**ORAP COMMITTEE 2026**
**February 12 Agenda**

**Substantive Agenda and Materials Only**

3. ORAP 1.40, 13.25, COA Verification and Sanctions -- Use of Fabricated Authorities from Artificial Intelligence

6. ORAP 3.30(6), 3.40(1)(b), 5.85(3)(a), etc., Response or Reply Times Run from Service Instead of Filing

11. ORAP 5.15, Brief References -- Party Designation in Domestic Relations Cases

12. ORAP 5.35 etc, Terminology -- Use "Table" of Contents etc. Instead of "Index"

13. ORAP 5.45, Plain Error Rule -- Revisions and Explanations

15. ORAP 5.50, Excerpts of Record -- Streamline Requirements

16. ORAP 6.05, COA Oral Argument Requests -- Time Runs from Reply Brief

17. ORAP 6.25, COA Reconsideration -- Permit Requests to Reconsider En Banc

19. ORAP 8.45, Notice of Mootness -- Probable Mootness, Does Not Require Party to Argue for Dismissal

20. ORAP 9.05 or 9.17, SCT Petitions or Briefs -- Use Same Sequence for Questions on Review and Facts

21. ORAP 10.15, COA Juvenile Dependency and Adoption -- Also Expedite Juvenile Delinquency Appeals

22. ORAP 10.30, COA Nonprecedential Opinions -- Expand When Opinions are Precedential

23. ORAP 11.10, new 11.12, 11.15, SCT Mandamus -- Consolidate and Clean Rules

26. ORAP 13.05, Costs -- Address SCT Remand to COA

27. ORAP 13.10, Attorney Fees -- Amount is Discretionary Even Absent Objection

**ORAP COMMITTEE 2026**
**February 12 Materials**

AMENDING RULE(S): Proposal # 3 -- ORAP 1.40, 13.25 -- Address Fabricated Facts and Law from Artificial Intelligence in Court of Appeals

PROPOSER: Hon. Erin C. Lagesen, Chief Judge, Court of Appeals

# EXPLANATION:

The proposed amendments are intended to address the uptick in fabricated law that the Court of Appeals is seeing as the use of generative artificial intelligence increases. Rather than propose direct regulation of the use of AI, the proposed amendments center on the consequences of submitting fabricated law and facts to the court, rather than on the likely mechanism by which that is occurring.

# RULES AS AMENDED:

**Rule 1.40**
**VERIFICATION; DECLARATIONS; ADOPTING ORCP 17**

(1) Except if specifically require by statute, no thing filed with the appellate court need be verified.

(2) When a statute requires a paper filed with the appellate court to be verified, a verification shall consist of a statement:

(a) that the person has read the paper and that the facts stated in the paper are true, to the best of the person's knowledge, information and belief formed after reasonable inquiry;

(b) signed and dated by the person; and

(c) sworn to or affirmed before a person authorized by law to administer oaths or affirmations, including, but not necessarily limited to, a notary public.

(3) A declaration under penalty of perjury may be used in lieu of any affidavit required or allowed by these rules. A declaration under penalty of perjury may be made without notice to adverse parties, must be signed by the declarant, and must include the substance of the following sentence in prominent letters immediately above the signature of the declarant: "I hereby declare that the above statement is true to the best of my knowledge and belief, and that I

understand it is made for use as evidence in court and is subject to penalty for perjury." As used in these rules, "declaration" means a declaration under penalty of perjury.

(4) Oregon Rule of Civil Procedure (ORCP) 17 is hereby adopted as a rule of appellate procedure applicable to the Supreme Court and Court of Appeals.[1]

(5) In addition to the specifications of ORCP 17, a person signing a document filed in the Court of Appeals certifies that (a) all citations to cases, statutes, constitutions, or other sources of law are to sources that, in fact, exist and that have been read and verified by the person or another human being; and (b) the person or another human being has verified that all statements of fact are supported by the portion of the record cited in the manner required by ORAP 5.20(1)-(3 ).

[1] *See* ORAP 13.25 regarding the procedure for requesting sanctions under this subsection.

*See generally* ORS 138.090 regarding the signing of notices of appeal in criminal cases, ORS 19.250(1)(g) regarding the signing of notices of appeal in civil cases, and ORAP 5.05(3)(e) regarding the signing of briefs.

**Rule 13.25**
**PETITIONS AND MOTIONS FOR DAMAGES AND SANCTIONS**

(1) Damages under ORS 19.445, attorney fees under ORS 20.105, and reasonable expenses (including attorney fees) under ORAP 1.40(4) and ORCP 17 D are recoverable only by petition filed within 21 days after the decision deciding the appeal or review in the manner provided in ORAP 13.10. A request for damages, attorney fees, and reasonable expenses should not be included in the party's brief.

(2) A motion for reasonable expenses (including attorney fees) under ORAP 1.40(4) and ORCP 17 D based on the filing of a motion or thing shall be included in the answer or objection to the motion, statement of costs and disbursements, or petition for attorney fees to which the motion for sanctions relates.

(3) (a) A person making the certification described in ORAP 1.40(5) is subject to sanctions under circumstances that include, but are not limited to, the following: when a document filed by the person contains (i) a citation or citations to nonexistent case law or any other nonexistent source of law; (ii) a nonexistent quotation attributed to an existing source of law; (iii) a statement of a principle of law attributed to an existing case or other source of law where the attribution is one that is objectively unreasonable; or (iv) an assertion of fact that is objectively unreasonable to attribute to the portion of the record cited in the manner required by ORAP 5.20 (1)-(3).

(b) Any document containing a citation, quotation, or objectively unreasonable attribution described in ORAP 13.25(3)(a) will be stricken on the court's own motion or on the motion of a party. The party that filed the document will be given 14 days to show cause why the proceeding should not proceed without the stricken document and why monetary sanctions should not be imposed on the person who signed it. Where the document in question is an opening brief, the show cause order shall direct the party to show cause why the appeal should not be dismissed. After the the response to the show cause order is filed, any other party to the appeal may file a supplemental response and may include a request for reasonable attorney fees incurred in responding to the citations to nonexistent sources, nonexistent quotations, and/or objectively unreasonable legal or factual attributions.

(c) Absent extraordinary circumstances, the court will impose monetary sanctions of a minimum of $500 for each citation to nonexistent authority, and $1000 for each nonexistent quotation or objectively unreasonable factual or legal attribution. In all instances, the court will award reasonable attorney fees incurred by any other party in responding to the citations, quotations, and/or objectively unreasonable attributions described in ORAP 13.25(3)(a). In determining whether to award sanctions in excess of the amounts required under this rule, and whether to permit the filing of a new document in the place of a stricken one, the court will take into account (i) the number of citations to nonexistent authority, nonexistent quotations, and/or objectively unreasonable attributions; (ii) the number of occasions on which the person filing the document has been found by the Court of Appeals or any other court to have filed documents containing citations to nonexistent authority, nonexistent quotations, and/or objectively unreasonable attributions; (iii) any prejudice to the other parties to the case; (iv) the degree to which the party on whose behalf the document was filed played a role in including or encouraging the use of citations to nonexistent authority, nonexistent quotations, and/or objectively unreasonable attributions; and (iv) any such other factor the court deems relevant under the circumstances.

**ORAP COMMITTEE 2026**
**February 12 Materials**

AMENDING RULE(S): Proposal # 6 -- ORAP 3.30(6), 3.40(1)(b), 5.85(3)(a), etc. -- Response or Reply Times Run from Service Instead of Filing

PROPOSER: Tom Christ

# EXPLANATION:

"Change the time for responding or replying to another party's document to begin when the document is served rather than when it was filed, as in the following rules, which are just a few of many:

- 3.30(6)
- 3.40(1)(b)
- 5.85(3)(a)
- 5.90(3)
- 6.25(4)
- 6.30(3)(a)(ii)
- 6.35(3)
- 7.05(3) and (4)
- 9.10(2)
- etc.

"You can't respond or reply to a document you haven't yet received. So the time for doing so should not begin to run until you've received it or are likely to have received it in the ordinary course, which can happen after filing, sometimes long after. To be sure, the rules say that a party that files a document must also serve it, but doesn't say when that has to happen. See ORAP 1.35(2) (a)(i). If the document is served electronically, via the eFiling system, the service and filing will coincide. But it doesn't have to be served that way; it can be served by email or mail instead, and at some later date, see ORAP 1.35(b), and, of course, if it's mailed, the delivery could take several days. That's why the ORCP adds three days to the time to respond or reply to a document served that way in a trial court proceeding. See ORCP 10 B.

"Lawyers are accustomed to response- and reply-times that start with service, not filing. E.g., ORCP 21 D and E (motions to make more definite and certain), ORCP 23 A (response to motion to amend), ORCP 43 B(2) (response to RFP); ORCP 45 B (response to request for admissions); ORCP 47 C ('served and filed') (response to MSJ and reply to response).

"I recently received a document that my client's opponent filed electronically on a Saturday evening and served on me by mail when the Post Office opened on Monday. When I got it on, I think, Wednesday, five days of my time to respond had already lapsed."

## RULE AS AMENDED:

[None provided. If the committee approves this change as a policy matter, recommend that a workgroup be formed to identify all rules and propose appropriate changes.]

**ORAP COMMITTEE 2026**
**February 12 Materials**

AMENDING RULE(S): Proposal # 11 -- ORAP 5.15(1) -- Party Designations in Domestic Relations Cases

PROPOSER: Hon. Steven R. Powers, Court of Appeals

# EXPLANATION:

The existing rule requires briefs to refer to the parties in domestic relations proceedings as "husband or wife, father or mother, or other appropriate specific designation." The terminology may require updating to reflect the possibility of having two parents of the same sex.

# RULE AS AMENDED:

[None. Current rule is:]

**Rule 5.15**
**REFERENCES IN BRIEFS TO PARTIES**
**AND CRIME VICTIMS OF OFFENSES AGAINST PERSONS**

(1) In the body of a brief, parties shall not be referred to as appellant and respondent, but as they were designated in the proceedings below, except that in domestic relations proceedings the parties shall be referred to as husband or wife, father or mother, or other appropriate specific designation.

(2) In the body of a brief on appeal in a criminal, post-conviction, or habeas corpus case or on judicial review of an order of the Board of Parole and Post-Prison Supervision that includes a conviction for an offense, or attempt to commit an offense, compiled in ORS Chapter 163, any references to the victim of the offense must not include the victim's full name.

**ORAP COMMITTEE 2026**
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AMENDING RULE(S): Proposal # 12 -- ORAP 5.35 etc. -- Terminology -- Substitute "Table" for "Index" in Briefs

PROPOSER: Tom Christ

## EXPLANATION:

"The rules refer repeatedly to *index* when it means *table*. E.g.; ORAP 5.35 (the appellant's opening brief shall begin with an 'index' of the contents of the brief, and 'index' of appendices, and an 'index' of authorities.)"

## RULE AS AMENDED:

[None provided. Although the proposal appears limited to briefs, the word "index" appears 30 times in the ORAP and is used for other things, including the record prepared by the trial court (e.g., ORAP 3.20) and the excerpts of record (e.g., ORAP 5.50). There are also at least a few uses of the verb "indexed" (e.g., ORAP 5.65: "The opening brief on cross-appeal shall be appropriately indexed at the front of the answering brief."]

**ORAP COMMITTEE 2026**
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AMENDING RULE(S): Proposal # 13 -- ORAP 5.45 -- Revise and Explain Plain Error Rule

PROPOSER: Ernest Lannet & William Kabeiseman

# EXPLANATION:

[From the memo:]

"ORAP 5.45 addresses plain error review in a piecemeal fashion in Subsections 1, (4)(b) and (7); it does not explain when an alternative request for plain error review may be presented in the argument section; and it warns of the consequences for failing to request plain error review rather than instructing appellants where and how to request plain error review. The proposal consolidates most sections on plain error review, explains that an alternative argument for plain error review may be presented in the argument section, and directs appellants to both request plain error review and explain to the reviewing court why plain error is warranted.

"Subsection 1 of ORAP 5.45 addresses plain error review but is silent on other circumstances in which the preservation requirement gives way entirely. The rule suggests that no exceptions exist, which would be misleading to unrepresented individuals. The proposal references those exceptional circumstances that the preservation requirement gives way and provides citation to applicable authority.

"Subsection 4 is also confusing in that it begins immediately with a subsection (a) to address preserved claims of error, ends with an introductory phase to three further subsections (i) to (iii), and then presents a subsection (b) untethered from the rest of Subsection 4. It contains obscure and confusing phrasing, e.g., 'Each assignment of error must demonstrate * * * .' The proposal suggests changes to correct structural defects and improve readability.

"Subsection 6 recognizes that practitioners may present a combined argument section for multiple assignments of error when the assignments of error present essentially the same legal question. The current rule is silent on whether practitioners may present a combined subheading for preservation of error or a combined subheading for standard of review. Practitioners often present combined preservation of error and combined standard of review subsections when presenting a combined argument. Often the appellant preserved the assignments of error at the same time and/or in the same manner. Often those assignments of error are subject to the same standard(s) of review. The proposal provides guidance on when presenting a combined preservation of error subsection or a combined standard of review subsection is proper."

# 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] and that the preservation requirement gives way entirely under some circumstances.[2] 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.

(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 or explain why the court nonetheless may review the assignment of error with citations to appliable authority. ~~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.~~

(a) Under the subheading "Preservation of Error":

(i) The appellant ~~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) The appellant ~~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 appellant ~~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.

(iv) The appellant may combine preservation statements for multiple assignments of error under one subheading when the questions or issues were raised and resolved contemporaneously or when separate claims of error present essentially the same legal question and were raise and ruled on multiple times.

(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. When the appellant contends that the error was preserved in the lower court but requests plain error review in the alternative, the appellant may request plain error review and explain the reasons why that the court should consider the error in the subsequent argument section.[3]

(5) 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. The appellant may combine standard of review statements for multiple assignments of error when separate claims of error present essentially the same legal question and the appellant expressly states which standard or standards of review apply to each assignment of error.~~[2]~~[4]

(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.

~~(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] *See Peeples v. Lampert*, 345 Or 209, 219-21, 191 P3d 637 (2008) (explaining general preservation requirement, the prudential policies it serves, and noting when those prudential policies must give way entirely under particular circumstances, *i.e.*, when a party has no practical ability to raise an issue, when preservation would have been futile because the trial court would

not have permitted an issue to be raised or the record to be developed, or when the unique nature of the right itself is not subject to preservation requirements).

[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).

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

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

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AMENDING RULE(S): Proposal # 15 -- ORAP 5.50 -- Streamline Excerpts of Record Rule

PROPOSER: Hon. Jacqueline S. Kamins, Court of Appeals

# EXPLANATION:

The rule proposes streamlining ORAP 5.50 governing the excerpts of record. These revisions emphasize the importance of including all decisions under review, provide an overall organizational structure, and stress that parties are not to include legal memoranda in the excerpts. The court routinely receives excerpts that are not in any kind of order, that do not include the decision under review, and that include all the legal memoranda filed in the trial court. The revisions also address the changing reality that the court now has access to the record in advance of argument and submission, but the transcripts are difficult to navigate and thus the rule encourages including transcript pages cited in the briefs in the excerpts of record. The rule also harmonizes the state appellate rule with the federal rule which should streamline practices for practitioners that appear in both courts.

# RULE AS AMENDED:

**Rule 5.50**
**THE EXCERPT OF RECORD**

(1) Except in the case of a self-represented party, the appellant must include in the opening brief an excerpt of record.[1] The parties to an appeal are encouraged to confer regarding the content of the excerpt of record, including whether to file a joint excerpt of record to be included in the opening brief.

(2) The excerpt of record must contain:[2]

(a) The judgment or order on appeal or judicial review.

(b) All decisions being appealed, reviewed, or collaterally challenged, whether oral or written, final or interim. If the decision was an oral one, the relevant transcript pages must be included ~~Any written or oral rulings by the lower tribunal or agency addressing the issues presented by the assignments of error.~~

(c) ~~Any pleading or excerpt of pleadings, particular part of the transcript, exhibit, evidentiary submission and other filing necessary for reviewing and understanding the assignments of error in advance of oral argument, if the parties~~

~~anticipate that the case will be orally argued~~All parts of the record relevant for deciding the appeal, including all parts of the trial court record and transcript pages cited or referenced in the briefs.[3]

(d) If~~-~~, and only if, preservation of error is or is likely to be disputed in the case, ~~parts~~ the portions of memoranda and the transcript pages pertinent to the issue of preservation presented by the case. Legal memoranda should not be otherwise be included in the excerpts of record.

(e) A copy of the eCourt Case Information register of actions, if the case arose in an Oregon circuit court.

(f) In criminal cases in which the defendant appealed after entering a conditional plea of guilty or no contest under ORS 135.335(3), the defendant must include in the excerpt of record the writing in which the defendant reserved for review on appeal the trial court's adverse determination of a pretrial motion.

~~(3) The excerpt of record must not contain memoranda of law filed in the trial court unless such memoranda are pertinent to a disputed or likely to be disputed issue of preservation.~~

(3~~4~~) A respondent may file, as part of the respondent's brief, a supplemental excerpt of record containing those materials required by subsection (2) of this rule that were omitted from the excerpt of record.

(4~~5~~) The excerpt of record and any supplemental excerpt of record must be in the following form:

(a) All documents or parts of documents must be copies of documents included in the record, rather than summarized or paraphrased. Omissions, if not apparent, must be noted. No matter may be omitted if to do so would change the meaning of the matter included.

(b) Contents must be set forth in reverse chronological order, except that the decisions being appealed must be the first document(s) in the excerpt of record and the OECI case register must be the last document in the excerpt of record. The excerpt must be consecutively paginated, with the first page being page ER-1. The excerpt must begin with an index organized ~~chronologically~~in reverse chronological order, describing each item and identifying where the item may be found in the trial court or agency record, and the page where the item may be found in the excerpt. The index may include bookmarks as described in ORAP 16.50. A supplemental excerpt of record must substantially conform to the same requirements, except that a supplemental excerpt must be paginated using "SER," *e.g.*, SER-1, SER-2, SER-3.

(c) The materials included must be reproduced on 8-1/2 x 11 inch white paper by any duplicating or copying process that produces a clear, black, legible image.

(d) The excerpt of record must comply with the applicable requirements of ORAP 5.05.

(5~~6~~) Self-represented parties are not required to file an excerpt of record or a supplemental excerpt of record. If a self-represented party files an excerpt of record or a supplemental excerpt of record, it must contain only those documents specified in ORAP 5.50(2)(a) and (b), must contain no other documents, and must otherwise comply with this rule.

(6~~7~~) The appellate court may strike any excerpt of record or supplemental excerpt of record that does not substantially comply with the requirements of this rule.

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[1] Any brief containing an excerpt of record filed through the eFiling system that exceeds 25 megabytes must be filed in compliance with ORAP 16.15(1).

[2] For other requirements for the excerpt of record in Land Use Board of Appeals cases, *see* ORAP 4.67.

[3] *See* Appendix 5.50, which sets forth examples of documents that a party should consider including in the excerpt of record depending on the nature of the issues raised in the briefs. ~~The full record is available and used by the court after submission of a case; therefore, the excerpt of record need include only those parts of the record that will be helpful to the court and the parties in preparing for and conducting oral argument.~~

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AMENDING RULE(S): Proposal # 16 -- ORAP 6.05(4)(b) -- Time to Request Oral Argument in Court of Appeals Runs from Reply Brief

PROPOSER: Kyle Krohn and Sasha Petrova (separate proposals to same effect)

# EXPLANATION:

**By Kyle Krohn:**

> "I propose that the timeline for requesting oral argument under ORAP 6.05(4)(b) be tied to the reply brief instead of the answering brief. In my experience, and the experience of every colleague I have spoken with, the current timeline which is tied to the answering brief has proven to be cumbersome and inefficient. Often appellant's counsel does not closely review the answering brief until they begin working on the reply, and that close review can inform the decision whether to request argument. Having to make the argument decision before working on the reply brief has led some attorneys to request argument more frequently than they would otherwise in an abundance of caution, while it has caused others to have to file untimely argument requests. Appellants will be able to make a fully informed decision whether to argue once they have completed the reply brief or decided not to file one.
>
> "Conversely, tying the timeline to the reply brief should benefit respondents as well. The current timeline permits unscrupulous appellants to sandbag the respondent by deciding not to request argument but to wait until the oral argument deadline has passed and then submit a reply brief containing unexpected arguments that the respondent will have no opportunity to rebut. Counsel for OPDC and the state currently have an informal agreement to avoid that result by communicating both the argument and reply decisions before the deadline, but the rules should not require an informal agreement between opposing parties to avoid unfairness. Just like appellants, respondents will be better equipped to decide whether argument will be helpful once briefing is complete."

**By Sasha Petrova:**

> "The reasons for my proposal are twofold. First, it is more intuitive for parties to begin thinking about oral argument once appellate briefing is complete. Requiring requests for oral argument to be submitted during the briefing process may present traps for unwary practitioners, and may increase the volume of late requests for oral argument via motion. Second, parties considering whether to request oral argument cannot make fully informed decisions until briefing is complete. For example, a respondent may wish to request oral

argument only if necessary to address points made in the appellant's reply brief."

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# RULE AS AMENDED:

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**By Kyle Krohn:**

**Rule 6.05**
**REQUEST FOR ORAL ARGUMENT;**
**SUBMISSION WITHOUT ARGUMENT**

* * * * *

(4) Timelines for submitting an Oral Argument Appearance Request

* * * * *

(b) With the exception of land use cases subject to ORAP 4.60 through 4.74, and juvenile dependency, termination of parental rights, and adoption cases subject to ORAP 10.15, which are governed by separate procedures in paragraphs (c) and (d) of this subsection, an Oral Argument Appearance Request shall be filed no later than 14 days after the filing of the reply ~~answering~~ brief ~~or notification of waiver of appearance~~ by the last appellant. ~~respondent, whichever is later.~~ If more than one reply ~~answering~~ brief is filed, the 14-day period runs from the date on which the last reply ~~answering~~ brief is filed. If no reply brief is filed, the Oral Argument Appearance Request shall be filed no later than 14 days after the date on which the reply brief or motion for leave to file a reply brief was due.

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**By Sasha Petrova:**

**Rule 6.05**
**REQUEST FOR ORAL ARGUMENT;**
**SUBMISSION WITHOUT ARGUMENT**

* * * * *

(4) Timelines for submitting an Oral Argument Appearance Request

* * * * *

(b) With the exception of land use cases subject to ORAP 4.60 through 4.74, and juvenile dependency, termination of parental rights, and adoption cases subject to ORAP 10.15, which are governed by separate procedures in paragraphs (c) and (d) of this subsection, an Oral Argument Appearance Request shall be filed no later than 14 days after the filing of a reply brief, or, if no reply brief is filed, no later than 14 days after the reply brief was due. If more than one reply brief is filed or permitted to be filed, including in cross-appeals, the 14-day period runs from the date on which the last reply brief is filed or was due. ~~the answering brief or notification of waiver of appearance by the last respondent, whichever is later. If more than one answering brief is filed, the 14-day period runs from the date on which the last answering brief is filed.~~

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**ORAP COMMITTEE 2026**
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AMENDING RULE(S): Proposal # 17 -- ORAP 6.25 -- Add Option to Request Court of Appeals Reconsideration En Banc

PROPOSER: Benjamin Gutman

# EXPLANATION:

The Department of Justice proposes amending ORAP 6.25 to allow parties to affirmatively request panel or en banc reconsideration from the Court of Appeals in limited, extraordinary circumstances. The suggested phrasing is taken largely from the federal rule.

# RULE AS AMENDED:

**Rule 6.25**
**RECONSIDERATION BY COURT OF APPEALS**

(1) As used in this rule, "decision" means an opinion, per curiam opinion, nonprecedential memorandum 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 may be a petition for panel reconsideration or a petition for reconsideration en banc. Panel rehearing is the ordinary means of reconsidering a panel decision. A petition for reconsideration en banc is disfavored.

(2) A petition for panel 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

(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.

(3) A petition for reconsideration en banc shall be based on one or more of these contentions, which shall be identified in a statement at the beginning of the petition:

(a) the panel decision conflicts with another decision of the Oregon Court of Appeals (with citation to the conflicting case or cases) and the full court's consideration is therefore necessary to secure or maintain uniformity of the court's decisions;

(b) the panel decision conflicts with a decision of the Oregon Supreme Court (with citation to the conflicting case or cases); or

(c) the proceeding involves one or more questions of exceptional importance, each concisely stated.

(42) 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 Panel Reconsideration," "Appellant's Petition for Reconsideration En Banc," ~~or~~ "Respondent's Petition for Panel Reconsideration~~.~~," or "Respondent's Petition for Reconsideration En Banc."

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

(64) 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]

(75) 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.

[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.

**ORAP COMMITTEE 2026**
**February 12 Materials**

AMENDING RULE(S): Proposal # 19 -- ORAP 8.45 -- Notify Court of Probable Mootness Without Obligation to Argue for Dismissal

PROPOSER: Benjamin Gutman

# EXPLANATION:

"As the rule currently is stated, it requires that, when a respondent becomes aware of facts rendering an appeal moot, the respondent must either file a motion to dismiss on that basis, or provide notice of those facts 'with argument against dismissal[.]' We propose amending ORAP 8.45 to allow the respondent to provide notice when becoming aware of facts that 'probably' render an appeal moot, but without necessarily providing argument against dismissal. The purpose of that would be to recognize that, on occasion, a respondent may have no necessary interest in arguing for or against dismissal of a case, while still providing the court with information that the court may want in order to avoid issuing opinions in moot cases."

# RULE AS AMENDED:

**Rule 8.45**
**DUTY TO GIVE NOTICE WHEN FACTS RENDER APPEAL MOOT**

(1) When an appellant becomes aware of facts that probably render an appeal moot,[1] except as to facts the disclosure of which is barred by the attorney-client privilege, the appellant must provide notice of the facts to the court.[2]

(a) If the appellant filing the notice believes that the appeal should not be dismissed, the notice must include the appellant's argument against dismissal.[3]

(b) Any other party may, within 14 days after the filing of a notice, file a response arguing that the appeal should or should not be dismissed. An appellant may, within seven days after the filing of a response, file a reply.

(c) If the notice does not include an argument against dismissal and no party files a response arguing against dismissal, the court may treat the notice as an unopposed motion to dismiss the appeal.

(2) When an appellant believes that the appeal is moot based on privileged facts, that party may move to dismiss the appeal as moot, but need not reveal the privileged facts.

(3) When a respondent becomes aware of facts that probably render an appeal moot, the respondent must either move to dismiss or provide notice of the facts to the court with an explanation as to why the respondent is not moving to dismiss the appeal~~with argument against dismissal to the court~~. Any other party may, within 14 days after the filing of the motion or notice, file a response arguing that the appeal should or should not be dismissed. A respondent may, within seven days after the filing of a response, file a reply.

(4) (a) If a party becomes aware of nonprivileged facts that may render an appeal moot and has reason to believe that the other party or parties are unaware of those facts, the party must promptly inform the other party or parties of those facts.

(b) If no notice is given under this subsection and the court later dismisses the appeal as moot based on those facts, the court, on motion of an aggrieved party, may award costs and attorney fees incurred by the aggrieved party after notice should have been given of the facts that may have rendered the appeal moot, payable by the party who had knowledge of those facts.

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[1] For example, the death of the defendant in a criminal case, the release from custody of the plaintiff in a habeas corpus case, or settlement of a civil case.

[2] An appeal is generally considered moot if the court's decision would have no practical effect on the rights of the parties, including no legally cognizable collateral consequences of the ruling challenged on appeal. *See, e.g., Dept. of Human Services v. P.D.*, 368 Or 627, 496 P3d 1029 (2021); *Garges v. Premo*, 362 Or 797, 421 P3d 345 (2018); *State v. K.J.B.*, 362 Or 777, 416 P3d 291 (2018); *Dept. of Human Services v. A.B.*, 362 Or 412, 412 P3d 1169 (2018).

[3] *See generally* ORS 14.175 (permitting a party to continue to prosecute, and the court to issue judgment in, certain actions notwithstanding that the specific act, policy, or practice giving rise to the action no longer has a practical effect on the party, so long as the party has standing and the challenged act is both capable of repetition (or the policy or practice continues in effect), and is likely to evade future judicial review).

**ORAP COMMITTEE 2026**
**February 12 Materials**

AMENDING RULE(S): Proposal # 20 -- ORAP 9.05(4) or 9.17(2)(b) -- Supreme Court Petitions and Briefs Use Different Order for Questions on Review and Facts

PROPOSER: Tom Christ

# EXPLANATION:

This proposal is to reconcile an inconsistency in the Supreme Court rules between the format of a petition for review and the format of a brief on the merits when review is allowed. In a petition for review, ORAP 9.05(4) requires the facts to come before the questions on review. For briefs, however, ORAP 9.17(2)(b) requires the questions on review to come before the facts. The proposer suggests that putting the questions after the facts "might be the preferred order since the facts often inform the questions."

# RULE AS AMENDED:

[Relevant part of current rules are:]

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

* * * * *

(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.

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**Rule 9.17**
**BRIEFS ON THE MERITS ON REVIEW**

* * * * *

(b) The petitioner's brief on the merits on review shall contain:

(i) Concise statements of the legal question or questions presented on review and of the rule of law that petitioner proposes be established. The questions should not be argumentative or repetitious. The phrasing of the questions need not be identical with any statement of questions presented in the petition for review, but the brief may not raise additional questions or change the substance of the questions already presented.

(ii) A concise statement of:

(A) The nature of the action or proceeding, the relief sought in the trial court, and the nature of the judgment rendered by the trial court; and

(B) All the facts of the case material to determination of the review, in narrative form with references to the places in the record where the facts appear.

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**ORAP COMMITTEE 2026**
**February 12 Materials**

AMENDING RULE(S): Proposal # 21 -- ORAP 10.15 -- Expedite Juvenile Delinquency Appeals

PROPOSER: Christa Obold Eshleman

# EXPLANATION:

"Members of the ORAP Committee:

"Youth, Rights & Justice (YRJ) is a non-profit public defense law firm that has been representing children, parents, and youth in juvenile delinquency and dependency cases at both the trial and appellate levels for the past 50 years. Based on our experience with these cases, we propose amending the rules of appellate procedure to expedite juvenile delinquency cases.

"Under the current version of the ORAPs, the briefing schedule in juvenile delinquency appeals is the same as for adult criminal cases. Under that schedule, unlike juvenile dependency cases, delinquency appeals are not resolved swiftly, leaving youth in uncertainty and sometimes subject to unlawful custodial dispositions for very long periods of time. In our experience, juvenile delinquency appeals that go through the entire process rarely resolve in less than a year and a half and frequently take over two years. Youth (often between ages 11 and 18 when their cases are tried) are rapidly moving between developmental stages. Because of this, lengthy delays in appellate case resolution are inconsistent with the express purposes of the juvenile justice system, which are framed in terms of youth development, i.e. that the system 'shall provide a continuum of services that emphasize prevention of further criminal activity by the use of early and certain sanctions, reformation and rehabilitation programs[,] and swift and decisive intervention in delinquent behavior.'[1] (Emphases added.) As the National Council of Juvenile and Family Court Judges (NCJFCJ) states, 'the juvenile justice process will not achieve its goals if the process is not timely.'[2]

"Appeals in juvenile delinquency cases involve a variety of issues, including whether the youth's adjudication was lawful and whether the juvenile court was authorized to remove the youth from their family and place them elsewhere, including in a youth correctional facility. Petitions for relief based on ineffective assistance of counsel generally must wait until a direct appeal is

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[1] ORS 419C.001(1).

[2] NCJFCJ, Enhanced Juvenile Justice Guidelines: Improving Court Practice in Juvenile Justice Cases, Ch. VII Appeals Process at 2 (pdf 222) (2018), available at NCJFCJ_Enhanced_Juvenile_Justice_Guidelines_Final.pdf (accessed Dec. 29, 2025) (hereafter NCJFCJ).

done.[3] Protracted delays in the appeal process cause system-involved youth to experience the ongoing consequences of potentially erroneous rulings for significant portions of their formative years. Such delays also leave youth in a state of uncertainty, which can hinder their progress not only in rehabilitation from unlawful behavior, but also in normal childhood development.[4] Moreover, a lengthy appellate process means that dispositional issues are likely to become moot before they are decided, both inhibiting the youth's sense of procedural justice and the development of juvenile justice case law.

"Relatively speaking, there are very few juvenile delinquency appeals filed in Oregon each year, and they result in even fewer written opinions by the appellate courts.[5] Virtually all the youth in these appeals are represented either by YRJ or OPDC attorneys. Because of this, the systemwide impact of a change to expedite juvenile delinquency cases will be minimal. YRJ's attached proposal would add juvenile delinquency cases to the expedited timelines in ORAP 10.15. It would, however, keep the current initial due date for opening and answering briefs in delinquency cases (49 days), which is 21 days more than what is allowed in other expedited cases (28 days).[6] The purpose of keeping the longer briefing timeline in delinquency cases is to provide a more flexible amount of time to address novel issues that may arise in delinquency cases, as well as accommodating the challenges a change would bring to attorneys accustomed to non-expedited timelines and carrying a mixed caseload.

"Thank you for considering our proposal. We would welcome a workgroup to discuss any concerns."

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[3] ORS 419C.615(1)(a) ("No proceeding under ORS 419C.615 may be pursued while direct appellate review of the adjudication remains available.").

[4] NCJFCJ at 3 (pdf 223); see also (citing research showing that sustained stress leads to adverse developmental outcomes for children, available at Stress Disrupts the Architecture of the Developing Brain); The Sentencing Project, Why Youth Incarceration Fails 20-21 (Dec 2022) (citing research that incarceration slows maturation and can exacerbate trauma, available at Why-Youth-Incarceration-Fails.pdf).

[5] Official statistics about the number of appellate delinquency cases were not available by the deadline to submit this proposal, but YRJ's search on Westlaw revealed approximately 38 written appellate opinions in juvenile delinquency cases in 2025 (including both precedential and non-precedential), out of a total of over 1400 opinions in all case types.

[6] The time to oral argument in the proposal for subsection (7) was calculated based on 49 days + 14-day extension + 21 days for reply brief + 7 days between reply brief and oral argument.

# RULE AS AMENDED:

***Proposer adds that additional conforming amendments would be necessary to other rules, but does not identify them.***

**Rule 10.15**
**JUVENILE DEPENDENCY, JUVENILE DELINQUENCY, AND ADOPTION CASES**

(1) (a) Subsections (2) through (10) of this rule apply to the following:

(i) an adoption case and a juvenile dependency case under ORS 419B.100, including but not limited to a case involving jurisdiction, disposition, permanency, or termination of parental rights, but excluding a support judgment under ORS 419B.400 to 419B.408; and~~.~~

(ii) a juvenile delinquency case under ORS Chapter 419C.

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

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

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

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

(c) In a disposition proceeding pursuant to ORS 419B.325, a dispositional review proceeding pursuant to ORS 419B.449, a permanency proceeding pursuant to ORS 419B.470 to 419B.476, or a termination of parental rights proceeding, respecting the record in the trial court, the appellant may designate as part of the record on appeal only the transcripts of the proceedings giving rise to the judgment or order being appealed, the exhibits in the proceeding, and the list prepared by the trial court under

ORS 419A.253(2) and all reports, materials, or documents identified on the list. A party may file a motion to supplement the record with additional material pursuant to ORS 19.365(4) and ORAP 3.05(3).

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

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

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

(6) (a) Appellant's opening brief and excerpt of record in a juvenile dependency or termination of parental rights case shall be served and filed within 28 days after the events specified in ORAP 5.80(1)(a) to (f). Appellant's opening brief and excerpt of record in a juvenile delinquency case shall be served and filed within 49 days after the events specified in ORAP 5.80(1)(a) to (f).

(b) Respondent's answering brief in a juvenile dependency or termination of parental rights case shall be served and filed within 28 days after the filing of the appellant's opening brief. Respondent's answering brief in a juvenile delinquency case shall be served and filed within 49 days after the filing of the appellant's opening brief.

(c) A reply brief, if any, shall be served and filed within 21 days after the filing of the respondent's answering brief and no later than 7 days before the date set for oral argument or submission to the court.

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

(7) The court will set the case for oral argument within 63 days after the filing of the opening brief in a dependency or termination of parental rights case, and within 91 days after the filing of the opening brief in a juvenile delinquency case.

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

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

(10) (a) Notwithstanding any provision to the contrary in ORAP 14.05(3):

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

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

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

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[1] *See* Appendix 10.15.

[2] *See* ORS 419A.211(3).

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

[4] *See* ORS 19.370(5).

**ORAP COMMITTEE 2026**
**February 12 Materials**

AMENDING RULE(S): Proposal # 22 -- ORAP 10.30 -- Extend Circumstances When Court of Appeals Opinion is Precedential

PROPOSER: Ernest Lannet

# EXPLANATION:

"From presentations during this year's Day with the Appellate Courts CLE, it appears that the Court of Appeals requires panel unanimity to designate an opinion precedential while the Ninth Circuit requires panel unanimity to designate a written disposition to be a memorandum (rather than a precedential, published opinion). In other words, the results differ if only two judges on a three-judge panel believe that a disposition should be nonprecedential: in the Oregon Court of Appeals, the resulting disposition would be a nonprecedential memorandum opinion, and in the Ninth Circuit, the resulting disposition would be a published, precedential opinion.

"This difference was difficult to derive from the text of ORAP 10.30 and the analogous local rule of the Ninth Circuit, Circuit Rule 36-2. But as I understand the only section that would apply, a single judge can influence the decision by authoring a concurring or dissenting opinion—even by authoring concurring opinion that joins the majority opinion in full.

"The difference may stem from the different phrasing of how the criteria for deciding whether a disposition should be precedential operates. The criteria listed in ORAP 10.30(2)(b), including the preference of a single judge, are merely advisory ('relevant in determining whether a written opinion will be precedential') while the substantially similar criteria listed in Circuit Rule 36-2 are dispositive.

"More specifically, in ORAP 10.30, the fact that one judge will submit a concurring opinion and requests that the disposition of the court be precedential is only one relevant factor to that determination. ORAP 10.30(2)(b)(v). In Circuit Rule 36-2, that same factor—as all the other factors—is determinative. Moreover, when looking at any of the other factors in ORAP 10.30(2)(b), it appears that any of those factors should be dispositive and result in a precedential, published opinion.

"This proposal offers two options. First, it proposes amending ORAP 10.30 to require a decision be published and precedential when the opinion meets any of the criteria listed in ORAP 10.30(2)(b). Second, it proposes amending ORAP 10.30 to specify that one judge's decision to author a separate concurring or dissenting opinion—even only to concur entirely with the opinion and request it be precedential—be specified as sufficient to result in a published, precedential opinion. Circuit Rule 36-2 is included for reference."

Circuit Rule 36-2

CIRCUIT RULE 36-2. CRITERIA FOR PUBLICATION

"A written, reasoned disposition shall be designated as an OPINION if it:

"(a) Establishes, alters, modifies or clarifies a rule of federal law, or

"(b) Calls attention to a rule of law that appears to have been generally overlooked, or

"(c) Criticizes existing law, or

"(d) Involves a legal or factual issue of unique interest or substantial public importance, or

"(e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or

"(f) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression."

(Rev. 1/1/12; 12/1/25)

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# RULE AS AMENDED:

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***Option 1:***

**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 to identify nonprecedential memorandum opinions that conflict with each other if relevant to an issue before the court or to identify recurring legal issues for which there is no clear precedent. 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."

(2) Precedential Decisions

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

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

(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 opinion, and the author of such separate opinion 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.

***Option 2:***

**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 to identify nonprecedential memorandum opinions that conflict with each other if relevant to an issue before the court or to identify recurring legal issues for which there is no clear precedent. 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."

(2) Precedential Decisions

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

(b) An opinion will be precedential when the opinion is accompanied by a separate concurring or dissenting opinion, and the author of such separate opinion

requests that the disposition of the court be precedential.

(c) 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; or

(v) ~~Whether the opinion is accompanied by a separate concurring or dissenting opinion, and the author of such separate opinion 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 2026**
**February 12 Materials**

AMENDING RULE(S): Proposal # 23 -- ORAP 11.10, new 11.12, 11.15 -- Reorganize Mandamus Rules and Remove Obsolete Requirements

PROPOSER: Lisa Norris-Lampe (Kendra Matthews submitted)

# EXPLANATION:

Reorganize mandamus rules for clarity and increased ease in reading. Remove some obsolete provisions (e.g., requiring the filing of "originals" and including a separate requirement for service (which is required by other rules)). Close a gap in the rules relating to requiring the parties to notify the court if there is compliance with an alternative writ at any time. See additional notes with each proposed rule change.

# RULE AS AMENDED:

## I. Amend ORAP 11.10

### A. Summary of Proposed Amendments to ORAP 11.10.

Move discussion of relator's reply memorandum to a separate subsection (from ORAP 11.10(1) to ORAP 11.10(2). Move balance of current rule (ORAP 11.10(2) - (5)) to a new rule (ORAP 11.12), so that ORAP 11.10 addresses only the adverse party's response and the relator's reply.

### B. Clean Version of Proposed Rule.

**Rule 11.10**

**MANDAMUS:**
**RESPONSE BY ADVERSE PARTY; REPLY MEMORANDUM**

(1) Unless the court directs otherwise, the adverse party in a mandamus proceeding that challenges the action of a judge in a particular case in the circuit court, the Tax Court, or the Court of Appeals or the defendant in any other mandamus proceeding may file a memorandum in

opposition.[1] The form of the memorandum must comply with ORAP 7.10(1) and (2). Any such memorandum must be filed within 14 days after the date the petition was filed.

(2) A relator may not file a reply memorandum unless the court has requested one.

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[1] *See* ORS 34.130(4) regarding an attorney for a party in an underlying proceeding appearing on behalf of a judge who is the defendant in a mandamus proceeding. *See* ORS 34.250(4) regarding a judge who is not the named defendant in a mandamus proceeding but whose action is challenged in the proceeding moving to intervene as a party.

## C. Proposed Amendments.

### Rule 11.10

### MANDAMUS: RESPONSE BY ADVERSE PARTY ~~AND CONSIDERATION BY THE COURT~~; REPLY MEMORANDUM

(1) Unless the court directs otherwise, the adverse party in a mandamus proceeding that challenges the action of a judge in a particular case in the circuit court, the Tax Court, or the Court of Appeals or the defendant in any other mandamus proceeding may file a memorandum in opposition.[1] The form of the memorandum must~~shall~~ comply with ORAP 7.10(1) and (2). Any such ~~The original~~ memorandum must~~shall~~ be filed within 14 days after the date the petition was filed. ~~A relator may not file a reply memorandum unless the court has requested one.~~

(2) A relator may not file a reply memorandum unless the court has requested one.

~~The petition and any memoranda in opposition to the petition shall be considered by the court without oral argument unless otherwise ordered. If the court determines to accept jurisdiction, it shall issue an order allowing the petition. Otherwise, the petition shall be denied by order of the court.~~

~~(3) If the court issues an alternative writ of mandamus in a mandamus proceeding that challenges the action of a judge in a particular case in the circuit court, the Tax Court, or the Court of Appeals, the Administrator shall mail copies of the order allowing the petition and the alternative writ of mandamus to the relator, to the adverse party, to any intervenor, and to the judge or court whose action is challenged in the petition. Proof of service of an alternative writ of mandamus need not be filed with the court. Unless the alternative writ of mandamus specifically requires that a return, answer, or responsive pleading be filed, the judge or court to which the writ is issued need not file a return, answer, or responsive pleading.~~

~~(4) If the court issues an alternative writ in any other mandamus proceeding, the court shall set a return date in the writ, and the Administrator shall mail copies of the order allowing~~

~~the petition and the alternative writ of mandamus to the relator, to the defendant, and to any intervenor. On or before the return date in the writ, the defendant shall either file a certificate of compliance or show cause by answer or motion to dismiss as provided by ORS 34.170. If the defendant fails to file a certificate of compliance or show cause by answer or motion to dismiss on or before the return date set in the writ, the court, without further notice to the parties, may issue a peremptory writ of mandamus, as provided in ORS 34.180. When the case is at issue on the pleadings,[2] the court will notify the parties to that effect.~~

~~(5) At any time after the filing of a petition for writ of mandamus or the issuance of an alternative writ of mandamus, if the defendant, judge, or court performs the act sought in the petition or required in the alternative writ, the relator shall notify, and the defendant, judge, court, or any other party to the lower court case may notify, the court of that compliance. After receiving notice of the compliance, the court on motion of any party or on its own motion may dismiss the mandamus proceeding.~~

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[1] *See* ORS 34.130(4) regarding an attorney for a party in an underlying proceeding appearing on behalf of a judge who is the defendant in a mandamus proceeding. *See* ORS 34.250(4) regarding a judge who is not the named defendant in a mandamus proceeding but whose action is challenged in the proceeding moving to intervene as a party.

~~[2] *See* ORS 34.170, ORS 34.180, and ORS 34.190.~~

~~*See generally* ORS 34.105 through 34.250 and Article VII (Amended), section 2, of the Oregon Constitution.~~

## II. Adopt ORAP 11.12

### A. Summary of Proposed New Rule (ORAP 11.12).

Reformat the provisions currently in ORAP 11.10(2) - (5) so that each is easier to read and is consistent with Supreme Court practice. Delete obsolete references to mailing documents. Remove references to serving documents because those requirements are already covered by other ORAPs.

- *New* ORAP 11.12(1) replaces ORAP 11.10(2). There are no substantive changes.

- *New* ORAP 11.12(2) replaces ORAP 11.10(3), which relates to a mandamus proceeding challenging the action of a judge in a particular circuit court, the Tax Court, or the Court of Appeals. Breaks out the old subsection into multiple sections to make it more readable; clarifies a judge or court's obligation when an alternative writ is issued.

- (a) (amendment) Uses the word "transmit" instead of "mail" to reflect that the SCA uses electronic means to notify litigants and judges when possible.

- (b) (new provision): consistent with Supreme Court practice, the rule clarifies that the alternative writ will command a trial court response (compliance or a show cause) by a specified date.

- (c) (amendment): this new section clarifies that, by statute, a judge or court is not actually required to respond and explains what happens if it does not complete the act as directed by the return date.

- (d) (amendment): requires prompt notice to the Supreme Court and specific argument from relator if the lower court takes action to comply. Although ORAP 11.10(5), which is ORAP 11.12(4) in the proposed amendments, already includes a notice requirement, this more specific rule is intended to reduce the times that the Supreme Court learns of the trial court's compliance at or on the eve of oral argument and finds that the parties are unprepared to address the impact of compliance on the case.

- *New* ORAP 11.12(3) replaces ORAP 11.10(4), which relates any other type of mandamus proceeding.

    - (a) (amendment) Uses the word "transmit" instead of "mail" to reflect that the SCA uses electronic means to notify litigants and judges when possible.

    - (b) and (c) are already contained in ORAP 11.10(4); they are broken out into separate subsections for greater clarity.

- *New* ORAP 11.12(4) and ORAP 11.12(5) replace ORAP 11.10(5).

    - There is no substantive change to the notice requirement. This subsection is broken into two parts because the last sentence, which relates to how the Supreme Court will react to a notice of compliance, applies to a notice served pursuant to ORAP 11.12(2)(d) and one served pursuant to ORAP 11.12(4).

**B. Clean Version of Proposed Rule.**

**Rule 11.12**

**MANDAMUS:**
**CONSIDERATION BY THE COURT; ISSUANCE OF WRIT, AND RESPONSE TO WRIT**

(1) The court will consider the petition and any memoranda in opposition without oral argument unless otherwise ordered. If the court determines to accept jurisdiction, it shall issue an order allowing the petition, together with either an alternative or peremptory writ.

(2) Issuance and delivery of an alternative writ of mandamus in a mandamus proceeding challenging the action of a judge in a particular case in the circuit court, the Tax Court, or the Court of Appeals; further actions:

(a) If the court issues an alternative writ of mandamus, the Administrator shall transmit copies of the order allowing the petition and the alternative writ of mandamus to the relator, to the adverse party, to any intervenor, and to the judge or court whose action is challenged in the petition. Proof of service of an alternative writ of mandamus need not be filed with the court.

(b) If the court issues an alternative writ of mandamus, the writ will include a date by which the Supreme Court commands that the judge or court must either perform the act required to be performed or show cause why the judge or court has not done so.

(c) Notwithstanding the language in the alternative writ and consistent with ORS 34.250, unless the alternative writ of mandamus specifically requires that a return, answer, or responsive pleading be filed, the judge or court to which the writ is issued need not file a return, answer, or responsive pleading. If the judge or court does not perform the act required by the alternative writ by the date referenced in subsection (b), the mandamus proceeding will proceed to briefing and oral argument as provided in ORAP 11.15.

(d) If, at any time, the judge or court to which the alternative writ was issued performs the act required by the writ, the relator must file in the mandamus proceeding either a motion to dismiss or a notice explaining why relator contends the Supreme Court should nevertheless retain jurisdiction. The relator must file the motion or notice within three judicial days of the entry date of the judge's or court's compliance.

(3) Issuance and delivery of an alternative writ in any other mandamus proceeding; further actions:

(a) If the court issues an alternative writ of mandamus, the Administrator shall transmit copies of the order allowing the petition and the alternative writ of mandamus to

the relator, to the defendant, and to any intervenor.

(b) If the court issues an alternative writ of mandamus, the writ will include a return date by which the Supreme Court commands that the defendant must either file a certificate of compliance or show cause by answer or motion to dismiss as provided by ORS 34.170.[1]

(c) If the defendant fails to either file a certificate of compliance or show cause on or before the return date, the court, without further notice to the parties, may issue a peremptory writ of mandamus, as provided in ORS 34.180.

(4) Unless subsection (2)(d) of this rule already applies, if, at any time, the defendant, judge, or court performs the act sought in the petition or required by the alternative writ, the relator shall notify, and the defendant, judge, court, or any other party to the lower court case may notify, the court of that compliance.

(5) Upon receiving any notice or certificate of compliance, the court on motion of any party or on its own motion may dismiss the mandamus proceeding.

[1] *See generally* ORS 34.170 through 34.190.

**C. Proposed Amendments.**

**Rule 11.12**

**MANDAMUS:**
**CONSIDERATION BY THE COURT; ISSUANCE OF WRIT, AND RESPONSE TO WRIT**

(12) The court will consider the petition and any memoranda in opposition ~~to the petition shall be considered by the court~~ without oral argument unless otherwise ordered. If the court determines to accept jurisdiction, it shall issue an order allowing the petition, together with either an alternative or peremptory writ. ~~Otherwise, the petition shall be denied by order of the court.~~

(23) Issuance and delivery of ~~If the court issues~~ an alternative writ of mandamus in a mandamus proceeding ~~that~~ challenging ~~es~~ the action of a judge in a particular case in the circuit court, the Tax Court, or the Court of Appeals; further actions:

(a) If the court issues an alternative writ of mandamus, the Administrator shall transmit ~~mail~~ copies of the order allowing the petition and the alternative writ of mandamus to the relator, to the adverse party, to any intervenor, and to the judge or court whose action is challenged in the petition. Proof of service of an alternative writ of mandamus need not be filed with the court.

(b) If the court issues an alternative writ of mandamus, the writ will include a date by which the Supreme Court commands that the judge or court must either perform the act required to be performed or show cause why the judge or court has not done so.

(c) Notwithstanding the language in the alternative writ and consistent with ORS 34.250, ~~U~~unless the alternative writ of mandamus specifically requires that a return, answer, or responsive pleading be filed, the judge or court to which the writ is issued need not file a return, answer, or responsive pleading. If the judge or court does not perform the act required by the alternative writ by the date referenced in subsection (b), the mandamus proceeding will proceed to briefing and oral argument as provided in ORAP 11.15.

(d) If, at any time, the judge or court to which the alternative writ was issued performs the act required by the writ, the relator must file in the mandamus proceeding either a motion to dismiss or a notice explaining why relator contends the Supreme Court should nevertheless retain jurisdiction. The relator must file the motion or notice within three judicial days of the entry date of the judge's or court's compliance.

(3~~4~~) Issuance and delivery of ~~If the court issues~~ an alternative writ in any other mandamus proceeding; further actions:

(a) If the court issues an alternative writ of mandamus, ~~, the court shall set a return date in the writ, and~~ the Administrator shall transmit ~~mail~~ copies of the order allowing the petition and the alternative writ of mandamus to the relator, to the defendant, and to any intervenor.

(b) If the court issues an alternative writ of mandamus, the writ will include a return date by which the Supreme Court commands that ~~On or before the return date in the writ,~~ the defendant must ~~shall~~ either file a certificate of compliance or show cause by answer or motion to dismiss as provided by ORS 34.170.[1]

(c) If the defendant fails to either file a certificate of compliance or show cause ~~by answer or motion to dismiss~~ on or before the return date, ~~set in the writ,~~ the court, without further notice to the parties, may issue a peremptory writ of mandamus, as provided in ORS 34.180. ~~When the case is at issue on the pleadings,[2] the court will notify the parties to that effect.~~

(4~~5~~) Unless subsection (2)(d) of this rule already applies, if, a~~A~~t any time, ~~after the filing of a petition for writ of mandamus or the issuance of an alternative writ of mandamus, if~~ the defendant, judge, or court performs the act sought in the petition or required by~~in~~ the alternative writ, the relator shall notify, and the defendant, judge, court, or any other party to the lower court case may notify, the court of that compliance.

(5) Upon ~~After~~ receiving any notice or certificate of ~~the~~ compliance, the court on motion of any party or on its own motion may dismiss the mandamus proceeding.

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[1] *See generally* ORS 34.170 through 34.190.

## III. Amend ORAP 11.15

### A. Summary of Proposed Amendments to ORAP 11.15.

Simplify the discussion relating to the timing of filing an opening brief. Remove obsolete provisions relating to service and mailing.

### B. Clean Version of Proposed Rule.

**Rule 11.15**

**MANDAMUS:**
**BRIEFS AND ORAL ARGUMENT**

(1) Unless otherwise directed by the court, and provided that the court does not receive notice of compliance with the alternative writ of mandamus by the defendant, judge, or court to whom the writ was issued, the relator shall file and serve the opening brief within 28 days after the date of issuance of the alternative writ of mandamus.

(2) The adverse party in a mandamus proceeding that challenges the action of a judge in a particular case in the circuit court, the Tax Court, or the Court of Appeals, or the defendant in any other mandamus proceeding, shall have 28 days after the date the relator files the opening brief to file the answering brief.

(3) The relator may file a reply brief only with leave of the court. A motion requesting leave to file a reply brief shall be filed within seven days after the filing of the brief to which permission to reply is sought. The content of a reply brief shall be confined to matters raised in the answering brief, and the form shall be similar to an answering brief, but need not contain a summary of argument.

(4) In complex cases, such as cases with multiple parties, multiple writs, or both, the parties may confer and suggest an alternative briefing schedule as provided in ORAP 5.80(8).

(5) All briefs shall be prepared in substantial conformity with ORAP 5.35 through 5.50.

## C. Proposed Amendments.

### Rule 11.15
### MANDAMUS:
### BRIEFS AND ORAL ARGUMENT

(1) Unless otherwise directed by the court, and provided that the court does not receive notice of compliance with the alternative writ of mandamus by the defendant, judge, or court ~~official~~ to whom the writ was issued, the relator shall file and serve the opening brief within 28 days after the date of issuance of the alternative writ of mandamus. ~~:~~

~~(a) Within 28 days after the date of issuance of the alternative writ of mandamus, in a mandamus proceeding that challenges the action of a judge in a particular case in the circuit court, the Tax Court, or the Court of Appeals; or~~

~~(b) Within 28 days after the date that the case is at issue on the pleadings, in any other mandamus proceeding.~~

(2) The adverse party in a mandamus proceeding that challenges the action of a judge in a particular case in the circuit court, the Tax Court, or the Court of Appeals, or the defendant in any other mandamus proceeding, shall have 28 days after the date the relator ~~serves and~~ files the opening brief to file the answering brief.

(3) The relator may file a reply brief only with leave of the court. A motion requesting leave to file a reply brief shall be filed within seven days after the filing of the brief to which permission to reply is sought. The content of a reply brief shall be confined to matters raised in the answering brief, and the form shall be similar to an answering brief, but need not contain a summary of argument.

(4) In complex cases, such as cases with multiple parties, multiple writs, or both, the parties may confer and suggest an alternative briefing schedule as provided in ORAP 5.80(8).

(5) All briefs shall be prepared in substantial conformity with ORAP 5.35 through 5.50. ~~An original brief shall be filed with the Administrator with proof of service showing that a copy was served on each party.~~

~~(6) After the briefs are filed, unless the court directs that the writ will be considered without oral argument, the court will set the matter for oral argument as in cases on appeal. At oral argument, the parties shall argue in the order in which their briefs were filed.~~

## IV. ORAP 11.17

No proposed changes to ORAP 11.17. It is included so the committee has all of the ORAPs related to mandamus at hand when reviewing the proposal.

**Rule 11.17**

**MANDAMUS:**
**ISSUANCE OF COMBINED**
**PEREMPTORY WRIT OF MANDAMUS**
**AND APPELLATE JUDGMENT**

If the court has determined that the relator is entitled to a peremptory writ of mandamus, the court shall direct the Administrator to issue the writ. The peremptory writ may be combined with the appellate judgment and issued together as a single document. If the peremptory writ and the appellate judgment are combined, the relator need not file proof of service of the writ with the court, and the judge or court to which the writ is issued in a mandamus proceeding that challenges the action of a judge in a particular case in the circuit court, the Tax Court, or the Court of Appeals or the defendant in any other mandamus proceeding need not file a return showing compliance with the writ.

_____
*See* ORS 34.250(8).

**ORAP COMMITTEE 2026**
**February 12 Materials**

AMENDING RULE(S): Proposal # 26 -- ORAP 13.05 -- Consider Amending Costs Rule to Address Situation when Supreme Court Remands to Court of Appeals

PROPOSER: Kendra M. Matthews, Appellate Legal Counsel, Supreme Court

# EXPLANATION:

"ORAP 13.05 outlines the rules for costs and disbursements on appeal. It addresses most scenarios that arise on appeal and much of it has statutory underpinnings. There are times that arise with some regularity, however, that may not be fully captured by the rule.

"For instance, ORAP 13.05(2) calls upon "the court" to "determine whether the prevailing party is allowed costs at the time the court issues its decision." But with some regularity, a Supreme Court decision will remand the case to the Court of Appeals for further proceedings. Thus, the answer to whether the prevailing party in the Supreme Court should be allowed costs on appeal is "maybe." While ORAP 13.05(4) provides for an award of costs to be determined following remand to the trial court or relevant agency, there is no express provision relating to the Supreme Court awarding costs to abide the outcome of a remand to the Court of Appeals. While a separate provision addressing that scenario might be appropriate, this gap in the rules might also be addressed by adding language to ORAP 13.05(2), e.g., "The court will designate a prevailing party and determine whether the prevailing party is allowed costs at the time that the court issues its decision. If the Supreme Court on review remands to the Court of Appeals for further proceedings, the court will designate a prevailing party in the proceeding before the Supreme Court, but the award of costs will abide the outcome of the proceedings on remand to the Court of Appeals."

"Rather than formally proposing such an amendment, I propose that members of the committee, including specifically a representative from each court and the records section, review each paragraph of the rule to discuss and determine whether an amendment or amendments would bring greater clarity to how costs are handled on appeal."

# RULE AS AMENDED:

[None. Current rule is:]

**Rule 13.05**
**COSTS AND DISBURSEMENTS**

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

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

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

(4) When a party prevails on appeal or on review and the case is remanded for further proceedings in which the party who ultimately will prevail remains to be determined, the court may allow costs to abide the outcome of the case. If the court allows costs to abide the outcome of the case, the prevailing party shall claim its costs within the time and in the manner prescribed in this rule. The appellate court may determine the amount of costs under this subsection, and may condition the actual award of costs on the ultimate outcome of the case. In that circumstance, the award of costs shall not be included in the appellate judgment, but shall be awarded by the court or tribunal on remand in favor of the prevailing party on appeal or review, if that party also prevails on remand, and shall be awarded against the party designated on appeal or review as the party liable for costs.

(5) (a) A party seeking to recover costs shall file a statement of costs and disbursements within 28 days after the date of the decision. The filing of a petition for review or a petition for reconsideration does not suspend the time for filing the statement of costs and disbursements.

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

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

(6) (a) (i) Except as provided in paragraph (ii) of this subsection, whether a brief is printed or reproduced by other methods, the party allowed costs is entitled

to recover 10 cents per page for the number of briefs required to be filed or actually filed, whichever is less, plus one copy for each party served and one copy for each party on whose behalf the brief was filed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**ORAP COMMITTEE 2026**
**February 12 Materials**

AMENDING RULE(S): Proposal # 27 -- ORAP 13.10(9) -- Make Amount of Attorney Fees Discretionary in Absence of Objection

PROPOSER: Kendra M. Matthews, Appellate Legal Counsel, Supreme Court

# EXPLANATION:

ORAP 13.10(9) currently provides that in the absence of timely filed objections an appellate court "*will"* award fees in the amount sought if they are statutorily authorized. The rule, as written, affords the relevant appellate court no discretion whatsoever. This proposal suggests changing the word "will" to "may."

Appellate courts, generally, rely on the parties' briefing to resolve attorney fee disputes. *See, e.g., Lehman v. Bradbury*, 334 Or 579, 582, 54 P3d 591 (2002) (court "generally limit [its] inquiry to the objections, if any, filed by the opposing party."); *Dockins v. State Farm Ins*. Co., 330 Or 1, 6-7, 997 P2d 859 (2000) ("We depend on petitioner's opponent to raise objections to the petitioner's request with as much particularity as possible and to support those objections with argument and (where appropriate) documentation that will assist this court in its efforts.").

But while an appellate court may almost always award fees in the amount sought if there is no objection--and the party against whom a fee award is sought should be aware of the risks inherent in not filing an objection to a fee petition--an appellate court should not be *required* by rule to do so under all circumstances. There may be circumstances in which a court concludes that the fees requested are unreasonable even absent an objection. Using the word "may" accounts for that possibility while still leaving in place the presumption and authority for the court to default to awarding the fees sought in the amount requested if there is no objection filed.

# RULE AS AMENDED:

**Rule 13.10**

**PETITION FOR ATTORNEY FEES**

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

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

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

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

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

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

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

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

request findings in a petition, objection, or reply in the form specified in this rule constitutes a waiver of any objection to the absence of findings to support the court's decision.

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

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

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

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

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

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

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

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

*See* Appendix 13.10.