ORAP COMMITTEE 2026

March 11 Agenda -- Combined Agenda and Materials

PENDING PROPOSALS:

- ***For discussion:***

  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

  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

  and

  14. ORAP 5.50, 6.05, 6.10, 6.15, 6.20, and 6.30, Temporary Rules -- COA Argument

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

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 ORAP 10.30, COA Nonprecedential Opinions -- Expand When Opinions are Precedential

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

- ***Technical amendments:***

  8. ORAP 3.43, New Rule -- Process to Transfer Transcript Between Appeals

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

- ***To be passed for April meeting:***

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

- ***Withdrawn proposals:***

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

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

FOR INFORMATIONAL PURPOSES ONLY: PROPOSALS RESOLVED AT PRIOR MEETING:

- ***Proposals approved:***

  1. ORAP 1.32 etc, Temporary Rules -- Terminology -- Change OSB Member to Licensee

  2. ORAP 1.35, Filing and Service -- Clarifications re Duplicative Filings and Service Requirements

  4. ORAP 1.45, Filings -- Cannot Use Color Text or Highlighting

  5. ORAP 2.35, SCT Summary Determination of Appealability -- Caption Requirement

  7. ORAP 3.30, Transcript Preparation -- Service Requirements

  9. ORAP 3.50, 4.20, Electronic Records Retention

  10. ORAP 5.05, 7.10, Briefs and Motions -- Captions Must Note Impending Oral Argument Date

  18. ORAP 6.25, COA Reconsideration of Orders -- 14 Days for Motion to Reconsider (approved with edit)

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

  24. ORAP 12.25, SCT Bar Proceedings -- Correct Terminology and Cross References

  25. ORAP 12.27, SCT Judicial Disability Proceedings -- Correct Limiting Term in Rule Subcaption

- ***Proposals not approved:***

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

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

ORAP COMMITTEE 2026
March 11 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
WORKGROUP:	Jeff Schick, Stacy Harrop, Kendra Matthews, Ernest Lannet, Julie Smith, Theresa Kidd

EXPLANATION:

Workgroup notes for March 11: The original proposal has been extensively amended and still requires some additional work. As a result, this version is submitted to the committee for discussion and feedback only.

This revision is intended to address concerns that the certification section and sanction sections seemed to set out different tests, to add the Supreme Court, to allow more discretion for types of sanctions, to line up the standards with ORCP 17 or other statutes that use sanctions, to address supplemental pro se briefs, and to match ORAP structure and wording.

Three notes for specific consideration:

(1) In ORAP 13.25(3)(a), the use of "objectively unreasonable" was retained, but it could be reworded to "one for which there is no objectively reasonable basis" or similar.

(2) Should the show cause process be mandatory in all cases? ORAP 13.25(3)(b) ("Upon striking the document, the court *will* direct the person or party that filed the document to show cause within 14 days * * *.") In particular, where a respondent has not appeared on appeal and the court determines striking the document is a sufficient remedy, should the rule allow discretion to not initiate a show cause process?

(3) The workgroup will be clarifying references to the "person" and to the "party," possibly to use "attorney or pro se party" in lieu of "person" to indicate a reference to the signer of the document. And use of "party" more generally to mean a party to the litigation. Also, should the show cause section explicitly allow for a party represented by an attorney who made a false certification the opportunity to respond separately from the attorney?

NOTE REGARDING FORMATTING: The "track changes" versions below include the text of the original proposal with changes accepted but made red, with track changes added in addition. Clean versions of the proposals have been added at the end.

Original 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:

TRACK CHANGES VERSION:

Rule 1.40
VERIFICATION; DECLARATIONS; ADOPTING ORCP 17

(1) Except if specifically required 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 general certifications in~~specifications of~~ ORCP 17 C, a person signing a document as required by ORCP 17 that is filed in the Supreme Court ~~and~~or the Court of Appeals is specifically certifying that ~~that~~ a human being ~~certifies that~~

(a) has read all citations to cases, statutes, constitutions, or other sources of law appearing in the document and has confirmed that each ~~are~~ citation is to a source~~s~~ of law that, in fact, exists, contains the text of any quotation attributed to it, and supports the principles of law attributed to it ~~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~~ has read all statements of fact appearing in the document and confirmed that those facts are supported by the portion of the record cited in the manner required by ORAP 5.20(1) - (3-).

(6) This rule does not impose any certification obligations on the attorney ~~counsel~~ with regard to ~~preparation of~~ a supplemental *pro se* brief prepared by the client under ORAP 5.92.

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[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) An appellate court may impose sanctions against a person or party who has made a false certification under ORAP 1.40(5).

(a) Circumstances in which the court will find a person has made a false certification under ORAP 1.40(5) in a document filed by the person~~(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 that does not contain the quoted text;

(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) The court on its own motion, or the motion of any party, will strike any document that the court finds a person has filed with a false certification under ORAP 1.40(5). ~~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.~~ Upon striking the document, the court will direct the person or ~~The~~ party that filed the document ~~will be given 14 days~~ to show cause within 14 days why the proceeding should not proceed without the stricken document~~, and~~ why ~~monetary~~ sanctions under paragraph (3)(c) of this rule should not be imposed on the person who signed the document~~it~~, and, in circumstances when the stricken ~~. 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. Within 14 days a~~A~~fter ~~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~~to the circumstances of the false certification under ORAP 1.40(5).

(c) Absent extraordinary circumstances, the court will impose sanctions on a person for filing a document with a false certification under ORAP 1.40(5), which will include monetary sanctions, but, in the court's discretion, may include other or additional appropriate sanctions. A court may impose one or more of the following sanctions:

(i) Monetary sanctions. When the court imposes monetary sanctions, absent extraordinary circumstances, it 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.~~.~~ The sanction imposed under this paragraph may be imposed as a fine or to compensate a party for the effects of the false certification.

(ii) Sanctions will include an award of ~~In all instances, the court will award~~ reasonable attorney fees to any other party incurred ~~by any other party in responding to~~ as a result of the circumstances of the false certification under ORAP 1.40(5)~~the citations, quotations, and/or objectively unreasonable attributions described in ORAP 13.25(3)(a).~~.

(iii) A sanction other than the sanctions specified in subparagraphs (i) and (ii) of this subsection if the court determines that the sanction would be an effective remedy for the false certification under ORAP 1.40(5).

(iv) In determining whether to sanction a person ~~to award sanctions~~ in excess of the amounts under subparagraph (i) of ~~required under~~ this rule, or to include other sanctions under subparagraph (iii), and whether to permit the filing of a new document in the place of a stricken one, the court will consider:~~take into account~~

(A~~i~~) the number of ~~citations to nonexistent authority, nonexistent quotations, and/or objectively unreasonable attributions~~times in the stricken document any of the circumstances under paragraph (3)(a) of this rule appear;

(B~~ii~~) the number of occasions on which the person filing the document has been found by the Supreme Court, Court of Appeals, or any other court to have filed documents containing the circumstances under paragraph (3)(a) of this rule~~citations to nonexistent authority, nonexistent quotations, and/or objectively unreasonable attributions~~;

(C~~iii~~) any prejudice to the other parties to the case resulting from the false certification under ORAP 1.40(5);

(D~~iv~~) the degree to which the party on whose behalf the document was filed played a role in including or encouraging the appearance of any of the circumstances under paragraph (3)(a) of this rule in the stricken document~~use of citations to nonexistent authority, nonexistent quotations, and/or objectively unreasonable attributions~~; and

(E~~iv~~) any such other factor the court deems relevant under the circumstances.

(d) The court order imposing sanctions under subsection (3) of this rule must specifically describe the false certification and the grounds for determining that the certification was false. The order must explain the grounds for the imposition of the specific sanction that is ordered.

CLEAN VERSIONS:

Rule 1.40
VERIFICATION; DECLARATIONS; ADOPTING ORCP 17

(1) Except if specifically required 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 general certifications in ORCP 17 C, a person signing a document as required by ORCP 17 that is filed in the Supreme Court or the Court of Appeals is specifically certifying that a human being

(a) has read all citations to cases, statutes, constitutions, or other sources of law appearing in the document and has confirmed that each citation is to a source of law that, in fact, exists, contains the text of any quotation attributed to it, and supports the principles of law attributed to it; and

(b) has read all statements of fact appearing in the document and confirmed that those facts are supported by the portion of the record cited in the manner required by ORAP 5.20(1) - (3).

(6) This rule does not impose any certification obligations on the attorney with regard to a supplemental *pro se* brief prepared by the client under ORAP 5.92.

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[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) An appellate court may impose sanctions against a person or party who has made a false certification under ORAP 1.40(5).

(a) Circumstances in which the court will find a person has made a false certification under ORAP 1.40(5) in a document filed by the person include, but are not limited to:

(i) a citation or citations to nonexistent case law or any other nonexistent source of law;

(ii) a quotation attributed to an existing source of law that does not contain the quoted text;

(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) The court on its own motion, or the motion of any party, will strike any document that the court finds a person has filed with a false certification under ORAP 1.40(5). Upon striking the document, the court will direct the person or party that filed the document to show cause within 14 days why the proceeding should not proceed without the stricken document, why sanctions under paragraph (3)(c) of this rule should not be imposed on the person who signed the document, and, in circumstances when the stricken document is an opening brief, why the appeal should not be dismissed. Within 14 days after 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 circumstances of the false certification under ORAP 1.40(5).

(c) Absent extraordinary circumstances, the court will impose sanctions on a person for filing a document with a false certification under ORAP 1.40(5), which will include monetary sanctions, but, in the court's discretion, may include other or additional appropriate sanctions. A court may impose one or more of the following sanctions:

(i) Monetary sanctions. When the court imposes monetary sanctions, absent extraordinary circumstances, it will impose a minimum of $500 for each citation to nonexistent authority, and $1000 for each nonexistent quotation or objectively unreasonable factual or legal attribution. The sanction imposed under this paragraph may be imposed as a fine or to compensate a party for the effects of the false certification.

(ii) Sanctions will include an award of reasonable attorney fees to any other party incurred as a result of the circumstances of the false certification under ORAP 1.40(5).

(iii) A sanction other than the sanctions specified in subparagraphs (i) and (ii) of this subsection if the court determines that the sanction would be an effective remedy for the false certification under ORAP 1.40(5).

(iv) In determining whether to sanction a person in excess of the amounts under subparagraph (i) of this rule, or to include other sanctions under subparagraph (iii), and whether to permit the filing of a new document in the place of a stricken one, the court will consider:

(A) the number of times in the stricken document any of the circumstances under paragraph (3)(a) of this rule appear;

(B) the number of occasions on which the person filing the document has been found by the Supreme Court, Court of Appeals, or any other court to have filed documents containing the circumstances under paragraph (3)(a) of this rule;

(C) any prejudice to the other parties to the case resulting from the false certification under ORAP 1.40(5);

(D) the degree to which the party on whose behalf the document was filed played a role in including or encouraging the appearance of any of the circumstances under paragraph (3)(a) of this rule in the stricken document; and

(E) any such other factor the court deems relevant under the circumstances.

(d) The court order imposing sanctions under subsection (3) of this rule must specifically describe the false certification and the grounds for determining that the certification was false. The order must explain the grounds for the imposition of the specific sanction that is ordered.

ORAP COMMITTEE 2026
March 11 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

WORKGROUP: Daniel Parr, Theresa Kidd

EXPLANATION:

Workgroup notes for March 11: The workgroup offers the following options (not in any specific order other than #1):

1) Do nothing.

2) Adopt ORCP 10B.

3) Make changes to the response time for certain filings. For example, when a rule requires 14 days or less to respond, add 3 days to the time (in the rule) with a comment that the historical time has been 14 days and we are making this change instead of adopting ORCP 10B. In other words, if a rule provides 7 days to respond it should be changed to 10, if 14 it should be changed to 17.

4) Mandate eService when eFiling is used.

If the committee prefers options 2, 3, or 4, then the workgroup will work on specific language or identify specific rules that will need to be modified

Original 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
March 11 Materials

AMENDING RULE(S):	Proposal # 13 -- ORAP 5.45 -- Revise and Explain Plain Error Rule and/or Allow for Combined Preservation and Standard of Review Subsections
PROPOSER:	Ernest Lannet & William Kabeiseman
WORKGROUP:	Ernest Lannet, Kendra Matthews, Julie Smith, Travis Eiva, Stacy Harrop (Ryan Kahn added)

EXPLANATION:

Workgroup notes for March 11: The proposal has been divided into three components: First, the edits improving readability and consolidating references to plain error (proposal A); second, an edit acknowledging the narrow circumstances where the rules of preservation (and plain error) do not preclude review (proposal B); and third, the edits allowing combined preservation subsections and combined standard of review subsections (proposal C).

For proposal B, the footnoted reference to *Peeples v. Lambert* has been moved to subsection (4) and the proposed text in subsection (1) that the preservation requirement sometimes "gives way" has been withdrawn.

Original explanation: "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:

Proposal A (improving readability and consolidating references to plain error):

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 party assigning error ~~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 party assigning error ~~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 party assigning error ~~appellant~~ ~~assignment of error~~ must quote or summarize the evidence that the party ~~appellant~~ believes was erroneously admitted or excluded. If an assignment of error challenges the exclusion of evidence, the party ~~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, the party ~~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 under the subheading "Preservation of Error". When a party ~~the appellant~~ contends that the error was preserved in the lower court but requests plain error review in the alternative, the party ~~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.~~[24]

(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).~~

Proposal B (also acknowledging the narrow circumstances where the rules of preservation do not preclude review (ORAP 5.45(4) n 2):

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.[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.~~

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

(i) The party assigning error ~~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 party assigning error ~~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 party assigning error ~~appellant assignment of error~~ must quote or summarize the evidence that the party ~~appellant~~ believes was erroneously admitted or excluded.

If an assignment of error challenges the exclusion of evidence, the party ~~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, the party ~~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 under the subheading "Preservation of Error". When a party ~~the appellant~~ contends that the error was preserved in the lower court but requests plain error review in the alternative, the party ~~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 narrow ~~particular~~ circumstances, *e.g.* ~~*i.e.*~~, when a party has

no practical ability to raise an issue or~~,~~ 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).~~

Proposal C (also allowing combined preservation subsections and combined standard of review subsections—ORAP 5.45(4)(a)(iv) and ORAP 5.45(5)):

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 narrow 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.[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.~~

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

(i) The party assigning error ~~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 party assigning error ~~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 party assigning error ~~appellant~~ ~~assignment of error~~ must quote or summarize the evidence that the party ~~appellant~~ believes was erroneously admitted or excluded. If an assignment of error challenges the exclusion of evidence, the party ~~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, the party ~~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 raised 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 under the subheading "Preservation of Error". When a party ~~the appellant~~ contends that the error was preserved in the lower court but requests plain error review in the alternative, the party ~~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 are subject to the same standard(s) of review ~~the appellant expressly states which standard or standards of review apply to each assignment of error.~~[24]

(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 narrow ~~particular~~ circumstances, *e.g.* ~~*i.e.*~~, when a party has no practical ability to raise an issue or~~,~~ 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).

~~[24]~~ Standards of review include but are not limited to *de novo* review and substantial evidence for factual issues, errors of law and abuse of discretion for legal issues, and special statutory standards of review such as those found in the Administrative Procedures Act, ORS 183.400(4), and ORS 183.482(7) and (8). *See also* ORS 19.415(1), which provides that, generally, "upon an appeal in an action or proceeding, without regard to whether the action or proceeding was triable to the court or a jury," the court's review "shall be as provided in section 3, Article VII (Amended) of the Oregon Constitution"; ORS 19.415(3)(b) regarding discretion of the Court of Appeals to try the cause *de novo* or make one or more factual findings anew on appeal in some equitable proceedings; *see also* ORAP 5.40(8) concerning appellant's request for the court to exercise *de novo* review and providing a list of nonexclusive items Court of Appeals may

consider in deciding whether to exercise its discretion.

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

ORAP COMMITTEE 2026
March 11 Materials

AMENDING RULE(S):	Proposal # 15 -- ORAP 5.50, 3.35, 5.05 -- Streamline Excerpts of Record
PROPOSER:	Hon. Jacqueline S. Kamins, Court of Appeals
WORKGROUP:	Judge Kamins, Ernest Lannet, Ryan Kahn, Julie Smith, Travis Eiva

EXPLANATION:

Workgroup notes for March 11 meeting: Additional edits to ORAP 3.35 and ORAP 5.05 were needed, so those rules have been added.

Original 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~~file an excerpt of record at the same time as the opening brief.[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~~filed with the opening brief.

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

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

(b) ~~Each assignment of error must identify precisely~~The portion of the record

containing the legal, procedural, factual, or other ruling 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 cited or referenced in the briefs as well as any transcript pages central to the issue on appeal~~.~~[3]

(d) If~~-~~, and only if, there is a reasonable likelihood that preservation of error ~~is or is likely to~~will 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~~with the respondent's brief, and an appellant may file, with the reply brief, a supplemental excerpt of record containing those materials required by subsection (2) of this rule that were omitted from the excerpt of record. The supplemental excerpt of record should not include anything already contained in 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) The excerpt of record and any supplemental excerpt of record must be filed as a separate filing.

(c~~b~~) Contents must be set forth in 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 caption~~first~~ page ~~being page~~paginated as ER-1 and every subsequent page shall be consecutively numbered, including but not limited to the table of contents of the excerpt, caption pages and blank pages, such that the page numbering is consistent with the PDF numbering. The excerpt must begin with an index organized ~~chronologically~~in 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~~d) 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~~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.~~

Rule 3.35
FORM OF TRANSCRIPT

(1) A transcript shall meet these specifications:

* * * * *

(k) If a transcript exceeds 200 pages, it shall be bound into volumes of approximately equal size of not more than 200 pages each. Volumes shall be consecutively numbered on their covers.

(2) The electronic version of the transcript filed with the Administrator as required by ORAP 3.33(4)(c) shall be in the following form:

(a) The electronic transcript shall be in Portable Document Format (PDF) that allows text searching, and copying and pasting into another document. The pagination of the transcript served on the parties shall correspond to the pagination of the electronic transcript filed with the court.

(b) ~~If the transcript exceeds 200 pages, the electronic transcript shall be broken into separate PDF files of approximately equal length not to exceed 200 pages.~~ Absent good cause, a transcript shall be filed as a single PDF file. If the proceedings were recorded by multiple transcribers, there may be as many pdf files as there are transcribers. Regardless of whether a transcript consists of one or more PDF files, each file shall be named in accordance with the file naming conventions set out in Appendix 3.35. If a PDF file contains more than one proceeding date, the beginning of each proceeding shall be bookmarked.~~Absent good cause, a transcript shall be filed as a single PDF file.~~ The page numbering of each pdf transcript file shall begin with the caption page counted as number 1, and every subsequent page shall be consecutively numbered. Alternative numbering formats—e.g., using roman numerals or starting each volume with page 1—may not be used. Although caption pages must be included in the consecutive numbering, the page number need not be printed on caption pages. All pages shall be included in the consecutive numbering, including but not limited to caption pages and blank pages such that the page numbering is consistent with the PDF numbering.

(c) ~~If the transcript is in two volumes or less, it~~A transcript may be filed by attaching the electronic transcript to an email directed to appealsclerk@ojd.state.or.us. If the Administrator determines that an electronic transcript must be rejected for security reasons (*e.g.*, virus or malware), or because the transcript file exceeds the size limits for transmitting by email, the court reporter or transcriber shall resubmit the transcript as directed by the Administrator. ~~If the transcript is more than two volumes, it shall be filed by optical disk.~~

(d) The electronic transcript shall comply with ORAP 3.35(1)(a), (c), (d), (e), (f), (g), and (h). The electronic transcript also shall comply with ORAP 3.35(1)(b), except that it will not be printed. Notwithstanding ORAP 3.33(5)(c), the electronic transcript filed with the court shall be prepared in the one page of transcript per one standard page format.

[1] *See* ORAP 4.20 regarding use of previously prepared single-sided transcripts in judicial review

cases.

Rule 5.05
SPECIFICATIONS FOR BRIEFS

(1) (a) Except as provided in paragraph (1)(c) of this subsection, an opening, answering, combined, or reply brief must comply with the word-count limitation in paragraph (1)(b) of this subsection.[1] Headings, footnotes, and quoted material count toward the word-count limitation. The front cover, index of contents and appendices, index of authorities referred to, ~~excerpt of record,~~ appendices, certificate of service, any other certificates, and the signature block do not count toward the word-count limitation.

* * * * *

(c) Pages must be consecutively numbered at the top of the page within 3/8 inch from the top of the page. ~~Pages of an excerpt of record included with a brief must be numbered independently of the body of the brief, and each page number must be preceded by "ER," *e.g.*, ER-1, ER-2, ER-3.~~ Pages of appendices must be preceded by "App," *e.g.*, App-1, App-2, App-3.

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ORAP COMMITTEE 2026
March 11 Materials

AMENDING RULE(S): Proposals # 14 and #16 -- ORAP Rules 5.50, 6.05, 6.10, 6.15, 6.20 and 6.30 -- Rules re: Court of Appeals Argument

PROPOSER: [Temporary rules to be made permanent]

WORKGROUP: Daniel Parr, Kendra Matthews, Ernest Lannet, Stacy Harrop

EXPLANATION:

Workgroup notes for March 11: Added amendments to ORAP 6.20; incorporated proposal #16 with additional changes; added an option to file a Joint Request for Submission on the Briefs; and made non-substantive edits throughout for clarity and consistency.

Original explanation: These temporary rules were adopted by the Court of Appeals through Chief Judge Order 25-01. The Chief Judge Order gives the following summary of the amendments:

> "The purpose of the amendments is to update the oral argument practices of the Court of Appeals to account for new technologies that allow for oral arguments to be conducted in a hybrid format, in addition to fully in-person and remote formats; to facilitate the court's ability to more efficiently manage its workflow and set cases for argument by requiring litigants to inform the court whether and in what format they intend to argue an appeal earlier in the appellate process than previously required; to allow for oral argument by self-represented litigants; and to provide the processes for oral arguments by self-represented litigants, including the processes that apply to litigants who are incarcerated."

Note: The versions of ORAP 6.05 proposed to be made permanent deletes ORAP 6.05(4)(a) and 6.05(7), as those provisions were time-limited and are longer appropriate for current cases.

RULES 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) 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.[3]

(d) If preservation of error is or is likely to be disputed in the case, parts of memoranda and the transcript pertinent to the issue of preservation presented by the case.

(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.

(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.

(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 chronological order, except that 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, 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.

(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.[4]

(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.

~~[4] Under ORAP 6.05(4), cases in which a self-represented party files a brief are submitted without argument by any party. For that reason, any excerpt or supplemental excerpt of record submitted by a self-represented party shall not contain any of the documents otherwise required by ORAP 5.50(2)(c) to (f) to assist the appellate court in preparing for oral argument.~~

Rule 6.05
REQUEST FOR ORAL ARGUMENT;
SUBMISSION WITHOUT ARGUMENT

(1) This rule applies to proceedings in the Court of Appeals and governs the process of requesting oral argument and expressing a preference for the format (in- person, by remote means, or hybrid, as described in ORAP 6.30).

(2) (a) Any party who intends to appear at oral argument must file an Oral Argument Appearance Request in accordance with this rule. An Oral Argument Appearance Request may be filed jointly by all parties, or individually, in one of the forms described in subsection (3) of this rule.

(b) If the parties agree that the case is suitable for submission on the briefs, the parties may file an optional Joint Request for Submission on the Briefs, described in subsection (3) of this rule. A Joint Request for Submission on the Briefs shall be filed no later than the date the answering brief is due.

(3) Forms

(a) Joint Request. The parties on appeal are encouraged to file a joint Oral Argument Appearance Request that addresses the requests and format preferences for all parties or a Joint Request for Submission on the Briefs that includes a request from all parties on appeal that the case will be submitted on the briefs. A joint Oral Argument Appearance R~~r~~equest ~~for oral argument~~ shall contain the following information with respect to each party that intends to appear:

(i) The name of each attorney or self-represented party who will argue the case.

(ii) ~~With respect to each party that intends to appear, w~~Whether the party prefers to appear in person or appear remotely.

(b) Individual Requests. Although joint requests are preferred, any party may file an individual Oral Argument Appearance Request that either requests oral argument on behalf of the party or states an appearance preference if the party does not request oral argument but intends to appear if another party requests oral argument. An individual request of either type shall contain the following information:

(i) The name of the attorney or self-represented party who will argue the case for the party filing the Oral Argument Appearance Request.

(ii) Whether the party prefers to appear in person or appear remotely.

(4) Timelines for submitting an Oral Argument Appearance Request.

(a) 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 (b) and (c) ~~and (d)~~ of this subsection, an Oral Argument Appearance Request shall be filed as soon as practicable but 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. ~~of the answering brief or~~

~~notification of waiver of appearance by the last respondent, whichever is later.~~ If more than one reply ~~answering~~ 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~~answering~~ brief is filed or was due. For those cases listed in ORAP 5.70(3)(a)(i) to (iv), an Oral Argument Appearance Request shall be filed no later than 14 days after the filing of the answering brief or notification of waiver of appearance by the last respondent, whichever is later.

(b) Juvenile and adoption cases subject to ORAP 10.15.

(i) An individual Oral Argument Appearance Request by an appellant must be filed at the time that the appellant files the opening brief.

(ii) An individual Oral Argument Appearance Request by a respondent must be filed at the time the respondent files the answering brief.

(iii) A joint Oral Argument Appearance Request must be filed within 3 days of the filing of the answering brief.

(iv) If an appellant on appeal has requested oral argument, and no respondent requests oral argument, the appellant on appeal may waive oral argument by notifying the court that the appellant waives oral argument within 3 days of the filing of the answering brief.

(c) Land use cases subject to ORAP 4.60 through ORAP 4.74.

(i) An Oral Argument Appearance Request, whether joint or individual, must be filed within 7 days of the filing of the petition for judicial review.

(ii) If one party has requested oral argument, and no other party requests oral argument, the party that requested oral argument may waive oral argument by notifying the court within 3 days of the filing of the answering brief.

(5) Submission will occur as follows:

(a) If no party files a timely Oral Argument Appearance R~~r~~equest ~~for oral argument~~ or the parties file a Joint Request for Submission on the Briefs, the case shall be submitted on the briefs. The court will notify the parties when the case is submitted for decision.

(b) If all parties that have filed a timely Oral Argument Appearance Request~~requested oral argument~~ subsequently notify the court that they waive oral argument, the case shall be submitted on the briefs.

(c) Notwithstanding paragraphs (a) and (b) of this subsection, if the court determines that oral argument will aid the court's decision-making process, the court may order that the case be set for oral argument.

(d) If a timely Oral Argument Appearance Request is filed~~request for oral argument is made~~, then the case will be set for oral argument in due course and the Administrator will send the parties notice of the date and time that argument has been scheduled. The case will be submitted to the court upon completion of oral argument.

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

(6) Argument Format

(a) Under ORAP 6.30, the court holds oral argument in three formats: (i) in person, where all litigants appear in person; (ii) by remote means, where all litigants appear remotely; and (iii) hybrid, in which at least one litigant appears remotely, and at least one litigant appears in person.[1]

(b) Except as provided below, in setting oral arguments, the court in general will schedule oral argument and submission in a manner that accounts for the preferences expressed by the litigants in their Oral Argument Appearance Requests as follows:

(i) If all parties express a preference for argument by remote means, the argument will be held by remote means.~~;~~

(ii) I~~i~~f all parties express a preference for in-person oral argument, the argument will be held ~~in person;~~in person.

(iii) I~~i~~f the parties differ in their preferences, the argument will be held in a hybrid format.

(iv) In the event that some, but not all, parties express a preference for the format of argument, the court in general will set argument in accordance with the preferences expressed and the court's needs.

(c) In all cases involving a self-represented party who is in custody, oral argument will be held by remote means.

(d) If the court orders oral argument in a case in which no party has requested oral argument, oral argument ordinarily will be held by remote means.

(e) In any case, and notwithstanding the preferences expressed by the parties, the court may determine that, under the circumstances, the needs of the court will be best served by a particular format of argument and may direct that argument will occur in that format.

(f) Where, in the court's judgment, inclement weather or other conditions make in-person argument difficult or unsafe, the court will, when possible, hold all scheduled arguments by remote means rather than postponing arguments.

(g) Except for emergency motions, the court will not entertain motions regarding the format of oral argument.

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[1] In any of the formats, one or more judges may participate through remote means. Generally, at least two judges will participate in person for hybrid and in-person arguments.

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

~~(2) (a) The Administrator will send the parties notice of the date that a case is scheduled to be submitted to the court ("the submission date"). The notice will include a form "Response to Notice of Submission" requesting the information described below. Within 14 days of receiving the notice, any party requesting oral argument must complete, file, and serve on every party to the appeal the form "Response to Notice of Submission." The information required by the form Response to Notice of Submission is the following:~~

~~(i) that the party requests oral argument;~~

~~(ii) the name of the attorney or self-represented party who will argue the case;~~

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

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

~~(b) Submission will occur as follows:~~

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

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

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

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

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

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

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[1] Self-represented parties in custody may not request in-person arguments. The court will instead set the case for remote argument pursuant to ORAP 6.30(2).

Rule 6.10
WHO MAY ARGUE;
FAILURE TO APPEAR AT ARGUMENT

(1) A party may present oral argument only if the party has filed a brief and filed an Oral Argument Appearance Request under ORAP 6.05.

(2) An *amicus curiae* may present oral argument only if permitted by the court on motion or on its own motion.

(3) An attorney who was a witness for a party, except as to merely formal matters such as attestation or custody of an instrument, shall not argue the cause without leave of the court.

(4) ~~Only~~ In the Court of Appeals, only self-represented parties and active members of the Oregon State Bar shall argue unless the court, on motion filed not less than 21 days before the date for argument, orders otherwise. If the court has allowed a lawyer from another jurisdiction to appear on appeal for a particular case under ORAP 8.10(4), the lawyer does not need leave of the court to participate in oral argument of the case.

(5) In the Supreme Court, only active members of the Oregon State Bar shall argue unless the court, on motion filed not less than 21 days before the date of argument, orders otherwise. If the court has allowed a lawyer from another jurisdiction to appear on appeal for a particular case under ORAP 8.10(4), the lawyer does not need leave of the court to participate in oral argument of the case.

(6~~5~~) (a) After any party has filed and served an Oral Argument Appearance R~~r~~equest ~~for oral argument~~ pursuant to ORAP 6.05(2), any party who decides to waive oral argument or cannot attend oral argument shall give the court and all other parties participating in oral argument at least 48 hours' notice that the party will not be appearing for oral argument.

(b) If a party fails to appear at oral argument, the court may deem the cause submitted without oral argument as to that party. A party's failure to appear shall not preclude oral argument by any other party.

(c) If a party fails to give at least 48 hours' notice of nonappearance at argument, the court may order counsel for that party to pay the costs and attorney fees that reasonably would not have been incurred but for failure to give timely notice of nonappearance.

Rule 6.15
PROCEDURE AT ORAL ARGUMENT

(1) In all cases in the Supreme Court:

(a) The appellant, petitioner, or petitioner on review shall have not more than 30 minutes to argue; and the respondent or respondent on review shall have not more than 30 minutes to argue.

(b) The appellant, petitioner, or petitioner on review shall argue first and may reserve not more than 10 minutes of the time allowed for argument in which to reply.

(c) If there are two or more parties on one side, they shall divide their allotted time among themselves, unless the court orders otherwise.

(2) (a) Unless the court otherwise orders, on oral argument in the Court of Appeals in all cases the appellant or petitioner shall have not more than 15 minutes and the respondent shall have not more than 15 minutes to argue.

(b) The appellant or petitioner may reserve not more than five minutes of the time allowed for argument in which to reply.

(3) A motion for additional time for argument shall be filed at least seven days before the time set for argument.

(4) No point raised by a party's brief shall be deemed waived by the party's failure to present that point in oral argument.

(5) For the purpose of this rule, a cross-appellant shall be deemed a respondent.

(6) It is the general policy of Oregon appellate courts to prohibit reference at oral argument to any authority not cited either in a brief or in a pre-argument memorandum of additional authorities.[1] If a party intends to refer in oral argument to an authority not previously cited, counsel or a self-represented party shall inform the court at the time of argument and shall make a good faith effort to inform opposing counsel or a self-represented party of the authority at the earliest practicable time. The court may, in its discretion, permit reference at argument to that authority and may give other parties leave to file a post-argument memorandum of additional authorities or a memorandum in response.

(7) If a party ~~counsel~~ desires to have present at oral argument an exhibit that has been retained by the trial court, it is the party's ~~counsel's~~ responsibility to arrange to have the exhibit transmitted to the appellate court.[2]

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[1] See ORAP 5.85 regarding memoranda of additional authorities.

[2] See ORAP 3.25 regarding arranging to have exhibits transmitted to the appellate court.

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

The Court of Appeals will set most cases for argument in Salem, but, pursuant to Chief Justice Order ~~19-053~~24-018, dated ~~September 17, 2019~~June 21, 2024, the court may set cases for oral argument in other locations throughout the state, and, pursuant to Chief Justice Order 22-012, dated June 23, 2022, ~~which includes setting~~ may set cases for oral argument by remote means. For purposes of this rule, "remote means" refers to an oral argument conducted by video conference with all parties and judges appearing remotely.

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

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

(1) For purposes of this rule,

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

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

(c) "Hybrid" for the purposes of the arguments in the Court of Appeals refers to an oral argument in which at least one litigant appears in person, and at least one litigant appears by remote means.

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

(a) Oral Argument in the Court of Appeals will be scheduled in the manner set forth in ORAP 6.05. ~~Except as otherwise provided in ORAP 6.05(2)(b)(iii), ORAP 6.05(2)(b)(iv), or ORAP 6.05(3), the case will be scheduled for argument by remote means.~~

(b) If an argument scheduled to proceed by remote means or in a hybrid

format cannot occur due to technical difficulties, the court will reset the argument for a later date.

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

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

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

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

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

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

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

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[1] *See* Chief Justice Order 24-018 ~~22-020~~ (providing that the principal location for the sitting of the Court of Appeals is currently 1163 State Street, Salem, OR 97301) or any subsequent order of the Chief Justice that amends or supersedes that order.

ORAP COMMITTEE 2026
March 11 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

WORKGROUP: Justice Bushong, Kendra Matthews (to report back)

EXPLANATION:

Workgroup notes for March 11: Justice Bushong and/or Kendra Matthews will report orally.

Original 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
March 11 Materials

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

PROPOSER: Ernest Lannet

WORKGROUP: Judge Kamins (to report back)

EXPLANATION:

Workgroup explanation: Judge Kamins will report orally at the meeting.

Original 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)

RULE AS AMENDED:

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
March 11 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
WORKGROUP:	Kendra Matthews, Theresa Kidd, Stacy Harrop, Daniel Parr (Stephen Armitage added)

EXPLANATION:

Workgroup notes for March 11: Based on discussions among the workgroup members, it appears that it would be helpful to Appellate Court Records if the rule addressed the remand situation. The proposed new text has been added it to paragraph (4), while paragraph has been broken into (a) and (b).

Original 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) (a) 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 Supreme Court remands to the Court of Appeals for further proceedings, any award of costs will abide the outcome of the appeal after the remand.

(b) 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
March 11 Materials

AMENDING RULE(S): Proposal # 8 -- New ORAP 3.43 -- Process to Transfer Transcripts Between Appeals

PROPOSER: Daniel Parr

WORKGROUP: Stephen Armitage

EXPLANATION:

Workgroup notes for March 11: Corrected ORAP 3.43(2)(b)(i) from "Within a notice to transcriber assignment" to "Within a notice of transcriber assignment". No other changes.

Original explanation: "This proposed rule establishes a formal process for filing a notice to transfer transcripts between appellate cases. It applies only to transcripts that have already been prepared and are in the custody of the Appellate Court Administrator. Currently, there are no existing rules or guidelines for this process."

RULE AS AMENDED:

Rule 3.43
TRANSFER OF PREVIOUSLY PREPARED TRANSCRIPTS BETWEEN APPEALS

(1) A transcript may be transferred from one appellate case to a related case, if:

(a) A party to the appeal or the court determines that the transcript is relevant to the current appeal;

(b) The transcript has been previously prepared and filed in a prior appellate case; and

(c) The transcript is currently in the custody of the Appellate Court Administrator.

(2) Request to Transfer Transcripts

(a) A party may request to transfer a previously prepared transcript:

(i) Within the designation of record included in the Notice of

Appeal; or

(ii) By filing a separate written notice.

(b) A transcript coordinator may request the transfer of a previously prepared transcript:

(i) Within a notice of transcriber assignment; or

(ii) By filing a separate written notice.

(c) Any notice requesting a transcript transfer must:

(i) Identify the prior appellate case in which the transcript was filed;

(ii) Specify the hearing dates of the transcript to be transferred; and

(iii) Be served on all parties to the current appeal, as well as any transcript coordinator or assigned transcriber.

ORAP COMMITTEE 2026
March 11 Materials

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

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

WORKGROUP: Stephen Armitage

EXPLANATION:

Workgroup notes for March 11: Modified as directed by committee at February 12 meeting.

Original 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:

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
March 11 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)
WORKGROUP:	Kendra Matthews, Ryan Kahn or designee (Crystal Chase and Travis Eiva to submit comments; Kirsten Naito and Stephen Armitage added)

EXPLANATION:

Workgroup notes for March 11: The workgroup needs additional time to work on some aspects of the proposal, so it asks that the proposal be passed for the April meeting.

Original 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
March 11 Materials

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

PROPOSER: Benjamin Gutman

WORKGROUP: Ryan Kahn (to report back).

EXPLANATION:

Workgroup notes for March 11: After discussion, the proposed amendment is withdrawn.

Original 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]

(7~~5~~) A request for reconsideration of any other order of the Court of Appeals ruling on a motion or an own motion matter shall be entitled "motion for reconsideration." A motion for reconsideration is subject to ORAP 7.05 regarding motions in general.

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

ORAP COMMITTEE 2026
March 11 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
WORKGROUP:	Kendra M. Matthews

EXPLANATION:

Workgroup notes for March 11: After discussions, the proposed amendment is withdrawn.

Original 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.