

ORAP COMMITTEE 2020
(updated March 11, 2020; May 12, 2020)

PROPOSAL NO.: 5

PROPOSER: Office of Public Defense Services, Appellate Division

AMENDING RULE(S): ORAP 5.70, 10.15 -- Allow Reply Briefs as Matter of Right
in Several Classes of Cases
(updated to add ORAP 10.15)

DATE SUBMITTED: December 31, 2019

WORKGROUP: *Josh Crowther, Ben Gutman, Julie E Smith, Daniel Parr,
Judge Lagesen*

EXPLANATION:

MAY 12, 2020 Update:

Email from Josh Crowther 5/12/2020: The ORAP subcommittee on ORAP 5.70 (reply briefs) has made progress and proposes the following for discussion, below. The original amendment carved out criminal and juvenile cases and allowed reply briefs in those cases as a matter of right. The subcommittee has reached a tentative agreement on omitting juvenile cases but expects some discussion on what other case types, if any, might be included in a final proposal.

- The subcommittee also added additional text to subsection(1)(b) as indicated in [track changes] to stress that a reply brief is not a requirement.
- In addition, in order to necessitate the timing of filings in juvenile cases, the subcommittee discussed ORAP 10.15 (Juvenile dependency and adoption cases) and submits the following for discussion.
- Finally, once final decisions are made about the types of cases in which reply briefs will be allowed, the briefing charts in ORAP 5.80 will need to be updated[.]

APRIL 16 PLACEHOLDER. Workgroup will report orally at April 16 meeting.

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Original materials shown below.

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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:

"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. A party is not expected to file a reply brief if the opening brief adequately presents the party's arguments.

(c) The court encourages a party who decides not to file a reply brief, as soon

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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;~~

~~(iiiiv)~~ 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); ~~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 back to the date of the filing for the motion;

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

Rule 10.15 JUVENILE DEPENDENCY AND ADOPTION CASES

(1) (a) Subsections (2) through (10) of this rule apply to an adoption case and a juvenile dependency case under ORS 419B.100, including but not limited to a case

involving jurisdiction, disposition, permanency, or termination of parental rights, but excluding a support judgment under [ORS 419B.400 to 419B.408](#).

(b) On motion of a party or on the court's own motion, the Court of Appeals may direct that a juvenile dependency case under [ORS 419B.100](#), except a termination of parental rights case, be exempt from subsections (2) through (10) of this rule.

(2) The caption of the notice of appeal, notice of cross-appeal, motion, or any other thing filed either in the Court of Appeals or the Supreme Court shall prominently display the words "EXPEDITED JUVENILE DEPENDENCY CASE (NOT TPR)," "EXPEDITED TERMINATION OF PARENTAL RIGHTS CASE," "JUVENILE DEPENDENCY SUPPORT CASE (NOT EXPEDITED)," or "EXPEDITED ADOPTION CASE," as appropriate.¹

(3) (a) In an adoption case or in a juvenile dependency case in which the appellant is proceeding without counsel or is represented by retained counsel, appellant shall make arrangements for preparation of the transcript within seven days after filing the notice of appeal.

(b) When the appellant is eligible for court-appointed counsel on appeal, the preparation of transcript at state expense is governed by the policies and procedures of the Office of Public Defense Services.²

(c) In a disposition proceeding pursuant to [ORS 419B.325](#), a dispositional review proceeding pursuant to [ORS 419B.449](#), a permanency proceeding pursuant to [ORS 419B.470 to 419B.476](#), or a termination of parental rights proceeding, respecting the record in the trial court, the appellant may designate as part of the record on appeal only the transcripts of the proceedings giving rise to the judgment or order being appealed, the exhibits in the proceeding, and the list prepared by the trial court under [ORS 419A.253\(2\)](#) and all reports, materials, or documents identified on the list. A party may file a motion to supplement the record with additional material pursuant to [ORS 19.365\(4\)](#) and [ORAP 3.05\(3\)](#).

(4) (a) The court shall not extend the time for filing the transcript under [ORAP 3.30](#) or for filing of an agreed narrative statement under [ORAP 3.45](#) for more than 14 days.³

(b) Except on a showing of exceptional circumstances, the court shall not grant an extension of time to request correction of the transcript.⁴

(5) The trial court administrator shall file the trial court record within 14 days after the date of the State Court Administrator's request for the record.

(6) (a) Appellant's opening brief and excerpt of record shall be served and filed within 28 days after the events specified in [ORAP 5.80\(1\)\(a\) to \(f\)](#).

(b) Respondent's answering brief shall be served and filed within 28 days after the filing of the appellant's opening brief.

(c) ~~No reply brief may be filed.~~ Any reply brief must be filed within 7 days after the filing of the respondent's answering brief.

(d) The court shall not grant an extension of time of more than 14 days for the filing of any opening or answering brief, nor shall the court grant more than one extension of time. The court shall not grant an extension of time for the filing of a reply brief.

(7) The court will set the case for oral argument within ~~63~~ 56 days after the filing of the opening brief.

(8) Notwithstanding [ORAP 7.30](#), a motion made before oral argument shall not toll the time for transmission of the record, filing of briefs, or hearing argument.

(9) The Supreme Court shall not grant an extension or extensions of time totaling more than 21 days to file a petition for review.

(10) (a) Notwithstanding any provision to the contrary in [ORAP 14.05\(3\)](#):

(i) The Administrator forthwith shall issue the appellate judgment based on a decision of the Court of Appeals on expiration of the 35-day period to file a petition for review, unless there is pending in the case a motion or petition for reconsideration on the merits, or a petition for review on the merits, or a party has been granted an extension of time to file a motion or petition for reconsideration on the merits or a petition for review on the merits. If any party has filed a petition for review on the merits and the Supreme Court denies review, the Administrator forthwith shall issue the appellate judgment.

(ii) The Administrator shall issue the appellate judgment based on a decision of the Supreme Court on the merits as soon as practicable after the decision is rendered and without regard to the opportunity of any party to file a petition for reconsideration.

(b) If an appellate judgment has been issued on an expedited basis under paragraph (a) of this subsection, the Administrator may recall the appellate judgment or issue an amended appellate judgment as justice may require for the purpose of making

effective a decision of the Supreme Court or the Court of Appeals made after issuance of the appellate judgment, including but not necessarily limited to a decision on costs on appeal or review.

¹ See [Appendix 10.15](#).

² See [ORS 419A.211\(3\)](#).

³ See [ORS 19.370\(2\)](#); [ORS 19.395](#).

⁴ See [ORS 19.370\(5\)](#).

RULES 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. A party is not expected to file a reply brief if the opening brief adequately presents the party's arguments.

(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;

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(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 back to the date of the filing for the motion;

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

Rule 10.15
JUVENILE DEPENDENCY AND ADOPTION CASES

(1) (a) Subsections (2) through (10) of this rule apply to an adoption case and a juvenile dependency case under [ORS 419B.100](#), including but not limited to a case involving jurisdiction, disposition, permanency, or termination of parental rights, but excluding a support judgment under [ORS 419B.400 to 419B.408](#).

(b) On motion of a party or on the court's own motion, the Court of Appeals may direct that a juvenile dependency case under [ORS 419B.100](#), except a termination of parental rights case, be exempt from subsections (2) through (10) of this rule.

(2) The caption of the notice of appeal, notice of cross-appeal, motion, or any other thing filed either in the Court of Appeals or the Supreme Court shall prominently display the words "EXPEDITED JUVENILE DEPENDENCY CASE (NOT TPR)," "EXPEDITED TERMINATION OF PARENTAL RIGHTS CASE," "JUVENILE DEPENDENCY SUPPORT CASE (NOT EXPEDITED)," or "EXPEDITED ADOPTION CASE," as appropriate.¹

(3) (a) In an adoption case or in a juvenile dependency case in which the appellant is proceeding without counsel or is represented by retained counsel, appellant shall make arrangements for preparation of the transcript within seven days after filing the notice of appeal.

(b) When the appellant is eligible for court-appointed counsel on appeal, the preparation of transcript at state expense is governed by the policies and procedures of

the Office of Public Defense Services.²

(c) In a disposition proceeding pursuant to [ORS 419B.325](#), a dispositional review proceeding pursuant to [ORS 419B.449](#), a permanency proceeding pursuant to [ORS 419B.470 to 419B.476](#), or a termination of parental rights proceeding, respecting the record in the trial court, the appellant may designate as part of the record on appeal only the transcripts of the proceedings giving rise to the judgment or order being appealed, the exhibits in the proceeding, and the list prepared by the trial court under [ORS 419A.253\(2\)](#) and all reports, materials, or documents identified on the list. A party may file a motion to supplement the record with additional material pursuant to [ORS 19.365\(4\)](#) and [ORAP 3.05\(3\)](#).

(4) (a) The court shall not extend the time for filing the transcript under [ORAP 3.30](#) or for filing of an agreed narrative statement under [ORAP 3.45](#) for more than 14 days.³

(b) Except on a showing of exceptional circumstances, the court shall not grant an extension of time to request correction of the transcript.⁴

(5) The trial court administrator shall file the trial court record within 14 days after the date of the State Court Administrator's request for the record.

(6) (a) Appellant's opening brief and excerpt of record shall be served and filed within 28 days after the events specified in [ORAP 5.80\(1\)\(a\) to \(f\)](#).

(b) Respondent's answering brief shall be served and filed within 28 days after the filing of the appellant's opening brief.

(c) Any reply brief must be filed within 7 days after the filing of the respondent's answering brief.

(d) The court shall not grant an extension of time of more than 14 days for the filing of any opening or answering brief, nor shall the court grant more than one extension of time. The court shall not grant an extension of time for the filing of a reply brief.

(7) The court will set the case for oral argument within 63 days after the filing of the opening brief.

(8) Notwithstanding [ORAP 7.30](#), a motion made before oral argument shall not toll the time for transmission of the record, filing of briefs, or hearing argument.

(9) The Supreme Court shall not grant an extension or extensions of time totaling more than 21 days to file a petition for review.

(10) (a) Notwithstanding any provision to the contrary in [ORAP 14.05\(3\)](#):

(i) The Administrator forthwith shall issue the appellate judgment based on a decision of the Court of Appeals on expiration of the 35-day period to file a petition for review, unless there is pending in the case a motion or petition for reconsideration on the merits, or a petition for review on the merits, or a party has been granted an extension of time to file a motion or petition for reconsideration on the merits or a petition for review on the merits. If any party has filed a petition for review on the merits and the Supreme Court denies review, the Administrator forthwith shall issue the appellate judgment.

(ii) The Administrator shall issue the appellate judgment based on a decision of the Supreme Court on the merits as soon as practicable after the decision is rendered and without regard to the opportunity of any party to file a petition for reconsideration.

(b) If an appellate judgment has been issued on an expedited basis under paragraph (a) of this subsection, the Administrator may recall the appellate judgment or issue an amended appellate judgment as justice may require for the purpose of making effective a decision of the Supreme Court or the Court of Appeals made after issuance of the appellate judgment, including but not necessarily limited to a decision on costs on appeal or review.

¹ See [Appendix 10.15](#).

² See [ORS 419A.211\(3\)](#).

³ See [ORS 19.370\(2\)](#); [ORS 19.395](#).

⁴ See [ORS 19.370\(5\)](#).

ORAP COMMITTEE 2020
(updated March 5, 2020; April 21, 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

(Updated March 5, 2020; April 21, 2020)

Workgroup: Ben Gutman, Josh Crowther, Theresa Kidd

EXPLANATION:

WORKGROUP REVISION FOR MAY 21 MEETING -- NOTES:

Email from Ben Gutman, 4/21/2020: Here is the final wordsmithing of ORAP 7.35(2) from our workgroup, which was tasked with making the proposal parallel to the language in ORAP 7.05. [SPA: The only change from the prior version of the rule as considered at the April 16 meeting is the addition of the following sentence at the end of (2): "If the moving party has not been able to learn a party's position on the motion, then the motion must so state."]

WORKGROUP REVISION FOR APRIL 16 MEETING -- NOTES:

Email from Ben Gutman, 3/5/2020: [The workgroup proposes amending subsection (2) as shown below.] The other subsections of ORAP 7.35 can remain as is. This proposal is substantively the same as the original one from Christa Obold Eshleman but applies to all cases rather than singling out juvenile dependency cases.

RULE AS AMENDED:

WORKGROUP REVISED VERSION FOR APRIL 16 MEETING:

Proposal #9 -- ORAP 7.35(2) -- Expand Notice Requirements for Emergency Motions in
Juvenile Dependency Cases

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. If the motion is filed within 21 days of the filing of the notice of appeal, the movant also shall make a good faith effort to notify counsel for each party and each self-represented party who is eligible to appear as of right as a party to the appeal under ORAP 2.25(3). The motion shall state whether the other party has been notified and served, and the party's position on the motion. If the moving party has not been able to learn a party's position on the motion, then the motion must so state.

(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

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

² See ORCP 9 F.

ORAP COMMITTEE 2020
(Updated 3/9/20; Updated May 12, 2020)

PROPOSAL NO.: 11

PROPOSER: Lisa Norris-Lampe, Appellate Legal Counsel

AMENDING: ORAP 8.15 -- Amicus Curiae

DATE: December 19, 2019
(Updated March 9, 2020, and May 12, 2020)

Workgroup: Julie A. Smith, Cody Hoesly, Lisa Norris-Lampe

EXPLANATION:

(3/9/20 Update Note: The Workgroup is proposing a structural rewrite of this rule that includes changing much of the text, although retaining the concepts set out in the original proposal regarding amicus briefs filed in the Supreme Court. (See explanation on pp 2-3 and updated proposal pp 4-13.)

(5/12/20 Update Note: Minor updates per second ORAP meeting discussion, including replacing "application" with "motion.")

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.

3/9/20 Update Note:

The Workgroup proposes restructuring ORAP 8.15, so that it begins with three preliminary subsections that govern amicus briefs regardless of appellate court (content of application; Oregon State Bar member, filing fee, and service requirements; and form of brief), then followed by a section each for the Court of Appeals and the Supreme Court, and then followed by additional, misc. subsections that apply regardless of court (memorandum of authorities, oral argument, State of Oregon as amicus). The Workgroup also updated much of the text, with the goal of making the rule easier to read. With the exception noted below, however, none of the textual changes are substantive (other than those originally proposed, relating to amicus filings in the Supreme Court).

Substantive change of note:

After conferring with Court of Appeals staff, the proposal makes one substantive change to the current Court of Appeals rule that permits an amicus applicant to file the application first and the brief later, or file the application and brief simultaneously. The updated proposal removes the first option and instead requires the applicant to file the application and the brief together, which is consistent with the current Supreme Court rule. The Workgroup thought it made sense to make the courts' rules consistent and therefore offers this proposal for the group's discussion. (And, it appears that more amicus applications are filed in the Supreme Court -- which already has a simultaneous filing rule -- than in the Court of Appeals (2019: 29 SC cases v. 15 C/A cases; 2018: 47 SC cases v. 20 C/A cases)). The downside of requiring simultaneous filings is that the applicant must take the time to prepare a brief, when there is a possibility that the application would be denied.

Additional potential change for Committee discussion:

The Workgroup also would like the Committee to discuss whether the word "application" throughout ORAP 8.15 could be replaced with "motion." In essence, the application serves as a motion (except that conferral requirements do not apply), and the Workgroup could not identify any persuasive reason to continue to use the unique term "application," when "motion" appears to apply. (There is no statutory requirement for an "application.")

5/12/20 Update Note:

At the second ORAP Committee meeting, the Committee approved the suggestion above, changing "application" to "motion." The updated proposal does that, also replacing "applicant" with "movant" (to distinguish between "amicus," which refers to the same person after the motion to appear as amicus curiae has been granted). The updated proposal excepts the "confer" requirement that ordinarily applies to motions under ORAP 7.05(1)(d); it also excepts the response and reply provisions set out in ORAP 7.05(3) and (4).

RULE AS AMENDED (*Updated 3/9/20; 5/12/20*):

Edited version (new text in **braces/boldface/underscore**; omitted text in *brackets/italics*):

Rule 8.15

AMICUS CURIAE

- (1) **Except as provided in subsection (8), a**[A] person¹ may appear as *amicus curiae* in any case pending before **an**[*the*] appellate court only by permission of the [*appellate*] court on written **motion**[*application*] setting forth the interest of the person in the case. [*The*] **Any motion to appear as amicus curiae shall not contain argument on the resolution of the case and otherwise** [*application*] must:
 - (a) **S**[*s*]tate whether the **movant**[*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) **I**[*i*]dentify the party with whom the **movant would be**[*amicus is*] aligned or state that the **movant**[*amicus*] is unaligned;
 - (c) **I**[*i*]dentify the **date**[*deadline*] in the case that is relevant to the timeliness of the **motion**[*amicus application*] (such as the date that the aligned party's brief is due); and
 - (d) **E**[*e*]xplain why the **motion**[*application*] is timely relative to that **date**[*deadline*].

[(e) *The application shall not contain argument on the resolution of the case.*]
- (2) The **motion**[*application*] shall be submitted by an active member of the Oregon State Bar. **No**[A] filing fee is [*not*] required. The form of the **motion**[*application*] shall comply with ORAP 7.10(1) and (2)**,** and the **movant**[*applicant*] shall [*file the original and one copy of the application. A copy of the application shall be*] serve[d] **it** on all parties to the proceeding. **Subsections (1)(d), (3), and (4) of ORAP 7.05 do not apply to a motion filed under this rule.**

(3) **{The motion shall be accompanied by the amicus brief sought to be filed. [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) **{I}[i]**if the court grants the **{motion}**[*application*], the date of filing for the brief relates back to the date of filing for the **{motion}**[*application*]; [or]

(b) **{I}[i]**if the court denies the **{motion}**[*application*], the **{brief will be deemed stricken}**[*court will strike the brief*];

{(c) The form of the brief is subject to the same rules as those governing briefs of the parties, to the extent practicable.²}

(4) In the Court of Appeals,

{(a) U}[u]nless the court grants leave otherwise for good cause shown, the **{motion}**[*amicus brief*] shall be **{filed within}**[*due*] seven days after the **{due}** date **{for}** the brief [*is due*] of the party with whom **{the movant}**[*amicus curiae*] is aligned or, if **{unaligned}**[*amicus curiae is not aligned with any party*], seven days after the **{due}** date **{for}** the opening brief [*is due*].

{(b) If a party obtains an extension of time for any applicable brief deadline, the time for filing a motion to appear as amicus curiae is automatically extended accordingly.}

(5) **{I}**[*With respect to cases i*]n the Supreme Court, except as otherwise provided in ORAP 11.35 and ORAP 12.30 [*on petition for review from the Court of Appeals:*]**{,}**

(a) A **{movant}**[*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.*]

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

{(ii) A petition for a writ, the merits of that case, or both; or}

- (iii) The merits of any other case before the court on direct appeal, direct judicial review, or direct review, or in an original proceeding.**
- (b) **{The following apply to a motion to appear as amicus curiae in support of or opposition to a petition for review or a petition for a writ:}***[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.]*
- {(i) The motion shall be filed within 14 days after the filing of the petition, unless the court grants leave otherwise for good cause shown.**
- {(ii) The movant may, but need not, file with the motion a combined amicus brief in support of, or in opposition to, the petition and also on the merits of the case. The due date set out in subparagraph (i) applies to a combined brief filed with the motion.**
- {(iii) If the movant does not submit a combined amicus brief with the motion, and the court grants the motion, the movant may file a brief on the merits without further leave of the court, by the applicable due date set out in paragraph (c).}**
- (c) *[Unless the court grants leave otherwise for good cause shown, an]***{A motion}***[application]* to appear *[amicus curiae]* on **{only}** the merits of a **{ny}** case *[on review]* shall be filed **{by the following dates, unless the court grants leave otherwise for good cause shown}**:
- (i) **{If the movant is aligned with a party, by the due}***[On the]* date **{for that party's}***[the]* brief **{(excluding reply briefs).}***[is due of the party on review with whom amicus curiae is aligned,]*
- (ii) **{If the movant is not aligned with any party, by}***[On]* the **{due}** date **{for}** the petitioner³*['s]* **{on review's}** brief on the merits **{or the opening brief.}***[on review is due, if amicus curiae is not aligned with any party on review,³ or]*
- (iii) **{If the case is before the court on a petition for}***[Within 28 days after]* review **{from the Court of Appeals and the}***[is allowed, if]*

petitioner on review has **{stated an intent to rely on the petition and the petitioner's Court of Appeals brief}***[filed a notice that petitioner does not intend to file a brief on the merits or has filed no notice]*, regardless of the **{movant's}** alignment*[of amicus curiae]*, **within 28 days after review is allowed**.

(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* **{for a writ, or for any of the}***[a] brief* **{deadlines described in paragraph (c)(i) or (ii)}***[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 **{a motion to appear as amicus curiae or}** the amicus *[curiae]* brief is automatically extended **{accordingly}***[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 **{in which}***[that] a party **{may do so}***[could file a memorandum of additional authorities] under ORAP 5.85.***

*[(7)[8])**{Unless the court grants leave otherwise, }***[A]{a}amicus curiae **{may}***[shall] not [be allowed to]orally argue the case[, unless the court specifically authorizes or directs oral argument].^{{3}[4]}***

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

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

2 See ORAP **{Chapters 5 and 9,}**[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 AS AMENDED (Originally Proposed):

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 (Updated, 5/12/20):

Rule 8.15

AMICUS CURIAE

- (1) Except as provided in subsection (8), a person¹ may appear as *amicus curiae* in any case pending before an appellate court only by permission of the court on written motion setting forth the interest of the person in the case. Any motion to appear as *amicus curiae* shall not contain argument on the resolution of the case and otherwise must:
 - (a) State whether the movant intends to present a private interest of its own or 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 movant would be aligned or state that the movant is unaligned;
 - (c) Identify the date in the case that is relevant to the timeliness of the motion (such as the date that the aligned party's brief is due); and
 - (d) Explain why the motion is timely relative to that date.
- (2) The motion shall be submitted by an active member of the Oregon State Bar. No filing fee is required. The form of the motion shall comply with ORAP 7.10(1) and (2), and the movant shall serve it on all parties to the proceeding. Subsections (1)(d), (3), and (4) of ORAP 7.05 do not apply to a motion filed under this rule.
- (3) The motion shall be accompanied by the amicus brief sought to be filed.
 - (a) If the court grants the motion, the date of filing for the brief relates back to the date of filing for the motion;
 - (b) If the court denies the motion, the brief will be deemed stricken;
 - (c) The form of the brief is subject to the same rules as those governing briefs of the parties, to the extent practicable.²
- (4) In the Court of Appeals,

- (a) Unless the court grants leave otherwise for good cause shown, the motion shall be filed within seven days after the due date for the brief of the party with whom the movant is aligned or, if unaligned, seven days after the due date for the opening brief.
 - (b) If a party obtains an extension of time for any applicable brief deadline, the time for filing a motion to appear as amicus curiae is automatically extended accordingly.
- (5) In the Supreme Court, except as otherwise provided in ORAP 11.35 and ORAP 12.30,
- (a) A movant 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 that case, or both;
 - (ii) A petition for a writ, the merits of that case, or both; or
 - (iii) The merits of any other case before the court on direct appeal, direct judicial review, or direct review or in an original proceeding.
 - (b) The following apply to a motion to appear as amicus curiae in support of or oppose a petition for review or a petition for a writ:
 - (i) The motion shall be filed within 14 days after the filing of the petition, unless the court grants leave otherwise for good cause shown.
 - (ii) The movant may, but need not, file with the motion a combined amicus brief in support of, or in opposition to, the petition and also on the merits of the case. The due date set out in subparagraph (i) applies to a combined brief filed with the motion.
 - (iii) If the movant does not submit a combined amicus brief with the motion, and the court grants the motion, the movant may file a brief on the merits without further leave of the court, by the applicable due date set out in paragraph (c).
 - (c) A motion to appear on only the merits of any case shall be filed by the following dates, unless the court grants leave otherwise for good cause shown:

- (i) If the movant is aligned with a party, by the due date for that party's brief (excluding reply briefs).
 - (ii) If the movant is not aligned with any party, by the due date for the petitioner on review's brief on the merits or the opening brief.
 - (iii) If the case is before the court on a petition for review from the Court of Appeals and the petitioner on review has stated an intent to rely on the petition and the petitioner's Court of Appeals brief, regardless of the movant's alignment, within 28 days after review is allowed.
- (d) If a party obtains an extension of time to file a response to a petition for review or for a writ, or for any of the brief deadlines described in paragraph (c)(i) or (ii), the time for filing a motion to appear as *amicus curiae* or the *amicus* brief is automatically extended accordingly.
- (6) *Amicus curiae* may file a memorandum of additional authorities under the same circumstances in which a party may do so under ORAP 5.85.
 - (7) Unless the court grants leave otherwise, *amicus curiae* may not orally argue the case.³
 - (8) The State of Oregon may appear as *amicus curiae* in any case in an appellate court without permission of the court. The state shall comply with all the requirements for appearing *amicus curiae*, including the time within which to appear, except that, if the state is not aligned with any party, the state's *amicus* brief shall be due on the same date as the respondent's brief on the merits or the answering brief.

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

2 See ORAP Chapters 5 and 9, concerning requirements for briefs.

3 See ORAP 6.10 concerning oral argument.

ORAP COMMITTEE 2020
(Updated 3/9/20, 5/12/20)

PROPOSAL NO.: 21

PROPOSER: Lisa Norris-Lampe, Appellate Legal Counsel

AMENDING RULE(S): ORAP 12.20(7) -- Delete Subsection Regarding When Court Will Set Oral Argument Date

DATE SUBMITTED: January 24, 2019
(Updated March 9, 2020 and May 12, 2020)

Workgroup: Bill Kabeiseman, Lisa Norris-Lampe

EXPLANATION:

[Taken from Lisa Norris-Lampe's original submission email:]

The certified question rule, ORAP 12.20, says in (7) that the case will be set for oral argument as soon as practicable after the parties' briefs are filed. The subparagraph should be eliminated. (1) The Supreme Court is trying to set argument earlier than once all the briefs are in; (2) subparagraph (3) already tells the parties that there may be argument, so there is no need for a separate section telling them when argument will be set; and (3) the rule creates an unnecessary restriction on the process of setting argument.

3/9/20 Update Note:

In reviewing the proposal, the Workgroup also proposes amending subsection (3) of ORAP 12.20 -- pertaining to whether parties may argue whether (or not) a question should be certified -- for the sake of clarity. (See pp 2, 4) The Workgroup has made no change to the original proposal to remove current subsection (7).

5/12/20 Update Note:

Minor rewording in subsection (3), per second meeting, for clarification.

RULE AS AMENDED (*Updated 3/9/20; 5/12/20*):

Rule 12.20 CERTIFICATION OF QUESTION OF LAW TO SUPREME COURT BY FEDERAL COURTS AND OTHER STATE COURTS

The procedure for certifying a question of law to the Supreme Court under ORS 28.200 through 28.255 shall be as follows:

(1) (a) The certification order shall set forth the question of law sought to be answered and a statement of facts relevant to the question, including the nature of the controversy in which the question arose. The statement of facts may be a brief, memorandum, or other material from the file of the certifying court if it contains the relevant facts and shows the nature of the controversy.

(b) The certification order shall be signed by the presiding judge and forwarded to the Supreme Court by the certifying court's clerk of court or court administrator accompanied by a copy of the court's register of the case. If the certifying court's register does not show the names and addresses of the parties or their attorneys, the court clerk or administrator shall separately provide that information.

(2) The filing and first appearance fees in the Supreme Court shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification. The fees shall be collected when the parties file their stipulated or separate designations of record, as provided in subsection (5) of this rule.

(3) In deciding whether to accept a certified question, the Supreme Court will not consider written argument from the parties or hold to it without oral argument unless it specifically directs otherwise or written argument from the parties unless otherwise directed by the Supreme Court.

(4) The Administrator shall send a copy of the court's order accepting or declining to accept a certified question of law to the certifying court and to the parties.

(5) (a) If the court accepts certification of a question of law, the parties to the certified question shall attempt to agree on a designation of the part of the record of the certifying court necessary to a determination of the question. If the parties are unable to agree on a designation of record, each party may file a separate designation of record.

(b) A stipulated designation of record or the parties' separate designations of

record shall be filed within 14 days after the date of the court's order accepting certification.

(c) On receipt of a stipulated designation or separate designations of record, the Administrator shall request from the certifying court's clerk of court or court administrator the part or parts of the record as designated, and any parts of the record that the Supreme Court determines may be necessary in answering the certified question(s). The Administrator shall serve a copy of the request on the parties.

(6) (a) Unless otherwise ordered by the Supreme Court, the certified question of law shall be briefed by the parties. The proponent of the question certified to the court shall file the opening brief and any other party may file an answering brief. If the nature of the question is such that no party is the proponent of the question, the plaintiff or appellant shall file the opening brief and the defendant, respondent, or appellee shall file the answering brief.

(b) The opening brief shall be served and filed within 28 days after the date the Administrator requests the record from the certifying court. The answering brief shall be served and filed within 28 days after the date the opening brief is served and filed. The reply brief, if any, is due within 14 days of the date the answering brief is served and filed.

(c) As nearly as practicable, briefs shall be prepared as provided in ORAP 5.05 through 5.52, except that, in lieu of assignments of error, the brief shall address each certified question accepted by the court.

(7) ~~The case will be set for oral argument as soon as practicable after the parties' briefs are filed.~~

~~(8)~~ The court shall issue a written decision stating the law governing the question certified. Unless specifically ordered by the Supreme Court, costs will not be allowed to either party. The Administrator shall send to the parties copies of the court's decision at the time the decision is issued.

~~(89)~~ Petitions for reconsideration of the court's decision shall be subject to ORAP 9.25. After expiration of the period for filing a petition for reconsideration or after disposition of all petitions for reconsideration, the Administrator shall send a copy of the decision under seal of the Supreme Court to the certifying court and shall send copies thereof to the parties. Issuance of a sealed copy of the court's decision to the certifying court terminates the Supreme Court case.

CLEAN:

Proposal # 21 -- ORAP 12.20(7) -- Delete Subsection Regarding When Court Will Set Oral Argument Date

Page 3

Rule 12.20
CERTIFICATION OF QUESTION OF LAW TO
SUPREME COURT BY FEDERAL COURTS
AND OTHER STATE COURTS

The procedure for certifying a question of law to the Supreme Court under ORS 28.200 through 28.255 shall be as follows:

(1) * * *

* * * * *

(3) In deciding whether to accept a certified question, the Supreme Court will not consider written argument from the parties or hold oral argument unless it specifically directs otherwise.

* * * * *

(7) The court shall issue a written decision stating the law governing the question certified. Unless specifically ordered by the Supreme Court, costs will not be allowed to either party. The Administrator shall send to the parties copies of the court's decision at the time the decision is issued.

(8) Petitions for reconsideration of the court's decision shall be subject to ORAP 9.25. After expiration of the period for filing a petition for reconsideration or after disposition of all petitions for reconsideration, the Administrator shall send a copy of the decision under seal of the Supreme Court to the certifying court and shall send copies thereof to the parties. Issuance of a sealed copy of the court's decision to the certifying court terminates the Supreme Court case.