

ORAP COMMITTEE 2022
February 17 Materials

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

PROPOSER: Thomas M. Christ

EXPLANATION:

[See also similar 2020 proposal, explanation for which is also quoted below. The 2020 proposal was tabled by the committee for the Court of Appeals to conduct a pilot project.]

[Quoted from Mr. Christ's letter:]

One [proposal] is to change the rule that denies pro se litigants the opportunity for oral argument as a matter of right. See ORAP 6.10(4) ("Only active members of the Oregon State Bar shall argue unless the court, on motion***, orders otherwise."). I believe oral argument is an important part of appellate practice, especially for appellants. It's their last chance to persuade the Court of Appeals that something went awry in the proceedings below, and their only chance to respond to any questions or concerns the judges might have about their argument for reversal. It shouldn't be left to the court's discretion whether to offer oral argument to unrepresented litigants. That opportunity is as important to their cases on appeal as it is to their cases in the trial courts, where there are no lawyer-only restrictions on oral argument. Just today, while sitting as a pro tern judge in Multnomah County Circuit Court, I heard two arguments by pro se litigants. They weren't the best arguments I've ever heard, but they were still helpful to me in understanding their cases. Indeed, I might not have understood them without those arguments and their answers to my questions from the bench, given the quality of their written submissions. So, allowing them to be heard improved my decision-making. The generally poor quality of written submissions by non lawyers is, if you think about it, all the more reason to allow them to argue their cases orally.

I've heard concerns that nonlawyers can be disruptive when allowed to speak in court, but that has not been my experience. To be sure, they are less familiar with procedures and protocols, like when to speak and when not. But, on the whole, I've found them no more difficult than some members of the Bar.

The real benefit, however, to allowing nonlawyer litigants to argue their cases is that it will help them to feel that they got a fair hearing - that they were given as much respect and courtesy as litigants who can afford counsel. And that, in turn, will help promote confidence in the judiciary and respect for its rulings.

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

[2020 proposal, quoted from Wells O'Byrne's email:]

Strike ORAP 6.05(3), so that self-represented litigants can present oral arguments to the Oregon Court of Appeals as a matter of standard procedure. Although ORAP 1.20(5) states that the Court can waive any rule at any time for good cause under a motion of the court or any party, self-represented litigants are typically not well-versed enough to know that this includes providing them a right to oral arguments when ORAP 6.05(3) currently specifically denies them this privilege. Similar to Oregon's extension of appellate-court eFiling privileges to attorneys but not to self-represented litigants as discussed above, our research indicates that Oregon is the only state in the U.S. Ninth Circuit jurisdiction whose appellate-court procedure rules deny self-represented litigants the opportunity to present oral arguments before the state's Court of Appeals while allowing attorneys to do so. And similar to Oregon's extension of appellate-court eFiling privileges to attorneys but not to self-represented litigants as discussed above, denying self-represented parties the opportunity to present oral arguments before the Oregon Court of Appeals while allowing attorneys to do so arguably also violates self-represented litigants' federal constitutional due-process and equal-protection rights. Such potential federal constitutional violations may be particularly substantial given the pivotal role that oral arguments can play in litigation. Given their possible constitutional violations, potential substantial detriments to self-represented litigants, and clear anomalies from other states' appellate-court procedure rules, Oregon's extension of appellate court eFiling and Court of Appeals oral-argument privileges to attorneys but not to self-represented litigants could suggest that the ORAP Committee lacks adequate fairness and impartiality towards self-represented litigants.

RULE AS AMENDED:

None. Current rules provide:

Rule 6.05

REQUEST FOR ORAL ARGUMENT; SUBMISSION WITHOUT ARGUMENT

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

(2) (a) The Administrator will send the parties notice of the date that a case is scheduled to be submitted to the court ("the submission date"). Parties to the case may request oral argument by filing a "Request for Oral Argument" in the form illustrated in

[Appendix 6.05](#) and directed to the attention of the court's calendar clerk. If a party files a timely request for oral argument, the case will be argued on the submission date and all parties who have filed a brief may argue. If no party files a timely request for oral argument, the case shall be submitted on the briefs on the submission date without oral argument, unless the court directs otherwise.

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

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

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

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

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

Rule 6.10
WHO MAY ARGUE;
FAILURE TO APPEAR AT ARGUMENT

(1) A party may present oral argument only if the party has filed a brief.

(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 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) (a) After any party has filed and served a request 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.