Examples of content that should be included as part of a unified single PDF file include: (1) notice of appeal, judgment being appealed, and certificate of service; (2) petition for judicial review, agency order as to which review is sought, and certificate of service; (3) petition for reconsideration, underlying decision as to which reconsideration is sought, and certificate of service; (4) petition for review, Court of Appeals decision as to which review is sought, and certificate of service; (5) motion, affidavit or declaration (if any) and certificate of service; (6) Supreme Court mandamus or habeas corpus petition, copy of order or written decision, and certificate of service; (7) Supreme Court memorandum in support of a mandamus or habeas corpus petition, excerpt of record, and certificate of service. *[Appendices 16.05-1, 16.05-2, and 16.05-3 should be re-labelled as Appendices 1.50-1, 1.50-2, and 1.50-3.]*

[3] See ORAP 8.42 regarding distinguishing confidential and sealed documents.

[4] *https://courts.oregon.gov/services/online/pages/appellate-efile.aspx*

B. Filing and Service

Rule 1.60
FILING AND SERVICE GENERALLY

(incorporates ORAP 1.35(1)(a) and (b)(i), (ii), (iv), and (v), and (2); 16.25(5), and 16.45(4))

(1) Filing

(a) A person intending to file a document in the appellate court must cause the document to be delivered to the Appellate Court Administrator, Appellate Court Records Section, 1163 State Street, Salem, Oregon 97301-2563, as provided in this rule, ORAP 1.65, or ORAP 1.75. Filing is complete when the Administrator accepts a document delivered for filing.

(i) Delivery

(A) An active member of the Oregon State Bar intending to file a document with the court must deliver the document for filing using the appellate courts' eFiling system as provided in ORAP 1.65, except as otherwise provided in ORAP 1.75.

(B) Any other person intending to file a document with the court must nonelectronically deliver the document for filing.

(C) If a person does not deliver a document for filing via the eFiling system as provided in ORAP 1.65 or via the U.S. Postal Service or commercial delivery service as provided in ORAP 1.80, then the document is not deemed filed until the document is actually received by the Administrator and accepted by the Administrator. If the Administrator accepts the document for filing, the filing date relates back to the date the Administrator received the document, as provided in paragraph (iii) of this subsection.

(D) Delivery of a document for filing by the Administrator by email is not permitted unless specifically authorized elsewhere in these rules.

(ii) Receipt

The Administrator or the Administrator's designee must endorse upon any document delivered for filing the day and month, and the year the Administrator received the document.

(iii) Acceptance

Except as otherwise provided by law or these rules, when the Administrator has accepted a document for filing, the filing date relates back to the date the Administrator received the document for filing.

(b) Corrected or Amended Documents

A person filing a corrected or amended version of a previously filed document must submit the entire corrected or amended document. The caption of a corrected or amended document must prominently display the word "CORRECTED" or "AMENDED," as applicable.

(c) The Administrator may digitize, scan, or otherwise reproduce a document that is filed nonelectronically into an electronic record, document, or image. The Administrator subsequently may destroy a nonelectronically filed document in accordance with the protocols established by the State Court Administrator under ORS 8.125(11).

(2) Service

(a) Except as provided in paragraph (f) of this subsection, a party filing a document with the court must serve a true copy of the document on each other party or attorney for a party to the case.[1]

(b) Except as otherwise provided by law[2] and subject to this rule, a party may serve a document on another person as provided in ORCP 9 B,[3] via commercial delivery service, or via the appellate courts' eFiling system as provided in Rule 1.70.

(i) For any case not subject to ORS 19.500, ORCP 9 B is adopted as a rule of appellate procedure, including authorizing service by mail via the U.S. Postal Service.

(ii) ORCP 9 F is adopted as a rule of appellate procedure. Service by facsimile communication is permitted only on the attorney for a party as provided in ORCP 9 F.

(iii) ORCP 9 G is adopted as a rule of appellate procedure. Service by conventional email is permitted only as provided in ORCP 9 G.

(c) Each service copy must include a certificate showing the date that the party delivered the document for filing.

(d) Any document filed with the Administrator must contain either an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service, and the names and addresses of the persons served, certified by the person who made service, except that:

(i) If an attorney for a party is served by the appellate courts eFiling system, the proof of service must state that service was accomplished at the

attorney's email address as recorded in the eFiling system on the date of service, and need not include the attorney's email address or mailing address.

(ii) If a person is served by email or by facsimile communication, the proof of service must state the email address or telephone number used to serve the person, as applicable, and need not include the attorney's mailing address.

(e) Service on Trial Court Administrator and Transcript Coordinator

(i) When a copy of a notice of appeal is required to be served on the trial court administrator, service is sufficient if it is mailed or delivered to the person serving in the capacity of trial court administrator for the county in which the judgment or appealable order is entered.

(ii) When a copy of a notice of appeal is required to be served on the transcript coordinator, service is sufficient if it is mailed or delivered to the office of the trial court administrator, addressed to "transcript coordinator."

(iii) An authorized user of the trial court electronic filing system may serve the trial court administrator and the transcript coordinator by using the "Courtesy Copies" e-mail function of that system, to send separate courtesy copies to the trial court administrator and to the transcript coordinator. The e-mail address for each judicial district's trial court administrator and transcript coordinator are available on the judicial district's website.

(f) Service of Motion or Application for Waiver or Deferral of Court Fees

A party filing a motion for waiver or deferral of court fees and costs under ORS 21.682 need not serve on any other party to the case a copy of the motion or any accompanying documentation of financial eligibility.[2] After the court has ruled on the motion, if another party to the case requests a copy of the motion or documentation of financial eligibility for the purpose of challenging the court's ruling, the filing party must comply with the request but may redact protected personal information as described in ORAP 8.50(1). As used in this clause, "documentation of financial eligibility" means a document showing eligibility for a government benefit based on financial need or an affidavit or declaration showing the income, assets, and financial obligations of a party and the party's household.[4]

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[1] Whenever these rules authorize or require service of a copy of any document on the Attorney General, the copy must be served at this address: Attorney General of the State of Oregon, Office of the Solicitor General, 400 Justice Building, 1162 Court Street, NE, Salem, Oregon 97301-4096.

[2] *See, e.g.*, ORS 183.482(2), relating to cases arising under the Administrative Procedures Act and ORS 197.850(4), relating to judicial review of Land Use Board of Appeals orders, each of which requires service of petitions for judicial review by registered or certified mail.

[3] *See* ORS 19.500 (making ORCP 9 B applicable to documents filed and served under ORS chapter 19; ORCP B authorizes service by mail).

[4] *See* Chief Justice Order No. 18-024 (order adopted pursuant to ORS 21.682(4) prescribing standards and practices for waiver or deferral of court fees and costs).

Rule 1.65
FILING USING APPELLATE COURTS' eFILING SYSTEM
(incorporates ORAP 16.10, 16.20(3) and (4),16.25, 16.30, and 16.45(1))

(1) Authorized eFilers

(a) Any active member of the Oregon State Bar may register to become an eFiler.[1]

(b) An attorney who registers to use the eFiling system thereby consents to be served with a document eFiled by any other registered user via the electronic mail function of the eFiling system.

(c) To become an eFiler, an attorney must:

(i) review the technical requirements for electronic filing at Appellate eFiling FAQs;

(ii) complete a training program, either online or in person, regarding the appellate court eFiling system;[2] and

(ii) register for access to the eFiling system by completing a registration form requesting a username and establishing a password. An eFiler's username and password may be used only by the attorney to whom the username and password were issued or by an employee of that attorney's law firm or office or by another person authorized by that attorney to use the username and password.

(d) Each eFiler agrees to and shall

(i) comply with the electronic filing terms and conditions when using the eFiling system;
(ii) furnish required information for case processing;

(iii) advise the Oregon Judicial Department Enterprise Technology Services Division of any change in the eFiler's e-mail address.[3]

(e) The appellate court may suspend the electronic filing privileges of an eFiler if the court becomes aware of misuse of the eFiling system or of the eFiler's username and password.

(2) eFiling System Availability; Filing Deadline

(a) A filer may use the eFiling system at any time, except when the system is temporarily unavailable as provided in ORAP 1.75(6).

(b) The filing deadline for any document filed electronically is 11:59:59 p.m. in the time zone in which the court is located on the date by which the document must be filed.

(3) Filing Fees; Motions to Waive or Defer Court Fees

(a) An eFiler must pay any required filing fees at the time of the electronic filing, by using the electronic payment system, unless otherwise directed by the court.

(b) If an eFiler seeks to waive or defer filing fees when electronically filing the first document in a case, at the same time, the eFiler must apply for a waiver or deferral of filing fees by eFiling an application to waive or defer filing fees.[4]

(4) Acceptance of eFiled Document

(a) The submission of a document electronically by the eFiler and acceptance of the document by the Administrator accomplishes electronic filing. When accepted for filing, the electronic version of the document constitutes the court's official record of the document.

(b) (i) The court considers a document received when the eFiling system receives the document. The eFiling system will send an email that includes the date and time of receipt to the eFiler's e-mail address, and to any other e-mail address provided by the eFiler, to confirm that the eFiling system received the document.

(ii) When the court accepts the document for filing, the eFiling system will affix to the document the time of day, the day of the month, the month, and the year that the eFiling system received the document. The date and time of filing entered in the register relate back to the date and time that the eFiling system received the document. The eFiling system will send an email that

includes the date and time of acceptance to the eFiler's e-mail address and to any other email address provided by the eFiler. If the document was electronically served by the eFiling system pursuant to ORAP 1.70,[5] the date of service will also relate back to the date that the eFiling system received the document.

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[1] Attorneys who are not active members of the Oregon State Bar, including an attorney temporarily admitted to the practice of law in the appellate court under ORAP 1.32, may not be registered users. Also, at this time, the appellate courts' eFiling system is not designed to accept self-represented persons as registered eFilers; therefore, self-represented litigants cannot become register users.

[2] Links to the registration form and to the online training program are available at Appellate eFiling.

[3] Use the form located on the Judicial Department's website, at the following address: <https://www.courts.oregon.gov/services/online/Pages/appellate-eFile-support.aspx>.

An eFiler should allow two business days for processing the update. Once the update is made, it becomes effectively immediately. This obligation is independent from the obligation of Oregon lawyers to notify the Oregon State Bar when the lawyer's e-mail address changes.

[4] When prompted by the eFiling system whether the document being filed requires a filing, check "no" and insert in the comment box: "requesting waiver or deferral."

[5] As provided in ORAP 1.70(1)(a) and (b), the eFiling system cannot electronically serve some documents and cannot be used to serve some attorneys.

Rule 1.70
SERVICE USING APPELLATE COURTS' eFILING SYSTEM

(incorporates ORAP 16.45(2), (3), and (5))

(1) Except as provided in paragraphs (a) and (b) of this subsection, a party eFiling a document with the appellate court may accomplish service of that document on any other party's attorney by using the eService function of the eFiling system.[1]

(a) Initiating Documents May Not Be Served via the Appellate Courts' eFiling System

A party may not serve via the appellate courts' eFiling system, and must nonelectronically serve as provided in ORCP 9 B or ORS 19.260(2), a document that:

(i) In the Court of Appeals, initiates a case, including a notice of appeal or a petition for judicial review;

(ii) In the Supreme Court:

(A) Initiates a case, including a petition for review;

(B) Is a first motion for extension of time to file a petition for review in the Supreme Court.

(b) Limits on Attorneys Who May be Served via the Appellate Courts' eFiling System

Electronic service via the eFiling system is permitted only on an attorney who is a registered user of the eFiling system under ORAP 1.65(1). A party may not serve an attorney via the eFiling system, and must nonelectronically serve the attorney as provided in ORCP 9 B or ORS 19.260(2), if the attorney:

(i) Is not a registered user of the eFiling system, including an attorney who is not an active member of the Oregon State Bar; or

(ii) Has obtained a waiver to the mandatory eFiling requirement under ORAP 1.75(5).

(2) When a document is served via the eFiling system, the system will generate an e-mail to the attorney being eServed that includes a link to the document that was eFiled. To access the eFiled document, the attorney who has been eServed must log in to the eFiling system.

(3) Service is effective under this rule when the eFiler receives a confirmation e-mail stating that the eFiled document has been received by the eFiling system.

(4) If an eFiled document is not eServed by the eFiling system because of an error in the transmission of the document or other technical problem experienced by the eFiler, the court may, upon satisfactory proof, permit the service date of the document to relate back to the date that the eFiler first attempted to eServe the document. A party must show satisfactory proof by filing and serving an accompanying letter explaining the circumstances, together with any supporting documentation.

_____

[1] The appellate courts' eFiling system currently is not designed to accept self-represented persons as registered eFilers; therefore, self-represented parties cannot be served using the eFiling system's electronic service function.

Rule 1.75
MANDATORY eFiling; EXCEPTIONS
(ORAP 16.25(4), 16.30(1), (2), (3), and 16.60)

(1) Mandatory eFiling; When eFiling Disallowed

Except as provided in subsections (2), (3), (4), (5) and (6) of this rule, an active member of the Oregon State Bar must file a document using the eFiling system.

(2) (a) An eFiler who is not a lawyer of record for a party in a case, including a lawyer for a person or entity appearing as *amicus curiae,* must nonelectronically file any document in any case that is confidential by law or court order.

(b) The Administrator is authorized to develop a means of electronic transmission for filing of a notice of appointment of counsel in a confidential case, for the purpose of documenting a lawyer of record on the case.

(3) Documents that May Not be eFiled

An eFiler may not electronically file, and must nonelectronically file, the following documents:

(a) A document filed under seal, including a motion requesting that a simultaneously filed document be filed under seal or a document with an attachment that is sealed by statute or court order.

(b) An oversized demonstrative exhibit or oversized part of an appendix or excerpt of record. Such a document must be filed within three business days of eFiling the document to which the oversized document relates. An eFiler may note, in the "comments" section of the eFiling screen, that an oversized appendix or excerpt of record will be filed nonelectronically.

(c) In the Supreme Court, an opinion of a trial panel of the Disciplinary Board under Bar Rule of Procedure 10.1.

(4) Documents that may be Filed via eFiling or Nonelectronically.

A party may file the following documents via eFiling or nonelectronically:

(a) A notice of appeal, petition for judicial review, cross-petition for judicial review, or petition under original Supreme Court or Court of Appeals jurisdiction.[1]

(b) A request or motion for waiver of the mandatory eFiling requirement, as provided in subsection (5) of this rule. If the request is approved or the motion granted, then any document subject to that approval or order may be nonelectronically filed.

(5) Waiver of eFiling Requirement

(a) On a showing of good cause, the Administrator or the court may waive mandatory eFiling under paragraph (a) of subsection (4) of this rule. The Oregon State Bar member must file one of the following:

(i) a request for waiver in all cases before the Court of Appeals, or the Supreme Court, or both, for a specific period of time; or

(ii) a motion in an existing case for waiver in that specific case.

(b) The Administrator is authorized to rule on a member's request under paragraph (i) of subsection (a); the court will rule on a member's request under paragraph (ii) of subjection (a).

(c) If the court or the Administrator approves a member's request, the member must

(i) file a copy of the court's order or the Administrator's approval in each case subject to the waiver; and

(ii) include the words "Exempt from eFiling per Waiver Approved [DATE]" in the caption of all documents nonelectronically filed during the duration of the waiver.

(d) If the court grants a motion filed under paragraph (a)(ii) of this subsection, the member must include the words "Exempt from eFiling per Waiver Granted [DATE]" in the caption of all documents nonelectronically filed in the case.

(6) Temporary Suspension of Mandatory eFiling

(a) As used in this subsection, "temporary unavailability" means the eFiling system is temporarily unavailable or an error in the transmission of the document or other technical problem prevents the eFiling system from receiving the document. A "temporary unavailability" does not include a problem with the eFiler's equipment or software, or other problems within

the eFiler's control.

(b) The Administrator will provide 24-hour advance notice of the suspension to registered eFilers via email and to the public via notice on the Oregon Judicial Department's website.

(c) When an eFiler is unable to use the eFiling system because of a temporary unavailability, the party may file and serve the document as provided in subparagraph (i) or (ii) of this paragraph.

(i) The eFiler may nonelectronically file and serve the document. If the eFiler nonelectronically files and serves the document by the end of the next business day following the cessation of the temporary unavailability, together with satisfactory proof of the temporary unavailability, the filing and service relate back to the date the party attempted to eFile the document.

(ii) Upon cessation of the temporary unavailability, the eFiler may use the eFiling system to file and, except as provided in ORAP 16.45(3), serve the document. If the party files and serves the document using the eFiling system by 11:59:59 p.m. of the next business day following cessation of the temporary unavailability and submits satisfactory proof of the temporary unavailability, the filing and service date relates back to the date the party attempted to eFile the document.

(d) Paragraph (c) of this subsection does not apply to the filing and service of a notice of appeal, a petition for judicial review, or any other initiating document. An eFiler's circumstances may require the eFiler to nonelectronically file and serve an initiating document within the time period imposed by statute.

(e) "Satisfactory proof of the temporary unavailability" means a written description of the temporary unavailability, together with any supporting documentation, satisfactory to the court.

(7) Consequences of Failing to Comply with Mandatory eFiling

If an eFiler submits a document for conventional filing in contravention of paragraph (a) of subsection (1) of this rule and the eFiler has not obtained a waiver pursuant to subsection (5) of this rule, nor is the electronic system unavailable as described in subsection (6) of this rule, then the Administrator is authorized to take any of the following actions:

(a) Accept the document for filing and provide notice to the filer that the Administrator will reject future conventional submissions by the filer that are subject to mandatory eFiling.

(b) Refuse to accept the document for filing.

(c) Return the document to the filer as unfiled.

(d) Refer the eFiler to the court for consideration of action under ORAP 1.20(1).

_____

[1] ***See*** **ORS 19.260(4).**

Rule 1.80
FILING AND SERVICE BY UNITED STATES POSTAL SERVICE OR COMMERCIAL DELIVERY SERVICE
(ORAP 1.35(1)(b)(i), (iii))

(1) Filing an Initiating Document

(a) As used in this subsection, "initiating document" means a notice of appeal, notice of cross-appeal, petition for judicial review, cross-petition for judicial review and a petition under the original jurisdiction of the Supreme Court or Court of Appeals.[1]

(b) Via United State Postal Service

(i) When a person files an initiating document via the U.S. Postal Service, filing is complete on the date of mailing if mailed in accordance with ORS 19.260(1)(a).

(ii) (A) If the Administrator receives the initiating document within the time prescribed by law, the person need not submit proof of the date of mailing. If the Administrator does not receive the document within the time prescribed law and the person must rely on the date of mailing as the date of filing, the person must file with the Administrator acceptable proof from the U.S. Postal Service of the date of mailing.

(B) Acceptable proof from the U.S. Postal Service of the date of mailing must be a receipt for certified or registered mail or other class of service for delivery within three calendar days, with the mail number on the envelope or on the item being mailed, and the date of mailing either stamped by the U.S. Postal Service on the receipt or shown by a U.S. Postal Service postage validated imprint on the envelope received by the Administrator or the U.S. Postal Service's online tracking system.

(iii) A person involuntarily confined in a state or local government facility may file an initiating document via the U.S. Postal Service and the date of filing relates back to the date of delivery for mailing if the person complies with ORS 19.260(3). If the person relies on the date of delivery for mailing, the person must certify the date of delivery to the person or place designated by the facility for handling outgoing mail.

(c) Via Commercial Delivery Service

A person may file an initiating document via commercial delivery service, and filing is complete on the date of dispatch for delivery by the delivery service if dispatched for delivery in accordance with ORS 19.260(1)(a). If the Administrator receives the document within the time prescribed by law, the person need not submit proof of the date of delivery for dispatch. If the Administrator does not receive the document within the time prescribed by law and if the person must rely on the date of delivery for dispatch, the person must file with the Administrator proof from the commercial delivery service of the date of delivery for dispatch, which may include the commercial delivery service's online tracking service.

(2) Service of a Non-Initiating Document[1]

(a) After a case is initiated:

(i) The date of service of any document served via the U.S. Postal Service relates back to the date of mailing if the party mails the document by first class, registered, or certified mail, or a class of delivery calculated to achieve delivery within three calendar days.

(ii) The date of service of any document served via commercial delivery service relates back to the date of dispatch by a class of delivery calculated to achieve delivery within three calendar days.

(b) This subsection applies to any document required to be submitted within a prescribed time, including, but not necessarily limited to, a brief, petition for attorney fees, petition for review, statement of costs and disbursements, objection, and a motion, response to a motion, and a reply.

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[1] ORS 19.260(1) provides that a notice of appeal may be filed by via the U.S. Postal Service or commercial delivery service. ORS 19.260(4) provides that, except as otherwise provided by law, ORS 19.260 applies to petitions for judicial review, cross-petitions for judicial review, and petitions under original jurisdiction of the Supreme Court or Court of Appeals.

Rule 5.07
HYPERLINKS AND BOOKMARKS IN eFILED BRIEFS
(renumbered ORAP 16.50)

(1) An eFiled document may contain one or more hyperlinks to other parts of the same document or hyperlinks to a location outside of the document that contains a source document for a citation.

(a) When a party eFiles a brief or other memorandum that is accompanied by excerpts of record or attachments, the party is encouraged to hyperlink citations to the relevant portions of the excerpts or attachments.

(b) The functioning of a hyperlink reference is not guaranteed. The appellate courts neither endorse nor accept responsibility for any product, organization, or content at any hyperlinked site.

(c) A hyperlink to cited authority does not replace standard citation format. The complete citation must be included within the text of the document. Neither a hyperlink, nor any site to which it refers, shall be considered part of the record. A hyperlink is simply a convenient mechanism for accessing material cited in an eFiled document.

(2) When a party eFiles a brief, the party is encouraged to electronically bookmark the sections of the brief, excerpt of record, and any appendix using PDF document creation software. The caption of a bookmark should be concise. The sections of the brief that should be bookmarked include the discussion on each assignment of error or question presented on review, or the response to any assignment of error or presented question. The sections of the excerpt of record or appendix that should be bookmarked include the judgment, order, or opinion under review and any separate findings or determinations that are part of that disposition.

_____
***See* Appendix 5.07 (example of electronic view of bookmarks).** *[The example in the Appendix would need to be renumbered and moved accordingly.]*

Rule 5.50
THE EXCERPT OF RECORD

(1) Except in the case of a self-represented party, the appellant must include in the opening brief an excerpt of record.[1] The parties to an appeal are encouraged to

confer regarding the content of the excerpt of record, including whether to file a joint excerpt of record to be included in the opening brief.

(2) The excerpt of record must contain:[2]

(a)The judgment or order on appeal or judicial review.

(b) Any written or oral rulings by the lower tribunal or agency addressing the issues presented by the assignments of error.

(c) Any pleading or excerpt of pleadings, particular part of the transcript, exhibit, evidentiary submission and other filing necessary for reviewing and understanding the assignments of error in advance of oral argument, if the parties anticipate that the case will be orally argued.[3]

(d) If preservation of error is or is likely to be disputed in the case, parts of memoranda and the transcript pertinent to the issue of preservation presented by the case.

(e) A copy of the ~~eCourt Case Information~~ **trial court's** register of actions, if the case arose in an Oregon circuit court **or the Tax Court**.

(f) In criminal cases in which the defendant appealed after entering a conditional plea of guilty or no contest under ORS 135.335(3), the defendant must include in the excerpt of record the writing in which the defendant reserved for review on appeal the trial court's adverse determination of a pretrial motion.

(3) The excerpt of record must not contain memoranda of law filed in the trial court unless such memoranda are pertinent to a disputed or likely to be disputed issue of preservation.

(4) A respondent may file, as part of the respondent's brief, a supplemental excerpt of record containing those materials required by subsection (2) of this rule that were omitted from the excerpt of record.

(5) The excerpt of record and any supplemental excerpt of record must be in the following form:

(a) All documents or parts of documents must be copies of documents included in the record, rather than summarized or paraphrased. Omissions, if not apparent, must be noted. No matter may be omitted if to do so would change the meaning of the matter included.

(b) Contents must be set forth in chronological order, except that the OECI case register must be the last document in the excerpt of record. The excerpt must be

consecutively paginated, with the first page being page ER-1. The excerpt must begin with an index organized chronologically, describing each item and identifying where the item may be found in the trial court or agency record, and the page where the item may be found in the excerpt. The index may include bookmarks as described in ORAP ~~16.50~~ **5.07**. A supplemental excerpt of record must substantially conform to the same requirements, except that a supplemental excerpt must be paginated using "SER," *e.g.*, SER-1, SER-2, SER-3.

(c) The materials included must be reproduced on 8-1/2 x 11-inch white paper by any duplicating or copying process that produces a clear, black, legible image.

(d) The excerpt of record must comply with the applicable requirements of ORAP 5.05.

(6) Self-represented parties are not required to file an excerpt of record or a supplemental excerpt of record. If a self-represented party files an excerpt of record or a supplemental excerpt of record, it must contain only those documents specified in ORAP 5.50(2)(a) and (b), must contain no other documents, and must otherwise comply with this rule.[4]

(7) The appellate court may strike any excerpt of record or supplemental excerpt of record that does not substantially comply with the requirements of this rule.

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[1] Any brief containing an excerpt of record filed through the eFiling system that exceeds 25 megabytes must be filed in compliance with ORAP ~~16.15(1)~~ **1.50(1)(a)(iv)**.

[2] For other requirements for the excerpt of record in Land Use Board of Appeals cases, *see* ORAP 4.67.

[3] *See* Appendix 5.50, which sets forth examples of documents that a party should consider including in the excerpt of record depending on the nature of the issues raised in the briefs. The full record is available and used by the court after submission of a case; therefore, the excerpt of record need include only those parts of the record that will be helpful to the court and the parties in preparing for and conducting oral argument.

[4] Under ORAP 6.05(2), cases in which a self-represented party files a brief are submitted without argument by any party. For that reason, any excerpt or supplemental excerpt of record submitted by a self-represented party shall not contain any of the documents otherwise required by ORAP 5.50(2)(c) to (f) to assist the appellate court in preparing for oral argument.

Proposed Partial Reorganization of ORAP

Table of Current ORAP as Proposed to be Reorganized

Current ORAP	As Reorganized
1.15(1)	ORAP 1.13(1)
(2)	ORAP 1.13(2)
(3) (a)	ORAP 1.15(1)
(b)	(2)
(c)	(3)
(d)	(4)
(e)	(5)
(f)	(6)
(g)	(7)
(h)	(8)
(i)	(9)
(j)	(10)
(k)(i)	(11) (a)
(ii)	(b)
(l)	(12)
(m)	(13)
(n)	(14)
(o)	(16)
(p)	(24)
(q)	(25)
(r)	(26)
(s)	(27)
(t)	(28)
(u)	(29)
(v)	(31)
(w)	(32)
(x)	(33)
(y)	(34)
(z)	(37)
1.20 (1)	ORAP 1.20 (1) (a) (i)
(2)	(1) (a) (ii)
(3)	(2)
(4)	(1) (b)
(5)	(3)
footnote 1	deleted

Current ORAP	As Reorganized
1.35 (1) (a) (i)	ORAP 1.60 (1)
(ii) (A)	(1) (a) (i)
(B)	(ii)
(1) (a) (iii)	(1) (b)
(1) (a) (iv)	(1) & (1)(c)
(v)	(2)
(b) (i)	ORAP 1.15 (23)
(ii)	deleted
(iii) (A)	ORAP 1.70 (1) (a) (i), (ii)
(B)	(1) (b)
(C)	(1) (a) (iii)
(D)	(2)
(iv)	ORAP 1.60 (1) (a) (iii)
(v)	(1) (a) (v)
(2) (a) (i)	ORAP 1.80 (1)
(ii)	(2)
(b)	(5)
(b) (i)	(5) (a)
(ii)	(b) (i), (ii)
(iii)	(c) (i), (ii)
(c)	(3)
(d) (i), (ii)	(4) (a), (b)
(e) (i), (ii), (iii)	ORAP 1.80 (8) (a), (b), (c)
footnote 1	ORAP 1.65 footnote 1
footnote 2	ORAP 1.80 footnote 1
footnote 3	footnote 2
footnote 4	footnote 3
16.03	ORAP 1.65 (1)
16.05 (1)	ORAP 1.15 (15)
(2)	(17)
(3)	(18)
(4)	(19)
(5)	(20)
(6)	(21)
(7)	(22)
(8)	(23)
(9)	(30)
(10)	(36)
footnote 1	footnote 2
footnote 2	footnote 3
16.10 (1) (a)	ORAP 1.65 (1) (a)
(b)	(b), (c)
(2) (a), (b), (c)	(2) (a), (b), (c)

Current ORAP		As Reorganized	
	footnote 1		footnote 2
16.15	(1)	ORAP 1.50	(1) (a) (i), (iv)
	(2)		(ii)
	(3)		(b)
	(4)		(1) (c)
	(5) (& all subparts)		(d)
	(6)		(1) (a) (iii)
	(7)		(c)
	footnote 1		footnote 1
	footnote 2		incorporated into text
	footnote 3		footnote 2
16.20	(1)		repealed
	(2) 1st sentence	ORAP 1.65	(9) (a)
	2nd sentence		repealed
	(3)	ORAP 1.65	(9) (b)
16.25	(1)	ORAP 1.65	(3) (b)
	(2)		(10) (a)
	(3) (a)		(b) (i)
	(b)		(ii)
	(4) (a)		(7) (a)
	(b) (i),(ii)		(c) (i),(ii)
	(c)		(d)
	(d)		(e)
16.30	(1) (a),(b),(c)	ORAP 1.70	(2) (b) (i), (ii), (iii)
	(2) (a),(b)		(a) (ii) (A), (B)
	(3) (a),(b)		(5)
16.40	(1)	ORAP 1.50	(2) (a)
	(2) (a),(b)		(b) (i),(ii)
	(3) (a),(b),(c)		(c) (i),(ii),(iii)
	(4)		(d)
	footnote 1		footnote 3
16.45	(1)	ORAP 1.80	(5) (b) (iii)
	(2) (a)		(iv)
	(b)		(v)
	(3) (a) (i)-(iv)		(6) (a) (i) (A)-(D)
	(b), (c)		(ii) (A), (B)
	(4)		(3) (a)
	(5)		(6) (e)

Current ORAP	As Reorganized
16.50 (1) (a)-(c), (2)	ORAP 5.07 (1) (a)-(c), (2)
16.55 (1), (2)	ORAP 1.50 (3) (a), (b)
16.60 (1) (a)	ORAP 1.70 (1) (a)
(b)	deleted
(2) (a)-(d)	(3) (a)-(d)
(3) (a),(b)	(4) (a)-(e)
(4) (a)-(d)	(5) (a)-(d)

ORAP COMMITTEE 2020

PROPOSAL NO.: 27

PROPOSER: Cody Hoesly

AMENDING RULE(S): ORAP __ -- Reference Mechanism by Which Appellate Court Can Maintain Jurisdiction to Give Trial Court Opportunity to Explain Discretionary Ruling

DATE SUBMITTED: December 3, 2019

EXPLANATION:

[Quoted from Cody Hoesly's email:]

> I apologize for the length of my explanation below. A short summary is that I propose to add a new ORAP or amend an existing one referencing the ability of a party to use ORCP 71 A as a mechanism by which the appellate court can maintain jurisdiction and pause its proceedings to give the trial court time to explain a discretionary ruling in instances where the appellate court otherwise would vacate the judgment for lack of an explanation sufficient to permit meaningful appellate review of the ruling.
>
> This relates to an issue that arose in my practice about two years ago. I talked then with some members of the ORAP Committee and OSB Appellate Practice Section, but we were thinking of a legislative solution at the time, which didn't occur. But now I think no legislation is necessary.
>
> Specifically, there are several different contexts in which the appellate courts have held that they cannot review a trial court's discretionary decision unless the trial court provides an explanation for that decision sufficient to permit "meaningful appellate review" of the decision. Examples include attorney fee awards, OEC 403 rulings, and I believe rulings regarding dismissal of a case for misconduct and shackling of criminal defendants, etc. In these cases, the appellate court will vacate or reverse the judgment and remand for entry of an explanation, then the trial court can make an explanation, then a new appeal can be filed (this time regarding the merits of the original ruling).
>
> This is an expensive and lengthy process. Indeed, it appears that most cases settle rather than go through with a second appeal after the explanation has been given. Note that this is not an issue of the appellant failing to make a sufficient record on

appeal to justify reversal. It is just as often the appellee whose judgment is reversed on these grounds (for example, the beneficiary of a favorable attorney fee award, who loses the award because it was not adequately explained).

Wouldn't it be nice if there were a mechanism by which the appellate court could maintain jurisdiction and just pause its proceedings to give the trial court time to enter an explanation, then resume appellate consideration of the ruling after the explanation is entered?

I think there is. ORCP 71 A, which allows for correction of "errors…arising from oversight or omission" in "judgments, orders, or other parts of the record." A motion for such a correction can be made during pendency of an appeal. ORCP 71 B(2); ORS 19.270(5)(b). I think the lack of an adequate explanation qualifies for ORCP 71 A relief. See Yarbrough v. Viewcrest Investments, LLC, 299 Or App 143, 156-63 (2019) (describing rule's scope). But I don't think practitioners are aware of this possibility, because it seems to be very rarely used, if at all. By contrast, there are legions of reversals for failure to have an adequate explanation. I therefore think it would be helpful to add a new ORAP or amend an existing one to notify practitioners of this mechanism.

I think that often the lack of adequate findings will be agreed upon by the parties after the opening brief is filed, so having this kind of mechanism will avoid the need for (1) the parties having to brief an issue when the outcome is foregone; (2) the parties having to wait forever for an appellate opinion/judgment to issue; (3) the court having to write an opinion saying the necessary findings aren't there; (4) the respondent losing prejudgment interest or other benefits of the judgment, all due to a technicality, when the appellate court reverses for entry of findings; and (5) related problems with supersedeas undertakings, cost awards, costs and fees to abide the outcome on remand, etc. In short, there's less prejudice to the parties by having this mechanism I'm advocating than there is under the current system. Again, we're not talking about a situation where the trial court got it wrong substantively; we're talking about a situation where the appellate court is reversing for findings so that it can make a substantive determination in a second appeal – I'm just trying to get rid of the need for a reversal and second appeal. Moreover, the trial court proceedings likely will be streamlined because in most cases, I imagine, the parties will file a joint motion with the trial court asking for an explanation of the prior ruling (perhaps with a reminder of what the arguments and ruling were), and then the trial court will enter findings; it will not address new arguments or admit new evidence.

As an aside, the statutory reference I proposed two years ago would have amended ORS 19.270(4), which says the appellate court may give the trial court leave to enter an appealable order/judgment.

I suggested revising ORS 19.270(4) to move its current text to a new subsection (a) and to add subsection (b):

--

> Notwithstanding the filing of a notice of appeal, the trial court has jurisdiction, with leave of the appellate court to:
>
> (a) Enter an appealable judgment or order if the appellate court determines that:
>
> (1) At the time of the filing of the notice of appeal the trial court intended to enter an appealable judgment or order; and
>
> (2) The judgment or order from which the appeal is taken is defective in form or was entered at a time when the trial court did not have jurisdiction of the cause under subsection (1) of this section, or the trial court had not yet entered an appealable judgment or order.
>
> (b) Enter an explanation for a ruling to which error has been assigned on appeal, if the appellate court determines that such an explanation is necessary to permit meaningful appellate review of the ruling.

--

Thank you for considering this proposal. If it's not adopted, maybe a section on this subject could be added to the OSB Bar Book on Appeals.

RULE AS AMENDED:

None provided; not applicable.

ORAP COMMITTEE 2020

PROPOSAL NO.: 28

PROPOSER: Lisa Norris-Lampe, Appellate Legal Counsel, Supreme Court

AMENDING RULE(S): ORAP 8.15, 9.05, 11.25, 12.05: Remove Some or All Fns

DATE SUBMITTED: December 19, 2019 (edited Jan 23, 2020)

EXPLANATION:

The ORAPs are replete with footnotes, which is unusual or typically rare for court rules (compare to Uniform Trial Court Rules), and they make the ORAPs as a whole unnecessarily long, cumbersome to read, and problematic to "downdraft" every two years. Perhaps such a change should be decided more globally; for this cycle, however, I offer several proposals to remove what appear to be unnecessary footnotes from rules that are already being amended.

Additional notes by SPA:

Rule 8.15: Delete all footnotes.

Rule 9.05: The proposal would either remove or trim FN 1, which cross-references ORS 2.520 (petitions for review) and ORAP 7.25(2) (information to include in a MOET; for MOETs on PTRVs, includes the date of the Court of Appeals decision)).

Rule 11.25: Delete footnote.

Rule 12.05: Delete all footnotes.

RULE AS AMENDED:

Rule 8.15
AMICUS CURIAE

(1) A person[1] may appear as *amicus curiae* in any case pending before the appellate court only by permission of the appellate court on written application setting forth the interest of

the person in the case. The application must:

(a) state whether the applicant intends to present a private interest of its own or to present a position as to the correct rule of law that does not affect a private interest of its own;

(b) identify the party with whom the amicus is aligned or state that the amicus is unaligned;

(c) identify the deadline in the case that is relevant to the timeliness of the amicus application (such as the date that the aligned party's brief is due); and

(d) explain why the application is timely relative to that deadline.

(e) The application shall not contain argument on the resolution of the case.

(2) The application shall be submitted by an active member of the Oregon State Bar. A filing fee is not required. The form of the application shall comply with ORAP 7.10(1) and (2) and the applicant shall file the original and one copy of the application. A copy of the application shall be served on all parties to the proceeding.

(3) In the Court of Appeals, the application to appear *amicus curiae* may, but need not, be accompanied by the brief the applicant would file if permitted to appear. In the Supreme Court, the application shall be accompanied by the brief sought to be filed. The form of an *amicus* brief shall be subject to the same rules as those governing briefs of parties.[2] If, consistently with this rule, a brief is submitted with the application, then:

(a) if the court grants the application, the date of filing for the brief relates back to the date of filing for the application; or

(b) if the court denies the application, the court will strike the brief.

(4) In the Court of Appeals, unless the court grants leave otherwise for good cause shown, an *amicus* brief shall be due seven days after the date the brief is due of the party with whom *amicus curiae* is aligned or, if *amicus curiae* is not aligned with any party, seven days after the date the opening brief is due.

(5) With respect to cases in the Supreme Court on petition for review from the Court of Appeals:

(a) A person wishing to appear *amicus curiae* may seek to appear in support of or in opposition to a petition for review, on the merits of the case on review, or both.

(b) Unless the court grants leave otherwise for good cause shown, an

application to appear *amicus curiae* in support of or in opposition to a petition for review shall be filed within 14 days after the filing of a petition for review.

(c) Unless the court grants leave otherwise for good cause shown, an application to appear *amicus curiae* on the merits of a case on review shall be filed:

(i) On the date the brief is due of the party on review with whom *amicus curia*e is aligned,

(ii) On the date the petitioner's brief on the merits on review is due, if *amicus curiae* is not aligned with any party on review,[3] or

(iii) Within 28 days after review is allowed, if petitioner on review has filed a notice that petitioner does not intend to file a brief on the merits or has filed no notice, regardless of the alignment of *amicus curiae*.

(d) If a person filing an application to appear *amicus curiae* wishes to file one brief in support of or in opposition to a petition for review and on the merits of the case, the application and brief shall be filed within the same time that an application to appear in support of or in opposition to a petition for review would be filed. If a person has been granted permission to appear *amicus curiae* in support of or in opposition to a petition for review and the Supreme Court allows review, the person may file an *amicus curiae* brief on the merits without further leave of the court.

(e) If a party obtains an extension of time to file a petition for review, a response to a petition for review or a brief on the merits and if an *amicus curiae* brief was due on the same date as the petition, response or brief on the merits, the time for filing the *amicus curiae* brief is automatically extended to the same date.

(6) Except as provided in ORAP 11.30(7), with respect to cases in the Supreme Court on direct review or direct appeal, or other proceedings not subject to subsection (5), *amicus curiae* briefs shall be due as provided in subsection (4) of this rule.

(7) *Amicus curiae* may file a memorandum of additional authorities under the same circumstances that a party could file a memorandum of additional authorities under ORAP 5.85.

(8) *Amicus curiae* shall not be allowed to orally argue the case, unless the court specifically authorizes or directs oral argument.[4]

(9) The State of Oregon may appear as *amicus curiae* in any case in the Supreme Court and Court of Appeals without permission of the court. The state shall comply with all the requirements for appearing *amicus curiae*, including the time within which to appear under subsections (4), (5), and (6) of this rule. If the state is not aligned with any party, the state's

amicus curiae brief shall be due on the same date as the respondent's brief.

~~[1] As used in this rule, "person" includes an organization.~~

~~[2] *See* ORAP 5.05 to 5.30, ORAP 5.52, ORAP 5.77, ORAP 5.95, ORAP 9.05, ORAP 9.10, and ORAP 9.17 concerning requirements for briefs.~~

~~[3] *See* ORAP 9.17 concerning the due dates of briefs on review.~~

~~[4] *See* ORAP 6.10 concerning oral argument.~~

Rule 9.05
PETITION FOR SUPREME COURT REVIEW OF COURT OF APPEALS DECISION

(1) Reviewable Decisions

As used in this rule, "decision" means a decision of the Court of Appeals in the form of an opinion, per curiam opinion, or affirmance without opinion, or an order ruling on a motion, own motion matter, petition for attorney fees, or statement of costs and disbursements, including an order of the appellate commissioner together with the decision of the Chief Judge or Motions Department under ORAP 7.55(4)(c) or an order of the appellate commissioner under ORAP 7.55(4)(d).

(2) Time for Filing and for Submitting Petition for Review

(a) Except as provided in ORS 19.235(3) and ORAP 2.35(4), any party seeking to obtain review of a decision of the Court of Appeals shall file a petition for review in the Supreme Court within 35 days after the date of the decision of the Court of Appeals.[1] The Supreme Court may grant an extension of time to file a petition for review.

(b) (i) If a timely petition for reconsideration of a decision of the Court of Appeals is filed by any party, the time for filing a petition for review concerning that decision for all parties shall not begin to run until the Court of Appeals issues its written disposition of the petition for reconsideration. If a party obtains an extension of time to file a petition for reconsideration and does not file a petition for reconsideration within the time allowed, the time for filing a petition for review shall begin to run on expiration of the extension of time.

(ii) If a petition for review is filed during the time in which a petition

for reconsideration in the Court of Appeals may be filed, the petition for review will not be submitted to the Supreme Court until the time for filing a petition for reconsideration expires.

(iii) If a petition for review is filed after the filing of a timely petition for reconsideration, the petition for review will not be submitted to the Supreme Court until the Court of Appeals issues its written disposition of the petition for reconsideration.[~~2~~1]

(c) (i) If a party files a petition for review after the appellate judgment has issued, the party must file with the petition a motion to recall the appellate judgment. The petition and the motion must be filed within a reasonable time after the appellate judgment has issued. The motion to recall the appellate judgment must explain why the petition for review was not timely filed. The party need not file a separate motion for relief from default.

(ii) A party filing a motion to recall the appellate judgment in a criminal case, in addition to serving all other parties to the appeal, shall serve a copy of the motion on the district attorney.

(3) Form and Service of Petition for Review

(a) The petition shall be in the form of a brief prepared in conformity with ORAP 5.05 and ORAP 5.35. For purposes of ORAP 5.05, the petition must not exceed 5,000 words or (if the certification under ORAP 5.05(2)(d) certifies that the preparer does not have access to a word-processing system that provides a word count) 15 pages. The cover of the petition shall:

(i) Identify which party is the petitioner on review, including the name of the specific party or parties on whose behalf the petition is filed, if there are multiple parties on the same side in the case.

(ii) Identify which party is the respondent on review.

(iii) Identify the date of the decision of the Court of Appeals.

(iv) Identify the means of disposition of the case by the Court of Appeals:

(A) If by opinion, the author of the challenged opinion and the other members of the court who concurred in or dissented from the court's decision;

(B) If by per curiam opinion, affirmance without opinion, or by order, the members of the court who decided the case.[32]

(v) Contain a notice whether, if review is allowed, the petitioner on review intends to file a brief on the merits or to rely on the petition for review and brief or briefs filed in the Court of Appeals.[43]

(vi) For a case expedited under ORAP 10.15, prominently display the words "JUVENILE DEPENDENCY CASE EXPEDITED UNDER ORAP 10.15," "TERMINATION OF PARENTAL RIGHTS CASE EXPEDITED UNDER ORAP 10.15," or "ADOPTION CASE EXPEDITED UNDER ORAP 10.15," as appropriate.

(vii) Comply with the requirements in ORAP 5.95 governing briefs containing confidential material.

(b) Any party filing a petition for review shall serve two copies of the petition on every other party to the appeal or judicial review, and file with the Administrator an original petition with proof of service.

(4) Contents of Petition for Review

The petition shall contain in order:

(a) A short statement of the historical and procedural facts relevant to the review, but facts correctly stated in the decision of the Court of Appeals should not be restated.

(b) Concise statements of the legal question or questions presented on review and of the rule of law that the petitioner on review proposes be established, if review is allowed.

(c) A statement of specific reasons why the legal question or questions presented on review have importance beyond the particular case and require decision by the Supreme Court.[54]

(d) If desired, and space permitting, a brief argument concerning the legal question or questions presented on review.

(e) A copy of the decision of the Court of Appeals, including the court's opinion and any concurring and dissenting opinions.

~~[1] *See generally* ORS 2.520. *See* ORAP 7.25(2) regarding information that must be included in a motion for extension of time to file a petition for review.~~

[12] Paragraph (2)(b) of this rule does not apply to a motion for reconsideration filed under ORAP 6.25(5).

[23] *See* Appendix 9.05.

[34] *See* ORAP 9.17 regarding briefs on the merits.

[45] *See* ORAP 9.07 regarding the criteria considered by the Supreme Court when deciding whether to grant discretionary review. An assertion of the grounds on which the decision of the Court of Appeals is claimed to be wrong, without more, does not constitute compliance with this paragraph.

See ORAP 5.90(5) regarding filing a petition for review where a "*Balfour*" brief was filed on behalf of the appellant in the Court of Appeals.

Rule 11.25
BAR ADMISSION, REINSTATEMENT, AND DISCIPLINARY PROCEEDINGS

(1) As used in this rule, the following are parties:

(a) The Oregon State Bar in a disciplinary, contested reinstatement, or contested admission proceeding.

(b) The respondent in a disciplinary proceeding.

(c) The applicant in a contested reinstatement proceeding.

(d) The applicant in a contested admission proceeding.

(2) Disciplinary and Contested Reinstatement Proceedings

(a) A petition concerning a disciplinary proceeding or a trial panel opinion in a former member's contested reinstatement shall be filed with the Administrator, with proof of service on all parties, within 30 days after written notice by the Bar's Disciplinary Board Clerk of receipt of the trial panel opinion.

(b) The Bar's Disciplinary Counsel must file the record of the proceedings before the trial panel pursuant to BR 10.4. The preparation, transmission, and service of

the record is subject to ORAP 4.20, except that subsections (8) and (9) do not apply. Upon receipt of the record, the Administrator must send written notice to the parties.

(c) An opening brief shall be due no later than 28 days after the Administrator's notice to the parties of receipt of the record. An answering brief shall be due 28 days after filing of the opening brief. A reply brief, if any, shall be due 14 days after filing of the answering brief.

(d) If a respondent files a petition but then fails to file a brief within the time allowed, the Bar must either:

(i) File a brief within the time allowed for filing an answering brief. The brief shall comply with the rules governing petitions and opening briefs. At the time the brief is filed, the Bar must indicate whether it wishes to waive oral argument and submit the case on the record. Or:

(ii) Submit a letter stating that it wishes the matter submitted to the court on the record without briefing or oral argument. Notwithstanding waiver of briefing and oral argument under this paragraph, at the direction of the Supreme Court, the Bar shall file a petition and brief within the time directed by the court.

(3) Contested Admission Proceedings

(a) The Bar must file the decision of the Board of Bar Examiners on reinstatement with the Administrator pursuant to RFA 9.55. The Bar also must file the record with the Administrator. The preparation, transmission, and service of the record is subject to ORAP 4.20, except that subsections (8) and (9) do not apply. Upon receipt of the record, the Administrator must send written notice to the parties.

(b) A petition concerning a bar applicant's contested admission under Rule for Admission 9.60(1) shall be filed with the Administrator, together with an opening brief, with proof of service on all parties, within 28 days after the Administrator's written notice to the parties of the court's receipt of the record of the proceedings before the Board.

(c) An answering brief shall be due 28 days after filing of the opening brief. A reply brief, if any, shall be due 14 days after filing of the answering brief.

(4) A brief in any of the proceedings described in this rule must conform to ORAP 5.05, ORAP 5.35, and ORAP 9.17(5), except that no excerpt of record is required. The brief must show proof of service on all parties to the proceeding. The Bar shall be served by service on the Bar's Disciplinary Counsel.

(5) If the case is argued orally, the party who files the opening brief shall argue first.

See ORS 9.536, and Oregon State Bar Rules of Procedure, which are found on the Oregon State Bar's website, <https://www.osbar.org>, and in Thomson/West's *Oregon Rules of Court*.

Rule 12.05
DIRECT APPEAL OR JUDICIAL REVIEW IN THE SUPREME COURT

(1) Where a statute authorizes a direct appeal from a court of law to the Supreme Court,[1] except as otherwise provided by statute or by rule of appellate procedure, the appeal shall be taken in the manner prescribed in the rules of appellate procedure relating to appeals generally.

(2) Where a statute authorizes direct judicial review of an agency order or a legislative enactment by the Supreme Court,[2] except as otherwise provided by statute, the judicial review shall be initiated and conducted in the manner prescribed in the rules of appellate procedure relating to judicial review of agency orders generally.

(3) The notice of appeal or petition for judicial review shall state the statutory authority under which a direct appeal or judicial review is taken to the Supreme Court. Filing fees shall be assessed as provided in ORS 21.010.

(4) When required to do so by statute, the court will expedite its disposition of the appeal or judicial review.[3]

(5) On motion of a party or on the court's own initiative, the court may establish a special briefing schedule for the appeal or judicial review.

[1] *See, e.g.*, ORS 305.445 (tax court judgments and orders), ORS 662.120 (injunctions in labor dispute cases), and ORS 138.045(2) (certain pretrial orders in murder and aggravated murder cases).

[2] *See, e.g.*, ORS 469.403(3) (nuclear facility siting certificates).

[3] *See, e.g.*, ORS 138.261(6) and ORS 138.045(2) (requiring expedited disposition on appeal to the Supreme Court of a pretrial order dismissing or setting aside the accusatory instrument or suppressing evidence in a murder case).

ORAP COMMITTEE 2020

PROPOSAL NO.: 29

PROPOSER: n/a

AMENDING RULE(S): ORAP 10.35 -- Make Permanent Temporary Rule Created by CJO 18-04

DATE SUBMITTED: n/a

EXPLANATION:

The Court of Appeals has adopted a temporary rule, ORAP 10.35, which allows the court to decide an appeal by unpublished order when the parties agree on the correct resolution; the case presents no substantial question of law; and a published opinion would not benefit the bench, bar, or public. The rule as readopted and amended expires on December 31, 2020, unless adopted as permanent.

RULE AS AMENDED:

[See CJO 18-04 adopting and amending ORAP 10.35 below.]

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of Temporary Oregon Rule of Appellate Procedure 10.35.	))	Chief Judge Order 18-04

ORDER RE-ADOPTING AND AMENDING TEMPORARY RULE 10.35

Pursuant to ORS 2.560(2) (authorizing Court of Appeals to adopt rules of appellate procedure) and ORAP 1.10(3) (authorizing appellate court to adopt temporary rules outside of procedure provided in ORAP 1.10(2) for adoption of permanent rules of appellate procedure), the Court of Appeals re-adopts and amends Temporary Rule 10.35 as set forth below. The temporary rule is effective January 1, 2019, and expires on December 31, 2020.

Temporary Rule 10.35
Joint Motions for Resolution of Appeals by Unpublished Order

(1) On joint motion of the parties to any appeal, a department of the Court of Appeals may decide the merits of an appeal by unpublished order if the department determines:

(a) The appeal does not present a substantial question of law;

(b) All parties to the appeal agree both on the correct resolution of all questions raised on appeal and on the appropriate disposition of the appeal; and

(c) A published opinion would not significantly benefit the bench, the bar, or the public.

(2) Parties seeking relief based on the assertion that the appeal does not present a substantial question of law must include a sufficient statement of the facts of the case to show that all of the questions raised on appeal are grounded in those facts.

(3) Parties are discouraged from moving for relief under this subsection when resolution of the merits of the appeal would require the appellate court to try the cause anew upon the record or to make one or more factual findings anew upon the record. The Court of Appeals will

exercise its discretion to grant relief under this subsection in such cases only in exceptional circumstances.[1]

CHIEF JUDGE

10/2/2018
DATE

[1] *See also* ORS 138.227, ORS 138.665, and ORS 419A.209, pertaining, respectively, to criminal, post-conviction relief, and juvenile court cases, and authorizing the filing of a joint motion to vacate the trial court decision being appealed and to remand for reconsideration. Under ORS 2.570(6), such motions may be decided by order.