

MEMORANDUM

TO: ORAP Committee

FROM: Justice Meagan Flynn; S.P. Armitage

RE: Public Comments to Proposed ORAP Amendments

DATE: September 3, 2020

EXECUTIVE SUMMARY

- Three people submitted public comments.
- *Nonsubstantive comments*: Two comments related to typos. Recommend appropriate changes.
- *Substantive comments*: Subcommittees who worked on relevant rules asked to review and provide any recommendations to committee. Forward to Stephen Armitage for circulation *by Thursday, September 24*:
 - ORAP 5.70: J Crowther, B Gutman, JE Smith, D Parr, E Lagesen.
 - ORAP 9.05: L Norris-Lampe, B Kabeiseman.
 - ORAP 12.05: L Norris-Lampe, A Landau, C Hoesly, B Gutman

DISCUSSION

The period for public comment has now expired. The committee received comments from three people: Jean Ann Quinn, Christa Obold Eshleman, and Elaine Bensavage. Ms. Eshleman and Ms. Bensavage raised substantive questions, so their comments are attached.

Two matters raised by the comments can be addressed quickly, because they involve typographical errors:

- Ms. Quinn noted that "in the amendments to ORAP 2.05, in the changes following

1 n 8, 'no content' [should] be 'no contest.'"

2 • Ms. Bensavage noted that ORAP 1.35 has two footnotes numbered "4."

3 Assuming for purposes of argument that the committee needs to authorize such technical
4 changes, we recommend that the committee do so.

5 The substantive comments require more detailed consideration. Briefly:

6 • Ms. Eshleman has questions or concerns in connection with juvenile cases.
7 Specifically, they involve:

8 ○ ORAP 5.70 (reply briefs): If reply briefs are now allowed without motion
9 in juvenile cases, would "a notice of intent not to file one * * * be expected
10 in every appeal, per ORAP 5.70(1)(c)"?¹

11 ○ ORAP 5.80 Brief Time Chart 1 (shows timing to file various briefs):
12 Juvenile delinquency briefs are governed by ORAP 5.80, but chart refers to
13 "juvenile" generically, and the footnote refers to ORAP 10.15 (which
14 applies only to juvenile dependency and adoption cases).

15 ○ ORAP 9.05 (petitions for review in Supreme Court): Question about
16 service requirements for motions to extend time to file petitions for review
17 in multiparty cases.

18 • Ms. Bensavage has concerns about the terminology and substance of ORAP 12.05
19 (relating to direct appeal, direct judicial review, and direct review proceedings),
20 primarily relating to the term "direct review proceeding."

21 The comments are at the end of this memo. Copies of the last agenda materials circulated
22 to the committee regarding those rules are also attached.

23 We ask the subcommittee chairs to coordinate with the subcommittee
24 members and forward recommended changes -- if any -- by email to Stephen Armitage
25 by Thursday, September 24 (one week before our next meeting). The subcommittees are:

¹ ORAP 5.70(1)(c) provides that parties who do not intend to file a reply brief are "encourage[d]" to notify the court in writing.

1 • ORAP 5.70: J Crowther, B Gutman, JE Smith, D Parr, E Lagesen.

2 • ORAP 9.05: L Norris-Lampe, B Kabeiseman.

3 • ORAP 12.05: L Norris-Lampe, A Landau, C Hoesly, B Gutman

4 Please contact Stephen Armitage if you have any questions.

5 Thank you.

From: Christa Obold Eshleman
To: OJD ORAP Committee
Subject: comments to proposed ORAP changes
Date: Friday, August 21, 2020 5:14:24 AM

ORAP Committee:

The Youth, Rights & Justice appellate section represents children, youth and parents in juvenile dependency and delinquency cases on appeal. We have the following comments on the proposed ORAP revisions:

1. Do we correctly understand that ORAP 5.70(3)(b) applies only to the types of cases in (3)(a), so no motion to file one would be required in juvenile cases, but a notice of intent not to file one would be expected in every appeal, per ORAP 5.70(1)(c)?

2. Although there is a 7-day timeline given for reply briefs in juvenile dependency cases in ORAP 10.15, that section does not apply to juvenile delinquency cases. Delinquency cases fall under ORAP 5.80, but this is not addressed in the Brief Time Chart 1 in ORAP 5.70. Instead, it lumps “Juvenile” cases into the expedited category, with an oblique reference to ORAP 10.15, which covers only dependency and adoption cases. We suggest adding “Juvenile Delinquency” to the chart as its own category, or at least including an explanation in either footnote 1 or 2 about where delinquency cases fall.

3. The service requirements for a motion for extension of time for a petition for review in multiparty cases are unclear. ORAP 9.05(3)(b) requires that the petition for review itself be served on “every other party to the appeal.” ORAP 10.15(9) provides the cap of 21 days extension of time to file a petition, but no reference to procedure for the MOET is included, particularly after the proposed deletion of footnote 1 in ORAP 9.05. In multiparty juvenile cases, many times the children or one of the parents are not served a MOET for a petition for review. Although there is a requirement that every party to the appeal be served the actual PFR, it is unclear if all of the parties to the Court of Appeals case must be served with the “case-initiating” motion for extension of time to file the PFR. The lack of service creates confusion for the unserved parties about the status of the Court of Appeals decision when we believe the time has elapsed for a PFR to be filed, yet later learn that it has not, because a MOET was filed without our knowledge. Rather than just removing footnote 1 in ORAP 9.05, we suggest also clarifying ORAP 9.05(3)(b) to include a MOET for a PFR.

Thank you very much for considering these comments and for your work to improve the ORAPs.

Best regards,
Christa Obold Eshleman, Supervising Attorney

Youth, Rights & Justice
1785 NE Sandy Blvd., Ste. 300
Portland, OR 97232
503-232-2540, ext. 250

MEMORANDUM

TO: ORAP Committee

FROM: Elaine E. Bensavage

RE: ORAP Amendments, 08-2020

DATE: August 31, 2020

1. ORAP 1.35: Footnote 4 is doubled (not the contents of the footnote, but the footnote number).
2. ORAP 12.05: My greatest concerns pertain to this ORAP. Subsections (2) and (3) explain "direct appeal" and "direct judicial review," but there is no corollary for "direct review proceeding." Likewise, there is no explanatory footnote containing an example of what is a "direct review proceeding," unlike for "direct appeal" and "direct judicial review." I'm uncertain of the difference between a "direct judicial review" and a "direct review proceeding." Would a ballot title review proceeding be an example of the former or the latter? Does "direct review proceeding" refer to statutes where the legislature directs that any challenge go directly to the Supreme Court? Or is that a separate category described by subsection (5) alone? Additionally, "direct review proceeding" is mentioned for the first time in subsection (4), without context. And subsection (5) feels like it's coming out of left field because, to the extent it is distinct, it is not mentioned in subsection (1). Perhaps I'm being dense, but I strongly urge the ORAP Committee to rethink the content and organization of this rule.

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.

Proposal # 5 -- ORAP 5.70, 10.15 -- Allow Reply Briefs as Matter of Right in Several
Classes of Cases

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

Proposal # 5 -- ORAP 5.70, 10.15 -- Allow Reply Briefs as Matter of Right in Several
Classes of Cases

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;

(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 3/9/20)

PROPOSAL NO.: 12 A & B

PROPOSER: Lisa Norris-Lampe, Appellate Legal Counsel

AMENDING: ORAP 9.05 -- Petition for Supreme Court Review of Court of Appeals Decision

DATE: December 19, 2019 (edited Jan 23, 2020)
(Updated March 9, 2020)

Workgroup: Bill Kabeiseman, Lisa Norris-Lampe

EXPLANATION:

(3/9/19 Update Note: Upon conferring after the last meeting, the Workgroup confirmed that no change was needed to this proposal. It therefore is being resubmitted in its original form.)

ORAP 9.05(2) governs the filing of petitions for review (PTRVs) in the Supreme Court; paragraph (b) of that rule provides that the Supreme Court may grant an extension of time to file a PTRV. This proposal would clarify the rules that govern the filing of such a motion for extension of time.

Summary of Issue and Proposed Changes:

AGENDA ITEM NO. 12 A:

Although ORAP 9.05(2) implicitly conveys that a motion for extension of time (MOET) should be filed in the Supreme Court, many such motions are filed each year in the Court of Appeals, instead. The proposed amendment therefore would clarify that any MOET to file a PTRV must be filed in the Supreme Court.

AGENDA ITEM NO. 12 B:

The proposal also would delete the text of FN 2, which excludes ORAP 6.25(5) from the timing rules, replacing it with an inclusive reference to ORAP 6.25(2) in new

subparagraph (c). (I think that it is easier for our users if exceptions to rules are part of the rules, rather than set out in footnotes.)

RULE AS AMENDED:

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

Rule 9.05

PETITION FOR SUPREME COURT REVIEW OF COURT OF APPEALS DECISION

* * * * *

(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.*[FNI, Or, alternatively, edit FN 1]*

{(b)} **A party seeking additional time to file a petition for review shall file a motion for extension of time in the Supreme Court, which that court may grant.***[The Supreme Court may grant an extension of time to file a petition for review.]*

{(c)}*[b]*(i) If a timely petition for reconsideration of a decision of the Court of Appeals is filed **{under ORAP 6.25(2)}** 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.[FN 2]
- {d}[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.

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

Clean Version:

Rule 9.05

PETITION FOR SUPREME COURT REVIEW OF COURT OF APPEALS DECISION

* * * * *

(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. [Alternative, edit FN 1]
- (b) A party seeking additional time to file a petition for review shall file a motion for extension of time in the Supreme Court, which that court may grant
- (c)
 - (i) If a timely petition for reconsideration of a decision of the Court of Appeals is filed under ORAP 6.25(2) 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.
- (d)
 - (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.

ORAP COMMITTEE 2020
(Updated 3/9/20)

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)
(Updated March 9, 2020)

Workgroup: *Ben Gutman, Aaron Landau, Cody Hoesly, Lisa Norris-Lampe, Jason Specht (and consulting Greg Chaimov)*

EXPLANATION:

(3/9/20 Update Note: The Workgroup retained most of the structure and essential content of the original proposal, but reworked some structure/text. See pp 2-5, 8-9).

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.

3/9/20 Update Note:

The Workgroup made minor, consistency-related edits to the title and to subsection (1) and (3).

As to new subsection (5), the Workgroup agreed with the proposed concept to require the petition to comply, to the extent practicable, with ORCP 18, and then require the filing of a response that complied, to the extent practicable, with ORCP 19. The Workgroup disagreed, however, with the original proposal's approach in requiring the petition and response to identify which facts were agreed-upon or disputed. The updated proposal instead sets out a two-step process: (1) the filing of a petition, response, and, if desired, a reply (to assert any affirmative allegation in avoidance of any affirmative defense asserted in the response); and then (2) a conferral requirement followed by the filing of a joint statement that sets out stipulated facts, identifies whether any facts remain disputed, and explains positions on the appointment of a special master. Finally, the Workgroup added two new briefing provisions, one to

clarify the time for filing briefs, and one to clarify briefing form and content requirements.

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

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

Rule 12.05

DIRECT APPEAL_{,}*[OR]* **{DIRECT}** JUDICIAL REVIEW_{,} **AND DIRECT REVIEW** IN THE SUPREME COURT

{(1)} This rule governs direct appeal, direct judicial review, and 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,*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],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 {case-initiating document}*[notice of appeal or petition for judicial review]* shall state the statutory authority under which **{the}***[a]* direct appeal_{,} **direct** *[or]*judicial review_{,} **or direct review proceeding** is **{being}** taken **{directly}** 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, except as otherwise provided by statute or court order:

(a) The petition shall, to the extent practicable, allege one or more claims for relief as provided in ORCP 18.

(b) A response to the petition shall be filed within 14 days after the petition is filed and shall, to the extent practicable, respond to the petitioner's claims for relief as provided in ORCP 19.

- (c) The petitioner may file a reply to assert any affirmative allegations in avoidance of any affirmative defenses asserted in the response. A reply shall be filed within 14 days after the response is filed.**
- (d) No later than 14 days after the response described in paragraph (b) is filed, the parties shall confer about the facts necessary for the court's resolution of the legal and procedural issues, and the petitioner shall file a joint statement that:**
- (i) Identifies all stipulated facts;**
 - (ii) States whether any facts are disputed and, if so, explains the parties' respective positions as to those facts; and**
 - (iii) Explains the parties' positions as to whether the court should appoint a special master.**
- (d) The time for filing briefs set out in ORAP 5.80 applies, except that the opening brief is due 49 days after the court settles the record.**
- (e) To the extent practicable, the rules set out in ORAP Chapter 5 apply to the form and content of any brief filed. }**

[(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) (**energy**)[*nuclear*] facility sit**e**[*ing*] 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).*]

RULE AS AMENDED (*Original Proposal*):

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 (Updated 3/9/20):

Rule 12.05

DIRECT APPEAL, DIRECT JUDICIAL REVIEW, AND DIRECT REVIEW IN THE SUPREME COURT

- (1) This rule governs direct appeal, direct judicial review, and direct review proceedings in the Supreme Court.
- (2) When a statute authorizes a direct appeal from a court of law,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,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 case-initiating document shall state the statutory authority under which the direct appeal, direct judicial review, or direct review proceeding is being taken directly 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, except as otherwise provided by statute or court order:
 - (a) The petition shall, to the extent practicable, allege one or more claims for relief as provided in ORCP 18.
 - (b) A response to the petition shall be filed within 14 days after the petition is filed and shall, to the extent practicable, respond to the petitioner's claims for relief as provided in ORCP 19.
 - (c) The petitioner may file a reply to assert any affirmative allegations in avoidance of any affirmative defenses asserted in the response. A reply shall be filed within 14 days after the response is filed.
 - (d) No later than 14 days after the response described in paragraph (b) is filed, the parties shall confer about the facts necessary for the court's resolution of

the legal and procedural issues, and the petitioner shall file a joint statement that:

- (i) Identifies all stipulated facts;
 - (ii) States whether any facts are disputed and, if so, explains the parties' respective positions as to those facts; and
 - (iii) Explains the parties' positions as to whether the court should appoint a special master.
- (d) The time for filing briefs set out in ORAP 5.80 applies, except that the opening brief is due 49 days after the court settles the record.
 - (e) To the extent practicable, the rules set out in ORAP Chapter 5 apply to the form and content of any brief filed.
- (6) On motion of a party or on the court's own initiative, the court may establish a special briefing schedule.

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) (energy facility site certificates).