ORAP COMMITTEE 2024
MATERIALS
MEETING DATE: MARCH 20, 2024, 9 A.M. - 12 P.M.

- Proposal 1: ORAP 1.15 etc, ACMS Upgrade Temporary Rules

and

- Proposal 19: ORAP 16.10 etc, Additional Amendments re ACMS Upgrade

- Proposal 3: ORAP 2.05, Clarify Entry Date In Register

- Proposal 4: ORAP 4.35, Clarify Rule re Agency Withdrawal of Orders

- 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- Proposal 6: ORAP 5.20 etc, COA Nonprecedential Memorandum Opinions, Temp Rules and Revisions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 15: ORAP 12.27, Judicial Disability Proceeding Notification

ORAP COMMITTEE 2024
March 20 Materials

AMENDING RULE(S): Proposal # 1 -- ORAP 1.15(3)(k), 1.32, 1.35, 1.45, 4.20, 5.20, 13.05(6), 16.03, 16.05, 16.10, 16.15, 16.20, 16.25, 16.30, 16.40, 16.45, and 16.60 -- Temporary Rules re: ACMS Upgrade

PROPOSER: [Temporary rules being made permanent.]

EXPLANATION:

WORKGROUP NOTES FOR MARCH 20

[Per S Armitage: New changes are to ORAP 1.32(1)(a) only.]

ORIGINAL EXPLANATION

The following temporary rules were adopted by CJO 23-051 / CJO 23-05 and became effective December 11, 2023. The primary purpose of the amendments were to address an upgrade to the Appellate Case Management System (ACMS) that allows filing by pro se parties. The amendments are proposed to be made permanent.

RULE AS AMENDED:

Rule 1.15
TERMINOLOGY

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

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

(ii) "Paper ~~Conventional~~ service" means the delivery of a copy of a

document on another person via the United States Postal Service, commercial delivery service, or personal delivery.

Rule 1.32
OUT-OF-STATE ATTORNEY AND SELF-REPRESENTED PARTY CONTACT INFORMATION; CHANGES IN CONTACT INFORMATION FOR ATTORNEY, OUT-OF-STATE ATTORNEY, AND SELF-REPRESENTED PARTY

(1) An out-of-state attorney who appears by brief or argues the cause under ORAP 6.10(4) or ORAP 8.10(4) and any self-represented party must provide the court with the address for that attorney or party.

(a) A self-represented party or out-of-state attorney ~~that~~who provides the court with an email address on a paper filed document or files a document using the appellate eFiling system will receive court notifications by email. A self-represented litigant may request notification by regular mail instead of email by filing a notice with the court.~~notifying the court.An out-of-state attorney also may consent to receive court notifications by email by providing an email address to the court.~~

~~(b) A self-represented party who consents to receive court notifications by email must provide the court with an email address and~~

~~(i) include a statement of consent to receive electronic notifications from the court in the party's initial filing in the cause; or~~

~~(ii) file a notice of consent to receive electronic notifications from the court.~~

~~(c) A self-represented party who has consented to receive electronic notifications from the court under paragraph (b) of this subsection may revoke that consent by notifying the court that the party's email address should no longer be used and that all court notifications should be sent to the party by conventional mail.~~

~~(d)~~ An out-of-state attorney or self-represented party who provides the court with an address or email address under subsection (1) of this rule must notify the court of a change of address or email address.[1]

(2) If an attorney for a party files a change of address with the Oregon State Bar, or if an out-of-state attorney or a self-represented party notifies the court of a change of mailing or email address in writing or otherwise, the attorney or party must inform all other parties ~~to the cause~~ of the change of~~f~~ mailing or email address within seven calendar days.

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[1] *See also* ORAP 16.10(2)(a)(v), regarding an updated email address for an Oregon State Bar member who is a registered user of the appellate eFiling ~~electronic filing~~ system.

Rule 1.35
FILING AND SERVICE

(1) Filing

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

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

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

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

(B) Except as otherwise provided in ORAP 16.30 or 16.60(2), any ~~Any~~ other person may ~~must~~ file any document by either the eFiling system or by paper filing. Paper filing should be made either ~~in conventional form,~~ by delivering the document via U.S. Postal Service or commercial delivery service to the Appellate Court Administrator, Appellate Court Records Section, 1163 State Street, Salem, Oregon 97301-2563 or in person to the Appellate Court Administrator, Appellate Court Records Section, 1163 State Street, Salem, Oregon 97301-2563.

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

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

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

(b) Manner of Filing

(i) "Initiating document" means any document that initiates a case, including but not limited to a notice of appeal; a petition for judicial review; a petition for a writ of mandamus, habeas corpus or quo warranto; and a recommendation for discipline from the Oregon State Bar or the Commission on Judicial Fitness and Disability. As used in this rule, "initiating document" does not include a petition for review under ORAP 9.05[2] or a motion for extension of the time to file a petition for review under ORAP 9.05.

(ii) Use of the a~~Using A~~ppellate ~~Courts'~~ eFiling system ~~System~~to deliver and file documents with either appellate court

~~Delivery for filing using the eFiling system~~ is subject to Chapter 16 of these rules.

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

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

(B) A person may deliver an initiating document for filing via commercial delivery service, and the delivery is complete on the date of dispatch for delivery by the delivery service if dispatched for delivery in accordance with ORS 19.260(1)(a). If the Administrator receives the initiating document within the time prescribed by law, the person need not submit proof of the date of delivery for dispatch. If the Administrator does

not receive the document within the time prescribed by law and if the person must rely on the date of delivery for dispatch, the person must file with the Administrator proof from the commercial delivery service of the date of delivery for dispatch, which may include the commercial delivery service's online tracking service.

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

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

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

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

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

(2) Service

(a) (i) Except as provided in clause (2)(a)(ii) of this subsection, a party filing a document with the court must serve a true copy of the document on each other party or attorney for a party to the case.[2] ~~3~~

(ii) A party filing a motion for waiver or deferral of court fees and costs under ORS 21.682 need not serve on any other party to the case a copy of the motion or any accompanying documentation of financial eligibility.[4] ~~3~~ After the court has ruled on the motion, if another party to the case requests a copy of

the motion or documentation of financial eligibility for the purpose of challenging the court's ruling, the filing party must comply with the request but may redact protected personal information as described in ORAP 8.50(1). As used in this clause, "documentation of financial eligibility" means a document showing eligibility for a government benefit based on financial need or an affidavit or declaration showing the income, assets, and financial obligations of a party and the party's household.

(b) Except as otherwise provided by law,[54] a party may serve a document on another person as provided in ORCP 9 or by commercial delivery service.

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

(ii) Electronic service via the eFiling system is permitted only on ~~attorneys who are~~ authorized users of the eFiling system and only as provided in ORAP 16.45.

(iii) Service by email or facsimile communication is permitted only as provided in ORCP 9 F or G.

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

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

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

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

(e) Service on Trial Court Administrators and Transcript Coordinators

(i) When a copy of a notice of appeal is required to be served on the trial court administrator, service is sufficient if it is mailed or delivered to the

person serving in the capacity of trial court administrator for the county in which the judgment or appealable order was ~~is~~ entered.

(ii) When a copy of a notice of appeal is required to be served on the transcript coordinator, service is sufficient if it is mailed or delivered to the office of the trial court administrator for the county in which the judgment or appealable order was entered, addressed to "transcript coordinator."

(iii) An authorized user of the trial court electronic filing system may serve a copy of a notice of appeal on the trial court administrator and the transcript coordinator by using the "Courtesy Copies" email function of that system. The email address for each judicial district's trial court administrator and transcript coordinator are available on the judicial district's website.

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

[2][1] ORAP 1.35 defines "initiating document" for purposes of paper ~~conventional~~ filing. For those purposes, the term does *not* include a petition for review under ORAP 9.05. ORAP 16.05 defines "initiating document" for purposes of eFiling and eService. For those purposes, the term *does* include a petition for review under ORAP 9.05. ORAP 16.05(7~~8~~).

[3][2] Whenever these rules authorize or require service of a copy of any document on the Attorney General, the copy must be served at this address: Attorney General of the State of Oregon, Office of the Solicitor General, 400 Justice Building, 1162 Court Street, NE, Salem, Oregon 97301-4096.

[4][3] *See* Chief Justice Order No. 18-024 (order adopted pursuant to ORS 21.682 prescribing standards and practices for waiver or deferral of court fees and costs) (available at https://cdm17027.contentdm.oclc.org/digital/collection/p17027coll10/id/263/rec/1).

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

Rule 1.45
FORM REQUIREMENTS

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

include:

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

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

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

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

(4) Parties using paper ~~conventionally~~ filing for any document ~~in the appellate courts~~ are:

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

(b) Required to use recycled paper if recycled paper is readily available at a reasonable price in the party's community. Parties also ~~Further, parties~~ are encouraged to use paper containing the highest available content of post-consumer waste, as defined in ORS 459A.500(3), that is recyclable in the office paper recycling program in the party's community. The court will not decline to accept any filing on the ground that the filing does not comply with paragraph (a) or (b) of this subsection.[1]

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

[1] See ORS 7.250.

Rule 4.20
RECORD ON JUDICIAL REVIEW

(1) As used in this rule:

(a) "Agency" means any state agency whose decision is the subject of a petition for judicial review filed in the Supreme Court or Court of Appeals; or the Oregon State Bar or Board of Bar Examiners in a proceeding under ORAP 12.25, when the proceeding below included an evidentiary hearing.

(b) "Agency record" means the record before the agency, including the agency file, exhibits offered and received (or the subject of an offer of proof), and the transcript of oral proceedings, or the shortened part of the record if the parties have so stipulated pursuant to ORS 183.482(4), regardless of whether the agency actually conducted a hearing.

(c) "Each party" may mean multiple parties if two or more parties are represented by the same attorney or law firm.

(d) "Electronic means" means optical disk[1] or Secure File Transfer Protocol, or other similar electronic medium if approved by the Administrator.

(e) "Instructions" means the instructions, located on the Oregon Judicial Department website, for filing and serving the agency record via Secure File Transfer Protocol by electronic means.[2]

(f) "SFTP" means Secure File Transfer Protocol.

(2) Transmitting Agency Record to Appellate Court. The agency may transmit the agency record to the Administrator ~~conventionally~~ in paper form, by optical disk, or by Secure File Transfer Protocol (SFTP), as provided in this rule.

(3) Preparation of the Record Generally

(a) (i) If a state agency has its own process for preparing the record, including any transcript, for use by the agency or tribunal and the form of the record substantially complies with this rule, the agency may submit the record in that form, subject to this rule.

(ii) As provided in ORS 656.298(6), the record on judicial review in a workers' compensation case includes the transcript prepared under ORS 656.295, all exhibits, and all decisions and orders entered during the hearing and review process.

(b) Agency file. The agency may prepare the agency file either with the first filed document on top (or in front) or the last filed document on top (or in front). If the agency is submitting the record in paper form, the pages of the agency file and the exhibits must be consecutively numbered at the bottom of each page.

(c) Exhibits.

(i) Except as provided in this paragraph, the agency must transmit all exhibits offered and received, including any exhibit that is the subject of an offer of proof. If the agency is transmitting the exhibits by electronic means, the agency must identify each disk or electronic file containing exhibits as provided in the Instructions.

(ii) Except as provided in clause (iii) of this paragraph, if the exhibits include any nondocumentary exhibit, the agency must conventionally transmit the exhibit.

(iii) If the exhibits include an audio or video recording on an optical disk, the agency must transmit the disk as part of the exhibits. If the exhibits include one or more audio or video tape recordings, unless a party objects, the agency may copy the recording to an optical disk and transmit the optical disk in lieu of the tape recording. A party may move the court to supplement the record on judicial review with a transcript of any audio or video recording, to be prepared at the party's expense.

(d) Transcript. If the agency is submitting the record in paper form, the transcript must be prepared as provided in ORAP 3.35(1). If the agency is submitting the record by electronic means, the agency must comply with ORAP 3.35(2)(a), (b), and (d).

(e) Indexing. The record must be indexed. The index for the record must identify each document in the agency file, each volume of transcript, and each exhibit. If the agency is transmitting the record by electronic means, each document identified in an index must be electronically linked to the document. If the agency is transmitting the record by optical disk and the record requires more than one disk, the second and any subsequent disk must have a subindex of the documents on that disk, with electronic links to each document on the disk.

(f) The agency must assemble the record in this order: The agency file, the parties' exhibits, and any transcript.

(g) If the agency is transmitting the record in paper form, the agency must securely fashion the index and record in a suitable cover or folder showing on the outside the case name and the agency name and case number. If the agency is transmitting the record by electronic means, the agency must submit the record as provided in the Instructions.

(4) Confidential and Sealed Documents

(a) If the record contains a confidential or sealed document* as defined in ORAP 3.07, the agency must place the document in an envelope (if the record is being transmitted ~~conventionally~~in paper form) or in a separate electronic file as provided in the Instructions (if the record is transmitted by electronic means). If the record includes multiple confidential documents, the agency may place all confidential documents in the same envelope or electronic file. If the agency record includes multiple sealed documents, the agency must place each sealed document in a separate envelope or electronic file.

(b) An envelope containing a sealed or confidential document must indicate on the outside of the envelope the case name, the agency name and case number, and that it contains a sealed or confidential document. An electronic file containing a sealed or confidential document must be labelled as provided in the Instructions.

(c) If the agency is transmitting the record by optical disk, all confidential documents must be placed on a separate disk labelled as provided in the Instructions, and each sealed document must be transmitted by a separate disk. If the agency is transmitting the record by SFTP, any sealed document must be transmitted by either optical disk or in paper form.

(5) Transmitting the Record in Paper Form. If the agency transmits and serves the record in paper form, the record must have a suitable cover or folder bearing on the outside the title and agency number of the case and the name of the agency from which the review is taken. Whenever feasible, the agency must submit the original record. The agency's transmission and service of the record in paper form qualifies as transmission of the record within the meaning of ORS 183.482(4).

(6) Preparing and Transmitting the Record by Electronic Means.

(a) If the agency transmits the record by electronic means, the agency must prepare the record as provided in the Instructions.

(b) The following qualifies as transmission of the record to the Administrator within the meaning of ORS 183.482(4):

(i) Delivery of the record in optical disk form to the Administrator for filing as provided in the Instructions; or

(ii) Uploading the agency record to the Judicial Department's SFTP site as provided in the Instructions, together with notification to the Administrator that the upload is complete, as provided in the Instructions.

(c) The following qualifies as service of the record on a party to the judicial review, as provided in subsection (3):

(i) Delivery of the record in conventional paper form to the party;

(ii) Delivery of the record in optical disk form to the party; or

(iii) Uploading the record to the Judicial Department's SFTP site as provided in the Instructions and providing notification to the other party that the upload is complete. The record will remain on the SFTP site for 14 days to allow a party being served by SFTP to retrieve the record and copy it to a suitable location on the party's computer.

(7) Service Generally

(a) On the same date the agency transmits the agency record to the Administrator, the agency must serve a copy of the record on each other party to the judicial review. The agency may serve the party ~~conventionally~~ in paper form, by optical disk, or by Secure File Transfer Protocol (SFTP), as provided in this subsection.

(b) Service on Party Represented by Attorney. If the agency transmits the record to the Administrator by optical disk or SFTP, the agency must serve a copy of the record on any party represented by an attorney, including an out-of-state attorney admitted *pro hac vice*, by the same means unless the attorney has made arrangements with the agency for service by other means.

(c) Service on Self-Represented Party.

(i) The agency may serve the record on a self-represented party ~~conventionally~~ in paper form or by optical disk.

(ii) The agency may serve the record on a self-represented party by SFTP, if the party has stated the party's willingness to be served by SFTP as provided in ORAP 4.15(1)(d) or if the agency otherwise has obtained the party's consent to be served by SFTP.

(iii) If the agency serves a self-represented party by optical disk or SFTP, the agency must notify the party that, if the party is unable to access the record, the party must notify the agency within 14 days of receipt, with contact information for the agency.[3] If a party so notifies the agency, the agency must serve the record on the party ~~conventionally~~ in paper form within seven days.

(d) If the record includes one or more confidential documents* as defined in

ORAP 3.07, the agency must serve the parties with a copy of the confidential document. If the record includes one or more sealed documents as defined in ORAP 3.07, the agency must not serve a copy of the sealed document on the parties.

(e) The agency must accompany the record as transmitted to the court with proof of service of the record on each party, stating the manner in which each party was served.

(8) Transmitting and Serving Corrected or Additional Agency Record

(a) The record is deemed settled when the time to move to correct the record as provided in ORAP 4.22 has expired or the process under that rule has been completed.

(b) If the agency or the court corrects or adds to any part of the record, the agency must transmit to the Administrator and serve on the parties the corrected or additional part of the record by one of the methods prescribed in this rule.

(c) The Administrator will notify the parties when the Administrator determines that the record is settled.

(9) Modified Record After Court Grants Leave to Present Additional Evidence

If the appellate court grants a party's motion under ORS 183.482(5) for leave to present additional evidence, following proceedings before the agency, the agency must transmit to the Administrator and serve on the parties any additional record by one of the methods prescribed in this rule.

(10) Disposition of Agency Record upon Issuance of Appellate Judgment

(a) If the agency transmitted the record to the Administrator in paper form, unless the court directs otherwise, when the Administrator issues the appellate judgment, the Administrator will return the record to the agency.

(b) If agency transmitted the record to the Administrator by electronic means, the Administrator issues the appellate judgment, the Administrator will not return the agency record to the agency. The Administrator will retain the electronic record for at least six months; thereafter, unless the court grants a party's request to retain the agency record longer, the Administrator may delete the record from computer storage.

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[1] See the definition of "optical disk" at ORAP 1.15(3)(s).

[2] The Instructions are published at:

<https://www.courts.oregon.gov/courts/appellate/rules/Pages/orap.aspx>.

[3] As provided in the SFTP Instructions, the agency will email notice to any party being served with the record by SFTP when the record is ready to be downloaded. The Instructions describe how to access the SFTP website and download the record.

* "Document" as used here means a document in the agency file, an exhibit, or any part of the transcript of oral proceedings that the administrative law judge, agency, or court has ordered to be treated as confidential or sealed.

Rule 5.20
REFERENCE TO EVIDENCE
AND EXHIBITS; CITATION OF AUTHORITIES

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

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

(2~~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 brief should cite ~~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.

(3~~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.

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

(56) 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 13.05
COSTS AND DISBURSEMENTS

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(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 formconventionally.

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16. FILING AND SERVICE BY ELECTRONIC MEANS

Rule 16.03
APPLICABILITY

This chapter applies These rules apply to electronic filing and service in the Oregon appellate courts. Court of Appeals and the Oregon Supreme Court. At this time, only members of the Oregon State Bar are eligible to file documents electronically.

Rule 16.05
DEFINITIONS

For purposes of this chapter:

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

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

(3) "Electronic filing system" or "eFiling system" means the system provided by the Oregon Judicial Department for a party or participant to electronically submit a document for filing in the appellate courts via the internet. The system may be accessed through at the Judicial Department's website.[1]

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

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

(5~~6~~) "Electronic service" or "eService" means the process for a user of the eFiling system to accomplish service via the electronic mail function of that ~~the appellate court eFiling~~ system.

(6~~7~~) "Hyperlink" means a navigational link in the electronic version of a document to another section of the same document or to another electronic document accessible via the internet.

(7~~8~~) "Initiating document" means any document that initiates a case, including but not limited to a notice of appeal; a petition for review;[2] a petition for judicial review; a petition for a writ of mandamus, habeas corpus or *quo warranto*; and a recommendation for discipline from the Oregon State Bar or the Commission on Judicial Fitness and Disability.

(8~~9~~) "PDF" means Portable Document Format, an electronic file format.

(9~~10~~) "Username" means the identifying term assigned to an eFiler by the court, used to access the appellate court eFiling system.

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

[2] ORAP 1.35 defines "initiating document" for purposes of paper ~~conventional~~ filing. For those purposes, the term does *not* include a petition for review under ORAP 9.05. ORAP 1.35(1)(b)(i). ORAP 16.05 defines "initiating document" for purposes of eFiling and eService. For those purposes, the term *does* include a petition for review under ORAP 9.05.

Rule 16.10
eFILERS

(1) Authorized eFilers

(a) Any person ~~member of the Oregon State Bar~~ may register to become an eFiler.

(b) To become an eFiler, a user must create an account with the eFiling system.~~an attorney must complete a registration form to request a username and must complete a training program, either online or in person, regarding the appellate court eFiling system. Links to the registration form and to the online training program are available at Appellate eFiling. An attorney who has been assigned a username, has created a password, and has completed training may eFile documents with the appellate courts.~~

(2) Conditions of Electronic Filing

(a) To access the eFiling system, each eFiler agrees to and shall

(i) review the "How to eFile" document available on the appellate court's eFiling website at: < https://www.courts.oregon.gov/services/online/Pages/appellate-efile.aspx>; ~~the technical requirements for electronic filing at Appellate eFiling FAQs;~~

(ii) register for access to the eFiling system;

(iii) comply with the electronic filing terms and conditions when using the eFiling system;

(iv) furnish required information for case processing; and

(v) update their account information in the eFiling system if any of that information changes, including but not limited to, any change in the user's email address. ~~advise the Oregon Judicial Department Enterprise Technology Services Division of any change in the eFiler's email address.~~[1]

(b) An eFiler's username and password may be used by only the user ~~only by the attorney~~ to whom the username and password were issued. Attorney users only may authorize ~~or by~~ an employee of that attorney's law firm or office or other ~~by another~~ person ~~authorized by that attorney~~ to use the username and password.

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

~~[1] Use the form located on the Judicial Department's website, at the following address: <https://www.courts.oregon.gov/services/online/Pages/appellate-eFile-support.aspx>.~~

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

Rule 16.15
FORMAT OF DOCUMENTS TO BE FILED ELECTRONICALLY

(1) Any document filed via the eFiling system must be in a Portable Document

Format (PDF) or Portable Document Format/A (PDF/A) that is compatible with the eFiling system requirements and that does not exceed 25 megabytes. An eFiler should break down a document that exceeds the size limit into as few smaller separate documents as possible, which the filer may upload as supporting documents under subsection (5) of this rule.[1] Unless the PDF document is a pro se supplemental brief filed under ORAP 5.92 or a supplemental pro se petition for review of a Court of Appeals decision, the document shall allow text searching and shall allow copying and pasting text into another document.

(2) A submitted document, when viewed in electronic format and when printed, shall comply, to the extent practicable, with the formatting requirements of any applicable Oregon Rule of Appellate Procedure. Except as provided in ORAP 16.40**,** a document submitted for electronic filing need not contain a physical signature.

(3) An eFiler who submits a document that does not comply with an applicable Oregon Rule of Appellate Procedure will receive from the court an acknowledgement of the electronic filing and a notice of the deficiency or deficiencies to be corrected.[21]

(4) The court may require that an eFiler submit, in the manner and time specified by the court, an electronic version of a document in its original electronic format.

(5) Except as provided in subsection (1) and paragraphs (5)(a) through (c) of this rule, to the extent practicable, an electronic filing must be submitted as a unified single PDF file, rather than as separate eFiled documents or as a principal eFiled document with additional supporting documents attached through the eFiling system.[32]

(a) The following documents must be submitted as supporting documents through the eFiling system:

(i) One or more parts of an eFiled document that exceeds the size limit set out in subsection (1) of this rule, as a supporting document to the initial eFiled document.

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

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

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

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

(ii) For the brief or other document, a comment that the electronic filing transaction relates to the earlier electronic filing transaction that submitted the motion or application to appear *amicus curiae*.

(6) An eFiled document may not contain an embedded audio or video file.

(7) Unless otherwise provided by these rules or directed by the court, an eFiler shall not submit to the court paper copies of an eFiled document.

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

[2] ~~*See* ORAP 1.20~~.

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

Rule 16.20
FILING FEES AND eFILING CHARGES

(1) The appellate courts may impose a transaction charge for using the eFiling system, as prescribed by order of the Chief Justice.[1]

(2) An eFiler shall pay any required filing fees or eFiling charges in effect at the time of the electronic filing as part of submitting an electronic filing, by using the electronic payment system, unless otherwise directed by the court. Charges for electronic filing may be recovered in the manner provided by ORAP 13.05.

(3) If an eFiler seeks to waive or defer filing fees, the eFiler shall apply for a waiver or deferral of filing fees by eFiling an application to waive or defer filing fees at the time of filing a document electronically.

[1] As of the publication date of these rules, no such charge has been imposed.

Rule 16.25
ELECTRONIC FILING AND ELECTRONIC FILING DEADLINES

(1) Except as provided in subsection (4), the filing deadline for any document filed electronically is 11:59:59 p.m. in the time zone in which the court is located on the date by which the document must be filed.

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

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

(b) When the court accepts the document for filing, the eFiling system will affix to the document the time of day, the day of the month, the month, and the year that the eFiling system received the document. The date and time of filing entered in the register relate back to the date and time that the eFiling system received the document. The eFiling system will send an email that includes the date and time of acceptance to the eFiler's email address and to any other email address provided by the eFiler. If the document was electronically served by the eFiling system pursuant to ORAP 16.45,[1] the date of service will also relate back to the date that the eFiling system received the document.

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

equipment or software, or other problem within the eFiler's control.

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

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

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

(c) Paragraph (b) of this subsection does not apply to extend any jurisdictional time period imposed by statute, including those related to the filing and service of a notice of appeal, a petition for judicial review, or any other initiating document. A party's circumstances may require the party to use paper filing and paper service for ~~conventionally file and serve~~ an initiating document within the time period imposed by statute.

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

(5) Documents ~~Conventionally~~ Filed by Paper Filing: The court may digitize, scan, or otherwise reproduce a document that is filed by paper filing ~~conventionally~~ into an electronic record, document, or image. The court subsequently may destroy a ~~conventionally~~ document filed by paper filing ~~document~~ in accordance with the protocols established by the State Court Administrator under ORS 8.125(11).

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[1] As provided in ORAP 16.45(3), the eFiling system cannot electronically serve some documents.

Rule 16.30
PAPER ~~CONVENTIONAL~~ FILING REQUIREMENTS

(1) A filer must file the ~~The~~ following documents by paper filing~~must be conventionally filed~~:

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

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

(2) An eFiler who is not a lawyer of record for a party in a case must use paper filing ~~conventionally file~~ for any document in any case that is confidential by law or court order.

(a) The paper ~~conventional~~ filing requirement in this subsection applies to a lawyer for a person or entity appearing as amicus curiae.

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

(3) A filer may file the ~~The~~ following documents by either paper filing or eFiling: ~~may be conventionally filed or eFiled:~~

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

(b) A request or motion for waiver of the mandatory eFiling requirement, as set out in ORAP 16.60(2). If the request is approved or the motion granted, then the approval or order filed in a case under ORAP 16.60(2)(c) or (d), and any document subject to that approval or order may be filed by paper filing.~~conventionally filed.~~

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

Rule 16.40
ELECTRONIC SIGNATURES

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

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

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

(b) The Administrator is authorized to provide notice on the Judicial Department's website[1] that eFilers may not include signature blocks generated by certain programs that are incompatible with the appellate courts' electronic court system~~s~~.

(3) When a document is filed electronically in which an opposing party joins, that all such parties join in the document must be shown ~~either~~ by any of the following:

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

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

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

(4) A party eFiling ~~electronically filing~~ a document ~~, such as a declaration,~~ that must be signed by a person other than the eFiler, such as a declaration, shall include a scanned image of the signature page showing the person's signature.

[1] <https://www.courts.oregon.gov/services/online/pages/appellate-efile.aspx>

Rule 16.45
ELECTRONIC SERVICE

(1) Registration as an eFiler with the eFiling system constitutes consent to receive service via the electronic service ~~mail~~ function of the eFiling system.

(2) (a) Except as provided in subsection (3), a party eFiling a document ~~with the appellate court~~ may use the eFiling system's eService function to accomplish service of that document on any other party's attorney or on a self-represented party, if that party's attorney or the self-represented party is a registered eFiler. ~~, by using the eService function of the eFiling system.~~ The eFiling system will generate an email to the attorney or self-represented party being eServed that includes a link to the document that was eFiled. To access the eFiled document, the attorney or self-represented party who has been eServed must log in to the eFiling system.

(b) eService is effective under this rule when the eFiler has received a confirmation email stating that the eFiled document has been received by the eFiling system.

(3) A party eFiling a document must accomplish service via paper service or other form of service permitted by ORCP 9, ~~the conventional manner, as provided by ORAP 1.35 and other applicable rules and statutes,~~ if:

(a) The document to be served:

(i) initiates a case in the Court of Appeals;

(ii) initiates a case in the Supreme Court under that court's original jurisdiction;

(iii) is a first motion for extension of time to file a petition for review in the Supreme Court; or

(iv) if no motion for extension of time has been filed, is a petition for review in the Supreme Court;

(b) The party to be served is self-represented and is not a registered eFiler; or

(c) The attorney to be served is not a member of the Oregon State Bar and is not a registered eFiler, or is a member of the Oregon State Bar but has obtained a waiver to the mandatory eFiling requirement under ORAP 16.60.

(4) All eFiled documents must be accompanied by a proof of service under ORAP 1.35(2)(e). The proof of service must certify service on all parties regardless of the means by

which service was accomplished, including eService. The proof of service must state that service was accomplished at the person's email address as recorded on the date of service in the eFiling system~~,~~ and need not include that person's email address or mailing address.

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

Rule 16.60
MANDATORY ELECTRONIC FILING

(1) An active member of the Oregon State Bar must file a document using the eFiling system, except:

(a) When a document must or may be filed by paper filing as provided in ~~conventionally filed under~~ ORAP 16.30~~;~~, or

(b) When the eFiling system is temporarily unavailable as provided in ORAP 16.25.

(2) An active member of the Oregon State Bar who is required ~~under subsection (1) of this rule~~ to file a document using the eFiling system under subsection (1) of this rule, may obtain a waiver of that ~~the~~ requirement as follows:

(a) The person ~~member~~ must file one of the following:

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

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

(b) A request or a motion must include an explanation describing good cause for the waiver. The request or motion may be filed by paper filing. ~~conventionally.~~

(c) The Administrator is authorized to approve or deny a request filed under subparagraph (a)(i) of this subsection.

(d) If the ~~court or the~~ Administrator approves a request, or if the court approves a motion, as described in subsection (a) of this rule, ~~under that subsection,~~ the person must

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

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

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

(3) The Administrator is authorized to suspend subsection (1) of this rule when the Administrator becomes aware of a temporary unavailability as defined in ORAP 16.25(4)(a) and, in the Administrator's judgment, ~~-~~the temporary unavailability is likely to prevent electronic filing for a substantial period of time under the circumstances.

(a) If the Administrator suspends subsection (1) of this rule, then the Administrator will strive to provide 24-hour advance notice of the suspension to registered eFilers via email and to the public via notice on the Oregon Judicial Department's website. If circumstances make it impractical to provide 24 hours' notice, the Administrator will provide as much advance notice as is practical under the circumstances.

(b) If the Administrator suspends subsection (1) of this rule under this subsection, then an active member of the Oregon State Bar may file the document as provided in ORAP 16.25(4).

(4) If a filer submits a document by paper filing ~~for conventional filing~~ in contravention of subsection (1) of this rule and either the filer has not obtained a waiver pursuant to subsection (2), or ~~of this rule, nor is~~ the electronic system is not unavailable as described in subsection (3) ~~of this rule~~, then the Administrator is authorized to take any of the following actions:

(a) Accept the document for filing and provide notice to the filer that the Administrator will reject future ~~conventional~~ submissions by paper filing from the filer that are subject to subsection (1) of this rule.

(b) Refuse to accept the document for filing.

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

(d) Refer the filing to the court for consideration of sanctions under ORAP 1.20(2).

ORAP COMMITTEE 2024
March 20 Materials

AMENDING RULE(S): Proposal # 19 -- ORAP 16.10, ORAP 16.25, ORAP 16.40, ORAP 16.45 -- Additional Clarifications of eFiling Rules for ACMS Upgrade

PROPOSER: Daniel Parr, Appellate Court Administrator

EXPLANATION:

WORKGROUP NOTES FOR MARCH 20

[Per S Armitage: Minor wordsmithing revisions to ORAP 16.10, 16.25, 16.45. Minor new change to previously unamended rule, ORAP 16.15(1).]

ORIGINAL EXPLANATION

[From Mr. Parr's memo:]

I am submitting these changes to go along with the temporary rules implemented for the 2023 ACMS upgrade. My goal is for these changes, along with the temporary rules, to be a starting point in clarifying the rules based on feedback we are receiving from users.

Issue: The courts implemented a new case management system on December 11, 2023. This new system included a combined eFiling and public access system that is now open to attorneys, self-represented litigants, parties, and the public. There are several rules that need clarification based on questions and feedback we are receiving in Appellate Court Records.

Proposed solution: Amend portions of ORAP 16 and add clarifying notes when necessary to ensure attorneys, their staff, and self-represented litigants understand what they need to do to successfully use the system. Alternatively, the clarifying footnotes could be incorporated into the rules if appropriate.

RULE AS AMENDED:

Rule 16.10
eFILERS

(1) Authorized eFilers

(a) Any person may register to become an eFiler.

(b) To become an eFiler, a user must create an account with the eFiling system.

(2) Conditions of Electronic Filing

(a) To access the eFiling system, each eFiler agrees to and shall

(i) review the Appellate eFiling and Public Portal Guide" and "Appellate eFile FAQs" ~~"How to eFile"~~ documents available on the appellate court's eFiling website at: < https://www.courts.oregon.gov/services/online/Pages/appellate-efile.aspx>;

(ii) register for access to the eFiling system and link ~~your~~the eFiler's user account with ~~your~~the eFiler's record in ACMS;[1]

(iii) comply with the electronic filing terms and conditions when using the eFiling system;

(iv) furnish required information for case processing; and

(v) update their account information in the eFiling system if any of that information changes, including but not limited to, any change in the user's email address.

(b) An eFiler's username and password may be used by only the user to whom the username and password were issued. Attorney users only may authorize an employee of that attorney's law firm or office or other person to use the username and password.[2]

* * * * *

[1] To link ~~your~~a user account to ~~your~~a record in ACMS, an OSB member or *pro hac vice* attorney should use the Request Attorney Access process in the system. A self-represented litigant should use the Request Case Access process ~~on your case~~.

[2] An employee of an attorney or the attorney's law firm may create an eFiling account and file on behalf of the attorney.

Rule 16.15
FORMAT OF DOCUMENTS TO BE FILED ELECTRONICALLY

(1) Any document filed via the eFiling system must be in a Portable Document Format (PDF) or Portable Document Format/A (PDF/A) that is compatible with the eFiling system requirements and that does not exceed 25 megabytes or 500 pages. An eFiler should

break down a document that exceeds the size limit into as few smaller separate documents as possible, which the filer may upload as supporting documents under subsection (5) of this rule. Unless the PDF document is a pro se supplemental brief filed under ORAP 5.92 or a supplemental pro se petition for review of a Court of Appeals decision, the document shall allow text searching and shall allow copying and pasting text into another document.

* * * * *

Rule 16.25
ELECTRONIC FILING AND ELECTRONIC FILING DEADLINES

(1) Except as provided in subsection (4), the filing deadline for any document filed electronically is 11:59:59 p.m. in the time zone in which the court is located on the date by which the document must be filed.

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

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

(b) When the court accepts the document for filing, ~~the eFiling system will affix to the document the time of day, the day of the month, the month, and the year that the eFiling system received the document.[1] The~~ the date and time of filing entered in the register relate back to the date and time that the eFiling system received the document. The eFiling system will send an email that includes the date and time of acceptance to the eFiler's email address and to any other email address provided by the eFiler. If the document was electronically served by the eFiling system pursuant to ORAP 16.45,~~[1]~~[2] the date of service will also relate back to the date that the eFiling system received the document.

* * * * *

[1] The filed date in the register is the official date the document is deemed filed. After submittal, the system processes the filing, when this is complete the system stamps the document. The document stamp may be different than the official filed date in the register. For instance, if a filer submitted a document at 11:59 p.m. the official filed date will be 11:59 p.m. of that day, however, the document stamp may show a different date and time due to system processing. ~~Due to technical processes that occur to the document upon submission, the time stamped on a document and the time entered on the docket entry in the register may be different by a minute or~~

~~two. For the purposes of this and all other rules, the date and time of the docket entry determines when a document was filed. The date and time on a docket entry will always match the time when the filing was received by the system.~~

[2] As provided in ORAP 16.45(3), the eFiling system cannot electronically serve some documents.

Rule 16.40
ELECTRONIC SIGNATURES

(1) The username and password required to submit a document to the eFiling system constitute the signature of the eFiler for purposes of these rules and for any other purpose for which a signature is required.[1]

* * * * *

[1] The username and password of an employee of a law firm or attorney constitutes the signature for an attorney when that employee is filing on behalf of the attorney.

Rule 16.45
ELECTRONIC SERVICE

(1) Registration as an eFiler with the eFiling system constitutes consent to receive service via the electronic service function of the eFiling system.

(2) (a) Except as provided in subsection (3), a party eFiling a document may use the eFiling system's eService function to accomplish service of that document on any other party's attorney or on a self-represented party, if that party's attorney or the self-represented party is a registered eFiler.[1] The eFiling system will generate an email to the attorney or self-represented party being eServed that includes a link to the document that was eFiled. To access the eFiled document, the attorney or self-represented party who has been eServed must log in to the eFiling system.

* * * * *

[1] Registration includes linking ~~your~~an appellate eFiling account with ~~your~~ arecord in the ACMS system as provided in ORAP 16.10(2)(a)(ii).

ORAP COMMITTEE 2024
March 20 Materials

AMENDING RULE(S): Proposal # 3 -- ORAP 2.05 -- Clarify What Date on Register Constitutes Entry for Purposes of Appeal

PROPOSER: Shenoa Payne (suggested revision prepared by SP Armitage)

UPDATE INFO: **Updated February 28, 2024 (submitted by Lisa Norris-Lampe)**

EXPLANATION:

WORKGROUP NOTES FOR MARCH 20

Updated explanation (from Lisa Norris-Lampe, 2/28/24):

Uniform Trial Court Rule (UTCR) 21.060 explains how to read the "filed" and "entry" dates in the circuit court (and Tax Court) registers of actions:

"(3) Register of Actions

The following apply whether or not a document is electronically filed with the court:

(a) For the purpose of ORS 7.020(1) and (2), the date that a document was filed displays in the date column of the register of actions for the case in the court's electronic case management system.

(b) For the purpose of ORS 7.020(2), entry occurs on the date an event is created in the register of actions.

(The cross-referenced statute, ORS 7.020, defines the "register" in which the court administrator is required to note the date of filing of any document, and the date of making, filing, and entry of an order, judgment, etc.)

Set out below is an updated proposal that more simply incorporates a cross-reference to UTCR 21.060, rather than explaining how to identify the "entry" date using different wording in the ORAPs as opposed to in the UTCRs. The amended proposal also cross-references the applicable Tax Court Rule (because the ORAP Notice of Appeal rules also apply to Tax Court appeals).

ORIGINAL EXPLANATION

[From Ms. Payne's original email:]

ORAP 2.05 provides that a notice of appeal shall be filed and served "within the time allowed by ORS 19.255, ORS 138.071, or other applicable statute."

ORS 19.255(1) and ORS 138.071 both provide that a notice of appeal must be filed within 30 days after the judgment appealed from "is entered in the register."

There recently was some discussion on the OSB appellate listserv regarding how to determine the date that judgment "is entered in the register" as there is both an entry date and a creation date. I had always understood that the "creation date" was considered the date of entry in the register (this date is the later date of the two dates). This apparently was confirmed to be correct at the recent OSB Appellate CLE. However, based on the discussion on the listserv, it was clear that there is confusion surrounding this issue based on how OECI enters its dates.

I think it could be helpful to all practitioners to have an ORAP or footnote in ORAP 2.05 noting that the Oregon appellate courts consider the "creation date" in OECI to be the date that a judgment is "entered in the register" for purposes of determining the time to file a notice of appeal.

RULE AS AMENDED (Updated, 2/24/28):

Rule 2.05
CONTENTS OF NOTICE OF APPEAL

The notice of appeal shall be served and filed within the time allowed by ORS 19.255, ORS 138.071, or other applicable statute.* Only the original need be filed. The notice of appeal shall be substantially in the form illustrated in Appendix 2.05 and shall contain:

(1) The complete title of the case as it appeared in the trial court, naming all parties completely, including their designations in the trial court (*e.g.*, plaintiff, defendant, cross-plaintiff, intervenor), and designating the parties to the appeal, as appropriate (*e.g.*, appellant, respondent, cross-appellant, cross-respondent). The title also shall include the trial court case number or numbers.

(2) The heading "Notice of Appeal" or "Notice of Cross-Appeal," as appropriate.

(3) A statement that an appeal is taken from the judgment or some specified part of the judgment,[1] the name of the court and county from which the appeal is taken, and the name of the trial judge or judges who signed the judgment being appealed.

(4) A designation of the adverse parties on appeal.

(5) The litigant contact information required by ORAP 1.30.

(6) A designation of those parts of the proceedings to be transcribed[2] and exhibits[3] to be included in the record in addition to the trial court file. If the record includes an audio or video recording played in the trial court, the designation of record should identify the date of the hearing at which the recording was played and, if the appellant wants the transcript to include a transcript of the recording, a statement to that effect.

(7) A plain and concise statement of the points on which the appellant intends to rely; but if the appellant has designated for inclusion in the record all of the testimony and all of the instructions given and requested, no statement of points is necessary.

(8) If more than 30 days has elapsed after the date the judgment was entered,* a statement as to why the appeal is nevertheless timely.

(9) If appellate jurisdiction is not free from doubt, citation to statute or case law to support jurisdiction.

(10) Proof of service, specifying the date of service.

(a) In a civil case, the notice of appeal shall contain proof of service on all other parties who appeared in the trial court and on all parties identified in the notice of appeal as adverse parties.

(b) In any civil case in which the adverse party is a governmental unit and an attorney did not appear, either in writing or in person, on behalf of the governmental unit in the proceedings giving rise to the judgment or order being appealed (for instance, in the prosecution of a violation, a contempt proceeding, or a civil commitment proceeding);

(i) The notice of appeal shall contain proof of service on the attorney for the governmental unit (for instance, the city attorney as to a municipality, the district attorney as to a county or the state); and

(ii) If the governmental unit is the state or a county, the notice of appeal shall also contain proof of service on the Attorney General.[4]

(c) In a criminal case, the notice of appeal shall contain proof of service on:

(i) The defendant, in an appeal by the state. The notice of appeal in such an appeal also shall contain proof of service of a copy of the notice of appeal on the Office of Public Defense Services when the defendant was represented by court-appointed counsel.[5]

(ii) The district attorney, in an appeal by the defendant. The notice of appeal in such an appeal also shall contain proof of service of a copy of the notice of appeal on the Attorney General.[6]

(d) In a juvenile dependency case, including a case involving the termination of parental rights, the notice of appeal shall contain proof of service on the Office of Public Defense Services when a parent was represented by court-appointed counsel.[7]

(e) In all cases, in addition to the foregoing requirements, the notice of appeal shall contain proof of service on:

(i) The trial court administrator; and

(ii) The transcript coordinator, if any part of the record of oral proceedings in the trial court has been designated as part of the record on appeal.[8]

(11) A certificate of filing, specifying the date the notice of appeal was filed with the Administrator.

(12) A copy of the judgment, decree or order appealed from and of any other orders pertinent to appellate jurisdiction.

~~* In the case register as displayed on the Oregon eCourt Case Information (OECI) website, the date that an order or judgment was entered in the register is the "creation" date, not the "signed" date~~*See* UTCR 21.060(3)(b) (describing how to identify the entry date in a circuit court register of actions); Tax Court Rule 9 A (incorporating UTCR chapter 21 in Tax Court proceedings).

[1] *See* ORAP 2.10 regarding filing separate notices of appeal when there are multiple judgments entered in a case, including multiple judgments in consolidated cases.

[2] *See* ORAP 3.33 regarding the appellant's responsibility to make financial arrangements with either the court reporter or the transcript coordinator for preparation of a transcript of oral proceedings.

[3] *See* ORAP 3.25 regarding making arrangements for transmitting exhibits to the appellate court for use on appeal. *See also* Uniform Trial Court Rule (UTCR) 6.120(2) and (3) regarding retrieval of exhibits by trial court administrators for use on appeal.

[4] Service of the notice of appeal on the Attorney General is for the purpose of facilitating the appeal and is not jurisdictional. *See* footnote 2 to ORAP 1.35 for the service address of the Attorney General.

[5] Service of the notice of appeal on the Office of Public Defense Services is for the purpose of facilitating the appeal and is not jurisdictional. The service address of the Office of Public Defense Services is 1175 Court Street, NE, Salem, Oregon 97301-4030.

[6] *See* footnote 4 to subparagraph (10)(b)(ii) of this rule.

[7] *See* footnote 5 to subparagraph (10)(c)(i) of this rule.

[8] *See* ORAP 1.35(2)(e).

See ORS 19.240(3) and ORS 19.250; *see also* ORAP 8.20 regarding bankruptcy. In a criminal case, if a defendant appeals a judgment of conviction based only on a plea of guilty or no contest, see ORS 138.085.

See Appendix 2.05 for a form of notice of appeal.

RULE AS AMENDED (Original):

Rule 2.05
CONTENTS OF NOTICE OF APPEAL

The notice of appeal shall be served and filed within the time allowed by ORS 19.255, ORS 138.071, or other applicable statute.* Only the original need be filed. The notice of appeal shall be substantially in the form illustrated in Appendix 2.05 and shall contain:

(1) The complete title of the case as it appeared in the trial court, naming all parties completely, including their designations in the trial court (*e.g.*, plaintiff, defendant, cross-plaintiff, intervenor), and designating the parties to the appeal, as appropriate (*e.g.*, appellant, respondent, cross-appellant, cross-respondent). The title also shall include the trial court case number or numbers.

(2) The heading "Notice of Appeal" or "Notice of Cross-Appeal," as appropriate.

(3) A statement that an appeal is taken from the judgment or some specified part of the judgment,[1] the name of the court and county from which the appeal is taken, and the name of the trial judge or judges who signed the judgment being appealed.

(4) A designation of the adverse parties on appeal.

(5) The litigant contact information required by ORAP 1.30.

(6) A designation of those parts of the proceedings to be transcribed[2] and exhibits[3] to be included in the record in addition to the trial court file. If the record includes an audio or video recording played in the trial court, the designation of record should identify the date of the hearing at which the recording was played and, if the appellant wants the transcript to include a

transcript of the recording, a statement to that effect.

(7) A plain and concise statement of the points on which the appellant intends to rely; but if the appellant has designated for inclusion in the record all of the testimony and all of the instructions given and requested, no statement of points is necessary.

(8) If more than 30 days has elapsed after the date the judgment was entered,* a statement as to why the appeal is nevertheless timely.

(9) If appellate jurisdiction is not free from doubt, citation to statute or case law to support jurisdiction.

(10) Proof of service, specifying the date of service.

(a) In a civil case, the notice of appeal shall contain proof of service on all other parties who appeared in the trial court and on all parties identified in the notice of appeal as adverse parties.

(b) In any civil case in which the adverse party is a governmental unit and an attorney did not appear, either in writing or in person, on behalf of the governmental unit in the proceedings giving rise to the judgment or order being appealed (for instance, in the prosecution of a violation, a contempt proceeding, or a civil commitment proceeding);

(i) The notice of appeal shall contain proof of service on the attorney for the governmental unit (for instance, the city attorney as to a municipality, the district attorney as to a county or the state); and

(ii) If the governmental unit is the state or a county, the notice of appeal shall also contain proof of service on the Attorney General.[4]

(c) In a criminal case, the notice of appeal shall contain proof of service on:

(i) The defendant, in an appeal by the state. The notice of appeal in such an appeal also shall contain proof of service of a copy of the notice of appeal on the Office of Public Defense Services when the defendant was represented by court-appointed counsel.[5]

(ii) The district attorney, in an appeal by the defendant. The notice of appeal in such an appeal also shall contain proof of service of a copy of the notice of appeal on the Attorney General.[6]

(d) In a juvenile dependency case, including a case involving the termination of parental rights, the notice of appeal shall contain proof of service on the Office of Public Defense Services when a parent was represented by court-appointed counsel.[7]

(e) In all cases, in addition to the foregoing requirements, the notice of appeal shall contain proof of service on:

(i) The trial court administrator; and

(ii) The transcript coordinator, if any part of the record of oral proceedings in the trial court has been designated as part of the record on appeal.[8]

(11) A certificate of filing, specifying the date the notice of appeal was filed with the Administrator.

(12) A copy of the judgment, decree or order appealed from and of any other orders pertinent to appellate jurisdiction.

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* In the case register as displayed on the Oregon eCourt Case Information (OECI) website, the date that an order or judgment was entered in the register is the "creation" date, not the "signed" date.

[1] *See* ORAP 2.10 regarding filing separate notices of appeal when there are multiple judgments entered in a case, including multiple judgments in consolidated cases.

[2] *See* ORAP 3.33 regarding the appellant's responsibility to make financial arrangements with either the court reporter or the transcript coordinator for preparation of a transcript of oral proceedings.

[3] *See* ORAP 3.25 regarding making arrangements for transmitting exhibits to the appellate court for use on appeal. *See also* Uniform Trial Court Rule (UTCR) 6.120(2) and (3) regarding retrieval of exhibits by trial court administrators for use on appeal.

[4] Service of the notice of appeal on the Attorney General is for the purpose of facilitating the appeal and is not jurisdictional. *See* footnote 2 to ORAP 1.35 for the service address of the Attorney General.

[5] Service of the notice of appeal on the Office of Public Defense Services is for the purpose of facilitating the appeal and is not jurisdictional. The service address of the Office of Public Defense Services is 1175 Court Street, NE, Salem, Oregon 97301-4030.

[6] *See* footnote 4 to subparagraph (10)(b)(ii) of this rule.

[7] *See* footnote 5 to subparagraph (10)(c)(i) of this rule.

[8] *See* ORAP 1.35(2)(e).

See ORS 19.240(3) and ORS 19.250; *see also* ORAP 8.20 regarding bankruptcy. In a criminal case, if a defendant appeals a judgment of conviction based only on a plea of guilty or no contest, see ORS 138.085.

See Appendix 2.05 for a form of notice of appeal.

ORAP COMMITTEE 2024
March 20 Materials

AMENDING RULE(S): Proposal # 4 -- ORAP 4.35 -- Clarify Rule re Agency Withdrawal of Orders

PROPOSER: Elaine E. Bensavage, Oregon Supreme Court

UPDATE INFO: **Updated February 29, 2024 (submitted by ORAP 4.35 Work Group -- Theresa Kidd, Bill Kabeiseman, Ernie Lannet, and Lisa Norris-Lampe)**

EXPLANATION:

WORKGROUP NOTES FOR MARCH 20

Updated explanation (from Work Group, 2/29/24):

The work group agreed with the proponent that ORAP 4.35, as drafted, contains some confusing and inconsistent wording; however, the work group also was concerned about inadvertent inaccuracies in the original proposal, as well as some other drafting concerns. Building on the original proposal, the work group now proposes the amendment set out below (no substantive edits to the rule). ***Summary:***

- *Title and new subsection (1):*

  Edits to the title, as well as new subsection (1), are intended to clarify the rule's scope, *i.e.*, applies to agency orders that are withdrawn for purposes of reconsideration only, and only when a petition for judicial review of the order already has been filed. *See* ORS 183.482(6) (setting out requirements for such orders for most agency cases) (APA); ORS 144.335(7) (setting out similar, but not as extensive requirements, for such orders withdrawn by the Board of Parole and Post-Prison Supervision); *State ex rel Hall v. Riggs*, 319 Or 282, 293-94, 877 P2d 56 (1994) (explaining that ORAP 4.35(1) involves orders withdrawn for purposes of reconsideration).

- *(Renumbering: With the addition of new (1), the remaining provisions have been renumbered accordingly.)*

- *Subsection (2) (reorganized):*

  - In paragraph (a), the updated proposal incorporates most of the content

from old (a) and (b), so that all previous duplicative operative provisions that applied regardless of whether the withdrawal was by a particular agency or under a particular statute appear together.

- Also in paragraph (a), the updated proposal would expressly require a "notice" from *any* agency withdrawing a subject order. (In old (b), a "notice" was required from only those agencies withdrawing orders under ORS 183.482(6) (APA), but the requirements that applied to other agencies essentially reduced to a notice requirement as well, *i.e.,* a copy of the order together with a statement of reasons and anticipated date of reconsideration decision.)

- In paragraph (b), the updated proposal continues the additional existing requirement that applies to only withdrawals under ORS 183.482(6) (APA). That statute provides that the agency shall, "within such time as the court may allow," affirm, modify, or reverse its order; the wording now in paragraph (b) therefore continues the current rule's approach of imposing a 60-day requirement unless otherwise specified (previously contained in paragraph (a)).

- *Subsection (3):* No change.

- *Subsection (4):*

  Essentially the same as the proponent's, with renumbering edits and one additional suggestion to eliminate additional unnecessary words.

- *Subsection (5):*

  - Builds on the proponent's restructuring and editing effort, so easier to read.

  - Places in paragraph (a) all instructions for a petitioner who seeks review of the order on reconsideration.

  - Moves to paragraph (b) the scenario of dismissal of the petitioner's pending judicial review proceeding (with minor edits).

  - Moves to paragraph (c) the "new case" scenario, when someone other than petitioner opts to file their own petition for judicial review (thus commencing a new case filing) (no edits).

- *Subsection (6):* Same as the proponent's.

- *Subsection (7):*

- Builds on the proponent's ideas for clarity improvements, mostly by breaking this long subsection into three paragraphs (opening brief scenario #1, opening brief scenario #2, answering brief).

For ease of reference, the two key statutory provisions are here:

ORS 183.482(6):

> *At any time subsequent to the filing of the petition for review and prior to the date set for hearing the agency may withdraw its order for purposes of reconsideration. If an agency withdraws an order for purposes of reconsideration, the agency shall, within such time as the court may allow, affirm, modify or reverse its order. If the petitioner is dissatisfied with the agency action after withdrawal for purposes of reconsideration, the petitioner may refile the petition for review and the review shall proceed upon the revised order. An amended petition for review shall not be required if the agency, on reconsideration, affirms the order or modifies the order with only minor changes. If an agency withdraws an order for purposes of reconsideration and modifies or reverses the order in favor of the petitioner, the court shall allow the petitioner costs, but not attorney fees, to be paid from funds available to the agency.*

ORS 144.335(7):

> *During the pendency of judicial review of an order, if the board withdraws the order for the purpose of reconsideration and thereafter issues an order on reconsideration, and the petitioner wishes to proceed with the judicial review, the petitioner need not seek administrative review of the order on reconsideration and need not file a new petition for judicial review. The petitioner shall file, within a time established by the court, a notice of intent to proceed with judicial review.*

ORIGINAL EXPLANATION

[Paraphrased from Ms. Bensavage's email:]

The existing rule is confusing in a number of respects. The purpose of the changes is to better organize the material and make it more reader-friendly and comprehensible.

RULE AS AMENDED (Updated, 2/29/28):

Rule 4.35
AGENCY WITHDRAWAL OF ORDERS FOR PURPOSE OF RECONSIDERATION

(1) This rule applies when an agency has withdrawn, for the purpose of reconsideration, an order that is the subject of a petition for judicial review.

(2~~1~~) (a) If an agency , ~~pursuant to ORS 183.482(6),~~ withdraws an order for the purpose of reconsideration, it shall file with the Administrator a notice of the withdrawal. The notice shall include a statement of reasons why the order is being reconsidered and the date the agency expects to submit a new order to the court after reconsideration. ~~An order on reconsideration shall be filed within 60 days after the filing of the notice of withdrawal or within such other time as the court may allow.~~

(b) If the ~~an~~ agency has withdrawn the order for the purpose of consideration pursuant to ORS 183.482(6), it shall file an order on reconsideration within 60 days after the filing of the notice of withdrawal or within such other time as the court may allow.~~not subject to ORS 183.482(6) withdraws an order on judicial review for the purpose of reconsideration it shall file with the Administrator a copy of its order or other decision withdrawing that order, accompanied by a statement of reasons why the order is being withdrawn and a statement whether the agency expects to submit a new order to the court following the withdrawal and, if so, when.~~

(3~~2~~) The filing of a notice under subsection (2~~1~~)(a) of this rule shall suspend proceedings on the petition for judicial review until an order on reconsideration is filed, or the time designated therefor expires, unless otherwise ordered by the court.

(4~~3~~) When ~~Regardless whether~~ an order ~~first~~ has been withdrawn for the purpose of reconsideration under paragraph~~s~~ (2~~1~~)(a) ~~or (b)~~ of this rule, and once the ~~if an~~ agency issues an order on reconsideration, the Attorney General shall file a copy of the order on reconsideration with the Administrator, ~~. The order shall be filed~~ within seven days after the agency issues the order ~~on reconsideration~~.

(5~~4~~) (a) If a petitioner desires judicial review of an agency's order on reconsideration,

(i) Unless ~~Except as provided in~~ subparagraph (54)(a)(ii) of this rule applies, ~~, after the filing of an order on reconsideration, if the petitioner desires judicial review of the order on reconsideration,~~ the petitioner shall file an amended petition for judicial review or notice of intent to proceed with judicial review within a period equal to that allowed for filing an original petition.[FN] No filing fee is required for an amended petition.

(ii) If the petition on ~~er on~~ judicial review pertains to ~~of~~ an order of the Board of Parole and Post-Prison Supervision, ~~desires to continue the judicial review after the Board issues its order on reconsideration,~~ the petitioner shall file a notice of intent to proceed with judicial review within the period equal to that allowed for filing an original petition, unless the court allows additional time.[FN]

~~(b) A person who is dissatisfied with the order on reconsideration and who does not file under paragraph (4)(a) of this rule may file a petition for judicial review of the order on reconsideration in accordance with statute and these rules.~~

(b~~e~~) If no amended petition for judicial review or notice of intent to proceed with judicial review is timely filed, the judicial review proceeding in the Court of Appeals will be dismissed.

(c) A person other than the petitioner who is dissatisfied with the order on reconsideration may file a petition for judicial review of the order on reconsideration, in accordance with statute and these rules.

(65) If the agency has considered any material beyond the present record, the agency shall submit an amended record to the Administrator within 14 days after the filing of a petition for judicial review, amended petition for judicial review, or notice of intent to proceed with judicial review. The amended record on review shall be prepared pursuant to ORAP 4.20.

(76) (a) If the petitioner filed an opening brief before the withdrawal of the order for reconsideration, in addition to filing an amended petition for judicial review or notice of intent to proceed with judicial review as required by paragraph (54)(a) of this rule, the petitioner shall ~~may~~ give notice to the Administrator whether ~~of~~ the petitioner~~'s~~ intends~~t~~ to proceed on the original opening brief.

(b) If the petitioner had not filed an opening brief or desires to file a supplemental brief, the petitioner's opening or supplemental brief shall be

filed 28 days after the date the amended petition for judicial review or notice of intent to proceed with judicial review was filed, or the date the agency submitted the amended record to the Administrator, whichever is later.

(c) A respondent's answering brief, if any, shall be filed within 28 days after the filing of the petitioner's opening or supplemental brief or notice that the petitioner will proceed on the original brief.

RULE AS AMENDED (Original):

Rule 4.35
AGENCY WITHDRAWAL OF ORDERS

(1) An agency may withdraw an order for the purpose of reconsideration, as follows:

(a) If an agency~~,~~ withdraws an order on judicial review pursuant to ORS 183.482(6), ~~withdraws an order for the purpose of reconsideration,~~ it shall file with the Administrator a notice of the withdrawal. The notice shall include a statement of reasons why the order is being reconsidered and the date the agency expects to submit a new order to the court after reconsideration. An order on reconsideration shall be filed within 60 days after the filing of the notice of withdrawal or within such other time as the court may allow.

(b) If an agency that is not subject to ORS 183.482(6) withdraws an order on judicial review ~~for the purpose of reconsideration,~~ it shall file with the Administrator a copy of its order or other decision withdrawing that order, accompanied by a statement of reasons why the order is being withdrawn and a statement whether the agency expects to submit a new order to the court following the withdrawal and, if so, when.

(2) The filing of a notice under subsection (1) of this rule shall suspend proceedings on the petition for judicial review until an order on reconsideration is filed, or the time designated therefor expires, unless otherwise ordered by the court.

(3) ~~Regardless whether~~When an order first has been withdrawn for the purpose of reconsideration under either paragraphs (1)(a) or (1)(b) of this rule, if ~~an~~the agency issues an order on reconsideration, the Attorney General shall file a copy of the order on reconsideration with the Administrator. The order shall be filed within seven days after the agency issues the order on reconsideration.

(4) (a) ~~(i) Except as provided in subparagraph (4)(ii) of this rule, after the filing~~ petitioner on judicial review seeks judicial review of an agency's order on

reconsideration~~, if the petitioner desires judicial review~~:

(i) After the filing of the order on reconsideration, the petitioner shall file an amended petition for judicial review or notice of intent to proceed with judicial review, within a period equal to that allowed for filing an original petition.[1] No filing fee is required for an amended petition.

(ii) ~~If~~And the ~~petitioner on judicial review of~~order is an order of the Board of Parole and Post-Prison Supervision~~ desires to continue the judicial review after the Board issues its order on reconsideration~~, the petitioner shall file a notice of intent to proceed with judicial review, within the period equal to that allowed for filing an original petition, unless the court allows additional time.[2]

(b) A person other than the petitioner on judicial review who is dissatisfied with the order on reconsideration and who does not file under paragraph (4)(a) of this rule may file a petition for judicial review of the order on reconsideration in accordance with ~~statute~~the applicable statutes and these rules.

(c) If ~~no~~an amended petition ~~or~~for judicial review or a notice of intent to proceed with judicial review is not timely filed, the judicial review proceeding in the Court of Appeals will be dismissed.

(5) If the agency has considered any material beyond the present record, the agency shall submit an amended record to the Administrator within 14 days after the filing of a petition for judicial review, amended petition for judicial review, or notice of intent to proceed with judicial review. The amended record on review shall be prepared pursuant to ORAP 4.20.

(6) If the petitioner filed an opening brief before the withdrawal of ~~the~~an order for reconsideration, in addition to filing an amended petition for judicial review or notice of intent to proceed with judicial review as required by paragraph (4)(a) of this rule, the petitioner may give notice to the Administrator of the petitioner's intent to proceed on the original opening brief~~. If~~, or the petitioner's intent to file a supplemental brief instead. An opening brief, if the petitioner had not filed an opening brief ~~or desires to file a supplemental brief, the petitioner's opening~~before the withdrawal of the order for reconsideration, or a supplemental brief, shall be filed 28 days after the date the amended petition for judicial review or notice of intent to proceed with judicial review was filed, or the date the agency submitted the amended record to the Administrator, whichever is later. A respondent's answering brief, if any, shall be filed within 28 days after the filing of the petitioner's opening or supplemental brief, or notice that the petitioner will proceed on the original brief.

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[1] *See* ORS 183.482(6).

[2] *See* ORS 144.335(7).

ORAP COMMITTEE 2024
March 20 Materials

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:

WORKGROUP NOTES FOR MARCH 20

Recommendation: Reject proposal.

Our workgroup met with LUBA's current staff attorney handling record production as well as the former LUBA staff attorney who had submitted the proposal. The current staff attorney let us know that this does not appear to be an ongoing problem that requires a rule change. Records are typically scanned and can be served electronically. The proposal was sparked by a particular case with the unusual confluence of an enormous paper record that had not already been scanned and a party who had changed lawyers (thus generating a request to LUBA for another copy of the record). In our view, a rule change is not necessary to address that outlier. And because LUBA's current staff attorney does not see the need for a rule change either, we recommend that the ORAP Committee disapprove the proposal.

ORIGINAL 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).

ORAP COMMITTEE 2024
March 20 Materials

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:

WORKGROUP NOTES FOR MARCH 20

The workgroup is proposing revisions to ORAP 5.45(13), ORAP 5.55(3), and ORAP 10.30(1)(d), which are shown in track changes below.

ORIGINAL 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, without argument, 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 issues presented in the case meet any of the factors listed in ORAP 10.30(2).

* 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, without argument, 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 issues presented in the case meet any of 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.

ORAP COMMITTEE 2024
March 20 Materials

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:

WORKGROUP NOTES FOR MARCH 20

Ben Gutman will briefly summarize the discussions for the committee. Otherwise, the workgroup asks the committee to pass the matter to April.

ORIGINAL 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).

ORAP COMMITTEE 2024
March 20 Materials

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
UPDATE INFO:	**Updated March 4, 2024 (submitted by Lisa Norris-Lampe and Ernie Lannet)**

EXPLANATION:

WORKGROUP NOTES FOR MARCH 20

Updated explanation (from Lisa Norris-Lampe and Ernie Lannet, 3/4/24; new proposal begins on p 4):

In discussing Mr. Latto's concept proposal at the last meeting, the ORAP Committee generally understood the key parts of his proposal as follows:

- *Balfour* petitions for review:
    - The rule permitting *Balfour*-style petitions for review, ORAP 5.90(5) (in the C/A *Balfour* briefs rule), should more clearly state that a *Balfour* petition is permitted only when a *Balfour* brief first was filed in the Court of Appeals.
    - That rule should be moved to the petition for review chapter (Chapter 9) (or at least should include a cross-reference to Chapter 9).
- Supplemental *pro se* petitions for review:
    - The rule permitting supplemental *pro se* briefs in the Court of Appeals, ORAP 5.92, does not contain any companion provision about supplemental *pro se* petitions for review (as in the *Balfour* rule), so it is unclear the extent to which (or when) supplemental *pro se* petitions are permitted.
    - ORAP 5.92 therefore should be amended to clarify that supplemental *pro se* petitions for review are permitted, when the client previously filed a supplemental *pro se* brief in the Court of Appeals.

- *Pro se* petitions for review filed by represented clients:
    - The rules should expressly permit an indigent, represented client to file their own petition for review, in the event that counsel does not think that any petition should be filed. (Stated another way, if *no Balfour* brief were filed in the Court of Appeals, and counsel now thinks that a petition for review should not be filed, the client should be able to file their own *pro se* petition for review.)

Set out below is a proposed new rule, ORAP 9.06, that is intended to capture Mr. Latto's proposal, for the ORAP Committee's consideration. In particular:

- Subsection (1), *Balfour* petitions for review:
    - Moves the essential content from current ORAP 5.90(5) to new 9.06(1)(a) (updated for petitions for review), including the caveat that counsel's obligation is limited to specific tasks; and
    - Describes, in relation to a petition (as opposed to a brief), what must be contained in Section A and in Section B.
- Subsection (2), Supplemental *pro se* petitions for review:
    - Proposes an expanded approach (broader than the proponent's), respecting when a supplemental *pro se* petition may be filed:
        - ► If a supplemental *pro se* brief were filed in the C/A, then no motion needed to file a supplemental *pro se* petition;
        - ► If no supplemental pro se brief were filed in the C/A, then motion for leave to file is required (similar to the C/A rule requiring motion for leave to file a supp *pro se* brief). *Rationale for suggesting this provision (for discussion):* The consideration whether to supplement counsel's brief filed in the Court of Appeals is qualitatively different than the consideration whether to supplement counsel's petition for review filed in the Supreme Court (which often is limited to only some of multiple assignments of error).
    - Otherwise, generally adapts the supplemental *pro se* brief rule (ORAP 5.92) to the petition for review context.
- Subsection (3), *pro se* petitions for review (by represented indigent clients):
    - Adds a provision expressly permitting an indigent represented client, whose counsel decides not to file a petition for review (or cannot file in *Balfour* format because no *Balfour* brief filed in the Court of Appeals), to file the client's own *pro se* petition for review (provisions generally track the supplemental *pro se* petition

section, adapted as necessary).

- Note: Although court-appointed counsel most typically does file a petition for review if the client so requests, there is one possible exception (*i.e.*, an identifiable practical circumstance to which this new subsection would apply): When the Court of Appeals reverses the trial court and orders the relief that the counsel had requested, but the client had filed a C/A supplemental *pro se* brief that had requested other relief, counsel would ask the client whether they want to seek review on those other issues (which they might pursue *pro se*).

And note, this proposal suggests other minor amendments to ORAP 5.90 and ORAP 5.92, to eliminate outdated copy requirements and to update binary gender wording.

ORIGINAL 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.]

RULES AS AMENDED (3/4/24):

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 as needed, 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.

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~~themself, 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
[No proposed amendments, included for information only]

(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.

Rule 9.06
"*BALFOUR*" AND *PRO SE* PETITIONS FOR REVIEW FILED BY CLIENTS REPRESENTED BY COURT-APPOINTED COUNSEL

(1~~5~~) "*Balfour*" Petitions for Review

(a) In any case in which the petitioner on review is represented by court-appointed counsel on appeal, and counsel filed a "*Balfour*" brief in the Court of Appeals under ORAP 5.90(1), 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 is the client's product.

(b) Section A of the petition for review shall contain:

(i) A statement of historical and procedural facts. as required by ORAP 9.05(4)(a);

(ii) A statement that the petition for review is being submitted pursuant to this rule and that counsel has thoroughly reviewed the Court of Appeals decision and the record, has discussed the case with the client, and has not identified any arguably meritorious issue to raise in a petition;

(iii) If the client has filed a Section B pursuant to subparagraph (c)(i) of this rule, a statement that that Section B replicates Section B of the opening brief filed in the Court of Appeals; and

(iv) Counsel's signature.

(c) Section B of the petition for review is the client's product and may contain any legal question that the client wishes the court to review.

(i) The client may submit, as Section B of the petition, the Section B of the opening brief filed in the Court of Appeals.

(ii) If the client does not submit the Section B of the opening brief filed in the Court of Appeals, the client shall attempt to identify in Section B of the petition the legal question, proposed rule of law, and reasons the case presents a significant issue of law as nearly as practicable in proper petition form, as set out in ORAP 9.05(4)(b) through (d). A Section B filed under this subparagraph shall not exceed 15 pages in length.

(iii) The last page of Section B of the petition shall contain the name and signature of the client.

(d) Counsel's obligation with respect to Section B of the petition for review shall be limited to correcting obvious typographical errors, attaching the Court of Appeals opinion, as required by ORAP 9.05(4)(e), preparing copies of the petition as needed, serving the appropriate parties, and filing the original petition with the court.

(2) Supplemental *Pro Se* Petitions for Review

(a) A client represented by court-appointed counsel on appeal, who is dissatisfied with a petition for review that counsel has filed, may file a supplemental *pro se* petition for review[1] as set out in this subsection.

(b) If the client previously filed a supplemental *pro se* brief in the appeal under ORAP 5.92, the client may file a supplemental *pro se* petition for review without moving for leave to file. A supplemental *pro se* petition filed under his paragraph is due 14 days after the filing of the petition filed by counsel and shall contain a statement that the client previously filed a supplemental *pro se* brief in the Court of Appeals.

(c) If the client did not previously file a supplemental *pro se* brief in the appeal under ORAP 5.92, either the client or counsel may move the court for leave to file a supplemental *pro se* petition for review, due 14 days after the filing of the petition filed by counsel. 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* petition along with the motion.

(d) The client shall attempt to prepare a supplemental *pro se* petition for review, whether filed under paragraph (2)(b) or (c) of this rule, as nearly as practicable, in the proper form and with the proper content, as required by ORAP 9.05(3) and (4), except that the petition must not exceed either 5,000 words or, alternatively, 15 pages in length. The last page of the supplemental *pro se* petition shall contain the name and signature of the client.

(e) A supplemental *pro se* petition for review is the client's product; therefore, if the client requests assistance in preparing the petition, counsel's obligation shall be limited to correcting obvious typographical errors, preparing copies of the petition for review as needed, serving the appropriate parties, and filing the original petition with the court. If the client prepares and files the supplemental *pro se* petition without the assistance of counsel, in addition to serving all other parties to the appeal as required by ORAP 9.05(3)(b), the client shall serve a copy of the petition on counsel.

(f) The provision of ORAP 16.15(1) requiring that all electronic filings be text-searchable does not apply to a *pro se* supplemental petition for review filed under this subsection.

(3) *Pro Se* Petitions for Review

(a) A client represented by court-appointed counsel on appeal, whose counsel has decided that a petition for review should not be filed, may file a *pro se* petition for review.

(b) The client shall file and submit the *pro se* petition for review pursuant to ORAP 9.05(2).

(c) The client shall prepare the *pro se* petition for review, as nearly as practicable, in the proper form and with the proper content, as required by ORAP 9.05(3) and (4), except that the petition must not exceed either 5,000 words or, alternatively, 15 pages in length. The last page shall contain the name and signature of the client.

(d) In addition to serving all other parties to the appeal as required by ORAP 9.05(3)(b), the client shall serve a copy of the petition on counsel.

(e) The provision of ORAP 16.15(1) requiring that all electronic filings be text-searchable does not apply to a *pro se* petition for review filed under this subsection.

[1] "*Pro se*" means "for oneself" or "on one's own behalf." A supplemental *pro se* petition for review filed under subsection (2) of this rule, and also a *pro se* petition filed under subsection (3) of this rule, is the product of the party themself, and not of the attorney representing the party.

RULE AS AMENDED (Original):

[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.

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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.

[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
March 20 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:

WORKGROUP NOTES FOR MARCH 20

Judge Kamins asks that the Committee pass the proposal for the April meeting. That will allow time to for the Court of Appeals' experiment with hybrid arguments this month, as a hybrid option may resolve some of the concerns with the rule.

ORIGINAL 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.

(45) 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.~~

(~~d~~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
March 20 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:

WORKGROUP NOTES FOR MARCH 20

Lisa Norris-Lampe asks that the Committee pass the proposal for the April meeting while additional comments are collected from the appellate court public information officers.

ORIGINAL 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]

[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

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

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.

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

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,

{(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.

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ORAP COMMITTEE 2024
March 20 Materials

AMENDING RULE(S): Proposal # 15 -- ORAP 12.27 -- Streamline Notification by Secretary of State in Judicial Disability Proceedings

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

UPDATE INFO: **Updated March 7, 2024 (submitted by Lisa Norris-Lampe)**

EXPLANATION:

NOTES FOR MARCH 20

Updated explanation (from Lisa Norris-Lampe, 3/7/24):

The ORAP Committee approved the original proposal set out below at its last meeting, and so it is not queued up for discussion at the next meeting. However, after the last meeting, I sent the proposal, as an FYI and to seek any desired feedback, to the Commission on Judicial Fitness and Disability. The Executive Director had no objection to the proposal, but, in the course of interacting with her, I have identified two additional proposed edits -- to the rule title and to one subhead title -- replacing the word "Disciplinary" with "Conduct," which is consistent with the statutory wording. (See "updated" proposal beginning on page 2 below (new additions highlighted in yellow).

I request that this item be placed on the Committee's upcoming meeting agenda, to approve those two additional changes in the version that is sent out for public comment.

ORIGINAL EXPLANATION

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

Issue: ORAP 12.27 covers a variety of filing, notice, and briefing scenarios regarding judicial fitness and disability proceedings (per several statutory provisions). One procedural step regarding disability proceedings could be streamlined to ensure timely creation of an appellate case -- specifically, ORS 1.310 requires a judge who has been the subject of a disability determination to provide notification of an appeal to the

Secretary of State, who then notifies the Chief Justice and the Commission.[1] The best practice to ensure timely appellate case creation, however, is for the Secretary's notification to be made directly to the Administrator.

Otherwise, various aspects of ORAP 12.27 would benefit from some clarifying and readability-type edits (nothing substantive).

Proposed solution: **(1)** Amend ORAP 12.27(1) to require the Secretary of State to provide notice to the Chief Justice of an appeal notification from a judge -- as required by ORS 1.310(8) -- by filing notice of the appeal with the Administrator (which will prompt creation of a Supreme Court case and notification to the Chief Justice and other members of the court of the fact of the appeal); and **(2)** Make other minor, nonsubstantive edits throughout the rule, to improve readability.

RULE AS AMENDED (Updated, 3/6/24):

Rule 12.27
JUDICIAL DISABILITY AND
CONDUCT ~~DISCIPLINARY~~ PROCEEDINGS

(1) Involuntary Retirement for Disability under ORS 1.310.

(a) On receipt of a notice under ORS 1.310(8) of a judge's appeal of a determination of disability by the Commission, the Secretary of State shall notify the Chief Justice, by filing notice with the Administrator, and also shall notify the Commission.[2]

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1 ORS 1.310(8) provides:

"The subject judge may appeal to the Supreme Court from a determination by the commission that the judge has a disability, by filing a notice with the Secretary of State within 10 days after the date of filing of the written findings of fact by the commission. The Secretary of State shall thereupon notify the commission and the Chief Justice. The commission shall forthwith transmit the official record to the Supreme Court, which upon receipt of the record shall have full jurisdiction of the proceeding."

2 Editorial note: The suggested final phrase, that the Secretary also notify the Commission, duplicates a statutory requirement, but helps a reader of this rule more easily understand what is now numbered as paragraph (1)(b) (regarding "next steps" after

(b) On receipt of notice from the Secretary of State of a judge's appeal of a determination of disability by the Commission, the Commission shall, within 14 days, transmit the record to the Supreme Court. The Administrator shall inform the judge of the date of receipt of the record from the Commission.

(cb) The judge shall have 28 days after the date of the notice from the court of receipt of the record to file a petition for review of the Commission's determination of disability, together with an opening brief in support of the petition. The Commission shall have 28 days after the date of filing of the opening brief to file an answering brief. The judge may file a reply brief, which shall be due 14 days after the date of filing of the Commission's answering brief.

(dc) If the case is argued orally, the judge shall argue first, followed by the Commission.

(ed) If the court remands the matter to the Commission for additional findings of fact, the review will be held in abeyance pending receipt from the Commission of notice of its action on remand.

(fe) The decision of the Supreme Court to affirm, reverse or annul the Commission's determination is subject to a petition for reconsideration under ORAP 9.25. If no petition for reconsideration is filed or if a petition for reconsideration is filed, on disposition of the petition, the Administrator shall issue the appellate judgment and shall provide a copy of the appellate judgment to the Secretary of State.

(2) Conduct ~~Disciplinary~~ Proceedings under ORS 1.420.

(a) Appointment of Masters

If the Commission requests appointment of three masters to hold a hearing under ~~Under~~ ORS 1.420(1)(b), ~~if the Commission requests appointment of three masters to hold a hearing,~~ the request shall be made in the form of a petition, which may nominate three or more candidates for appointment as masters. The ~~and the~~ Commission shall serve a copy of the petition on the judge. ~~The Commission may nominate three or more candidates for appointment as masters.~~ The judge shall have 14 days after being served ~~with the Commission's request~~ to file a response, which ~~response~~ may include nominations for three or more candidates for appointment as masters.

(b) Review of Commission's Recommendations[1]

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the Secretary sends notice to the Commission).

(i) If the Commission recommends to the court the censure, suspension, or removal from office of a judge under ~~Under~~ ORS 1.420(4), ~~if the Commission recommends to the court the censure, suspension, or removal from office of a judge,~~ the Commission shall accompany its recommendation with the record of proceedings before the commission. The Administrator shall inform the judge of the date of receipt of the record from the Commission.

(ii) A request for receipt of additional evidence shall be filed as a motion in the manner provided in ORAP 7.05 and ORAP 7.10.

(iii) The judge shall have 28 days after the date of the notice from the court of receipt of the record to file an opening brief ~~concerning the Commission's recommendation~~. The Commission shall have 28 days after the date of filing of the opening brief to file an answering brief. The judge may file a reply brief, which shall be due 14 days after the date of filing of the Commission's answering brief. If the judge does not ~~fails to~~ file an opening brief, the Commission may file an opening brief, and thereafter the judge may file an answering brief.

(iv) If the case is argued orally, the judge shall argue first, followed by the Commission, unless the judge did not file any brief, in which case the Commission alone may present oral argument.~~orally argue the matter.~~

(v) If the court remands ~~the matter~~ to the Commission for additional findings of fact, the review will be held in abeyance pending receipt from the Commission of notice of its action on remand.

(vi) The decision of the Supreme Court to affirm, reverse, or annul the Commission's determination is subject to a petition for reconsideration under ORAP 9.25. If no petition for reconsideration is filed or if a petition for reconsideration is filed, on disposition of the petition, the Administrator shall issue the appellate judgment. If the decision is for removal of the judge from office, the Administrator shall provide a copy of the appellate judgment to the Secretary of State.

(vii) The decision of the Commission after hearing or upon review of the record and report of the masters under ORS 1.420 shall be a public record, together with the recommendations, if any, of the Commission to the Supreme Court.*

(c) Temporary Suspension Under ORS 1.420(5)

(i) If the Supreme Court on its own motion proposes to suspend a judge during the pendency of disciplinary proceedings under ORS 1.420, the Administrator shall provide written notice thereof to the judge.

(ii) If the Commission files a recommendation that a judge be suspended during the pendency of a disability determination proceeding, the Commission shall serve a copy of the recommendation on the judge.

(iii) The judge shall have 14 days after the date of either the court's notice of proposed suspension or ~~after the date of~~ the Commission's recommendation that the judge be suspended during the pendency of a disability determination to file a memorandum regarding the proposed or recommended suspension.

(iv) When the court on its own motion proposes to suspend a judge during the pendency of disciplinary proceedings, the Commission shall have 14 days after the date of filing of the judge's memorandum to file a memorandum regarding the proposed suspension.

(v) The matter of a proposed or recommended temporary suspension will not be subject to oral argument unless oral argument is requested by the judge or the Commission.

(d) Consent to Discipline Under ORS 1.420(1)(c)

(i) On receipt of a judge's consent to censure, suspension, or removal, the court may request briefing and oral argument before the consent is submitted to the court for decision.

(ii) If the court accepts the stipulation of facts part of a consent, but rejects the disciplinary action agreed to by the judge and Commission and remands the matter to the Commission for further proceedings, the review will be held in abeyance pending receipt of notice of the Commission's decision on remand.

(iii) A judge's consent to censure, suspension, or removal shall not be a public record until the consent or stipulation is submitted to the Supreme Court for a decision. On submission to the court, the consent shall be a public record.*

(3) Temporary Disability Proceedings Initiated by Chief Justice Under ORS 1.425.

(a) Review of Commission's Recommendation

(i) Under ORS 1.425(1)(a), if the Commission elects to proceed as provided in ORS 1.420, the procedure in the Supreme Court shall be the same as provided in subsection (2) of this rule.

(ii) Under ORS 1.425(4)(b), if the Commission finds that the judge has a temporary disability and recommends to the court that the judge be suspended, the Commission shall accompany its recommendation with the record of proceedings before the Commission. The Administrator shall inform the judge of the date of receipt of the record from the Commission.

(iii) A request for receipt of additional evidence shall be filed as a motion in the manner provided in ORAP 7.05 and ORAP 7.10.

(iv) The judge shall have 28 days after the date of the notice from the court of receipt of the record to file an opening brief ~~concerning the Commission's recommendation~~. The Commission shall have 28 days after the date of filing of the opening brief to file an answering brief. The judge may file a reply brief, which shall be due 14 days after the date of filing of the Commission's answering brief. If the judge does not ~~fails to~~ file an opening brief, the Commission may file an opening brief, and thereafter the judge may file an answering brief.

(v) If the case is argued orally, the judge shall argue first, followed by the Commission, unless the judge did not file any brief, in which case the Commission alone may present oral argument.~~orally argue the matter.~~

(vi) The decision of the Supreme Court is subject to a petition for reconsideration under ORAP 9.25. If no petition for reconsideration is filed or if a petition for reconsideration is filed, on disposition of the petition, the Administrator shall issue the appellate judgment and shall provide a copy of the appellate judgment to the Secretary of State.

(vii) The decision of the commission after hearing or upon review of the record and report of masters under ORS 1.425 shall not be a public record, except for a decision and recommendation for suspension under ORS 1.425(4)(b).*

(b) Temporary Suspension Under ORS 1.425(5)

(i) If the Supreme Court on its own motion proposes to suspend a judge during the pendency of disability, the Administrator shall provide written notice thereof to the judge.

(ii) If the Commission files a recommendation that a judge be suspended during the pendency of a disability determination proceeding, the commission shall serve a copy of the recommendation on the judge.

(iii) The judge shall have 14 days after the date of either the court's notice of proposed suspension~~,~~ or the ~~c~~Commission's recommendation that the judge be suspended~~,~~ during the pendency of a disability determination to file a

memorandum regarding the proposed or recommended suspension.

(iv) When the court on its own motion proposes to suspend a judge during the pendency of disability proceedings, the Commission shall have 14 days after the date of filing of the judge's memorandum to file a memorandum regarding the proposed suspension.

(v) The matter of a proposed or recommended temporary suspension will not be subject to oral argument unless oral argument is requested by the judge or the Commission.

(c) Consent to Treatment Under ORS 1.425(4)(a)

(i) On receipt of a judge's consent to counseling, treatment or other assistance or to comply with other conditions in respect to the future conduct of the judge, the court may request briefing and oral argument before the consent is submitted to the court for decision.

(ii) A judge's consent to counseling, treatment, or assistance or compliance with other conditions shall not be a public record until the consent is accepted by the Supreme Court.

4) As used in this rule, "Commission" means the Commission on Judicial Fitness and Disability.

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[1] *See generally* ORS 1.430.

* *See* ORS 1.440(1).

RULE AS AMENDED (Original):

Rule 12.27
JUDICIAL DISABILITY AND
DISCIPLINARY PROCEEDINGS

(1) Involuntary Retirement for Disability under ORS 1.310.

(a) On receipt of a notice under ORS 1.310(8) of a judge's appeal of a determination of disability by the Commission, the Secretary of State shall notify the Chief Justice, by filing notice with the Administrator, and also shall notify the

Commission.[3]

(b) On receipt of notice from the Secretary of State of a judge's appeal of a determination of disability by the Commission, the Commission shall, within 14 days, transmit the record to the Supreme Court. The Administrator shall inform the judge of the date of receipt of the record from the Commission.

(cb) The judge shall have 28 days after the date of the notice from the court of receipt of the record to file a petition for review of the Commission's determination of disability, together with an opening brief in support of the petition. The Commission shall have 28 days after the date of filing of the opening brief to file an answering brief. The judge may file a reply brief, which shall be due 14 days after the date of filing of the Commission's answering brief.

(dc) If the case is argued orally, the judge shall argue first, followed by the Commission.

(ed) If the court remands the matter to the Commission for additional findings of fact, the review will be held in abeyance pending receipt from the Commission of notice of its action on remand.

(fe) The decision of the Supreme Court to affirm, reverse or annul the Commission's determination is subject to a petition for reconsideration under ORAP 9.25. If no petition for reconsideration is filed or if a petition for reconsideration is filed, on disposition of the petition, the Administrator shall issue the appellate judgment and shall provide a copy of the appellate judgment to the Secretary of State.

(2) Disciplinary Proceedings under ORS 1.420.

(a) Appointment of Masters

If the Commission requests appointment of three masters to hold a hearing under ~~Under~~ ORS 1.420(1)(b), ~~if the Commission requests appointment of three masters to hold a hearing,~~ the request shall be made in the form of a petition, which may nominate three or more candidates for appointment as masters. The ~~and the~~ Commission shall serve a copy of the petition on the judge. ~~The Commission may nominate three or more candidates for appointment as masters.~~ The judge shall have 14 days after being served ~~with the Commission's request~~ to file a response, which ~~response~~ may include

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[3] Editorial note: The suggested final phrase, that the Secretary also notify the Commission, duplicates a statutory requirement, but helps a reader of this rule more easily understand what is now numbered as paragraph (1)(b) (regarding "next steps" after the Secretary sends notice to the Commission).

nominations for three or more candidates for appointment as masters.

(b) Review of Commission's Recommendations[1]

(i) If the Commission recommends to the court the censure, suspension, or removal from office of a judge under ~~Under~~ ORS 1.420(4), ~~if the Commission recommends to the court the censure, suspension, or removal from office of a judge,~~ the Commission shall accompany its recommendation with the record of proceedings before the commission. The Administrator shall inform the judge of the date of receipt of the record from the Commission.

(ii) A request for receipt of additional evidence shall be filed as a motion in the manner provided in ORAP 7.05 and ORAP 7.10.

(iii) The judge shall have 28 days after the date of the notice from the court of receipt of the record to file an opening brief ~~concerning the Commission's recommendation~~. The Commission shall have 28 days after the date of filing of the opening brief to file an answering brief. The judge may file a reply brief, which shall be due 14 days after the date of filing of the Commission's answering brief. If the judge does not ~~fails to~~ file an opening brief, the Commission may file an opening brief, and thereafter the judge may file an answering brief.

(iv) If the case is argued orally, the judge shall argue first, followed by the Commission, unless the judge did not file any brief, in which case the Commission alone may present oral argument.~~orally argue the matter.~~

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(vi) The decision of the Supreme Court to affirm, reverse, or annul the Commission's determination is subject to a petition for reconsideration under ORAP 9.25. If no petition for reconsideration is filed or if a petition for reconsideration is filed, on disposition of the petition, the Administrator shall issue the appellate judgment. If the decision is for removal of the judge from office, the Administrator shall provide a copy of the appellate judgment to the Secretary of State.

(vii) The decision of the Commission after hearing or upon review of the record and report of the masters under ORS 1.420 shall be a public record, together with the recommendations, if any, of the Commission to the Supreme Court.*

(c) Temporary Suspension Under ORS 1.420(5)

(i) If the Supreme Court on its own motion proposes to suspend a judge during the pendency of disciplinary proceedings under ORS 1.420, the Administrator shall provide written notice thereof to the judge.

(ii) If the Commission files a recommendation that a judge be suspended during the pendency of a disability determination proceeding, the Commission shall serve a copy of the recommendation on the judge.

(iii) The judge shall have 14 days after the date of either the court's notice of proposed suspension or ~~after the date of~~ the Commission's recommendation that the judge be suspended during the pendency of a disability determination to file a memorandum regarding the proposed or recommended suspension.

(iv) When the court on its own motion proposes to suspend a judge during the pendency of disciplinary proceedings, the Commission shall have 14 days after the date of filing of the judge's memorandum to file a memorandum regarding the proposed suspension.

(v) The matter of a proposed or recommended temporary suspension will not be subject to oral argument unless oral argument is requested by the judge or the Commission.

(d) Consent to Discipline Under ORS 1.420(1)(c)

(i) On receipt of a judge's consent to censure, suspension, or removal, the court may request briefing and oral argument before the consent is submitted to the court for decision.

(ii) If the court accepts the stipulation of facts part of a consent, but rejects the disciplinary action agreed to by the judge and Commission and remands the matter to the Commission for further proceedings, the review will be held in abeyance pending receipt of notice of the Commission's decision on remand.

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(ii) Under ORS 1.425(4)(b), if the Commission finds that the judge has a temporary disability and recommends to the court that the judge be suspended, the Commission shall accompany its recommendation with the record of proceedings before the Commission. The Administrator shall inform the judge of the date of receipt of the record from the Commission.

(iii) A request for receipt of additional evidence shall be filed as a motion in the manner provided in ORAP 7.05 and ORAP 7.10.

(iv) The judge shall have 28 days after the date of the notice from the court of receipt of the record to file an opening brief ~~concerning the Commission's recommendation~~. The Commission shall have 28 days after the date of filing of the opening brief to file an answering brief. The judge may file a reply brief, which shall be due 14 days after the date of filing of the Commission's answering brief. If the judge does not ~~fails to~~ file an opening brief, the Commission may file an opening brief, and thereafter the judge may file an answering brief.

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(vii) The decision of the commission after hearing or upon review of the record and report of masters under ORS 1.425 shall not be a public record, except for a decision and recommendation for suspension under ORS 1.425(4)(b).*

(b) Temporary Suspension Under ORS 1.425(5)

(i) If the Supreme Court on its own motion proposes to suspend a judge during the pendency of disability, the Administrator shall provide written notice thereof to the judge.

(ii) If the Commission files a recommendation that a judge be suspended during the pendency of a disability determination proceeding, the commission shall serve a copy of the recommendation on the judge.

(iii) The judge shall have 14 days after the date of either the court's notice of proposed suspension~~,~~ or the ~~e~~Commission's recommendation that the judge be suspended~~,~~ during the pendency of a disability determination to file a memorandum regarding the proposed or recommended suspension.

(iv) When the court on its own motion proposes to suspend a judge during the pendency of disability proceedings, the Commission shall have 14 days after the date of filing of the judge's memorandum to file a memorandum regarding the proposed suspension.

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(c) Consent to Treatment Under ORS 1.425(4)(a)

(i) On receipt of a judge's consent to counseling, treatment or other assistance or to comply with other conditions in respect to the future conduct of the judge, the court may request briefing and oral argument before the consent is submitted to the court for decision.

(ii) A judge's consent to counseling, treatment, or assistance or compliance with other conditions shall not be a public record until the consent is accepted by the Supreme Court.

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[1] *See generally* ORS 1.430.

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