

ORAP Committee 2022 Meeting Minutes

Date: 2/17/2022

Time: 9:00 - 12:00 PM

Location: Remote via Webex

Members Present:	Justice Meagan Flynn (Committee Chair), Judge Jacqueline Kamins, Benjamin Gutman, Ernest Lannet, Tiffany Keast, Julie Smith, William Kabeiseman, Travis Eiva, Crystal Chase, Debbie Spradley
Members Absent:	Chief Judge Erin Lagesen
Nonvoting Members Present:	Theresa Kidd, Daniel Parr, Stephen Armitage, Stacy Harrop
Court Liaison Present:	Lisa Norris-Lampe, Judge James Egan
Scribe:	Khoben Ghattas
Next Meeting:	April 21, 2022

Introduction – ORAP Committee and members.

Justice Meagan Flynn, committee chair, opened the meeting by asking the committee members to introduce themselves.

Consideration of "technical" proposals.

Justice Meagan Flynn asked members to identify any proposals that they felt needed individual discussion. It was noted that at the request of any one committee member, a "technical amendment" would be moved to part C of the agenda for a proposal-specific discussion. Ernest Lannet asked that proposal number 7 be moved for a short discussion about the specific revisions to ORAP 13.05. Julie Smith asked that proposal number 9 be moved for a discussion of the wording of the proposed amendment.

Collective vote on those proposals that do not need individual discussion.

Proposed amendments 3, 4, 13, and 14, were addressed by a single vote. Ernest Lannet moved to adopt those without individual discussion, the motion was seconded by Benjamin Gutman. Proposals 3, 4, 13, 14 were adopted by unanimous vote.

Consideration of proposals requiring discussion and individual votes.

Proposal # 1 -- ORAP 2.05(1) -- Service on Non-Appearing Parties

Justice Meagan Flynn noted that this issue has occurred with cases in the Supreme Court and involves an issue with the statutes. Theresa Kidd indicated that she has had these issues come up, is on board with the proposal, and would be happy to prepare draft text. A subcommittee was created. Theresa Kidd and Stephen Armitage were designated as members of the subcommittee.

Proposal # 2 -- ORAP 3.05(1) -- Remove Automatic Designation of Record

Justice Meagan Flynn indicated that the concern identified by this proposal appears to be that designations aren't being accomplished as intended and that the issue may involve designating exhibits. Daniel Parr noted that the trial court interprets the notice of appeal, which is required to be served on the trial court administrator, and the designation of record. The trial court gives the appellate courts the record based on how they interpret the designation of record. Debbie Spradley agreed. Stacy Harrop commented that ORS Chapter 19 requires that exhibits be designated and that the ORAP is ambiguous. Justice Meagan Flynn requested that wording be prepared and asked for volunteers for a subcommittee to draft the wording. A subcommittee was created. The members of the subcommittee are Stacy Harrop, Daniel Parr, Travis Eiva, and Theresa Kidd.

Proposal # 5 -- ORAP 5.40(8)(c) -- Expand De Novo Review in Court of Appeals

Justice Meagan Flynn suggested that perhaps the Appellate Practice Section of the Oregon State Bar should address the matter if there is a consensus bar-wide. Judge Jacqueline Kamins suggested that this is not really an ORAP issue and that it may need to be handled by statutory amendment. Justice Meagan Flynn agreed that this is on a different level than the ORAPs. Travis Eiva commented that an exceptional case doesn't give much guidance -- nobody knows what it means -- he suggested that maybe a list of factors would be helpful? Theresa Kidd noted that the Court of Appeals was still deciding family law cases, it just was less likely to perform the "long walk over flat ground" required by de novo review. Justice Meagan Flynn asked Judge Jacqueline Kamins and Judge James Egan, to run this past Court of Appeals for comment. Judge Jacqueline Kamins confirmed that she would be happy to take to full court and will report back

Proposal # 6 -- ORAP 5.45(6) -- No Combined Brief Sections re: Preservation of Error or Standard of Review

Ernest Lannet commented that sometimes combined brief sections make a lot of sense. In juvenile cases, OPDS sometimes has to make the same arguments as to each child; the preservation of error and standard of review really are the same, so it saves space. Benjamin Gutman noted that he shared the same concerns as Ernest Lannet. He has seen it happen, and he was concerned they may take up more space unnecessarily, but he was not sure how to make it better in the rule. Travis Eiva mentioned that maybe it could be put into the rule that the party a party was required to set preservation of error and standard of review out separately unless the party affirmatively states that the same preservation of error or standard of review applies. Ernest Lannet noted that framing it properly could mean 10 different issues with 10 different preservations of error and standards of review. Bill Kabeiseman commented that any prescription was going to run into the unusual case and that we can't mandate good lawyering. A subcommittee was appointed. The subcommittee members are: Ernest Lannet, Benjamin Gutman, Crystal Chase, Bill Kabeiseman, and Travis Eiva.

Proposal # 7 5.95(2) etc.

Ernest Lannet noted that the changes in 13.05 were meant to make "two copies" into "one copy," but the text merely deleted "two copies." There was a motion to adopt the rule as amended, and the motion was seconded. The proposal was adopted by unanimous vote.

Proposal # 8 -- ORAP 6.05(3), 6.10(4) -- Allow Pro Se Parties to Argue in Court of Appeals

Judge Jacqueline Kamins noted that there is enthusiasm within the court to have a pilot project and that it was a good time to bring this back into conversation as COVID eases. She suggested that it should still be tabled for now, but that the matter will be moving. Ernest Lannet commented that the conversation should be sure to draw a distinction between true pro se, and represented parties filing supplemental pro se briefs. Justice Meagan Flynn said that if the Court of Appeals needed a temporary amendment or anything to aid in the pilot project, Judge Kamins could let the committee know at next meeting.

Proposal # 8.5 -- ORAP 6.30 -- Mandate In-Person or Remote Viewing of All Oral Arguments

Tiffany Keast noted that when arguments are being conducted remotely, clients and trial attorneys are not always able to travel to Salem to view the arguments in the arranged close-circuit location. Lisa Norris-Lampe explained that the courts do not stream cases that are confidential by statute, or that involve VAWA [federal Violence Against Women Act] matters -- pursuant to joint CJO 21-022 and 21-01. Judge James Egan noted that that is only for a small fraction of cases, but the only way to view the argument is to show up in person. Tiffany Keast commented that clients and trial attorneys are not able to view the arguments if they can't travel to Salem and that they've had problems getting virtual viewing for their attorneys in the Court of Appeals. Judge Egan noted that the Court of Appeals has authorized OPDS supervisors to view arguments and commented that it sounded like Tiffany Keast was concerned with the ability for all attorneys be able to attend. Tiffany Keast confirmed that Judge Egan understood her concern correctly and also noted that it is more difficult to train new attorneys when they can't view the arguments. Judge Egan commented that the viewing issue became a technology problem for Court of Appeals, a coordination problem due to people logging in and out of arguments. Daniel Parr noted that too many participants make arguments chaotic and requires additional staff time to send out invitations and keep track of participants. Further he noted that it also could violate VAWA, which prohibits putting certain information on internet. Judge Egan mentioned that while OPDS is under attorney-client privilege, sending out links had become unmanageable. Daniel Parr commented that there is a volume difference between Supreme Court and Court of Appeals arguments. Justice Meagan Flynn noted that it seemed premature to discuss this as an ORAP amendment and that maybe discussions could help resolve this asked if Tiffany Keast could prepare some sort of request? Tiffany Keast mentioned that she believed the conversations had been ongoing but could continue. Ernest Lannet offered that a group could form to discuss options as opposed to completely tabling the matter. Benjamin Gutman noted that he was happy to participate. Tiffany Keast also volunteered. Justice Meagan Flynn noted that this may not be an ORAP subcommittee, but a workgroup that could report back in April.

The group members are: Tiffany Keast, Ernest Lannet, Benjamin Gutman, Lisa Norris-Lampe, and Daniel Parr.

Proposal # 9 7.05

Julie Smith noted that she was not sure exactly what she wants to change about the proposed wording, but that she had to read it a few times and found the last sentence confusing. She felt that some wordsmithing could help. Julie Smith offered to prepare alternative wording for the April meeting.

Proposals # 10A & 10B -- ORAP 8.45 -- Delete or Amend Duty to Notify Court of Mootness

Benjamin Gutman noted that he thinks this issue needs more clarity and that we need to figure out what the policy is before trying to draft appropriate text. Ernest Lannet commented that this issue creates tension for an attorney between "do I think the matter is moot" and "would the state or the court think the matter is moot". Theresa Kidd added that she handles this issue frequently at Court of Appeals, and it is important for court to have some notice that an issue is or may be moot. A subcommittee was formed. The members of the subcommittee are: Benjamin Gutman, Ernest Lannet, Theresa Kidd, and Lisa Norris-Lampe.

Proposal # 11 -- ORAP 10.15 -- Apply Rule to Juvenile Delinquency Cases and Modify Briefing Schedule

Tiffany Keast commented that OPDS frequently needs more time to prepare these briefs, and that the rule should provide 2 weeks longer and further should open the door to longer extensions because the cases involve lengthy records and at times novel legal issues. Theresa Kidd explained that she does not handle most of these requests for extensions of time, they go to the Chief Judge at the Court of Appeals. Judge James Egan confirmed that that was correct. Ernest Lannet noted that the part of the amendment requiring a reply brief to be filed no later than 7 days before oral argument is already part of an existing agreement with the court, so that change is just a matter of recognizing. Benjamin Gutman commented that he has significant concerns with almost everything in this proposal, it slows down cases, and codifying it in the ORAPs would make that worse. He also has concerns about it extending to delinquency case. He noted that comparable extensions are not available to state. Judge Egan indicated that he would take it to the full court. Justice Meagan Flynn said she would discuss the issue as it relates to petitions for review with the Supreme Court.

Proposal # 12 -- ORAP 11.35, 11.40 -- Possible Revisions re: Reapportionment Review

Lisa Norris-Lampe noted that she would work up temp rules with modifications as proposed amendments and then would run them by Benjamin Gutman and Daniel Parr. A subcommittee was formed. The members of the subcommittee are: Lisa Norris-Lampe, Benjamin Gutman, and Daniel Parr.

Proposal # 15 -- ORAP 13.10, 14.05 -- Extend Time to Petition for Attorney Fees

Crystal Chase noted that extending the time was a good idea as a civil practitioner who recently requested an extension of time to file a petition for attorney fees. Benjamin Gutman moved to adopt the proposal. The motion was seconded and passed on a unanimous vote.

Closing

Justice Meagan Flynn noted that Stephen Armitage would email the list of assignments for workgroups on proposals that are not yet ready for a final vote. The next meeting is Thursday, April 21, 2022, from 9 am to 12 pm.