ORAP COMMITTEE 2022

Agenda Materials
Thursday, May 19, 2022

- Proposal # 6 -- ORAP 5.45(6) -- No Combined Brief Sections re: Preservation of Error or Standard of Review

- Proposals # 10A & 10B -- ORAP 8.45 -- Delete or Amend Duty to Notify Court of Mootness

- Proposal # 11 -- ORAP 10.15 -- Apply Rule to Juvenile Delinquency Cases and Modify Briefing Schedule

ORAP COMMITTEE 2022
May 19 Materials

AMENDING RULE(S):	Proposal # 6 -- ORAP 5.45(6) -- No Combined Brief Sections re: Preservation of Error or Standard of Review
PROPOSER:	Hon Robyn Ridler Aoyagi, Court of Appeals
WORKGROUP:	Crystal Chase, Travis Eiva, Ben Gutman, Ernest Lannet, Bill Kabeiseman

EXPLANATION:

The matter was passed from the April 21 meeting for Judge Kamins to discuss the workgroup's proposal with Judge Aoyagi.

Judge Aoyagi has expressed concerns about the proposal as currently framed. Justice Flynn summarizes:

> I've now had a number of discussions with Judge Aoyagi about her proposal #6 (add a sentence to ORAP 5.45(6) to emphasize that the ORAPs do not authorize the combining of the preservation and standard-of-review requirements for multiple assignments of error). She's now provided text for her proposal to add a sentence to ORAP 5.45(6) [shown below]. It addresses a problem that she is mostly encountering in briefing by civil attorneys who do not regularly handle appeals. As Judge Aoyagi, Judge Joyce, and I recently explained in the recent Appellate Section CLE, the failure to go through the exercise of identifying preservation and the standard of review for each assignment of error too often causes less experienced practitioners to miss important difference between arguments that need to be made to support the distinct assignments of error.
>
> With her permission, I'm sharing some of the key excerpts of Judge Aoyagi's comments regarding both her proposal and the alternative proposal that the work group presented at the last meeting.
>
> > "I'm not meaning to speak for the court as a whole, only for myself. Obviously I am motivated to address what I consider an issue of court-wide relevance, and I would like to believe that my colleagues would tend to agree with me, but I don't want there to be a misunderstanding that I am somehow the official voice of the COA on this issue."

> "I think that the currently proposed amendment [from the workgroup] is problematic. It expressly approves of combining preservation and SOR sections, which is the opposite of what I had proposed. In doing so, it expressly allows something that the current rule implicitly disallows. Given that the problem is lack of compliance with the existing rule—resulting in incomplete preservation sections, masked preservation problems, and substantive briefing problems arising from improperly combined SOR sections--changing the rule to expressly allow the combining of preservation and SOR sections seems like it may only make it worse. Also, the amended rule would be inconsistent with Appendix 5.45, which correctly shows preservation and SOR as part of the assignment of error, not part of the 'Argument.' Finally, I have hesitations about requiring parties to 'certify' something that is not as clear-cut as a word count or the like."

In discussing the issue, Solicitor General Gutman provided the following written comments setting out his position regarding the original proposal:

> Bottom line is that I can live with any of the three options: (1) keep the rule as is; (2) keep the rule with the clarifying sentence that Judge Aoyagi suggests; or (3) go with our workgroup's original proposal or a modified version.
>
> Our workgroup's proposal was deliberately a change from the current rule, which as folks have noted is frequently not followed. We saw it as a compromise between what the current rule technically requires and what common practice seems to be, by specifying a narrow set of circumstances where combining preservation and standards of review would be permissible. That allows appellants to save words in circumstances where, we thought, there would be no value to the court in requiring the same information to be repeated. (E.g., a juvenile dependency appeal in which there are four children and so four assignments of error but the legal issues are all identical, and the preservation and standard sections would literally be cut and pasted for each assignment.)
>
> That said, I think it will rarely make a huge practical difference – probably a few dozen words and at most an extra page in all but extreme cases. So if our proposal causes the court concern, I'm fine dropping it. And in that case, I'd advocate for clarifying along the lines of Judge Aoyagi's suggestion because, although a careful review of the rules does reflect that these sections can't be combined, the practice is widespread.

RULE AS AMENDED:

VERSION 1: JUDGE AOYAGI'S PROPOSAL
(showing changes from existing rule)

Rule 5.45
ASSIGNMENTS OF ERROR AND ARGUMENT

(1) Assignments of error are required in all opening briefs of appellants and cross-appellants. No matter claimed as error will be considered on appeal unless the claim of error was preserved in the lower court and is assigned as error in the opening brief in accordance with this rule, provided that the appellate court may, in its discretion, consider a plain error.[1]

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

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

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

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

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

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

assignment of error challenges the admission of evidence, appellant also must identify where in the record the evidence was admitted.

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

(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.[2]

(6) Each assignment of error must be followed by the argument. If several assignments of error present essentially the same legal question, the argument in support of them may be combined so far as practicable. Where argument is combined, each assignment of error must still contain its own "Preservation of Error" and "Standard of Review" sections, as shown in Appendix 5.45. Only the argument may be combined.

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

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

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

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

VERSION 2: PRIOR WORKGROUP PROPOSAL
(showing changes from existing rule)

Rule 5.45
ASSIGNMENTS OF ERROR AND ARGUMENT

(1) Assignments of error are required in all opening briefs of appellants and cross-appellants. No matter claimed as error will be considered on appeal unless the claim of error was preserved in the lower court and is assigned as error in the opening brief in accordance with this rule, provided that the appellate court may, in its discretion, consider a plain error.[1]

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

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

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

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

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

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

(iv) Preservation statements for multiple assignments of error may not be combined under one subheading unless (a) the subheading expressly identifies that the preservation statement applies to multiple assignments of error, and (b) the first statement under the subheading certifies that all of the questions or issues were raised and resolved contemporaneously.

(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.

(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.[2] Standards of review for multiple assignments of error may not be combined under one subheading unless (a) the subheading expressly identifies that the standard of review applies to multiple assignments of error, and (b) the first statement under the subheading certifies that the standard of review is identical for those assignments of error.

(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]

---

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

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

exercise *de novo* review and providing a list of nonexclusive items Court of Appeals may consider in deciding whether to exercise its discretion.

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

ORAP COMMITTEE 2022
May 19 Materials

AMENDING RULE(S):	Proposals # 10A & 10B -- ORAP 8.45 -- Delete or Amend Duty to Notify Court of Mootness
PROPOSER:	Ernest Lannet, Office of Public Defense Services
WORKGROUP:	Ben Gutman, Commissioner Kidd, Ernest Lannet, Lisa Norris-Lampe

EXPLANATION:

WORKGROUP NOTES FOR MAY 19 MEETING

At the April 21 meeting, the committee referred the matter back to the workgroup. The workgroup will report orally at meeting.

RULE AS AMENDED:

[Due to the extensive changes, a clean copy of the amended workgroup proposal is provided first, followed by the original workgroup proposal. As the original proposal was an almost complete rewrite of the existing ORAP 8.45, the current rule is provided at the end.]

AMENDED WORKGROUP PROPOSAL

RULE 8.45
DUTY TO GIVE NOTICE WHEN FACTS RENDER APPEAL MOOT

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

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

[2] An appeal is generally considered moot if the court's decision would have no practical effect on the rights of the parties, including no legally cognizable collateral consequences of the ruling challenged on appeal. *See, e.g.*, *Dept. of Human Services v. P.D.*, 368 Or

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

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

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

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

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

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

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

627, 496 P3d 1029 (2021); *Garges v. Premo* , 362 Or 797, 421 P3d 345 (2018); *State v. K.J.B.*, 362 Or 777, 416 P3d 291 (2018); *Dept. of Human Services v. A.B.*, 362 Or 412, 412 P3d 1169 (2018).

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

ORIGINAL WORKGROUP PROPOSAL

RULE 8.45
DUTY TO FILE MOTION OR GIVE NOTICE WHEN FACTS RENDER APPEAL MOOT

(1) When a party becomes aware of facts that render an appeal moot,[4] except as to facts the disclosure of which is barred by the attorney-client privilege, and the party believes that the correct disposition of the appeal is dismissal,

(a) Unless subsection (1)(b) applies, that party must move to dismiss the appeal.[5]

(b) If the party believes that the correct disposition under a reasonable extension or modification of current law would not be dismissal, that party need not move to dismiss the appeal.

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

(3) ORAP 7.05 governs any response to a motion to dismiss as moot under subsection (1) or (2), and any reply in support of the motion, except that the filing of a reply is not discouraged if the party filing the reply has the burden of persuasion. Notwithstanding ORAP 7.05(1)(d), if no party files a response to a motion to dismiss as moot within 14 days, the court may treat the motion as unopposed.

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

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

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

(b) If no notice is given under subsection (4)(a) and the court later dismisses the appeal as moot based on those facts, the court, on motion of an aggrieved party, may award costs and attorney fees incurred by the aggrieved party incurred after notice should have been given of the facts probably rendering the appeal moot, payable by the party who had knowledge of those facts.

CURRENT RULE

Rule 8.45
DUTY TO SERVE NOTICE OR
FILE MOTION ON OCCURRENCE OF EVENT
RENDERING APPEAL MOOT

Except as to facts the disclosure of which is barred by the attorney-client privilege, when a party becomes aware of facts that probably render an appeal moot,[1] that party shall provide notice of the facts to the court and to the other party or parties to the appeal, and may file a motion to dismiss the appeal. If a party becomes aware of facts that probably render an appeal moot and fails promptly to inform the other party or parties to the appeal and the court dismisses the appeal as moot, the court, on motion of the aggrieved party, may award costs and attorney fees incurred by the aggrieved party incurred after notice should have been given of the facts probably rendering the appeal moot, payable by the party who had knowledge of the facts.

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

ORAP COMMITTEE 2022
May 19 Materials

AMENDING RULE(S): Proposal # 11 -- ORAP 10.15 -- Apply Rule to Juvenile Delinquency Cases and Modify Briefing Schedule

PROPOSER: Tiffany Keast

WORKGROUP: Ben Gutman; Ernest Lannet; Tiffany Keast

EXPLANATION:

WORKGROUP NOTES FOR MAY 19 MEETING

Overview: The original proposal failed to find a consensus at the April 21 meeting, but the matter was referred to an ad hoc workgroup to see if they could either reach a consensus on the original proposal or develop an alternative proposal.

- The workgroup was not able to reach a consensus on the original proposal.
- The original proposal has not been withdrawn.
- The alternative proposal is a consensus proposal, in the event that the committee does not accept the original proposal. The alternative proposal retains only a proposed change to ORAP 10.15(6)(c), extending the time to file a reply brief to 21 days.

Accordingly, the following materials are attached:

- Additional materials submitted by Office of Public Defense Services (OPDS) in support of the original proposal.
- The previous materials from Youth Rights & Justice, the Department of Justice, and OPDS regarding the original proposal.
- The text of the original proposal.
- The text of the alternative proposal.

New Materials Submitted by OPDS in Support of Original Proposal: The emails are inserted on the following pages:

From: Dan Casey
To: Tiffany C. Keast
Subject: Re: your input needed re ORAP 10.15
Date: Wednesday, April 27, 2022 11:05:04 PM

Hi Tiffany,

Hope you're doing well.

I'd rather not be part of a workgroup. But to the extent it helps, I support (1) through (3), and would support (4) only if (1) through (3) are also implemented. (I'd be very wary about accepting a delinquency murder appeal, for example, on an expedited briefing schedule under the current version of ORAP 10.15).

Dan

From: Tiffany C. Keast <Tiffany.C.Keast@opds.state.or.us>
Sent: Wednesday, April 27, 2022 12:16 PM
To: aron@mcminnvillelegal.com <aron@mcminnvillelegal.com>
Cc: Mary-Shannon Storey <Mary-Shannon.Storey@opds.state.or.us>; Tiffany C. Keast <Tiffany.C.Keast@opds.state.or.us>
Subject: your input needed re ORAP 10.15

Hello,

I am on the ORAP Committee this year, and there is a proposal to amend rule 10.15 (relating to juvenile dependency and adoption cases) in several respects. The proposal is attached for your review, but generally, the proposal would (1) alter the briefing schedule to allow the parties one extension of 28 days (instead of 14 days, as it is now) and give up to 21 days to file a reply instead (instead of 7 days); (2) change the phrasing from barring further extensions to allowing further extensions "upon a showing that the record is exceptionally long, the legal issue presented is novel and requires additional time to adequately brief, or other circumstances demonstrating that additional time is needed to adequately present the appeal"; (3) remove the provision about allowing only one extension for petitions for review; and (4) make the rule applicable to juvenile delinquency cases.

At the most recent meeting of the ORAP Committee, the representatives from the Court of Appeals and Supreme Court indicated that the courts are open to amending the rule but wanted the stakeholders to come up with a proposal they all agreed to (if possible). There was opposition to the proposed changes from Ben Gutman on behalf of DOJ and from representatives from Youth Rights and Justice (YRJ was not opposed to making the rule apply to delinquency cases but was opposed to expanding the briefing schedule). The committee has formed a workgroup to further discuss the proposal, and my office would love to have your input and/or your participation in that workgroup. Any new proposals would have to be submitted to the Committee by May 9, so time is short, and we

may schedule a virtual meeting to discuss, or we may just discuss via email.

Could you please let me know if you would like to be part of the conversation? And, if not, could you please respond and provide me with any thoughts on the proposed changes to the rule?

Thank you so much for your time.

Tiffany Keast (she/her)
Senior Deputy Defender, Juvenile Appellate Section
Office of Public Defense Services
Tiffany.C.Keast@opds.state.or.us
(503) 378-6235

From: Kristen Williams
To: Tiffany C. Keast
Subject: RE: your input needed re ORAP 10.15
Date: Monday, May 2, 2022 12:25:02 PM
Attachments: image001.png

Hi Tiffany,

I'm sorry it has taken me so long to get back to you. I appreciate your detailed information below and your time with this. I'm happy to participate in the workgroup, if my schedule permits, but May is tough for me. To that end, here are some thoughts on the proposed changes.

I'm in support of the changes. I understand the concern with expanding the briefing schedule, but balancing that with sufficient time to fully and accurately brief these cases, I am more in support of the changes to allow additional time to brief.

Seven days to reply is, simply, not workable given our workloads and if we want to take vacation (which we all need to keep us motivated and mentally healthy). I think allowing a 28-day extension for briefing is reasonable even though these are expedited cases. That amount of time may not be needed in every case, but, speaking for a panel member who has to juggle a variety of other cases included civil matters and administrative matters with other deadlines, there are times when 28 day extensions are needed. Things can get bottlenecked quickly with this caseload.

I especially like the addition of criteria for an additional extension for the exceptionally long record, novel/complex legal issues, etc. The state (DHS/DOJ) generally controls the length of the trial record and with the liberal use of judicial notice to bring in entire files of sometimes 1,000, 2,000 or more pages, we often don't know the true length of the record until we get the transcript and see of what the court took judicial notice. It puts appellants at a distinct disadvantage when we have limited time to review these lengthy records, digest the information, and draft a coherent summary of facts that touches upon the information.

I hope these comments are helpful.

Thank you again for your time and attention to this.

Kristen

Kristen Williams (she/her/hers)
Attorney at Law
Williams Weyand Law, LLC
P: (503) 212-0050
W: williamsweyandlaw.com E: kristen@williamsweyandlaw.com
Mail: P.O. Box 360, McMinnville, OR 97128
McMinnville Office: 609 Baker St. Suite #120

From: Tiffany C. Keast <Tiffany.C.Keast@opds.state.or.us>
Sent: Wednesday, April 27, 2022 12:16 PM
To: Gregorio Perez-Selsky <aron@mcminnvillelegal.com>
Cc: Mary-Shannon Storey <Mary-Shannon.Storey@opds.state.or.us>; Tiffany C. Keast <Tiffany.C.Keast@opds.state.or.us>
Subject: your input needed re ORAP 10.15

Hello,

I am on the ORAP Committee this year, and there is a proposal to amend rule 10.15 (relating to juvenile dependency and adoption cases) in several respects. The proposal is attached for your review, but generally, the proposal would (1) alter the briefing schedule to allow the parties one extension of 28 days (instead of 14 days, as it is now) and give up to 21 days to file a reply instead (instead of 7 days); (2) change the phrasing from barring further extensions to allowing further extensions "upon a showing that the record is exceptionally long, the legal issue presented is novel and requires additional time to adequately brief, or other circumstances demonstrating that additional time is needed to adequately present the appeal"; (3) remove the provision about allowing only one extension for petitions for review; and (4) make the rule applicable to juvenile delinquency cases.

At the most recent meeting of the ORAP Committee, the representatives from the Court of Appeals and Supreme Court indicated that the courts are open to amending the rule but wanted the stakeholders to come up with a proposal they all agreed to (if possible). There was opposition to the proposed changes from Ben Gutman on behalf of DOJ and from representatives from Youth Rights and Justice (YRJ was not opposed to making the rule apply to delinquency cases but was opposed to expanding the briefing schedule). The committee has formed a workgroup to further discuss the proposal, and my office would love to have your input and/or your participation in that workgroup. Any new proposals would have to be submitted to the Committee by May 9, so time is short, and we may schedule a virtual meeting to discuss, or we may just discuss via email.

Could you please let me know if you would like to be part of the conversation? And, if not, could you please respond and provide me with any thoughts on the proposed changes to the rule?

Thank you so much for your time.

Tiffany Keast (she/her)
Senior Deputy Defender, Juvenile Appellate Section
Office of Public Defense Services
Tiffany.C.Keast@opds.state.or.us
(503) 378-6235

From: George Kelly
To: Tiffany C. Keast
Subject: Re: your input needed re ORAP 10.15
Date: Wednesday, April 27, 2022 12:30:38 PM

Tiffany,

I'm not sure I want to participate directly, but I support each of the changes that are being suggested. In general, I do not see that a few weeks additional time to resolve appeals will much affect the children (in general, DHS and the juvenile court forge ahead with whatever plan is in play, notwithstanding that an appeal is pending). And I do see benefits to allowing appellate practitioners a bit more time to work on their cases (it will result in better briefing, less stress and, possibly, more attorneys willing to do this kind of work). If it is helpful and anyone cares, you may share this email with the balance of the committee.

-- George Kelly

On 4/27/2022 12:16 PM, Tiffany C. Keast wrote:

> Hello,
>
> I am on the ORAP Committee this year, and there is a proposal to amend rule 10.15 (relating to juvenile dependency and adoption cases) in several respects. The proposal is attached for your review, but generally, the proposal would (1) alter the briefing schedule to allow the parties one extension of 28 days (instead of 14 days, as it is now) and give up to 21 days to file a reply instead (instead of 7 days); (2) change the phrasing from barring further extensions to allowing further extensions "upon a showing that the record is exceptionally long, the legal issue presented is novel and requires additional time to adequately brief, or other circumstances demonstrating that additional time is needed to adequately present the appeal"; (3) remove the provision about allowing only one extension for petitions for review; and (4) make the rule applicable to juvenile delinquency cases.
>
> At the most recent meeting of the ORAP Committee, the representatives from the Court of Appeals and Supreme Court indicated that the courts are open to amending the rule but wanted the stakeholders to come up with a proposal they all agreed to (if possible). There was opposition to the proposed changes from Ben Gutman on behalf of DOJ and from representatives from Youth Rights and Justice (YRJ was not opposed to making the rule apply to delinquency cases but was opposed to expanding the briefing schedule). The committee has formed a workgroup to further discuss the proposal, and my office would love to have your input and/or your participation in that workgroup. Any new proposals would have to be submitted to the Committee by May 9, so time is short, and we may schedule a virtual meeting to discuss, or we may just discuss via email.

Could you please let me know if you would like to be part of the conversation? And, if not, could you please respond and provide me with any thoughts on the proposed changes to the rule?

Thank you so much for your time.

Tiffany Keast (she/her)
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EXPLANATION (cont'd):

Prior Materials from April 21 Meeting: The committee received a comment from Youth Rights & Justice. The letter is inserted on the following pages, followed by the summary positions provided by DOJ and OPDS.

Youth, Rights & Justice

ATTORNEYS AT LAW

March 11, 2022

Members of the ORAP Committee:

Youth, Rights & Justice (YRJ) is a non-profit law firm that has been representing children, parents, and youth in juvenile delinquency and dependency appeals for more than four decades. YRJ provides most of the appellate representation for Oregon youth in delinquency cases. This letter is intended to express our position on Proposal #11, under consideration by the committee. As discussed below, YRJ supports the proposal insofar as it applies ORAP 10.15 to juvenile delinquency appeals, but YRJ opposes the proposed modifications to the briefing schedule in juvenile dependency cases that would extend the standard extension and provide for additional extensions.

Lengthening the Briefing Schedule in Dependency Appeals

Proposal #11 would modify the schedule for dependency appeals by lengthening the standard briefing extension from 14 to 28 days, expressly authorizing additional extensions, and removing any limit on extensions for petitions for review. Apart from the provision extending the timeline for reply briefs from 7 to 21 days (which does require an additional change to the oral argument schedule), YRJ opposes the proposed changes to the dependency timelines. The changes would create an additional delay of a month and a half as a matter of normal procedure, plus easier access to further unlimited extensions.

This proposed change is contrary to the recommendation of the National Council of Juvenile and Family Court Judges (NCJFCJ), which has stated: "Limiting the time required to bring [child welfare] cases to their conclusion limits the exposure of children, parents, and families to the stress caused by uncertainty and indecision."[1] It is well-established that prolonged stress leads to long-term developmental problems for children.[2]

One of the unique aspects of dependency cases is that there are many stages in each case that result in appealable judgments and orders, including jurisdictional hearings, dispositional or review hearings, post-jurisdiction removal hearings, permanency hearings, and termination-of-parental-rights proceedings. When parties appeal at each stage—and additional delay is added to the resolution of each appeal—the cumulative effect is significantly longer periods of uncertainty for families involved in the dependency system.

There is also no need to expressly authorize extensions beyond the standard extensions in dependency cases. Under ORAP 1.20(5), the court may "on its own motion or on motion of any party" waive any rule. Thus, ORAP 1.20(5) already provides a mechanism for a party to request additional extensions when good cause warrants them, including in circumstances where the record is exceptionally long or the legal issues presented are exceptionally complex. A rule enumerating circumstances that constitute good cause for further extensions will only serve to encourage litigants to seek such extensions, creating further delays in the resolution of dependency appeals.

Expediting Juvenile Delinquency Appeals

Under the current version of the ORAPs, the briefing schedule in juvenile delinquency appeals is the same as for adult criminal cases. Under that schedule, delinquency appeals are not resolved swiftly, leaving youth in uncertainty for extended periods of time.[3] Those lengthy delays in resolution are inconsistent with the express purposes of the delinquency system as found in ORS 419C.001, *i.e.*, that the delinquency system "shall provide a continuum of services that emphasize prevention of further criminal activity by the use of *early and certain* sanctions, reformation and rehabilitation programs[,] and *swift and decisive* intervention in delinquent behavior." (Emphases added.) Appeals in delinquency cases involve a variety of issues, including whether sufficient evidence supported the youth's adjudication, whether the juvenile court was authorized to remove the youth from his family and place him in a state institution, and whether the youth will be required to report as a sex offender. Protracted delays in the appeal process cause justice-involved youth to experience the ongoing consequences of potentially erroneous rulings for significant portions of their formative years. Such delays also leave youth in a state of uncertainty, which can hinder their progress in rehabilitative services, including by forcing them to choose between progressing in services and avoiding additional legal exposure in the event that their appeal is successful. Moreover, a lengthy appellate process discourages appeals in delinquency cases, which in turn inhibits the development of delinquency case law.[4]

Proposal #11 would apply ORAP 10.15 to delinquency appeals, which would expedite the briefing schedule and limit parties to filing one 14-day extension. This aspect of the proposal is consistent with the recommendation of the National Council of Juvenile and Family Court Judges (NCJFCJ) that delinquency appeals be expedited.[5] According to NCJFCJ, "the juvenile justice process will not achieve its goals if the process is not timely," given the developmental stage of youth offenders.[6] Further, the

lack of a timely process produces "prolonged uncertainty" for youth and increases their anxiety, which can "negatively impact trust and a sense of fairness" and "damage the youth's cognitive development."[7] In other words, resolving delinquency appeals after lengthy delays undermines the rehabilitative and corrective purposes of juvenile delinquency proceedings.

Relatively speaking, there are very few delinquency appeals (43 in 2021, some of which were consolidated for briefing),[8] so the proposed change would not significantly impact the appellate system as a whole. For those reasons, YRJ urges the committee to adopt Proposal #11 insofar as it applies ORAP 10.15 to delinquency appeals.

Thank you for considering our position on Proposal #11.

Sincerely,

Erica Hayne Friedman Christa Obold Eshleman Ginger Fitch
Youth, Rights & Justice, Attorneys at Law

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[1] NCJFCJ, *Enhanced Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases*, at 31 (2016), *available at* https://tinyurl.com/ms3f4m23 (accessed March 9, 2022)).
[2] National Scientific Council on the Developing Child, *Excessive Stress Disrupts the Architecture of the Developing Brain*, (Jan. 2014), *available at* https://developingchild.harvard.edu/wp-content/uploads/2005/05/Stress_Disrupts_Architecture_Developing_Brain-1.pdf) (accessed March 10, 2022)
[3] *See, e.g.*, *State v. J. R.*, 318 Or App 21 (2022) (874 days between notice of appeal and issuance of opinion); *State v. A. E. J.*, 317 Or App 363 (2022) (1,120 days); *State v. J. J. W.-H.*, 316 Or App 694 (2021) (491 days); *State v. G. E. S.*, 316 Or App 294 (2021) (826 days); *State v. C. L. E.*, 316 Or App 5 (2021) (852 days); *State v. A. R. H.*, 314 Or App 672 (2021) (721 days); *State v. S. M. E.*, 314 Or App 113 (2021) (691 days).
[4] *See* Jacqueline L. Bullard & Kimberly E. Dvorchak, *Juvenile Appeals: A Promising Legal Strategy to Reduce Youth Incarceration*, 8 Marshall L J 403, 421 (Spring 2015) ("By the time an appellate court reviews a child's commitment order, that sentence may be at or near completion. As a result, a lengthy appellate process discourages appeals and renders many sentencing issues moot.").
[5] *See* NCJFCJ, *Enhanced Juvenile Justice Guidelines* (2018), at 229, *available at* https://tinyurl.com/yc5zuuhe (accessed March 7, 2022) (recommending that appellate courts "establish timeframe requirements, including the preparation of the record and the filing of briefs, that will shorten the process to the minimum possible length of time and strictly enforce the timeframes").
[6] *Id.* at 222.
[7] *Id.* at 223.
[8] Appellate Case Management System (search for juvenile delinquency appeals in 2021). The vast majority of these were appeals by YRJ clients.

EXPLANATION (cont'd):

The Department of Justice commented (email dated March 23):

> DOJ shares YRJ's concern about amendments that would extend the time it takes for dependency appeals to be heard and decided. Those appeals add to the time it takes to resolve the underlying proceedings and, particularly with termination-of-parental-rights appeals, add months or years of delay in which children are in limbo. Those delays are harmful and increase the chances of a child's permanent placement being disrupted before it can be implemented. During the COVID-19 state of emergency, DOJ has not been objecting to certain extensions of time that exceed what ORAP 10.15 allows, recognizing the difficulties that the pandemic caused opposing counsel. But we hope to see the court return to the ORAP timeframes in the near future and oppose making those extraordinary extensions the permanent norm.
>
> The proposed amendments to ORAP 10.15 also would lead to inequitable briefing schedules in the Court of Appeals unless the appeals were further delayed. ORAP 10.15 requires the court to schedule a dependency appeal for oral argument within 63 days of the opening brief. The standard 28 days for the respondents' brief, plus the 14-day extension allowed by ORAP 10.15, plus 7 days for a reply adds up to 49 days – making the briefing completed at most two weeks before argument.
>
> Allowing longer extensions as a matter of course will either require adding to the 63-day schedule for oral argument or will mean that those extensions are generally available only for appellants and not for respondents.
>
> As for delinquency appeals, DOJ will work to comply with expedited briefing schedules if the court decides that they should be prioritized over criminal cases, which is historically how they have been treated for scheduling purposes. Because expediting those case will require attorneys to reprioritize their dockets and adjust their expectations, I suggest that any change apply only prospectively to appeals filed after a certain date.

The Office of Public Defense Services commented (email dated April 7):

> OPDS Appellate Division supports the proposed amendments as drafted.
>
> As to dependency and TPR cases, the proposed amendments mirror what has been

the existing practice for the past two years and we believe the ORAPs should reflect and codify existing practice. OPDS Appellate Division is not concerned that continuing and codifying existing practice will unnecessarily delay achieving family reunification because appeals from juvenile dependency and TPR proceedings do not stay the underlying proceedings. Thus, it is not uncommon for a child's wardship to be terminated and for the child to be reunified with her family while an appeal is pending.

To the extent that respondents are concerned about continuing existing practice, OPDS Appellate Division would agree to further amending ORAP 10.15 to require respondent's briefs to be filed within 28 days of the filing of the opening brief and to allow no extensions. Appellants must compile the record, secure the exhibits, review the record for errors of law and ineffective assistance of counsel, and of course, select the issues to be briefed and brief them. Respondents must merely respond.

In any event, OPDS Appellate Division believes that the ORAPs should clarify that NFE orders are not intended to impair court-appointed counsel's ability to adequately represent the client. Court-appointed counsel manage high volume caseloads attending to multiple open cases on appeal at all stages of the appellate proceedings. The ORAPS should reflect that bona fide circumstances requiring additional time to adequately file an opening brief exist, and that upon such a showing, counsel can expect the Court of Appeals to grant counsel such additional time.

RULE AS AMENDED:

ORIGINAL PROPOSAL

Rule 10.15
JUVENILE DEPENDENCY AND ADOPTION CASES

(1) (a) Subsections (2) through (10) of this rule apply to an adoption case and a juvenile dependency case under ORS 419B.100, including but not limited to a case involving jurisdiction, disposition, permanency, or termination of parental rights, and to a juvenile delinquency case under ORS 419C.005, but excluding a support judgment under ORS 419B.400 to 419B.408.

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

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

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

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

(c) In a disposition proceeding pursuant to ORS 419B.325, a dispositional review proceeding pursuant to ORS 419B.449, a permanency proceeding pursuant to ORS 419B.470 to 419B.476, or a termination of parental rights proceeding, respecting the record in the trial court, the appellant may designate as part of the record on appeal only the transcripts of the proceedings giving rise to the judgment or order being appealed, the exhibits in the proceeding, and the list prepared by the trial court under ORS 419A.253(2) and all reports, materials, or documents identified on the list. A party may file a motion to supplement the record with additional material pursuant to ORS 19.365(4) and ORAP 3.05(3).

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

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

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

(6) (a) Appellant's opening brief and excerpt of record shall be served and filed within 28 days after the events specified in ORAP 5.80(1)(a) to (f).

(b) Respondent's answering brief shall be served and filed within 28 days after the filing of the appellant's opening brief.

(c) A reply brief, if any, shall be served and filed within 21 days after the

filing of the respondent's answering brief and no later than 7 days before the date set for oral argument or submission to the court. ~~Any reply brief must be filed within 7 days after the filing of the respondent's answering brief.~~

(d) The court shall not grant an extension of time of more than 28 ~~14~~ days for the filing of any opening or answering brief, nor shall the court grant more than one extension of time except upon a showing that the record is exceptionally long, the legal issue presented is novel and requires additional time to adequately brief, or other circumstances demonstrating that additional time is needed to adequately present the appeal.. The court shall not grant an extension of time for the filing of a reply brief.

(7) The court will set the case for oral argument within 63 days after the filing of the opening brief.

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

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

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

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

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

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

[1] *See* Appendix 10.15.

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

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

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

ALTERNATIVE PROPOSAL

Rule 10.15
JUVENILE DEPENDENCY AND ADOPTION CASES

(1) (a) Subsections (2) through (10) of this rule apply to an adoption case and a juvenile dependency case under ORS 419B.100, including but not limited to a case involving jurisdiction, disposition, permanency, or termination of parental rights, but excluding a support judgment under ORS 419B.400 to 419B.408.

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

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

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

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

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

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

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

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

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

(6) (a) Appellant's opening brief and excerpt of record shall be served and filed within 28 days after the events specified in ORAP 5.80(1)(a) to (f).

(b) Respondent's answering brief shall be served and filed within 28 days after the filing of the appellant's opening brief.

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

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

(7) The court will set the case for oral argument within 63 days after the filing of the opening brief.

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

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

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

(i) The Administrator forthwith shall issue the appellate judgment based on a decision of the Court of Appeals on expiration of the 35-day period to

file a petition for review, unless there is pending in the case a motion or petition for reconsideration on the merits, or a petition for review on the merits, or a party has been granted an extension of time to file a motion or petition for reconsideration on the merits or a petition for review on the merits. If any party has filed a petition for review on the merits and the Supreme Court denies review, the Administrator forthwith shall issue the appellate judgment.

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

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

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[1] *See* Appendix 10.15.

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

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

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