ORAP COMMITTEE 2024
SUBSTANTIVE PROPOSALS
MEETING DATE: FEBRUARY 22, 2024, 9 A.M. - 12 P.M.

- Proposal 5: ORAP 4.64(1), LUBA Service of Record
- Proposal 6: ORAP 5.20 etc, COA Nonprecedential Memorandum Opinions, Temp Rules and Revisions
- Proposal 7: ORAP 5.45, Limit Combining Preservation and Std of Review in Briefs
- Proposal 8: ORAP 5.90 etc, Petitions for Review and Balfour Briefs
- Proposal 9: ORAP 6.05 etc, COA Oral Argument Temp Rules
- Proposal 11: ORAP 8.35, Media Coverage During Appellate Court Proceedings
- Proposal 13: ORAP 9.25(1), Clarify Timing for Petitions to Reconsider
- Proposal 17: ORAP 13.05, 13.10, SCT Reversal Changes Costs and Atty Fees
- Proposal 18: ORAP 15.05 etc, Appellate Settlement Conf Program

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AMENDING RULE(S): Proposal # 5 -- ORAP 4.64(1) -- LUBA Not Required to Serve Record When Previously Served

PROPOSER: Caleb Huegel, Staff Attorney, Land Use Board of Appeals

EXPLANATION:

[From Mr. Huegel's memo:]

The Land Use Board of Appeals (LUBA) was created in 1979 to simplify and speed up the appeal process for land use decisions and to provide consistent interpretation of land use law. As an administrative agency, LUBA's decisions are reviewed pursuant to ORAP [chapter] 4. More specifically, because LUBA's final orders are "land use cases," LUBA's decisions are reviewed pursuant to ORAP [chapter] 4(B).

LUBA is required to transmit a record of its proceedings to the Court of Appeals on judicial review within 7 days after the date the petition for judicial review is filed. ORS 197.850(5). Unlike most agencies, LUBA's proceedings are themselves generally confined to a record prepared by a separate entity—a local government, special district, or state agency. ORS 197.830(10)(a). Those entities may transmit the local record to LUBA in electronic or paper form. OAR 661-010-0025(2). In addition, those entities must serve the local record on other parties to LUBA's proceedings. OAR 661-010-0025(3). When LUBA transmits a record of its proceedings to the Court of Appeals on judicial review, the "agency file" usually consists of correspondence, motions, briefs, orders, and opinions issued by LUBA. ORAP 4.20(3)(b). The local record is usually included in LUBA's record as an "exhibit." ORAP 4.20(3)(c).

Despite the fact that LUBA's proceedings are reviewed pursuant to ORAP 4(B), LUBA must prepare, transmit, and serve its record on judicial review like most other agencies. ORAP 4.64(1). As a result, LUBA must serve a copy of its record, including the local record, on all parties to the judicial review. ORAP 4.20(7). ORAP 4.20(7) was adopted in 2018. Serving a copy of the local record on other parties is fairly simple when the local government transmits the local record to LUBA in electronic form. However, that task becomes more difficult when the local government transmits its record to LUBA in paper form—particularly when the local record is voluminous.

As an example, in one recent appeal, the local government transmitted in paper form a local record comprised of approximately 63,000 pages, divided into 10 volumes. Having to scan or photocopy that local record in order to serve a copy on each party to the judicial review proceeding would have required a tremendous amount of resources, both financial and labor, particularly given the 7-day timeframe described above. In turn, that lost time would have made

it more difficult for LUBA to meet its statutory deadlines for resolving other pending land use appeals. ORS 197.805; ORS 197.830; OAR chapter 661, division 10.

Fortunately, all parties to the judicial review in that case were also parties to LUBA's proceedings, and they had therefore already been served with a copy of the local record when the local government transmitted it to LUBA. As a result, no party requested a copy of the paper record from LUBA, and LUBA did not have to divert its resources to provide one. All LUBA had to do was physically transmit its own copy of the paper local record to the Court of Appeals.

It is an infrequent occurrence that the counsel who represented a party at LUBA will be different from the counsel representing the party at the Court of Appeals. As such, we ask that the ORAP Committee consider an amendment to ORAP 4.64, providing that LUBA need not serve a party to judicial review with a copy of the local record under ORS 197.830(10)(A) if that party or their counsel was served with a copy of the local record during LUBA's proceedings under OAR 661-010-0025(3).

RULE AS AMENDED:

Rule 4.64
RECORD ON JUDICIAL REVIEW

(1) The agency must prepare, transmit, and serve the agency record as provided in ORAP 4.20. However, in a LUBA case, LUBA need not serve a party to the judicial review with a copy of the record of the local proceeding before LUBA if that party or their counsel received a copy of the record during the LUBA proceeding.

(2) The cover or folder for a record transmitted in paper form, and each disk for a record transmitted in optical disk form, and each electronic folder transmitted by electronic means, must be labelled to show the case title and agency number and identify it as a LUBA, LCDC, CRGC, expedited land division, or expedited industrial land use case, as appropriate.

(3) After the Administrator issues the appellate judgment, the Administrator will dispose of the record as provided in ORAP 4.20(10).

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AMENDING RULE(S): Proposal # 6 -- ORAP 5.20, 5.40, 5.55, 6.25, 10.30 -- Court of Appeals Nonprecedential Memorandum Opinions: Temporary Amendments and Additions

PROPOSER: Stacy Harrop, Court of Appeals Staff Attorney, on behalf of Court of Appeals

EXPLANATION:

These are temporary amendments adopted by CJO No. 22-02 being made permanent, together with additional revisions as shown.

(DRAFTER'S NOTE: Temporary Amendments made by CJO No. 22-02 are shown in red typeface, with deleted material shown in ~~single strikeout~~ print and added material in single underline print. Revisions to the temporary amendment that are proposed to be included in the permanent rules are shown in blue typeface, with deleted material in ~~double strikeout~~ print and additions shown in double underline print.)

RULE AS AMENDED:

Rule 5.20
REFERENCE TO EVIDENCE AND EXHIBITS; CITATION OF AUTHORITIES

(1) Briefs, in referring to the record, shall make appropriate reference to pages and volumes of the transcript or narrative statement, or in the case of an audio record, to the tape number and official cue or numerical counter number or, in the case of an exhibit, to its identification number or letter.

(2) If the precise location on the audio record cannot be determined, it is permissible to indicate between which cue numbers the evidence is to be found.

(3) In referring to any part of the record transmitted to the Administrator by optical disk or by Secure File Transfer Protocol (SFTP) in Portable Document Form (PDF), the court prefers citation to the page number of the PDF file. In any judicial review in which the agency has served a self-represented party with the record in conventional paper form, a party citing to the record may either:

(a) Include in the party's brief parallel citations to the record in conventional paper form; or

(b) On request of any self-represented party, provide in writing to that party parallel citations to the record in conventional paper form.

(4) The following abbreviations may be used:

"P Tr" for pretrial transcript;

"Tr" for transcript;

"Nar St" for narrative statement;

"ER" for Excerpt;

"App" for Appendix;

"AR Tape No. ___, Cue No. ___" for audio record;

"PAR" for pretrial audio record;

"PDF" for PDF of agency record filed by electronic means with the Administrator;

"TCF" for trial court file;

"Rec" for record in judicial review proceedings only;

"Ex" for exhibit.

Other abbreviations may be used if explained.

(5) Guidelines for style and conventions in citation of authorities may be found in the Oregon Appellate Courts Style Manual.[1]

(6) Cases affirmed without opinion by the Court of Appeals should not be cited as authority. Cases decided by nonprecedential memorandum opinion may only be cited as provided in ORAP 10.30(1)(d).

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1 Copies of the Oregon Appellate Courts Style Manual may be obtained from the Publications Section of the Office of the State Court Administrator, 1163 State Street, Salem, Oregon 97301-2563; (503) 986-5656; the Style Manual also is published on the Judicial Department's website at: <https://www.courts.oregon.gov/publications/Pages/default.aspx>.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(9) A concise summary, without argument, of all the facts of the case material to determination of the appeal. The summary shall be in narrative form with references to

the places in the transcript, narrative statement, audio record, record, or excerpt where such facts appear.

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

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

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

(13) In the Court of Appeals, the appellant's brief may also include, under the heading "ORAP 10.30," a statement explaining whether, in the appellant's view, the court's decision in the case should be precedential under the factors listed in ORAP 10.30(2).

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

Rule 5.55
RESPONDENT'S ANSWERING BRIEF

(1) (a) The respondent's answering brief must follow the form prescribed for the appellant's opening brief, omitting repetition of the verbatim parts of the record in appellant's assignments of error.

(b) The brief must contain a concise answer to each of the appellant's assignments of error preceding respondent's own argument as to each.

(2) Under the heading "Statement of the Case," the respondent specifically shall accept the appellant's statement of the case, or shall identify any alleged omissions or inaccuracies, and may state additional relevant facts or other matters of record as may

apply to the appeal, including any significant motion filed on appeal and the disposition of the motion. The additional statement shall refer to the pages of the transcript, narrative statement, audio record, record, or excerpt in support thereof but without unnecessary repetition of the appellant's statement.

(3) In the Court of Appeals, the respondent's brief may also include, under the heading "ORAP 10.30," a statement explaining whether, in the respondent's view, the court's decision in the case should be precedential under the factors listed in ORAP 10.30(2).

(~~2~~4) If a cross-appeal is abandoned, the respondent shall immediately notify the appellate court in writing and, if notice has not been given previously, the respondent shall notify the court of the abandonment when the respondent's answering brief is filed, in writing and separately from the brief.

(~~4~~5) If the court gives an appellant leave to file a supplemental brief after the respondent's answering brief has been filed, the respondent may file a supplemental respondent's answering brief addressing those issues raised in the appellant's supplemental brief.

Rule 6.25
RECONSIDERATION BY COURT OF APPEALS

(1) As used in this rule, "decision" means an opinion, per curiam opinion, affirmance without opinion, and an order ruling on a motion or an own motion matter that disposes of the appeal. A party seeking reconsideration of a decision of the Court of Appeals shall file a petition for reconsideration. A petition for reconsideration shall be based on one or more of these contentions:

(a) A claim of factual error in the decision;

(b) A claim of error in the procedural disposition of the appeal requiring correction or clarification to make the disposition consistent with the holding or rationale of the decision or the posture of the case below;

(c) A claim of error in the designation of the prevailing party or award of costs;

(d) A claim that there has been a change in the statutes or case law since the decision of the Court of Appeals; ~~or~~ or

(e) A claim that the Court of Appeals erred in construing or applying the law. Claims addressing legal issues already argued in the parties' briefs and addressed by the Court of Appeals are disfavored; ~~or~~

~~(f) A claim that a decision issued as a nonprecedential memorandum opinion, as defined in ORAP 10.30(1), should be designated as precedential under the factors listed in subsection (2) of that rule. A party seeking reconsideration under this paragraph shall prominently display in the caption of the petition the words "SEEKS RECONSIDERATION OF NONPRECEDENTIAL DESIGNATION."~~

(2) A petition for reconsideration shall be filed within 14 days after the decision. The petition shall have attached to it a copy of the decision for which reconsideration is sought. The form of the petition and the manner in which it is served and filed shall be the same as for motions generally, except that the petition shall have a title page printed on plain white paper and containing the following information:

(a) The full case caption, including appropriate party designations for the parties as they appeared in the court from which the appeal was taken and as they appear on appeal, and the trial and appellate court case numbers; and

(b) A title designating the party filing the petition, such as "Appellant's Petition for Reconsideration" or "Respondent's Petition for Reconsideration."

(3) The filing of a petition for reconsideration is not necessary to exhaust remedies or as a prerequisite to filing a petition for review.

(4) If a response to a petition for reconsideration is filed, the response shall be filed within seven days after the petition for reconsideration was filed. The court will proceed to consider a petition for reconsideration without awaiting the filing of a response, but will consider a response if one is filed before the petition for reconsideration is considered and decided.[1]

(5) A request for reconsideration of any other order of the Court of Appeals ruling on a motion or an own motion matter shall be entitled "motion for reconsideration." A motion for reconsideration is subject to ORAP 7.05 regarding motions in general.

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1 See ORAP 9.05(2) regarding the effect of a petition for reconsideration by the Court of Appeals on the due date and consideration of a petition for review by the Supreme Court.

Rule 10.30
NONPRECEDENTIAL AND PRECEDENTIAL DECISIONS

(1) Nonprecedential Decisions

(a) The judges participating in the decision of an appeal submitted to a department may issue a nonprecedential decision as follows:

(i) By issuing an affirmance without opinion;

(ii) By issuing a nonprecedential memorandum opinion, designated by a notation on the title page of the opinion substantially to the effect of the following: "This is a nonprecedential memorandum opinion pursuant to ORAP 10.30 and may not be cited except as provided in ORAP 10.30(1)."

(b) A nonprecedential memorandum opinion may be authored or per curiam.

(c) Nonprecedential memorandum opinions are not precedent and are not binding authority except as relevant under the law of the case doctrine or the rules of claim preclusion or issue preclusion.

(d) Nonprecedential memorandum opinions may be cited in briefing if no precedent addresses the issue before the court, ~~in briefing~~ to identify ~~argue that a precedential decision is warranted because of conflicting~~ nonprecedential memorandum opinions that conflict with each other if relevant to the issue before the court, or to identify recurring legal issues for which there is no clear precedent. ~~or in a petition for reconsideration under ORAP 6.25 claiming that a decision issued as a nonprecedential memorandum opinion should be designated as precedential under the factors listed in subsection (2)(b) of this rule.~~ When citing a nonprecedential memorandum opinion, the citing party shall:

(i) Explain the reason for citing the nonprecedential memorandum opinion and how it is relevant to the issues presented; and

(ii) Include a parenthetical as part of the case citation indicating that the case is a "nonprecedential memorandum opinion."

(iii) Attach a copy of the cited nonprecedential memorandum opinion as

an appendix to the pleading in which the authority is cited.

~~(c) The court may, upon a petition for reconsideration under ORAP 6.25 or on the court's own motion, remove the nonprecedential designation from an opinion.~~

(2) Precedential Decisions

(a) All written opinions issued by the Court of Appeals sitting en banc are precedential.

(b) Otherwise, the following factors are relevant in determining whether a written opinion will be precedential:

(i) Whether the opinion establishes a new principle or rule of law or clarifies existing case law;

(ii) Whether the opinion decides a novel issue involving a constitutional provision, statute, administrative rule, rule of court, or other provision of law;

(iii) Whether the opinion resolves a significant or recurring legal issue for which there is no clear precedent;

(iv) Whether the opinion criticizes existing law;

(v) Whether the opinion is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests that the disposition of the court be precedential; or

(vi) Whether the opinion resolves a conflict among existing nonprecedential memorandum opinions brought to the court's attention.

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AMENDING RULE(S): Proposal # 7 -- ORAP 5.45 -- Limit Combining Preservation and Std of Review Sections in Briefs

PROPOSER: Hon. Robyn Aoyagi, Court of Appeals

EXPLANATION:

[From Judge Aoyagi's emails:]

The goal of this amendment is to reduce the frequency with which parties improperly combine the preservation-of-error and standard-of-review sections for multiple assignments of error. The concern is that improper combination of those sections creates extra works for the Court of Appeals judges, as parties often make mistakes and provide incomplete information in conjunction with improper combining. Currently, ORAP 5.45 allows combination of only the "Argument" sections for multiple assignments of error, but it is nonetheless common for parties to combine the preservation-of-error and standard-of-review sections too, suggesting that not everyone finds the rule clear on that point.

This proposed amendment [which is a modified version of a proposal submitted in 2022] now serves two purposes.

First, it emphasizes that the argument "combining" provision in current ORAP 5.45(6) is limited to the argument section and does not allow combining of other sections. Improper combining of other sections often results in omissions in the preservation and standard of review sections that create additional work for the court in evaluating the parties' arguments.

Second, it adds new provisions to ORAP 5.45(4) and (5), allowing combining of the preservation and standard of review sections in juvenile dependency cases in certain circumstances. Those additions recognize the unusually duplicative nature of assignments of error in some juvenile dependency cases and should address an issue raised during the last ORAP amendment cycle when the amendment to sub (6) was first proposed.

RULE AS AMENDED:

Rule 5.45
ASSIGNMENTS OF ERROR AND ARGUMENT

(1) Assignments of error are required in all opening briefs of appellants and cross-appellants. No matter claimed as error will be considered on appeal unless the claim of error was

preserved in the lower court and is assigned as error in the opening brief in accordance with this rule, provided that the appellate court may, in its discretion, consider a plain error.[1]

(2) Each assignment of error must be separately stated under a numbered heading. The arrangement and form of assignments of error, together with reference to pages of the record, should conform to the illustrations in Appendix 5.45.

(3) Each assignment of error must identify precisely the legal, procedural, factual, or other ruling that is being challenged.

(4) (a) Each assignment of error must demonstrate that the question or issue presented by the assignment of error timely and properly was raised and preserved in the lower court. The court may decline to consider any assignment of error that requires the court to search the record to find the error or to determine if the error properly was raised and preserved. Under the subheading "Preservation of Error":

(i) Each assignment of error, as appropriate, must specify the stage in the proceedings when the question or issue presented by the assignment of error was raised in the lower court, the method or manner of raising it, and the way in which it was resolved or passed on by the lower court.

(ii) Each assignment of error must set out pertinent quotations of the record where the question or issue was raised and the challenged ruling was made, together with reference to the pages of the transcript or other parts of the record quoted or to the excerpt of record if the material quoted is set out in the excerpt of record. When the parts of the record relied on under this clause are lengthy, they must be included in the excerpt of record instead of the body of the brief.

(iii) If an assignment of error challenges an evidentiary ruling, the assignment of error must quote or summarize the evidence that appellant believes was erroneously admitted or excluded. If an assignment of error challenges the exclusion of evidence, appellant also must identify in the record where the trial court excluded the evidence and where the offer of proof was made; if an assignment of error challenges the admission of evidence, appellant also must identify where in the record the evidence was admitted.

(b) Where a party has requested that the court review a claimed error as plain error, the party must identify the precise error, specify the state of the proceedings when the error was made, and set forth pertinent quotations of the record where the challenged error was made.

(c) In juvenile dependency cases, if several assignments of error present essentially the same legal question, and the arguments in support of them are combined as allowed by subsection (6), then the preservation sections may also be combined, if the

claims of error were preserved at the same time in the same way.

(5) (a) Under the subheading "Standard of Review," each assignment of error must identify the applicable standard or standards of review, supported by citation to the statute, case law, or other legal authority for each standard of review.[2]

(b) In juvenile dependency cases, if several assignments of error present essentially the same legal question, and the arguments in support of them are combined as allowed by subsection (6), then the standard-of-review sections may also be combined, if the standards of review are identical.

(6) Each assignment of error must be followed by the argument. If several assignments of error present essentially the same legal question, the argument in support of them may be combined so far as practicable. Where argument is combined, each assignment of error must still contain its own "Preservation of Error" and "Standard of Review" sections, as shown in Appendix 5.45, except in juvenile dependency cases as provided in subsections (4)(c) and (5)(b) of this rule

(7) The court may decline to exercise its discretion to consider plain error absent a request explaining the reasons that the court should consider the error.[3]

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[1] For an error to be plain error, it must be an error of law, obvious and not reasonably in dispute, and apparent on the record without requiring the court to choose among competing inferences; in determining whether to exercise its discretion to consider an error that qualifies as a plain error, the court takes into account a non-exclusive list of factors, including the interests of the parties, the nature of the case, the gravity of the error, and the ends of justice in the particular case. *See State v. Vanornum*, 354 Or 614, 629-30, 317 P3d 889 (2013).

[2] Standards of review include but are not limited to *de novo* review and substantial evidence for factual issues, errors of law and abuse of discretion for legal issues, and special statutory standards of review such as those found in the Administrative Procedures Act, ORS 183.400(4), and ORS 183.482(7) and (8). *See also* ORS 19.415(1), which provides that, generally, "upon an appeal in an action or proceeding, without regard to whether the action or proceeding was triable to the court or a jury," the court's review "shall be as provided in section 3, Article VII (Amended) of the Oregon Constitution"; ORS 19.415(3)(b) regarding discretion of the Court of Appeals to try the cause *de novo* or make one or more factual findings anew on appeal in some equitable proceedings; *see also* ORAP 5.40(8) concerning appellant's request for the court to exercise *de novo* review and providing a list of nonexclusive items Court of Appeals may consider in deciding whether to exercise its discretion.

[3] *See State v. Ardizzone*, 270 Or App 666, 673, 349 P3d 597, *rev den*, 358 Or 145 (2015) (declining to review for plain error absent a request from the appellant).

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AMENDING RULE(S): Proposal # 8 -- ORAP 5.90(5), 5.92, ORAP 9.05 -- Petitions for Review and Supplemental Pro Se Briefs and Balfour Briefs

PROPOSER: Harrison Latto

EXPLANATION:

[From Mr. Latto's email:]

I am writing with a suggestion for an amendment to ORAP 5.90(5). That subsection permits, in cases where counsel is court-appointed, the filing of a Balfour-type petition for review, "[i]n any case in which * * * counsel filed a [Balfour] brief in the Court of Appeals[.]" But Rule 5.92 also permits the represented litigant to file a pro se, "supplemental" brief in the Court of Appeals. Rule 5.92 allows the litigant personally to elaborate on arguments made in the counsel-prepared brief, or to pursue other claims asserted in the trial court, that were omitted from the counsel-prepared brief.

Rule 5.90(5) does not explicitly state, but implies that a Balfour-type petition for review maybe filed ONLY when a Balfour brief was filed in the Court of Appeals. The fact that Rule 5.92 lacks any comparable provision, similar to ORAP 5.90(5), supports the interpretation that a Balfour-type, supplemental petition for review is permitted ONLY when a Balfour brief is filed in the Court of Appeals, and not when the party has filed a pro se supplemental brief. I think Rule 5.92 might be amended to clarify, or provide that such a party is permitted to file a pro se supplemental petition for review, after he or she filed a supplemental brief in the Court of Appeals. There is an important consideration that applies equally to that situation, which is that the party may wish to assert claims, found only in his supplemental opening brief, before the Supreme Court, in order to preserve his or her ability to pursue those claims in federal court.

Incidentally, I also think that subsection (5) of Rule 5.90, which deals with a petition for review, is more appropriately placed or at least cross-referenced in Chapter 9 of the ORAP.

While I'm on the topic: I think that court-appointed counsel might legitimately determine, even after he or she has filed an "ordinary" brief in the Court of Appeals, that (especially after an AWOP) there is no legitimate basis upon which he can honestly contend that the case is worthy of review by the Supreme Court, under its criteria. The considerations are completely different under the ORAP, between a brief in the Court of Appeals, and a petition for review. It follows that court-appointed counsel should be entitled to take a pass on a petition for review under those circumstances, and require the litigant to file his or her own, pro se petition for review. No rule permits that.

[Additional note from SP Armitage: ORAP 16.15(1), which provides for the required formatting for documents filed electronically, expressly mentions supplemental pro se petitions for review.]

RULE AS AMENDED:

[None provided. Below are the rules as currently written:]

Rule 5.90
"*BALFOUR*" BRIEFS FILED
BY COURT-APPOINTED COUNSEL

(1) If counsel appointed by the court to represent an indigent defendant in a criminal case on direct appeal has thoroughly reviewed the record, has discussed the case with trial counsel and the client, and has determined that the case does not raise any arguably meritorious issues, counsel shall file an opening brief with two sections:

(a) Section A of the brief shall contain:

(i) A statement of the case, including a statement of the facts of the case. If the brief contains a Section B with one or more claims of error asserted by the client, the statement of facts shall include facts sufficient to put the claim or claims of error in context.

(ii) A description of any demurrer or significant motion filed in the case, including, but not limited to, a motion to dismiss, a motion to suppress and a motion *in limine*, and the trial court's disposition of the demurrer or motion.

(iii) A statement that the case is being submitted pursuant to this rule, that counsel has thoroughly reviewed the record and discussed the case with trial counsel and the client, and that counsel has not identified any arguably meritorious issue on appeal. If the brief does not contain a Section B, counsel also shall state that counsel contacted the client, gave the client reasonable opportunity to identify a claim or claims of error, and that the client did not identify any claim of error for inclusion in the brief.

(iv) Counsel's signature.

(b) (i) Section B of the brief is the client's product and may contain any claim of error that the client wishes to assert. The client shall attempt to state the claim and any argument in support of the claim as nearly as practicable in proper appellate brief form. Section B of the brief shall not exceed 48 pages in length. The last page of Section B of the brief shall contain the name and signature of the client.

(ii) Counsel's obligation with respect to Section B of the brief shall be limited to correcting obvious typographical errors, preparing copies of the brief, serving the appropriate parties, and filing the original brief and the appropriate number of copies with the court.

(2) A case in which appellant's opening brief is prepared and filed under this rule shall be submitted without oral argument, unless otherwise ordered by the court.

(3) On reviewing the record and the briefs filed by the parties, if the court identifies one or more arguably meritorious issues in the case, the court shall notify appellant's counsel of the issue or issues so identified. Appellant's counsel shall have 28 days after the date of the court's notice to file a supplemental opening brief addressing those issues. In addition to addressing the issue or issues identified by the court, counsel may address any other arguably meritorious issue counsel has identified. Respondent shall have 28 days after appellant files a supplemental opening brief to file a response or supplemental answering brief addressing the issues raised in the supplemental opening brief.

(4) In a case other than a criminal case on direct appeal, court-appointed counsel who determines that there are no meritorious issues on appeal may submit a brief under this rule, in which case the matter will be submitted without oral argument, unless otherwise ordered by the court.

(5) In any case in which the appellant is represented by court-appointed counsel on appeal and counsel filed a brief in the Court of Appeals under subsection (1) of this rule, counsel may submit a petition for review that contains a Section A that complies with ORAP 9.05(3)(a) and a Section B that complies with paragraph (1)(b) of this rule.

See generally State v. Balfour, 311 Or 434, 451-53, 814 P2d 1069 (1991).

Rule 5.92
SUPPLEMENTAL *PRO SE* BRIEFS

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

(2) The client shall attempt to prepare a supplemental *pro se* brief as nearly as

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

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

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

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

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

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

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

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

(1) Reviewable Decisions

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

or motion for reconsideration in the Court of Appeals as provided by ORAP 6.25.

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

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

(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.

(3) Form and Service of Petition for Review

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

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

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

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

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

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

(B) If by per curiam opinion, affirmance without opinion, or by order, the members of the court who decided the case.[2]

(v) Contain a notice whether, if review is allowed, the petitioner on review intends to file a brief on the merits or to rely on the petition for review and brief or briefs filed in the Court of Appeals.[3]

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

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

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

(4) Contents of Petition for Review

The petition shall contain in order:

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

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

(c) A statement of specific reasons why the legal question or questions presented on review have importance beyond the particular case and require decision by the Supreme Court.[4]

(d) If desired, and space permitting, a brief argument concerning the legal question or questions presented on review.

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

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

[2] *See* Appendix 9.05.

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

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

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

ORAP COMMITTEE 2024
February 22 Materials

AMENDING RULE(S): Proposal # 9 -- ORAP 6.05, 6.20, 6.30, Appendix 6.05 -- Court of Appeals Pro Se Oral Argument Temporary Rules

PROPOSER: [Temporary rules to be made permanent.]

EXPLANATION:

The following temporary rules were adopted for the Court of Appeals by CJO 22-07 on November 10, 2022, and are proposed to be made permanent.

RULE AS AMENDED:

Rule 6.05
REQUEST FOR ORAL ARGUMENT;
SUBMISSION WITHOUT ARGUMENT

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

(2) (a) The Administrator will send the parties notice of the date that a case is scheduled to be submitted to the court ("the submission date"). ~~Parties to the case may request oral argument by filing a "Request for Oral Argument" in the form illustrated in Appendix 6.05 and directed to the attention of the court's calendar clerk. If a party files a timely request for oral argument, the case will be argued on the submission date and all parties who have filed a brief may argue. If no party files a timely request for oral argument, the cause shall be submitted on the briefs on the submission date without oral argument, unless the court directs otherwise.~~ The notice will include a form "Response to Notice of Submission" requesting the information described below. Within 14 days of receiving the notice, any party requesting oral argument must complete, file, and serve on every party to the appeal the form "Response to Notice of Submission." The information required by the form Response to Notice of Submission is the following:

(i) that the party requests oral argument;

(ii) the name of the attorney who will argue the case;

(iii) whether the party requests in-person oral argument as described in ORAP 6.30(1)(a);

(iv) whether the party has conferred with all other parties regarding in-person oral argument and, if so, whether any party objects.

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

(i) If no party files a timely request for oral argument, the case shall be submitted on the briefs on the submission date without oral argument, unless the court directs otherwise.

(ii) Except as otherwise provided in subparagraph (iii), if a timely request for oral argument is made, then the case will be set for remote argument pursuant to ORAP 6.30 on the submission date and all parties who have filed a brief may argue.

(iii) Unless the court determines that remote argument better meets the needs of the court, (a) if a party submits a timely request for in-person argument, and certifies that the party has conferred with all other parties and that no party objects to in-person argument, or (b) if all parties submit requests for in-person argument, then the case will be set for in-person argument pursuant to ORAP 6.30 on the submission date and all parties who have filed a brief may argue.

(iv) Notwithstanding subparagraph (iii), a party may move the court for an order that an oral argument should proceed in person. The motion must be filed within seven days after the deadline for filing a Response to Notice of Submission and must explain the circumstances that support the request and demonstrate good cause for arguing in-person; good cause does not include a mere preference for in-person argument. Any party may file a response to the motion; the response must be filed within seven days after the filing of the motion.

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

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

(3) Notwithstanding subsection (2) of this rule, in any case, the court may, on its own motion, determine that the needs of the court will be best served by either in-person argument or remote argument, and order that the parties appear for argument in the manner directed. If the court orders the parties to appear remotely after the case has previously been set for in-person argument under subparagraph (2)(b)(iii), any party may file a motion as described in

subparagraph (2)(b)(iv) within a reasonable time of the court's order.

(~~3~~4) Notwithstanding subsection (2) of this rule, if a self-represented party files a brief, the case will be submitted without argument by any party. An attorney representing himself or herself is not considered to be a self-represented party for the purpose of this rule.

(~~4~~5) Notwithstanding subsection (2) of this rule, when a respondent submits an answering brief confessing error as to all assignments of error and not objecting to the relief sought in the opening brief, the respondent shall so inform the court by letter when the brief is filed or at any time thereafter. On receipt of respondent's notice that a brief confesses error, the case will be submitted without oral argument. The appellant may by letter bring to the court's attention that a respondent's brief appears to confess error. If the court concurs, the case will be submitted without oral argument.

Rule 6.20
ARGUMENT IN SALEM, ~~AND~~ OTHER LOCATIONS, AND BY REMOTE MEANS

The Court of Appeals will set most ~~cases for~~ in-person oral arguments in Salem, but, pursuant to Chief Justice Order ~~19-053~~22-020, dated ~~September 17, 2019~~October 7, 2022, the court may set cases for oral argument in other locations throughout the state, and, pursuant to Chief Justice Order 22-012, dated June 23, 2022, ~~which includes setting~~may set cases for oral argument by remote means. For purposes of this rule, "remote means" refers to an oral argument conducted by video conference with all parties and judges appearing remotely.

See ORS 2.560(1) and ORS 1.085(2).

Rule 6.30
SPECIAL RULES FOR ORAL ARGUMENTS:
MODE OF ARGUMENT AND ARGUMENTS CONDUCTED BY REMOTE MEANS

(1) For purposes of this rule,

(a) "In person" refers to an oral argument to be conducted with all parties appearing in person, in either a courtroom or an alternative physical location being used as a courtroom; and

(b) "Remote means" refers to an oral argument conducted by video conference with all parties and justices or judges appearing remotely.

(2) This subsection applies to proceedings in the Court of Appeals.

(a) Except as otherwise provided in ORAP 6.05(2)(b)(iii) or ORAP 6.05(3), ~~Except for cases designated as expedited under ORAP 4.60 and ORAP 10.15, within 21 days after the filing of an answering brief, the parties may file a joint notice that they are amenable to oral argument by remote means. Unless the court directs otherwise, when a joint notice under this rule has been filed and a party files a timely request for oral argument under ORAP 6.05(2),~~ the case will be scheduled for argument by remote means.

~~(b) Notwithstanding paragraph (a) of this subsection the court may direct that oral argument in a case or set of cases occur by remote means, which includes setting remote oral argument sessions in the ordinary course or directing that oral arguments occur remotely in response to inclement weather or other unforeseen circumstances. If the court directs that an oral argument occur by remote means, a party may request an in-person argument as follows:~~

~~(i) A party may move the court for an order that an oral argument should proceed in person. The motion must be filed at least 14 days before the scheduled date of the oral argument. The motion must state the scheduled date and time of the oral argument and explain the circumstances that support the request.~~

~~(ii) Any party may file a response to the motion. The response must be filed within seven days after the filing of the motion.~~

~~(iii) The court may, for good cause shown, shorten the time for filing a motion or response.~~

(~~e~~b) If an argument scheduled to proceed by remote means cannot occur due to technical difficulties, the court will reset the argument for a later date.

(~~d~~c) A live audio and video feed of oral arguments that are being conducted by remote means will be available in the principal location for the sitting of the Court of Appeals.[1] Seating in the courtroom at the principal location to view a live audio and video feed of oral arguments that are being conducted by remote means will be limited to the number of persons that is posted at the Marshal's Station at the building entrance.

(3) This subsection applies to proceedings in the Supreme Court.

(a) The court will ordinarily schedule oral argument to be conducted in person.

(b) (i) A party may file a motion requesting that an argument scheduled to be conducted in person be conducted by remote means. Such a motion must be filed at least 21 days before the scheduled date of the oral argument and must state the scheduled date and time of the oral argument and explain the circumstances that support the request.

(ii) Any party may file a response to the motion. The response must be filed within seven days after the filing of the motion.

(4) Except as otherwise provided in ORAP 8.35, electronic recording of an appellate oral argument being conducted by remote means is not permitted without express prior approval of the court. "Electronic recording" includes, but is not limited to, video recording, audio recording, live streaming, and still photography by cell phone, tablet, computer, camera, recorder, or any other means.

(5) Absent permission from the court or, in the Court of Appeals, the presiding judge of the panel to proceed otherwise, when appearing for an oral argument to be conducted by remote means, all attorneys and court officials must wear appropriate attire, remain on camera, and conduct themselves as if they were appearing in person in the courtroom.

[1] *See* Chief Justice Order ~~19-053~~22-020 (providing that the principal location for the sitting of the Court of Appeals is currently ~~1162 Court Street NE~~1163 State Street, Salem, OR 97301) or any subsequent order of the Chief Justice that amends or supersedes that order.

~~APPENDIX 6.05~~

~~Illustration for ORAP 6.05~~

~~IN THE COURT OF APPEALS OF THE STATE OF OREGON~~

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

~~REQUEST FOR ORAL ARGUMENT~~

~~To the Calendar Clerk for the Court of Appeals:~~

~~[Appellant/Respondent/Other Party] hereby requests that the above-captioned case, scheduled to be submitted to the court on [date], be scheduled for oral argument before the Oregon Court of Appeals on that date. The name and bar number of the attorney who will appear on behalf of [appellant / respondent] at oral argument are [name], [bar number].~~

~~Date _____~~

~~_____~~
~~Attorney for [Appellant/Respondent/Other Party]~~
~~[Sign and print/type name, bar number, address, telephone number, and email address]~~

ORAP COMMITTEE 2024
February 22 Materials

AMENDING RULE(S):	Proposal # 11 -- ORAP 8.35 -- Media Coverage of Appellate Court Proceedings
PROPOSER:	Lisa Norris-Lampe, Appellate Legal Counsel, Supreme Court

EXPLANATION:

[From Ms. Norris-Lampe's memo:]

Two sources of authority currently govern electronic writing in, and electronic recording and media coverage of, appellate court proceedings:

(1) ORAP 8.35, pertaining to media coverage in both courts; and

(2) Supreme Court Order (SCO) 19-043, pertaining to electronic recording and electronic writing on Oregon Supreme Court premises (and adjacent areas), but limited to proceedings before the Oregon Supreme Court (not including proceedings before the Court of Appeals).

The trial courts also have long had a "media" rule -- UTCR 3.180 -- which has been amended three times over the last six years, now titled as an "Electronic Recording and Writing" rule (and still including media-related provisions).

When it adopted SCO 19-043 (in July 2019), the Supreme Court applied then-existing trial court provisions pertaining to electronic recording and writing to Supreme Court proceedings. SCO 19-043 otherwise was intended to be a transitional order -- during the Supreme Court's temporary move to a different location during the 2019-2023 building restoration project -- with a more comprehensive ORAP update to follow in 2024.[1]

Meanwhile, UTCR 3.180 was most recently amended effective August 2023, to incorporate the concept of electronic transmission as well as writing and recording.

[1] SCO 19-043, set out as Attachment A, contains other provisions that are not related to court proceedings -- namely, provisions relating to photography and recordings in and around the Supreme Court building (not in proceedings). If ORAP 8.35 is ultimately amended as proposed (or at least in some related manner), then a new Supreme Court Order could be written to retain the parts of SCI 19-043 not incorporated into ORAP 8.35.

Simply stated, in new subsection (2), UTCR 3.180 prohibits the following activities in relation to court proceedings (unless permission is granted in advance): (**1)** electronic recording, regardless of whether proceedings are in-person or remote; **(2)** electronic writing within a courtroom; **(3)** electronic transmission of either an electronic recording or writing from within a courtroom; and, **(4)** if remotely participating in or viewing a remote proceeding, electronically transmitting any electronic writing directly and specifically to a witness until the witness is excused by the court. UTCR 3.180 also has been restructured so that the generally applicable electronic recording, writing, and transmission provisions are set out first, followed by the more specific media provisions.[2]

Issues: **(1)** For transparency purposes, it is preferable if all restrictions that apply to court proceedings appear together in the ORAPs, instead of some restrictions appearing in the ORAPs and others in a Supreme Court Order; **(2)** for modernization purposes, the current "media rule" in the ORAPs should be updated -- akin to current UTCR 3.180 -- to acknowledge the proliferation of electronic writing, recording, and transmission capabilities by persons not affiliated with media broadcasting; **(3)** for consistency and public understanding, it seems preferable if the same rules apply to both appellate courts, and also that the same rules -- to the extent applicable or practicable -- apply to the appellate courts as the trial courts.

Solution: Rewrite ORAP 8.35 to **(1)** incorporate provisions of SCO 19-043 that pertain to electronic recording and writing; **(2)** update those same provisions to make them consistent -- as appropriate -- with the trial court rules (most notably, including a new concept of "electronic transmission" that is separate from electronic writing or electronic recording); **(3)** update those same provisions to make them applicable to the Court of Appeals as well as the Supreme Court; **(4)** restructure the rule to set out the generally applicable provisions first, followed by the more specific media provisions; and **(5)** modernize the media provisions (*e.g.*, acknowledge concept of internet broadcasting, remove references to "videotape").

RULE AS AMENDED:

New text in **{braces/bold/underscored}**; deleted text in [*brackets/italics*].

Rule 8.35 **{ELECTRONIC RECORDING, WRITING, AND TRANSMISSION, AND}** MEDIA COVERAGE OF APPELLATE COURT PROCEEDINGS

(1) As used in this rule,

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[2] UTCR 3.180 is set out as Attachment B.

{(a) "Courtroom media coverage" means coverage of proceedings by radio, television, broadcast internet, or still photography.

(b) "Proceedings" means public judicial proceedings conducted by the Supreme Court or the Court of Appeals. When proceedings are conducted in the Oregon Supreme Court courtroom, any provision of this rule that limits activity "within a courtroom" applies to any simultaneously displayed video feed to a public viewing area in the State of Oregon Law Library.

{(b)} "**{J}**[*j*]udge presiding in a proceeding" means the Chief Justice of the Supreme Court **{or designee;}**[,] the Chief Judge of the Court of Appeals **{or designee;}**[,] or the justice or judge presiding in a public proceeding **{before}**[*in*] the Supreme Court or Court of Appeals **{or designee;}**[,] as appropriate.

{(c) "Electronic recording" includes, but is not limited to, video recording, audio recording, and still photography by cell phone, tablet, computer, camera, recorder, or other means.

(d) "Electronic writing" means the taking of notes or otherwise writing by electronic means and includes, but is not limited to, the use of word processing software and the composition of text, emails, and instant messages.

(e) "Electronic transmission" means to send an electronic recording or writing, including but not limited to transmission by email, text, or instant message; live streaming; or posting to a social media or networking service.}

(2) The judge presiding in a proceeding shall have the authority and responsibility to control the conduct of proceedings before the court, **{ensure}**[*insure*] decorum and prevent distractions, and **{ensure}**[*insure*] the fair administration of justice in proceedings before the court. Subject to that authority and responsibility,

{(a) Electronic writing in, and electronic recording and electronic transmission of, proceedings may be permitted, as provided in subsections (3) and (4) of this rule; and

{(b) Courtroom media [*radio, television, and still photography*]coverage of [*public judicial*] proceedings [*in the appellate courts*] shall be

{permitted}[*allowed*]**{, as provided in subsection (5) of}**[*in accordance with*] this rule.

(3) **{Except with the express prior permission of the judge presiding in a proceeding, and except as otherwise provided in subsections (4) and (5) of this rule, a person may not:**

(a) Electronically record any court proceeding;

(b) Electronically transmit any recording from within a courtroom during a proceeding;

(c) Engage in electronic writing within a courtroom during a proceeding; or

(d) Electronically transmit any electronic writing from within a courtroom during a proceeding.

(4) Subsections (3)(c) and (d) of this rule do not apply to attorneys or agents of attorneys, unless otherwise ordered by the judge presiding in a proceeding.}

(**{5}**[*3*])**{Courtroom media coverage shall be permitted as set out in this subsection.**

(a) Prior permission is required, as set out in subsection (3) of this rule.

(b)} Where available, audio pickup for all media purposes shall be accomplished from existing audio systems present in the courtroom, except if the audio pickup is attached to and operated as part of a television or video[*tape*] camera. If no technically suitable audio system exists in the courtroom, microphones and related wiring essential for media purposes shall be unobtrusive and shall be located in places designated in advance of the proceeding by the judge presiding in the proceeding.

[*(4)*] **{(c)}** One still photographer, utilizing not more than two still cameras and related equipment, and one television or video[*tape*] camera operator shall be permitted[*to cover any public proceeding in an appellate court*]. The judge presiding in the proceeding shall designate:

[*(a)*] **{(i)}** **{A particular location}**[*Where*] in the courtroom **{where}** the photographer or television or video[*tape*] camera operator shall be positioned; and

[*(b)*] **{(ii)}** **{A particular location}**[*Where*] outside the courtroom **{where any}** video[*tape*] recording equipment that is not part of the television or video[*tape*] camera shall be positioned.

[*(5)*] **{d}** Microphones and cameras shall be placed in the courtroom before proceedings each day or during a recess and, once positioned, shall not be moved during the proceeding. Microphones and cameras shall be removed only after adjournment of proceedings each day or during a recess. Broadcast media representatives shall not move about the courtroom while proceedings are in session.

[*(6)*] **{(e) (i)}** Audio and photographic equipment that produces distracting sound or light shall not be used, nor shall artificial lighting device of any kind be used. Broadcast media representatives shall eliminate all excessive noise while in the courtroom; e.g., any equipment coverings or cassette cases should be removed or opened before being brought into the courtroom and may not be replaced or closed inside the courtroom. Television film magazines (as distinct from videotape) and still camera film or lenses shall not be changed in the courtroom except during a recess.

[*(b)*] **{(ii)}** The judge presiding in the proceedings may require any media representative intending to cover the proceeding to demonstrate adequately in advance of the proceeding that the equipment **{to}** [*that will*] be used meets the light and sound standards of this rule.

[*(7)*] **{(f)}** "Pooling" arrangements required by the limitations of this rule on media equipment and personnel shall be the sole responsibility of the media**{,}** without calling on the judge presiding in the proceeding to mediate any dispute as to the appropriate representative or equipment authorized to cover a particular proceeding. In the absence of advance media agreement on disputed equipment or personnel issues, the judge presiding in the proceeding shall exclude all **{media}**[*radio, television and still photography*] coverage.

[*(8)*] **{(g)}** Media representatives attending an**{y}** [*appellate court*]proceeding shall be dressed so as not to detract from the dignity of the court and may be removed from the courtroom for failure to wear appropriate attire.

ATTACHMENT A

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of Procedures for Electronic Recording and Electronic Writing on and Adjacent to Oregon Supreme Court Premises	)	Supreme Court Order 19-043
	)	
	)	ELECTRONIC RECORDING
	)	AND ELECTRONIC
	)	WRITING ON AND
	)	ADJACENT TO OREGON
	)	SUPREME COURT PREMISES

On July 9, 2019, the Oregon Supreme Court considered and adopted the procedures set out below, concerning electronic recording and electronic writing on and adjacent to Oregon Supreme Court premises.

IT IS HEREBY ORDERED:

(1) Definitions

(a) "Chief Justice" includes the Chief Justice and the Chief Justice's designee.

(b) "Court proceedings" means case-related proceedings held before the Oregon Supreme Court, in the courtroom or simultaneously displayed via a video feed to a public viewing area in the State of Oregon Law Library.

(c) "Electronic recording" includes, but is not limited to, video recording, audio recording, live streaming, and still photography by cell phone, tablet, computer, camera, recorder, or any other means.

(d) "Electronic writing" means the taking of notes or otherwise writing by electronic means and includes, but is not limited to, the use of word processing software and the composition of texts, emails, instant messages, and postings to social media and networking services.

(e) "Historic aspects or public areas of the building":

(i) In the Supreme Court Building located at 1163 State Street, Salem, OR 97301, "historic aspects or public areas of the building" means the public entry, the marble hallways and columns, the grand stairwell, the entry to and public areas of the State of Oregon Law Library, the public entry to the courtroom, the courtroom, and artwork hung in public areas. That term applies to no other area of the building, including the security station, security cameras, displayed floorplans, and the Appellate Records Services Division viewing room.

(ii) In the temporary Supreme Court location at 2850 Broadway NE, Salem, OR 97303, "public areas of the building" means the courtroom, the State of Oregon Law Library, and artwork hung in public areas. That term applies to no other area of the building, including the security station and the Appellate Records Services Division viewing room.

(2) Electronic Recording and Electronic Writing During Supreme Court Proceedings

(a) This subsection applies to activity during Supreme Court proceedings.

(b) Except as provided in subparagraph (d) below and as otherwise provided in ORAP 8.35 (media coverage of appellate court proceedings), electronic recording and electronic writing is not permitted during Supreme Court proceedings without express prior approval of the Chief Justice.

(c) Unless permitted in accordance with ORAP 8.35, and except as provided in subparagraph (d) below, even if a person is granted permission to engage in electronic recording or electronic writing, the person may not send any electronic recording or electronic writing during a Supreme Court proceeding.

(d) The prohibitions in subparagraphs (b) and (c) on electronic writing and sending an electronic recording or writing during Supreme Court proceedings do not apply to attorneys or to agents of attorneys, unless otherwise ordered by the Chief Justice.

(3) Electronic Recording and Electronic Writing on Supreme Court Premises, Not in Supreme Court Proceedings

(a) This subsection applies to activity on Supreme Court premises other than in Supreme Court proceedings.

(b) Except as provided in subparagraph (e) below, video recording, audio recording, and still photography made or taken in historic aspects or public areas of the building is:

(i) permitted during court tours, public ceremonies and events, and weddings; and

(ii) otherwise permitted only with approval of the Chief Justice.

(c) Except as provided in subparagraph (e) below, video recording, audio recording, and still photography of or in any other area under the control and supervision of the court is permitted only with approval of the Chief Justice.

(d) Except as provided in subparagraph (e) below, live streaming is permitted only with approval of the Chief Justice.

(e) Electronic recording of any person is not permitted without the permission of that person.

(f) Electronic writing is permitted in any public area of the building.

(4) Electronic Recording of Supreme Court Justices in Adjacent Parking Lot

(a) This subsection applies to activity in the parking lot adjacent to the Supreme Court Building or Supreme Court premises, including any sidewalk adjacent to both the building/premises and the parking lot.

(b) Unless a justice grants permission, electronic recording of that justice or that justice's vehicle is not permitted in the adjacent parking lot or sidewalk, as described in subparagraph (a).

(5) If a person violates this order or any other requirement imposed by the Chief Justice or the court, the Chief Justice may, in addition to any other lawful sanction, order the person, and any organization with which the person is affiliated, to terminate electronic recording or electronic writing. If the person does not comply with that order, the Chief Justice may order that the person be excluded from the premises.

(6) This rule does not apply to court personnel engaged in the performance of official duties.

(7) This order is effective immediately.

Dated this 10th day of July, 2019.

Martha L. Walters
Chief Justice

ATTACHMENT B

3.180 ELECTRONIC RECORDING AND WRITING

(1) As used in this rule:

(a) "Electronic recording" includes video recording, audio recording, and still photography by cell phone, tablet, computer, camera, tape recorder, or any other means. "Electronic recording" does not include "electronic writing."

(b) "Electronic writing" means the taking of notes or otherwise writing by electronic means and includes but is not limited to the use of word processing software and the composition of texts, emails, and instant messages.

(c) "Electronic transmission" means to send an electronic recording or writing, including but not limited to transmission by email, text, or instant message; live streaming; or posting to a social media or networking service.

(2) Except with the express prior permission of the court, and except as provided in subsection (3) of this rule, a person may not:

(a) Electronically record in any area of the courthouse under the control and supervision of the court unless permitted by SLR pursuant to subsection (11)(a) of this rule;

(b) Electronically record any court proceeding;

(c) Electronically transmit any recording from within a courtroom during a proceeding;

(d) Engage in electronic writing within a courtroom;

(e) Electronically transmit any electronic writing from within a courtroom during a proceeding; or

(f) While remotely observing or participating in a proceeding, electronically transmit any electronic writing directly and specifically to a witness until the witness is excused by the court.

(3) Subsections (2)(d), (e), and (f) of this rule do not apply to attorneys or to agents of attorneys unless otherwise ordered by the court.

(4) (a) A request for permission to engage in electronic recording or writing must be made prior to the start of a proceeding. No fee may be charged.

(b) The granting of permission to any person or entity to engage in electronic recording or writing is subject to the court's discretion, which may include considerations of the need to preserve the solemnity, decorum, or dignity of the court; the protection of the parties, witnesses, or jurors; or whether the requestor has demonstrated an understanding of all provisions of this rule.

(c) If the court grants all or part of the request,

(i) The court shall provide notice to all parties, and electronic recording or writing thereafter shall be allowed in the proceeding, in any courtroom or during a remote proceeding, consistent with the court's permission.

(ii) The court shall permit one video camera, one still camera, and one audio recorder in the courtroom, and it may permit additional cameras and electronic recording in any courtroom or during a remote proceeding consistent with this rule.

(ii) The court may prescribe the location of and the manner of operating electronic equipment within a courtroom. Artificial lighting is not permitted.

(iv) Any pooling arrangement made necessary by limitations on equipment or personnel imposed by the court is the sole responsibility of the persons or entities seeking to electronically record.

(v) The court will not mediate disputes. If multiple persons or entities seeking to electronically record are unable to agree on the manner in which the recording will be conducted or distributed, the court may terminate any or all such recording.

(5) Except as otherwise provided in this rule:

(a) The court shall not wholly prohibit all electronic recording of a court proceeding unless the court makes findings of fact on the record setting forth substantial reasons that establish:

(i) A reasonable likelihood that the electronic recording will interfere with the rights of the parties to a fair trial or will affect the presentation of evidence or the outcome of the trial; or

(ii) A reasonable likelihood that the costs or other burdens imposed by the electronic recording will interfere with the efficient administration of justice.

(b) "Wholly prohibit all electronic recording" means issuing an order prohibiting all recording of a proceeding by all persons. The court's denial of a particular request under the factors in section (4)(b) does not constitute an order prohibiting all recording by all persons and does not require findings of fact on the record, even if the person whose request is denied is the only person who has requested permission to record a proceeding.

(6) The court has discretion to limit electronic recording of particular components of the proceeding based on one or more of the following factors:

(a) The limitation is necessary to preserve the solemnity, decorum, or dignity of the court or to protect the parties, witnesses, or jurors;

(b) The use of electronic recording equipment interferes with the proceedings;

(c) The electronic recording of a particular witness would endanger the welfare of the witness or materially hamper the testimony of the witness; or

(d) The requestor has not demonstrated an understanding of all provisions of this rule.

(7) Notwithstanding any other provision of this rule, the following may not be electronically recorded by any person at any time:

(a) Proceedings in chambers.

(b) Any notes or conversations intended to be private including but not limited to counsel and judges conferring at the bench and conferences involving counsel and their clients.

(c) Dissolution, juvenile, paternity, adoption, custody, visitation, support, civil commitment, trade secrets, and abuse, restraining, and stalking order proceedings.

(d) Proceedings involving a sex crime, if the victim has requested that the proceeding not be electronically recorded.

(e) *Voir dire*.

(f) Any juror anywhere under the control and supervision of the court during the entire course of the trial in which the juror sits.

(g) Recesses or any other time the court is off the record.

(8) For the purpose of determining whether this rule or other requirements imposed by the court have been violated, or to ensure the effective administration of justice, a person engaged in electronic recording under this rule must, upon request and without expense to the court, provide to the court, for *in camera* review, an electronic recording in a format accessible to the court. The copy may be retained by the court and may be sealed if necessary for the further administration of justice.

(9) If a person violates this rule or any other requirement imposed by the court, the court may order the person, and any organization with which the person is affiliated, to terminate electronic recording or electronic writing.

(10) This rule does not:

(a) Limit the court's contempt powers;

(b) Operate to waive ORS 44.510 to 44.540 (media shield law); or

(c) Apply to court personnel engaged in the performance of official duties.

(11) A judicial district may, by SLR:

(a) Designate areas outside a courtroom and under the control and supervision of the court, including hallways or entrances, where electronic recording is allowed without prior permission, unless otherwise ordered in a particular instance.

(b) Adopt procedures to obtain permission for electronic recording or electronic writing.

(c) SLR 3.181 is reserved for any SLR adopted under this subsection.

3.190 CIVIL ARRESTS (Repealed)

REPORTER'S NOTE: UTCR 3.190 was repealed to avoid conflict or duplication with ORS 181A.828.

ORAP COMMITTEE 2024
February 22 Materials

AMENDING RULE(S): Proposal # 13 -- ORAP 9.25(1) -- Clarify What Constitutes "Decision" for Purposes of Petition for Reconsideration

PROPOSER: Hon. Meagan Flynn, Chief Justice, Supreme Court

EXPLANATION:

[Restated from email:]

A petition for reconsideration must be filed "within 14 days after the date of the decision." ORAP 9.25(1). In at least one instance, a litigant had understood the word "decision" to refer to the appellate judgment. The suggestion is to replace "decision" with "order or opinion," or alternatively to clarify that it is not a reference to the appellate judgment.

RULE AS AMENDED:

Rule 9.25
RECONSIDERATION IN SUPREME COURT

(1) A party seeking reconsideration of a decision of the Supreme Court shall file a petition for reconsideration within 14 days after the date of the order or opinion being challenged. ~~decision.~~ The petition shall be in the form of a brief, prepared in conformity with ORAP 5.05 and ORAP 5.95, insofar as they are applicable. The petition must be no longer than a petition for review in the Supreme Court as prescribed by ORAP 9.05(3)(a). The petition shall include a copy of the court's ~~decision~~order or opinion. A petitioner shall identify on the cover which party is the petitioner, the date of the ~~decision~~order or opinion, and, if there is an opinion or if there are opinions, the judges who joined therein.

(2) Any response to a petition for reconsideration must be filed within seven days after the filing of the petition for reconsideration.

(**3**) The court shall either deny or allow reconsideration. If the court allows reconsideration, the court may reconsider with or without further briefing or oral argument. Reconsideration shall result in affirmance, modification, or reversal of the decision that has been reconsidered.

ORAP COMMITTEE 2024
February 22 Materials

AMENDING RULE(S): Proposal # 17 -- ORAP 13.05, 13.10 -- Supreme Court Reversal of Court of Appeals Opinion Supersedes Court of Appeals Award of Costs and Attorney Fees

PROPOSER: Hon. Meagan Flynn, Chief Justice, Supreme Court (explanation and suggested revision by SP Armitage)

EXPLANATION:

The Court of Appeals may award costs and attorney fees to a prevailing party prior to any Supreme Court decision on review. *See* ORAP 13.05(5)(a) (bill of costs due 21 days after decision (note proposed amendment to make that 28 days)); ORAP 13.10(2) (petition for attorney fees due 28 days after decision). Petitioners on review have sometimes concluded that they must file an additional, amended, or supplemental petition for review so as to challenge that award of fees and costs.

The purpose of the amendment is to incorporate into the rules a provision analogous to ORS 20.220(3):

> "(3) When an appeal is taken from a judgment under ORS 19.205 to which an award of attorney fees or costs and disbursements relates:
>
> "(a) If the appellate court reverses the judgment, the award of attorney fees or costs and disbursements shall be deemed reversed[.]"

The proposed amendment would only affect an award of fees or costs if the prevailing party changes. A petitioner who contends that the award is erroneous for other reasons -- say, that even if the petitioner lost on the merits, the petitioner contends that the Court of Appeals had abused its discretion in deciding to award attorney fees -- would still need to file a separate or supplemental petition for review on that question.

The proposed amendment gives the Supreme Court discretion to retain the Court of Appeals's award of costs or fees. That's because it is possible for the Supreme Court to reverse the Court of Appeals without changing the prevailing party.

Two things conjoin to create this possibility. First, appeal and review are "considered as one continuous appeal process." *See* ORAP 13.05(5)(d)(i) (so stating regarding prevailing party fee); *see also* ORAP 14.05 (contemplating single appellate judgment from Court of Appeals and Supreme Court). Thus, whether a person is a prevailing party depends on the outcome of the appeal and review process as a whole. *See* ORAP 13.05(3) ("appellant or petitioner * * * is the

prevailing party only if the court reverses or substantially modifies the judgment or order from which the appeal or judicial review was taken"); ORS 20.077(3) (for purposes of attorney fees, "the appellate court in its discretion may designate as the prevailing party a party who obtains a substantial modification of the judgment").

Second, the Supreme Court may consider only a subset of the issues addressed by the Court of Appeals. *See* ORAP 9.20 (noting that parties or court may limit questions on review).

Thus, the Supreme Court could reverse the Court of Appeals on that subset of issues, but in such a way that it did not change who was the prevailing party on appeal and review as a whole.

(Example: An appellant contends that the trial court erred in granting summary judgment on two claims for relief. The Court of Appeals agrees as to both claims and reverses. The respondent seeks Supreme Court review as to claim 1, and the Supreme Court agrees with the respondent. Because the Court of Appeals's reversal on claims 2 remains effective, the appellant would still be considered the prevailing party as to the appeal and review as a whole, because the appellant obtained a substantial modification of the trial court's judgment.)

RULE AS AMENDED:

Rule 13.05
COSTS AND DISBURSEMENTS

(1) As used in this rule, "costs" includes costs and disbursements. "Allowance" of costs refers to the determination by the court that a party is entitled to claim costs. "Award" of costs is the determination by the court of the amount that a party who has been allowed costs is entitled to recover.[1]

(2) The court will designate a prevailing party and determine whether the prevailing party is allowed costs at the time that the court issues its decision.

(3) When an allowance of costs is dependent on identification of a party as a prevailing party, the appellant or petitioner (or cross-appellant or cross-petitioner, as appropriate) is the prevailing party only if the court reverses or substantially modifies the judgment or order from which the appeal or judicial review was taken. Otherwise, the respondent (or cross-respondent, as appropriate) is the prevailing party.

(4) When a party prevails on appeal or on review and the case is remanded for further proceedings in which the party who ultimately will prevail remains to be determined, the court may allow costs to abide the outcome of the case. If the court allows costs to abide the outcome of the case, the prevailing party shall claim its costs within the time and in the manner prescribed in this rule. The appellate court may determine the amount of costs under this subsection, and may condition the actual award of costs on the ultimate outcome of the case. In that

circumstance, the award of costs shall not be included in the appellate judgment, but shall be awarded by the court or tribunal on remand in favor of the prevailing party on appeal or review, if that party also prevails on remand, and shall be awarded against the party designated on appeal or review as the party liable for costs.

(5) (a) A party seeking to recover costs shall file a statement of costs and disbursements within 21 days after the date of the decision. The filing of a petition for review or a petition for reconsideration does not suspend the time for filing the statement of costs and disbursements.

(b) A party must file the original statement of costs and disbursements, accompanied by proof of service showing that a copy of the statement was served on every other party to the appeal.

(c) A party objecting to a statement of costs and disbursements shall file objections within 14 days after the date of service of the statement. A reply, if any, shall be filed within 14 days after the date of service of the objections. The original objection or reply shall be filed with proof of service.

(6) (a) (i) Except as provided in paragraph (ii) of this subsection, whether a brief is printed or reproduced by other methods, the party allowed costs is entitled to recover 10 cents per page for the number of briefs required to be filed or actually filed, whichever is less, plus one copy for each party served and one copy for each party on whose behalf the brief was filed.

(ii) If a party filed a brief using the eFiling system, the party allowed costs is entitled to recover the amount of the transaction charge and any document recovery charge* incurred by that party for electronically filing the brief, as provided in subsection (b) of this section. The party allowed costs is not entitled to recover for the service copy of any brief served on a party via the eFiling system, but is entitled to recover for one copy for each party served in paper form.

(b) If the party who has been allowed costs has incurred transaction charges or any document recovery charges* in connection with electronically filing any document, the party is entitled to recover any such charge so incurred.

(c) If the prevailing party who has been allowed costs has paid for copies of audio or video tapes in lieu of a transcript or incident to preparing a transcript, the party is entitled to recover any such charge so incurred.

(d) (i) For the purposes of awarding the prevailing party fee under ORS 20.190(1)(a), an appeal to the Court of Appeals and review by the Supreme Court shall be considered as one continuous appeal process and only one prevailing party fee per party, or parties appearing jointly, shall be awarded.

(ii) The prevailing party fee will be awarded only to a party who has appeared on the appeal or review.

(iii) A prevailing party is not entitled to claim more than one prevailing party fee, nor may the court award more than one prevailing party fee against a nonprevailing party, regardless of the number of parties in the action.[2]

(e) If a prevailing party who has been allowed costs timely files a statement of costs and disbursements and no objections are filed, the court will award costs in the amount claimed, except when the entity from whom costs are sought is not a party to the proceeding or when the court is without authority to award particular costs claimed.

(f) If a prevailing party who has been allowed costs untimely files a statement of costs and disbursements, that party is entitled to recover the party's filing or first appearance fee and the prevailing party fee under ORS 20.190(1).

(g) If a prevailing party who has been allowed costs does not file a statement of costs and disbursements, the court shall award that party's filing or first appearance fee and the prevailing party fee under ORS 20.190(1) as part of the appellate judgment.

(7) Parties liable for payment of costs and disbursements shall be jointly liable.

(8) If the Supreme Court on review reverses a decision of the Court of Appeals, then any award of costs by the Court of Appeals is deemed to be reversed, unless otherwise directed by the Supreme Court.

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[1] *See generally* ORS 20.310 to 20.330 concerning costs and disbursements on appeal and in cases of original jurisdiction.

[*] Document recovery charges were charges collected to offset the cost incurred by the courts in making the necessary number of printed copies of documents eFiled before February 8, 2016, under the authority of a prior version of ORAP 16.20(2). *See, e.g.*, ORAP 16.20(2) (2017).

[2] *See* ORS 20.190(4).

Rule 13.10
PETITION FOR ATTORNEY FEES

(1) This rule governs the procedure for petitioning for attorney fees in all cases except the recovery of compensation and expenses of court-appointed counsel payable from the Public Defense Services Account.[1]

(2) A petition for attorney fees shall be served and filed within 28 days after the date of decision. The filing of a petition for review or a petition for reconsideration does not suspend the time for filing the petition for attorney fees.

(3) When a party prevails on appeal or on review and the case is remanded for further proceedings in which the party who ultimately will prevail remains to be determined, the appellate court may condition the actual award of attorney fees on the ultimate outcome of the case. In that circumstance, an award of attorney fees shall not be included in the appellate judgment, but shall be awarded by the court or tribunal on remand in favor of the prevailing party on appeal or review, if that party also prevails on remand, and shall be awarded against the party designated on appeal or review as the party liable for attorney fees. The failure of a party on appeal or on review to petition for an award of attorney fees under this subsection is not a waiver of that party's right later to petition on remand for fees incurred on appeal and review if that party ultimately prevails on remand.

(4) When the Supreme Court denies a petition for review, a petition for attorney fees for preparing a response to the petition for review **may** be filed in the Supreme Court.

(5) (a) A petition shall state the total amount of attorney fees claimed and the authority relied on for claiming the fees. The petition shall be supported by a statement of facts showing the total amount of attorney time involved, the amount of time devoted to each task, the reasonableness of the amount of time claimed, the hourly rate at which time is claimed, and the reasonableness of the hourly rate.

(b) If a petition requests attorney fees pursuant to a statute, the petition shall address any factors, including, as relevant, those factors identified in ORS 20.075(1) and (2) or ORS 20.105(1), that the court may consider in determining whether and to what extent to award attorney fees.[2]

(6) Objections to a petition shall be served and filed within 14 days after the date the petition is filed. A reply, if any, shall be served and filed within 14 days after the date of service of the objections.

(7) A party to a proceeding under this rule may request findings regarding the facts and legal criteria that relate to any claim or objection concerning attorney fees. A party requesting findings must state in the caption of the petition, objection, or reply that the party is requesting findings pursuant to this rule.[3] A party's failure to request findings in a petition, objection, or reply in the form specified in this rule constitutes a waiver of any objection to the absence of findings to support the court's decision.

(8) The original of any petition, objections, or reply shall be filed with the Administrator together with proof of service on all other parties to the appeal, judicial review, or proceeding.

(9) In the absence of timely filed objections to a petition under this rule, the Supreme Court and the Court of Appeals, respectively, will allow attorney fees in the amount sought in the petition, except in cases in which:

(a) The entity from whom fees are sought was not a party to the proceeding; or

(b) The Supreme Court or the Court of Appeals is without authority to award fees.

(10) If the Supreme Court on review reverses a decision of the Court of Appeals, then any award of attorney fees by the Court of Appeals is deemed to be reversed, unless otherwise directed by the Supreme Court.

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[1] This subsection does not create a substantive right to attorney fees, but merely prescribes the procedure for claiming and determining attorney fees under the circumstances described in this subsection.

[2] *See, e.g.*, *Tyler v. Hartford Insurance Group*, 307 Or 603, 771 P2d 274 (1989), and *Matizza v. Foste*r, 311 Or 1, 803 P2d 723 (1990), with respect to ORS 20.105(1), and *McCarthy v. Oregon Freeze Dry, Inc.*, 327 Or 84, 957 P2d 1200, *adh'd to on recons*, 327 Or 185, 957 P2d 1200 (1998), with respect to ORS 20.075.

[3] For example: "Appellant's Petition for Attorney Fees and Request for Findings Under ORAP 13.10(7)" or "Respondent's Objection to Petition for Attorney Fees and Request for Findings Under ORAP 13.10(7)."

See Appendix 13.10.

ORAP COMMITTEE 2024
February 22 Materials

AMENDING RULE(S): Proposal # 18 -- ORAP 14.05, 15.05, 15.10 -- Appellate Settlement Conference Program Changes

PROPOSER: Genevieve E. Evarts, Director, Appellate Settlement Conference Program

EXPLANATION:

[Per Ms. Evarts:]

The rules governing the Settlement Conference Program were last amended in 2019 when changes were made to ORAP 15.05(6)(a) regarding mediation confidentiality. However, the rest of the rule has not been updated in some time. The SCP Director worked with Chief Judge Lagesen to prepare the following set of more comprehensive amendments to the rule – with the most significant changes proposed in ORAP 15.05(7) regarding program mediation fees. Changes proposed therein, include: increasing the mediation program fee (which to my understanding has not been updated since the late 1990s), changing the timeframe when fees are due, adding alternate methods for payment of mediation fees, and addressing the procedure if mediation fees are not paid (which also requires a minor amendment to ORAP 14.05(4)(b)).

Other changes were made to bring the rule in line with current program practices. For example, the program shifted to remote mediation starting in 2020 and continues to allow mediations to be conducted by remote, in-person, or hybrid means, which requires an update to ORAP 15.05(1)(b)(i). Similarly, proposed amendments to ORAP 15.05(4)(a)(ii) (regarding extensions of the program abeyance period) and ORAP 15.05(5) (regarding the submission of information to the program) more accurately describe current program practices. Finally, other revisions are intended to update and bring consistency to the language in the rule, but not substantively change it (*e.g.*, ORAP 15.05(3)(a), (6)(b), and (6)(c)).

RULES AS AMENDED:

Rule 15.05
APPELLATE SETTLEMENT
CONFERENCE PROGRAM

(1) Cases Subject

(a) The procedures in this rule apply to cases filed in the Court of Appeals. The Chief Judge or the Chief Judge's designee shall determine the individual cases or categories of cases that may be included or excluded from the appellate settlement conference program (program). Upon the court's own motion, at any time, a panel of the Court of Appeals may refer a case to the program.

(b) (i) A settlement conference shall be held for any case assigned to the program unless the program director or the court cancels the conference or removes the case from the program. Settlement conferences may be held in-person, by remote means, or in a hybrid format. The program director shall determine the appropriate format for the settlement conference on a case-by-case basis. A party or person with actual authority to settle the case must participate in and be available during the duration of ~~be present at~~ the program settlement conference unless that person's absence ~~or appearance by telephone~~ is approved prior to the conference by the program director.

(ii) After the first settlement conference is held, any party may withdraw from the program, except that the program director may require the parties to attend one or more additional conferences as the program director deems reasonable and necessary to facilitate a settlement. If the program director requires the parties to attend one or more additional conferences, the neutral's fee for any additional conference will be paid by the program and not by the parties.

(2) Supervising Judge and Program Director

(a) The Chief Judge shall have overall responsibility for the program but may appoint a supervising judge and/or a program director for the program.

(b) If a supervising judge is appointed, the supervising judge shall have the powers needed to administer the program. The Chief Judge, and the supervising judge if one is appointed, may delegate authority to the program director.

(c) If the Chief Judge, or the supervising judge if one is appointed, serves as a judge or judge pro tempore of the Court of Appeals, the Chief Judge or supervising judge may not participate in the consideration of any case in which the judge is aware of confidential information concerning the case obtained from the program.

(d) If a judge or judge pro tempore of the Court of Appeals serves as the neutral in a case and the case does not settle and proceeds in the Court of Appeals, that judge shall not thereafter participate in any way in the case. Further, such judge shall take steps as necessary to ensure ~~insure~~ that the judge does not disclose to other judges or to court staff any communication from the settlement conference.

(3) Neutrals

(a) The Chief Judge, supervising judge, and/or program director shall determine the responsibilities and qualifications of neutrals to be provided by the program and shall approve the neutrals selected for the program. The supervising judge, if one is appointed, or program director will assign neutrals for individual cases.

(b) A neutral shall not act in any other capacity in the case.

(4) Abeyance of Appeal

(a) (i) On assignment of a case to the program, the court will hold preparation of the transcript (including correcting it or adding to it), preparation of the record, and briefing, in abeyance for a period of 120 days after the date of the notice of assignment of the case to the program. During that time, a party to the appeal may file an amended designation of record. A party wishing to hold in abeyance any other aspect of the appeal or seeking an extension of time to complete any other task required by law or by the Oregon Rules of Appellate Procedure must file an appropriate motion with the court.

(ii) At the end of the 120-day abeyance period, ~~if the parties have engaged in settlement negotiations and need more time to reduce the settlement to writing or to implement a settlement, any party may request the program director to order, and the program director may order, an extension of the abeyance period for up to 60 days. If all parties to an appeal agree to an extension for longer than 60 days,~~ the program director may extend the abeyance period for as long as reasonably necessary to permit the parties to continue settlement discussions, participate in a settlement conference, implement a settlement, and/or dismiss the appeal pursuant to a settlement.~~implement a settlement.~~

(b) If a respondent files a motion to dismiss the appeal or an appellant files a motion to stay enforcement of the judgment when the case is being held in abeyance, in addition to serving a copy of the motion on all other parties to the appeal, the party shall serve a copy of the motion on the program director accompanied by a letter of transmittal stating whether the party prefers that the motion be decided before the case proceeds in the program. The program director may direct that the case proceed in the program or may terminate the referral. If the program director terminates the referral, the case may be re-referred to the program after the court disposes of the motion to stay enforcement or denies the motion to dismiss.

(c) The program director may reactivate a case held in abeyance at any time:

(i) On the program director's own motion; or

(ii) On motion of a party showing good cause for reactivating the

appeal. In addition to serving a copy of the motion on all other parties to the appeal, a party filing a motion to reactivate shall serve a copy of the motion on the program director.

(5) Submission of Information

The parties may be required to submit information to facilitate the screening of cases for the program or the program settlement conference, including but not limited to the program's Settlement Conference Statement form. The parties shall submit this information in a timely manner to the program director and the other parties to the appeal ~~or the neutral~~ as designated in the request. Information submitted to the program at the program's request shall be a confidential mediation communication pursuant to subsection (6) of this rule.~~Each party also shall submit the requested information to the other parties, with the exception of material that is designated by the party as confidential, which shall be treated by the program director or the neutral as confidential pursuant to subsection (6) of this rule.~~

(6) Confidentiality

(a) The Appellate Settlement Conference Program is a "mediation program," as defined in ORS 36.110(8), and the provisions of ORS 36.100 to 36.238 apply to the program, including the provisions of ORS 36.220 providing that "mediation communications," as defined in ORS 36.110(7), are confidential. For purposes of the program, "mediation," which is defined in ORS 36.110(5), begins when an appeal is referred to the program and ends when the program director removes the appeal from the program, or when the court dismisses the appeal, whichever occurs first.

(b) All materials submitted to the supervising judge, ~~or to~~ the neutral, and/or the program director and all materials created by the supervising judge, ~~or~~ the neutral, and/or the program director that pertain to a program settlement conference and are not a part of the record on appeal shall be maintained separately from the record of the case. These materials shall not be subject to disclosure, except as the law may require or as the parties and the supervising judge, the neutral, and/or the program director may all agree. The materials referred to in this paragraph shall be destroyed at the time and in the manner prescribed by the Oregon Judicial Department's records retention policies.~~policy adopted by the program director pursuant to the Task Force on Records Retention.~~

(c) The Chief Judge, supervising judge, and/or program director may request the parties or the neutral or both to provide oral and written evaluations of the case settlement process. The materials referred to in paragraph (6)(b) of this rule, and oral and written evaluations of the case settlement process, may be used to evaluate the program. Any evaluation of the program, whether disseminated to the appellate courts or to the public, shall not disclose specific case identifying information.

(7) Appellate Settlement Conference Program Fees

(a) For the purposes of this paragraph, multiple parties who are represented by the same attorney or attorneys shall be deemed to be a single party. Except as provided in paragraph (d) of this subsection, each party to the appeal who participates in the program shall pay the initial program fee prescribed in this subsection. Each party shall pay the initial program fee directly to the neutral or, if instructed by the program director, to the State Court Administrator. Except as provided in paragraph (d) ~~(f)~~ of this subsection, each party shall pay the initial program fee no later than fourteen (14) days prior to the date of the first settlement conference. Unless otherwise ordered by ~~agreed to by the parties, the neutral, and~~ the program director, each party to a general civil, ~~or~~ domestic relations, or probate appeal must pay an initial program fee of $500.~~$350, and each party to a workers' compensation appeal must pay an initial program fee of $150.~~ Parties to a workers' compensation appeal are not required to pay a program fee if the mediation is conducted through the Workers' Compensation Board's mediation program. In all other appeals, the parties, neutral, and program director shall agree on the fees.

(b) (i) The initial program fee shall cover up to one hour of neutral preparation time and up to five hours of settlement conference time whether or not the settlement conference involves more than one session.

(ii) In complex ~~unusual~~ cases, if the neutral reasonably needs more than one hour of preparation time, the neutral may contact the program director and the program director may contact the parties to discuss whether to include ~~exclude~~ the additional preparation time in ~~from~~ the hours covered by the initial program fee.

(iii) If the parties agree to extend the settlement conference beyond the initial five hours, the parties shall compensate the neutral for any additional time that is expended and recorded by the neutral, with the total cost of the additional time being shared equally by the parties. The rate shall be the mediator's hourly mediation rate as identified in the program's Notice of Assignment of Neutral, ~~$150 per hour,~~ unless otherwise agreed to by the parties, the neutral, and the program director.

(c) If an individual or entity who is not a party to the appeal participates in the settlement conference as part of an attempt to reach a global resolution of a dispute or disputes outside the scope of the appeal but involving some or all of the parties to the appeal, the program director may require each such individual or entity to pay the program fees prescribed in paragraph (a) of this subsection.

(d) The Chief Judge or the Chief Judge's designee may waive ~~or defer~~ payment of program fees on motion of a party based on a showing that the party is financially unable to pay the fees without substantial economic hardship in providing basic economic necessities to the party or the party's dependent family. If liability for

payment of a party's share of program fees is waived ~~or deferred~~, that party's portion of program fees shall be paid by the court. ~~program from funds appropriated for that purpose.~~ If a party's program fees have been paid by the court and the party thereafter pays the fees, the fees shall be paid to the State Court Administrator as provided in paragraph (e) of this subsection.

(e) When a settlement conference is conducted by a neutral, an administrative law judge, "Plan B" retired judge, or other person who does not accept a fee for the services, the parties shall make the program fees payable to the State Court Administrator.~~,~~ Payment can be made via the court's electronic filing system, by credit card via phone through Appellate Court Records, or by mailing a check referenc~~e~~ing the case name and number~~, and mail it~~ to: Appellate Court Records ~~Settlement Conference Program~~, 1163 State Street, Salem, OR 97301-2563.

(f) A party who fails to pay the mediation program fee and/or any additional mediation fees shall remain liable for the unpaid fees. If, by the time the appellate judgment issues, a party has not paid all mediation fees owed and such fees have not been waived, the amount of the unpaid mediation fees will be included in a money award against the party who failed to pay in favor of the Judicial Department in the appellate judgment. ~~A party whose program fees are deferred and who has not paid the fees by the conclusion of the settlement conference shall remain liable for the unpaid fees, unless the fees are waived following completion of the settlement conference. If a party's program fees have been paid by the program and the party thereafter pays the fees, the fees shall be paid to the program as provided in paragraph (e) of this subsection.~~

(8) Actions Are Not Reviewable

Except as necessary to decide a motion for sanctions under subsection (9) of this rule, the actions of a neutral, a program director, or a supervising judge shall not be reviewed by the Court of Appeals or by the Supreme Court.

(9) Sanctions

At the request of the program director, the court may impose sanctions against a party, or counsel for a party, or both, for the failure of the party, or counsel, or both to perform any act required by this rule or by the written policies of the Appellate Settlement Conference Program. Sanctions include but are not necessarily limited to monetary assessments and dismissal of the appeal.

See ORS 2.560(3).

Rule 15.10
APPELLATE SETTLEMENT CONFERENCE PROGRAM
IN THE SUPREME COURT

(1) Cases Subject

(a) The procedures in this rule apply only to cases filed in the Supreme Court. The court shall determine which pending cases or category of cases, if any, may be included in the Appellate Settlement Conference Program (program).

(b) Cases shall be screened and settlement conferences held in the manner prescribed by ORAP 15.05, unless otherwise stated in this rule.

(2) Abeyance of Case

(a) On assignment of a case to the program, the Chief Justice or their ~~his~~ designee shall inform the program director and/or parties whether any abeyance of the case will occur pending the settlement conference.

(b) The court may reactivate a case held in abeyance at any time:

(i) At the request of the program director pursuant to the request of a party or on the director's own motion, or

(ii) On the motion of a party showing good cause for reactivating the case. In addition to serving a copy of the motion on all parties to the case, a party filing a motion to reactivate shall serve a copy of the motion on the program director, or

(iii) On the court's own motion.

(3) Appellate Settlement Conference Program Fees. Program mediation fees shall be administered in the manner provided in ORAP 15.05(7), except that the Supreme Court shall be responsible for payment of any waived or unpaid program fees for cases it refers into the program.

Rule 14.05
APPELLATE JUDGMENT

(4) **(a)** […]

(b) The money award part of an appellate judgment for an unpaid filing fee, mediation fee, or other costs in favor of the Judicial Department shall be satisfied as follows. […]