ORAP COMMITTEE 2020
(updated March 5, 2020)

PROPOSAL NO.: 2

PROPOSER: Appellate Commissioner James Nass (retired)

AMENDING RULE(S): Proposal# 2 -- ORAP 4.20(8), 4.22 -- Correct Terminology regarding Agency Submission of Record

(updated to add ORAP 4.20(8))

DATE SUBMITTED: January 10, 2019 (edited Feb 5, 2020)

(Updated March 5, 2020)

Workgroup: ***Bill Kabeiseman, Daniel Parr, Lisa Norris-Lampe, Stephen Armitage***

EXPLANATION:

WORKGROUP REVISION FOR APRIL 16 MEETING -- NOTES:

SPA, 3/5/2020: Per the discussion in the committee, the workgroup offers the following redraft. There are two copies of the amendments below: the workgroup's suggested redraft comes first, followed by the original proposal is at the bottom.

Brief notes:

- Removed most changes of "file" to "submit."
- Time to move to correct the record will necessarily run from date of service. The agency does transmit the record to the court, see ORAP 4.20(7), and the transmission date should match the service date -- but other parties will not be aware of the transmission date. Accordingly:
    - Added proposed amendment to ORAP 4.20, deleting ORAP 4.20(8)(a) to eliminate duplication of ORAP 4.22, and revising text of ORAP 4.20(8)(b) to be more readable.

- ORAP 4.22, specify that deadlines run from service.

- ORAP 4.22, use "motion filed under subsection (1)."

RULE AS AMENDED:

WORKGROUP REVISED VERSION FOR APRIL 16 MEETING:

Rule 4.20
RECORD ON JUDICIAL REVIEW

* * * * *

(7) Service Generally

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

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

(c) Service on Self-Represented Party.

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

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

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

serve the record on the party conventionally in paper form within seven days.

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

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

(8) Transmitting and Serving Corrected or Additional Agency Record

(a) ~~The agency's initial transmission of the record to the Administrator and service on the parties to a judicial review triggers the 15-day period under ORAP 4.22(1) to move to correct or add to the transcript or to correct the record other than the transcript.~~

~~(b)~~ The record is deemed settled when the time to move to correct the record as ~~upon exhaustion of the opportunity to move to correct or add to the transcript or to correct the record other than the transcript and to obtain appellate court review of the agency's disposition of such a motion as~~ provided in ORAP 4.22 has expired or the process under that rule has been completed.

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

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

* * * * *

Rule 4.22
CORRECTING THE RECORD ON JUDICIAL REVIEW

Unless a statute prescribes a different procedure in particular cases, the record on direct judicial review of an agency order shall be corrected or added to as follows:

(1) Within 15 days after the agency ~~files~~ serves the record of agency proceedings, or such further time as may be allowed by the court, any party may file with the agency a motion:

(a) To correct any errors appearing in the transcript or to have additional parts of the proceedings transcribed, if the record includes a transcript.

(b) To correct the record, other than the transcript, by removing material appearing in the agency record as filed that was not made part of the record before the agency, or by adding material that was made part of the record before the agency but was omitted from the record as filed. This paragraph does not authorize supplementing the record on judicial review with evidence that never was part of the record before the agency.[1]

(2) A motion filed under subsection (1) ~~The motion~~ shall be captioned "Before the [name of agency to which the motion is directed]." The party shall file ~~serve the court with~~ a copy of the motion with the court, which shall include on the title page the notation "Court ~~Service~~ Notice Copy."

(3) The agency shall file with the court a copy of its order disposing of a ~~the~~ motion filed under subsection (1), which shall include on the title page the notation "Court Notice Copy." ~~to correct the record or to correct or add to the transcript.~~ If the agency grants the motion in whole or in part, the agency shall serve on the adverse party or parties and ~~file with~~ transmit to the court a corrected record, a corrected transcript, or an additional transcript, as appropriate. ~~When the agency files a corrected~~ corrects a record or transcript, ~~in the discretion of the agency, the agency may serve and file~~ transmit for filing ~~only those pages as have been corrected.~~

(4) Any party aggrieved by the agency's disposition of a motion to correct the record or to correct or add to the transcript, may request, by motion filed within 14 days after the date of ~~filing~~ service of the agency's disposition, that the court review the agency's disposition. The motion shall be captioned "In the Court of Appeals of the State of Oregon" or "In the Supreme Court of the State of Oregon," as appropriate, and shall be entitled "Motion for Review of Agency Order Under ORAP 4.22."

(5) (a) If no party files a motion under subsection (1), ~~to correct the record or correct or add to the transcript,~~ the court will deem the record settled 15 days after it is filed, and the period for filing the petitioner's opening brief shall begin the next day.

(b) If a party files a motion under subsection (1) ~~to correct the record or correct or add to the transcript~~ and the agency grants the motion in its entirety, the court will deem the agency record settled on the agency filing a copy of its order with the court.

(c) If a party files a motion under subsection (1) ~~to correct the record or correct or add to the transcript~~ and the agency denies the motion in whole or in part, the

court will deem the agency record settled:

(i) On expiration of the time under subsection (4) of this rule to move for review of the agency's order or

(ii) If the party moves for review under subsection (4), on the court's disposition of the motion for review.

(d) Upon settling the record ~~On the record settling~~ as provided in paragraphs (b) and (c) ~~of this subsection~~, the court will notify the parties that the record is settled and that the period for filing the petitioner's brief has begun.

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[1] *See* ORS 183.482(5) regarding an application for leave to present additional evidence that was never part of the record before the agency in the proceeding.

See ORS 183.482(4) regarding correcting the record on judicial review of orders in contested cases: "* * * The court may require or permit subsequent corrections or additions to the record when deemed desirable. * * *"

ORAP COMMITTEE 2020
(updated March 11, 2020)

PROPOSAL NO.: 3

PROPOSER: Laura Graser

AMENDING RULE(S): ORAP 5.40(8)(c) -- Make De Novo Review More Common in Court of Appeals

DATE SUBMITTED: December 31, 2019

WORKGROUP: ***Aaron Landau, Christine Moore***

EXPLANATION:

PLACEHOLDER. Workgroup will report orally at April 16 meeting. Original materials shown below (but with supporting letters and emails deleted).

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[Quoted from letter by Laura Graser:]

My appellate practice focuses on family law, specifically, cases under ORS chapter 106 to 109: divorce (support, property division, custody), domestic partnerships (same issues, slightly different rules), and related issues. This comment does not involve termination of parental rights, where the standard of review remains de novo. These cases, with the attorney general always a party, have a different set of issues that I am not addressing here.

I am concerned that the 2009 statutory shift, followed by ORAP 5.40(8)(c), from automatic de novo review, to almost-never de novo review, has frozen the law, in a manner that is not helpful to Oregon families, and to the development of the law.

The statute was passed with no input from the family law bar, and I believe the same was true for the ORAP. I respectfully ask the court to consider the difficulty the effective elimination of de novo review made in family law practice, and to make a modest change in the ORAP.

Oregon families are evolving, but the law cannot change with them, because the general statute provides no guidance, and the court's routine review only for errors of law provides little guidance. When Court of Appeals occasionally reviews de novo, by definition, that review is for outlier cases ("exceptional cases.") Family law rarely involves a pure question of law. We know what the range is for, say, reasonable spousal support, from fact-based cases. There are essentially none since 2009.

But more importantly (in my view) is that, while the law has stopped developing, Oregon families are changing, in some cases drastically. Some of the changes are controversial. Nevertheless, the rules should be the same for a divorcing same-sex couple as they are for a heterosexual couple, and the rules should be the same in Multnomah County and in the most conservative county in the state. Without regular opinions from the Court of Appeals, after de novo review, we don't know if there is any difference.

Now, a judge on the Circuit Court (correctly) believes that the Circuit Court is the end of the line; that its ruling is essentially unreviewable. A consequence of that is that there is no mechanism to assure that decisions are uniform throughout the state.

[After setting out the proposed amendment shown below, Ms Graser added:]

I have contacted colleagues about this, and have received enthusiastic support. Appellate practitioners George Kelly and Margaret Leiberan authorized me to add their names.

Mr. Kelly wrote:

> As things presently stand, parties in family law matters receive very different results depending on what county they live in and what judge is assigned to their case. In the past, the court of appeals at least sometimes pushed the courts towards handing out more uniform decisions. Now it does not; some litigants are lucky and others are unlucky. The "range" of acceptable decisions is nowhere defined and known by no one. Your proposed change is a modest attempt at partially fixing the problem.

Ms. Leiberan told me she wished to sign the proposal.

As did Jack Lundeen, a recently-retired long-time family law trial lawyer.

Joel Fowlks, an active family lawyer added:

> I completely endorse your proposed changes. My eight years of family law trial practice has led me to feel that too often trial courts -- already feeling the pressure

of too many matters coming in daily -- are finding incentive not to take harder looks at their initial impression of a situation, understanding that there is basically no risk of their discretion being scrutinized.

This, in turn, feeds on itself. When I have a client who feels like they got the shaft and wishes to explore an appeal, I have to explain that abuse of discretion is a high bar that may only be cleared in very specific circumstances that may have no relationship to how poor the trial judge's decision was. Most often, these clients give up their idea of appeal. If a client is still motivated to proceed in some way, it's usually in the direction of a modification. My assumption is that good opportunities to test exactly how high the bar is for abuse of discretion are lost because this.

[Other letters supporting proposal were submitted directly.]

RULE AS AMENDED:

Rule 5.40
APPELLANT'S OPENING BRIEF:
STATEMENT OF THE CASE

The appellant's opening brief shall open with a clear and concise statement of the case, which shall set forth in the following order under separate headings:

(1) A statement, without argument, of the nature of the action or proceeding, the relief sought and, in criminal cases, the indictment or information, including citation of the applicable statute.

(2) A statement, without argument, of the nature of the judgment sought to be reviewed and, if trial was held, whether it was before the court or a jury.

(3) A statement of the statutory basis of appellate jurisdiction and, where novelty or possible doubt makes it appropriate, other supporting authority.

(4) A statement of the date of entry of the judgment in the trial court register, the date that the notice of appeal was served and filed, and, if more than 30 days elapsed between those two dates, why the appeal nevertheless was timely filed; and any other information relevant to appellate jurisdiction.

(5) In cases on judicial review from a state or local government agency, a statement of the nature and the jurisdictional basis of the action of the agency and of the trial court, if any.

(6) A brief statement, without argument and in general terms, of questions presented on appeal.

(7) A concise summary of the arguments appearing in the body of the brief.

(8) (a) In those proceedings in which the Court of Appeals has discretion to try the cause anew on the record and the appellant seeks to have the court exercise that discretion, the appellant shall concisely state the reasons why the court should do so.*

(b) In those proceedings in which the Court of Appeals has discretion to make one or more factual findings anew on the record and the appellant seeks to have the court exercise that discretion, the appellant shall identify with particularity the factual findings that the appellant seeks to have the court find anew on the record and shall concisely state the reasons why the court should do so.*

(c) The Court of Appeals will exercise its discretion to try the cause anew on the record or to make one or more factual findings anew on the record only when that is warranted by a need to clarify the scope of the trial court's discretion, or for another need as described by a party to the appeal or by *amicus*.~~in exceptional cases. Consistently with that presumption against the exercise of discretion, requests under paragraph (a) or (b) of this section are disfavored.~~

(d) The Court of Appeals considers the items set out below to be relevant to the decision whether to exercise its discretion to try the cause anew on the record or make one or more factual findings anew on the record. These considerations, which are neither exclusive nor binding, are published to inform and assist the bar and the public.

(i) Whether the trial court made express factual findings, including demeanor-based credibility findings.

(ii) Whether the trial court's decision comports with its express factual findings or with uncontroverted evidence in the record.

(iii) Whether the trial court was specifically alerted to a disputed factual matter and the importance of that disputed factual matter to the trial court's ultimate disposition of the case or to the assignment(s) of error raised on appeal.

(iv) Whether the factual finding(s) that the appellant requests the court find anew is important to the trial court's ruling that is at issue on appeal (*i.e.*,

whether an appellate determination of the facts in appellant's favor would likely provide a basis for reversing or modifying the trial court's ruling).

(v) Whether the trial court made an erroneous legal ruling, reversal or modification of which would substantially alter the admissible contents of the record (*e.g.*, a ruling on the admissibility of evidence), and determination of factual issues on the altered record in the Court of Appeals, rather than remand to the trial court for reconsideration, would be judicially efficient.

(9) A concise summary, without argument, of all the facts of the case material to determination of the appeal. The summary shall be in narrative form with references to the places in the transcript, narrative statement, audio record, record, or excerpt where such facts appear.

(10) In a dissolution proceeding or a proceeding involving modification of a dissolution judgment, the summary of facts shall begin with the date of the marriage, the ages of the parties, the ages of any minor children of the parties, the custody status of any minor children, the amount and terms of any spousal or child support ordered, and the party required to pay support.

(11) Any significant motion filed in the appeal and the disposition of the motion. A party need not file an amended brief to set forth any significant motion filed after that party's brief has been filed.

(12) Any other matters necessary to inform the court concerning the questions and contentions raised on the appeal, insofar as such matters are a part of the record, with reference to the parts of the record where such matters appear.

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[*] *See* ORS 19.415(3)(b) regarding discretion of the Court of Appeals to try the cause *de novo* or make one or more factual findings anew on appeal in some equitable proceedings; *see also* ORAP 5.45(5) concerning the identification of standards of review for each assignment of error on appeal.

ORAP COMMITTEE 2020
(updated March 11, 2020)

PROPOSAL NO.: 5

PROPOSER: Office of Public Defense Services, Appellate Division

AMENDING RULE(S): ORAP 5.70 -- Allow Reply Briefs as Matter of Right in Several Classes of Cases

DATE SUBMITTED: December 31, 2019

WORKGROUP: ***Josh Crowther, Ben Gutman, Julie E Smith, Daniel Parr, Judge Lagesen***

EXPLANATION:

PLACEHOLDER. Workgroup will report orally at April 16 meeting. Original materials shown below.

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Oregon Rule of Appellate Procedure 5.70 addresses reply briefs. The first subsection generally grants a party permission to file a reply brief to a respondent's answering brief or an answering brief of a cross-respondent. The second subsection addresses the form of the reply brief and indicates that it shall be similar to a respondent's answering brief. However, the third subsection creates exceptions to the general permissive rule under subsection (1) for a variety of case types including criminal, probation revocation, and juvenile court cases. Under subsection (3), the party must move the court and demonstrate a need for a reply brief before filing it.

This proposed amendment to ORAP 5.70 would grant a party in a criminal, probation revocation, or juvenile court case permission to file a reply brief without filing a motion. The proposed amendment would strike the terms "criminal," "probation revocation," "juvenile court" and "adoption cases and certain juvenile delinquency proceedings subject to ORAP 10.15" from subsection (3).

The amendment would eliminate unnecessary motion practice, be more

efficient for the court and for practitioners, and would normalize the appellate rules based on case types.

RULE AS AMENDED:

CURRENT RULE

Rule 5.70
REPLY BRIEF

(1)(a) Except as provided in subsection (3) of this rule, a party may file a reply brief to a respondent's answering brief or an answering brief of a cross-respondent.

(b) A reply brief shall be confined to matters raised in the respondent's answering brief or the answering brief of a cross-respondent; reply briefs that merely restate arguments made in the opening brief are discouraged.

(c) The court encourages a party who decides not to file a reply brief as soon as practicable thereafter, to notify the court in writing to that effect.

(2) The form of a reply brief shall be similar to a respondent's answering brief. A reply brief shall have an index and shall contain a summary of argument.

(3)(a) Except on request of the appellate court or on motion of a party that demonstrates the need for a reply brief, reply briefs shall not be submitted in the following cases:

(i) traffic, boating, wildlife, and other violations;

(ii) criminal, probation revocation, habeas corpus, and post-conviction relief;

(iii) juvenile court;

(iv) civil commitment;

(v) forcible entry and detainer;

(vi) judicial review of orders of the Land Use Board of Appeals and Land Conservation and Development Commission in land use cases, as provided in ORAP 4.66(1)(c); and

(vii) adoption cases and certain juvenile delinquency proceedings subject to ORAP 10.15.

(b) A motion for leave to file a reply brief shall be submitted within 14 days after the filing of the brief to which permission to reply is sought. If a reply brief is submitted with the motion, then:

(i) if the court grants the motion, the date of filing for the reply brief relates backs to the date of the filing for the motion;

(ii) if the court denies the motion, the court will strike the reply brief.

“TRACK CHANGES” VERSION

Rule 5.70
REPLY BRIEF

(1)(a) Except as provided in subsection (3) of this rule, a party may file a reply brief to a respondent’s answering brief or an answering brief of a cross-respondent.

(b) A reply brief shall be confined to matters raised in the respondent’s answering brief or the answering brief of a cross-respondent; reply briefs that merely restate arguments made in the opening brief are discouraged.

(c) The court encourages a party who decides not to file a reply brief as soon as practicable thereafter, to notify the court in writing to that effect.

(2) The form of a reply brief shall be similar to a respondent's answering brief. A reply brief shall have an index and shall contain a summary of argument.

(3)(a) Except on request of the appellate court or on motion of a party that demonstrates the need for a reply brief, reply briefs shall not be submitted in the following cases:

(i) traffic, boating, wildlife, and other violations;

(ii) ~~criminal, probation revocation,~~ habeas corpus~~,~~ and post-conviction relief;

~~(iii) juvenile court;~~

(iii~~iv~~) civil commitment;

(iv~~v~~) forcible entry and detainer; and

(v~~i~~) judicial review of orders of the Land Use Board of Appeals and Land Conservation and Development Commission in land use cases, as provided in ORAP 4.66(1)(c).~~; and~~

~~(vii) adoption cases and certain juvenile delinquency proceedings subject to ORAP 10.15.~~

(b) A motion for leave to file a reply brief shall be submitted within 14 days after the filing of the brief to which permission to reply is sought. If a reply brief is submitted with the motion, then:

(i) if the court grants the motion, the date of filing for the reply brief relates backs to the date of the filing for the motion;

(ii) if the court denies the motion, the court will strike the reply brief.

RULE AS AMENDED

Rule 5.70
REPLY BRIEF

(1)(a) Except as provided in subsection (3) of this rule, a party may file a reply brief to a respondent's answering brief or an answering brief of a cross-respondent.

(b) A reply brief shall be confined to matters raised in the respondent's answering brief or the answering brief of a cross-respondent; reply briefs that merely restate arguments made in the opening brief are discouraged.

(c) The court encourages a party who decides not to file a reply brief as soon as practicable thereafter, to notify the court in writing to that effect.

(2) The form of a reply brief shall be similar to a respondent's answering brief. A reply brief shall have an index and shall contain a summary of argument.

(3)(a) Except on request of the appellate court or on motion of a party that demonstrates the need for a reply brief, reply briefs shall not be submitted in the following cases:

(i) traffic, boating, wildlife, and other violations;

(ii) habeas corpus and post-conviction relief;

(iii) civil commitment;

(iv) forcible entry and detainer; and

(v) judicial review of orders of the Land Use Board of Appeals and Land Conservation and Development Commission in land use cases, as provided in ORAP 4.66(1)(c).

(b) A motion for leave to file a reply brief shall be submitted within 14 days after the filing of the brief to which permission to reply is sought. If a reply brief is submitted with the motion, then:

(i) if the court grants the motion, the date of filing for the reply brief relates backs to the date of the filing for the motion;

(ii) if the court denies the motion, the court will strike the reply brief.

ORAP COMMITTEE 2020
(Updated March 9, 2020)

PROPOSAL NO.: 6

PROPOSER: Office of Public Defense Services

AMENDING RULE(S): ORAP 5.92, 16.15(1) -- Extend Page Limits for Pro Se Supplemental Briefs

-- Also including ORAP 16.15(1)

DATE SUBMITTED: December 31, 2019

(Updated March 9, 2020)

WORKGROUP: ***Joshua Crowther, Lisa Norris-Lampe***

EXPLANATION:

(3/9/20 Update Note: See pp 2, 6, 8)

Oregon Rule of Appellate Procedure 5.92 establishes a five-page limit for *pro se* supplemental briefs. In addition, ORAP 16.15 requires all documents filed with the court to be submitted in a text-searchable PDF format.

The proposed amendment to ORAP 5.92 would increase the *pro se* page limit to ten pages and exempt *pro se* supplemental briefs from the text-searchable requirement.

The amendment would increase efficiency by easing the administrative burden on the Office of Public Defense Services (OPDS), which, in many cases, represents clients who are incarcerated and who can only send and receive documents through the mail. Furthermore, some institutions restrict telephone access to incarcerated clients, adding additional complications to preparing *pro se* supplemental briefs. If a client sends a brief to counsel that exceeds five pages, it must be returned in the mail with an explanatory letter. In turn, the client must send revised briefs, which results in additional extension requests and mailing expenses. The current procedure also leads to additional delays in the appeals process. If a client insists on filing an over length brief, counsel must also

prepare a motion requesting leave for the over-length document to be filed. Finally, *pro se* litigants do not always have access to a word processor for purposes of making a document text-searchable.

3/9/20 Update Note:

At the February 20, 2020, ORAP Committee Meeting, the group tentatively approved excepting pro se briefs from the ORAP 16.15(1) requirement for searchable briefs, but passed the proposal so that a companion amendment to ORAP 16.15(1) could be drafted. That amendment is set out below, on pp 6, 8. (Nothing in the updated proposal change the originally proposed changes to ORAP 5.92.)

RULE AS AMENDED *(Updated 3/9/20)*:

CURRENT RULE

Rule 5.92
SUPPLEMENTAL PRO SE BRIEFS

(1) When a client is represented by court-appointed counsel and the client is dissatisfied with the brief that counsel has filed, within 28 days after the filing of the brief, either the client or counsel may move the court for leave to file a supplemental pro se brief.[1] If the client files the motion, in addition to serving all other parties to the case, the client shall serve counsel with a copy of the motion. If counsel files the motion, in addition to serving all other parties to the case, counsel shall serve the client with a copy of the motion. Whoever files the motion may tender the proposed supplemental pro se brief along with the motion.

(2) The client shall attempt to prepare a supplemental pro se brief as nearly as practicable in proper appellate brief form. The brief shall identify questions or issues to be decided on appeal as assignments of error identifying precisely the legal, procedural, factual, or other ruling that is being challenged.[2] The last page of the brief shall contain the name and signature of the client. Unless the court orders otherwise, the statement of the case, including the statement of facts, and the argument together shall be limited to five pages.

(3) If the supplemental pro se brief includes an excerpt of record, the excerpt must contain only the information included in ORAP 5.50(2),[3] and only if that material is not included in the appellant's opening brief. If the supplemental pro se brief includes an appendix, it must comply with the appendix rules in ORAP 5.52 and shall not contain any confidential material.

(4) A supplemental pro se brief is the client's product; therefore, if the client requests assistance in preparing the brief, counsel's obligation shall be limited to correcting obvious typographical errors, preparing copies of the brief, serving the appropriate parties, and filing the original brief with the court. If the client prepares and files the brief without the assistance of counsel, in addition to serving all other parties to the appeal, the client shall serve a copy of the brief on counsel.

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[1] "Pro se" means "for oneself" or "on one's own behalf." A supplemental pro se brief is the product of the party himself or herself, and not of the attorney representing the party.

[2] *See* ORAP 5.45, which describes requirements for assignments of error and argument.

[3] See ORAP 5.50(2) (indicating that an excerpt of record must contain "[t]he judgment or order on appeal or judicial review" and "[a]ny written or oral rulings by the lower tribunal or agency addressing the issues presented by the assignments of error").

Rule 16.15
FORMAT OF DOCUMENTS TO BE FILED ELECTRONICALLY

(1) Any document filed via the eFiling system must be in a Portable Document Format (PDF) or Portable Document Format/A (PDF/A) that is compatible with the eFiling system requirements and that does not exceed 25 megabytes. An eFiler should break down a document that exceeds the size limit into as few smaller separate documents as possible, which the filer may upload as supporting documents under subsection (5) of this rule.1 The PDF document shall allow text searching and shall allow copying and pasting text into another document.

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“TRACK CHANGES” VERSION *(Updated 3/20/20)*

Rule 5.92
SUPPLEMENTAL PRO SE BRIEFS

(1) When a client is represented by court-appointed counsel and the client is dissatisfied with the brief that counsel has filed, within 28 days after the filing of the brief, either the client or counsel may move the court for leave to file a supplemental pro se brief.[1] If the client files the motion, in addition to serving all other parties to the case, the client shall serve counsel with a copy of the motion. If counsel files the motion, in addition to serving all other parties to the case, counsel shall serve the client with a copy of the motion. Whoever files the motion may tender the proposed supplemental pro se brief along with the motion.

(2) The client shall attempt to prepare a supplemental pro se brief as nearly as practicable in proper appellate brief form. The brief shall identify questions or issues to be decided on appeal as assignments of error identifying precisely the legal, procedural, factual, or other ruling that is being challenged.[2] The last page of the brief shall contain the name and signature of the client. Unless the court orders otherwise, the statement of the case, including the statement of facts, and the argument together shall be limited to ~~five~~ 10 pages.

(3) If the supplemental pro se brief includes an excerpt of record, the excerpt must contain only the information included in ORAP 5.50(2),[3] and only if that material is not included in the appellant’s opening brief. If the supplemental pro se brief includes an appendix, it must comply with the appendix rules in ORAP 5.52 and shall not contain any confidential material.

(4) A supplemental pro se brief is the client’s product; therefore, if the client requests assistance in preparing the brief, counsel’s obligation shall be limited to correcting obvious typographical errors, preparing copies of the brief, serving the appropriate parties, and filing the original brief with the court. If the client prepares and files the brief without the assistance of counsel, in addition to serving all other parties to the appeal, the client shall serve a copy of the brief on counsel.

(5) The provision of ORAP 16.15(1) requiring that all electronic filings be text-searchable does not apply to a brief filed under this rule.

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[1] "Pro se" means "for oneself" or "on one's own behalf." A supplemental pro se brief is the product of the party himself or herself, and not of the attorney representing the party.

[2] *See* ORAP 5.45, which describes requirements for assignments of error and argument.

[3] *See* ORAP 5.50(2) (indicating that an excerpt of record must contain "[t]he judgment or order on appeal or judicial review" and "[a]ny written or oral rulings by the lower tribunal or agency addressing the issues presented by the assignments of error").

Rule 16.15
FORMAT OF DOCUMENTS TO BE FILED ELECTRONICALLY

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RULE AS AMENDED *(Updated 3/20/20)*

Rule 5.92
SUPPLEMENTAL PRO SE BRIEFS

(1) When a client is represented by court-appointed counsel and the client is dissatisfied with the brief that counsel has filed, within 28 days after the filing of the brief, either the client or counsel may move the court for leave to file a supplemental pro se brief.[1] If the client files the motion, in addition to serving all other parties to the case, the client shall serve counsel with a copy of the motion. If counsel files the motion, in addition to serving all other parties to the case, counsel shall serve the client with a copy of the motion. Whoever files the motion may tender the proposed supplemental pro se brief along with the motion.

(2) The client shall attempt to prepare a supplemental pro se brief as nearly as practicable in proper appellate brief form. The brief shall identify questions or issues to be decided on appeal as assignments of error identifying precisely the legal, procedural, factual, or other ruling that is being challenged.[2] The last page of the brief shall contain the name and signature of the client. Unless the court orders otherwise, the statement of the case, including the statement of facts, and the argument together shall be limited to 10 pages.

(3) If the supplemental pro se brief includes an excerpt of record, the excerpt must contain only the information included in ORAP 5.50(2),[3] and only if that material is not included in the appellant's opening brief. If the supplemental pro se brief includes an appendix, it must comply with the appendix rules in ORAP 5.52 and shall not contain any confidential material.

(4) A supplemental pro se brief is the client's product; therefore, if the client requests assistance in preparing the brief, counsel's obligation shall be limited to correcting obvious typographical errors, preparing copies of the brief, serving the appropriate parties, and filing the original brief with the court. If the client prepares and files the brief without the assistance of counsel, in addition to serving all other parties to the appeal, the client shall serve a copy of the brief on counsel.

(5) The provision of ORAP 16.15(1) requiring that all electronic filings be text-searchable does not apply to a brief filed under this rule.

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[1] "Pro se" means "for oneself" or "on one's own behalf." A supplemental pro se brief is the product of the party himself or herself, and not of the attorney representing the party.

[2] *See* ORAP 5.45, which describes requirements for assignments of error and argument.

[3] *See* ORAP 5.50(2) (indicating that an excerpt of record must contain "[t]he judgment or order on appeal or judicial review" and "[a]ny written or oral rulings by the lower tribunal or agency addressing the issues presented by the assignments of error").

Rule 16.15
FORMAT OF DOCUMENTS TO BE FILED ELECTRONICALLY

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

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ORAP COMMITTEE 2020
(updated March 11, 2020)

PROPOSAL NO.: 7

PROPOSER: Wells O'Byrne

AMENDING RULE(S): ORAP 6.05(3): Permit Oral Argument Before Court of Appeals by Self-Represented Party

DATE SUBMITTED: February 11, 2019

EXPLANATION:

PLACEHOLDER. Judge Lagesen will report orally at April 16 meeting. Original materials shown below.

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[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:

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.

ORAP COMMITTEE 2020
(updated March 5, 2020)

PROPOSAL NO.: 9

PROPOSER: Christa Obold Eshleman

AMENDING RULE(S): ORAP 7.35(2) -- Expand Notice Requirements for Emergency Motions in Juvenile Dependency Cases

DATE SUBMITTED: December 31, 2019

(Updated March 5, 2020)

Workgroup: ***Ben Gutman, Josh Crowther, Theresa Kidd***

EXPLANATION:

WORKGROUP REVISION FOR APRIL 16 MEETING -- NOTES:

Email from Ben Gutman, 3/5/2020: [The workgroup proposes amending subsection (2) as shown below.] The other subsections of ORAP 7.35 can remain as is. This proposal is substantively the same as the original one from Christa Obold Eshleman but applies to all cases rather than singling out juvenile dependency cases.

RULE AS AMENDED:

WORKGROUP REVISED VERSION FOR APRIL 16 MEETING:

Rule 7.35
MOTIONS SEEKING EMERGENCY RELIEF

(1) If a party files a motion for substantive relief and requires relief in less than 21 days, the party shall include in the caption of the motion a statement that the motion is an "EMERGENCY MOTION UNDER ORAP 7.35." The motion should explain in the first paragraph the reason for the emergency and identify any deadline for action by the court.

(2) Before filing the motion, the movant shall make a good faith effort to notify the opposing counsel or opposing party, if the party is not represented by counsel. If the motion is filed within 21 days of the filing of the notice of appeal, the movant also shall make a good faith effort to notify counsel for each party and each self-represented party who is eligible to appear as of right as a party to the appeal under ORAP 2.25(3). The motion shall state whether the other party has been notified and served, and the party's position on the motion.

(3) A motion seeking emergency relief, other than a motion for an extension of time, and any response to a motion seeking emergency relief may be served and filed by telephonic facsimile communication device,[1] provided that the material being transmitted does not exceed 10 pages and subject to the following conditions:

(a) Filing shall not be deemed complete until the entirety of the motion or response being transmitted has been received by the Administrator, but, as so filed, the facsimile transmission shall have the same force and effect as filing of the original.

(b) The party or attorney being served maintains a telephonic facsimile communication device at the party's address or at the attorney's office and the device is operating at the time service is made. The proof of service shall contain the facsimile number of any party or attorney served by facsimile transmission.[2]

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[1] The facsimile transmission number for the Administrator is (503) 986-5560.

[2] S*ee* ORCP 9 F.

ORAP COMMITTEE 2020
(Updated 3/9/20)

PROPOSAL NO.: 11

PROPOSER: Lisa Norris-Lampe, Appellate Legal Counsel

AMENDING: ORAP 8.15 -- Amicus Curiae

DATE: December 19, 2019

(Updated March 9, 2020)

Workgroup: ***Julie A. Smith, Cody Hoesly, Lisa Norris-Lampe***

EXPLANATION:

(3/9/20 Update Note: The Workgroup is proposing a structural rewrite of this rule that includes changing much of the text, although retaining the concepts set out in the original proposal regarding amicus briefs filed in the Supreme Court. (See explanation on pp 2-3 and updated proposal pp 4-13.)

Currently, subsection (4) of ORAP 8.15 sets out deadlines for amicus briefs in the Court of Appeals; subsection (5) sets out deadlines for amicus briefs in Supreme SC cases on petitions for review (as to allowing the petition and then on the merits); and subsection (6) then states that all other Supreme Court cases (except ballot titles) follow the Court of Appeals deadlines set out in subsection (4). This proposal would create consistent deadlines for all Supreme Court cases, regardless of case type.

Summary of Issue and Proposed Changes:

The following issues have arisen respecting subsections (5) and (6):

- Recent case processing has shown that it is confusing to have two different timing rules for the Supreme Court, depending on whether the case is on a petition for review or on direct review -- there is no reason for that distinction. The preference is to create one single Supreme Court deadline, following the current timelines set out in subsection (5).

- The current default approach in subsection (6) also is confusing for amici who support or oppose a petition for writ of mandamus, because the Court of Appeals timing rules set out in subsection (4) are based on "briefing," and there are no briefs in the early part of a mandamus proceeding.

The proposed amendment therefore removes current subsection (6) and otherwise reworks subsection (5), so that it applies to petitions for review, initial mandamus filings, and all Supreme Court cases on the merits. The proposed amendment also removes an outdated cross-reference to filing copies and other extraneous wording.

3/9/20 Update Note:

The Workgroup proposes restructuring ORAP 8.15, so that it begins with three preliminary subsections that govern amicus briefs regardless of appellate court (content of application; Oregon State Bar member, filing fee, and service requirements; and form of brief), then followed by a section each for the Court of Appeals and the Supreme Court, and then followed by additional, misc. subsections that apply regardless of court (memorandum of authorities, oral argument, State of Oregon as amicus). The Workgroup also updated much of the text, with the goal of making the rule easier to read. With the exception noted below, however, none of the textual changes are substantive (other than those originally proposed, relating to amicus filings in the Supreme Court).

Substantive change of note:

After conferring with Court of Appeals staff, the proposal makes one substantive change to the current Court of Appeals rule that permits an amicus applicant to file the application first and the brief later, or file the application and brief simultaneously. The updated proposal removes the first option and instead requires the applicant to file the application and the brief together, which is consistent with the current Supreme Court rule. The Workgroup thought it made sense to make the courts' rules consistent and therefore offers this proposal for the group's discussion. (And, it appears that more amicus applications are filed in the Supreme Court -- which already has a simultaneous filing rule -- than in the Court of Appeals (2019: 29 SC cases v. 15 C/A cases; 2018: 47 SC cases v. 20 C/A cases)). The downside of requiring simultaneous filings is that the applicant must take the time to prepare a brief, when there is a possibility that that the application would be denied.

Additional potential change for Committee discussion:

The Workgroup also would like the Committee to discuss whether the word "application" throughout ORAP 8.15 could be replaced with "motion." In essence, the application serves as a motion (except that conferral requirements do not apply), and the Workgroup could not identify any persuasive reason to continue to use the unique term "application," when "motion" appears to apply. (There is no statutory requirement for an "application.")

RULE AS AMENDED *(Updated 3/9/20)*:

Edited version (new text in **{braces/boldface/underscore}**; omitted text in [*brackets/italics*]:

Rule 8.15

AMICUS CURIAE

(1) A person[1] may appear as *amicus curiae* in any case pending before **{an}**[*the*] appellate court only by permission of the [*appellate*] court on written application setting forth the interest of the person in the case. The application **{shall not contain argument on the resolution of the case and otherwise}** must:

(a) **{S}**[*s*]tate whether the applicant intends to present a private interest of its own or [*to present*] a position as to the correct rule of law that does not affect a private interest of its own;

(b) **{I}**[*i*]dentify the party with whom the **{applicant would be}**[*amicus is*] aligned or state that the **{applicant}**[*amicus*] is unaligned;

(c) **{I}**[*i*]dentify the **{date}**[*deadline*] in the case that is relevant to the timeliness of the [*amicus*] application (such as the date that the aligned party's brief is due); and

(d) **{E}**[*e*]xplain why the application is timely relative to that **{date}**[*deadline*].

[*(e) The application shall not contain argument on the resolution of the case.*]

(2) The application shall be submitted by an active member of the Oregon State Bar. **{No}**[*A*] filing fee is [*not*] required. The form of the application shall comply with ORAP 7.10(1) and (2)**{,}** and the applicant shall [*file the original and one copy of the application. A copy of the application shall be*] serve[*d*] **{it}** on all parties to the proceeding.

(3) **{The application shall be accompanied by the amicus brief sought to be filed.** [*In the Court of Appeals, the application to appear amicus curiae may, but need not, be accompanied by the brief the applicant would file if permitted to appear. In the Supreme Court, the application shall be accompanied by the brief sought to be filed. The form of an amicus brief shall be subject to the same rules as those*

governing briefs of parties.[2] *If, consistently with this rule, a brief is submitted with the application, then:*]

(a) **{I}**[*i*]f the court grants the application, the date of filing for the brief relates back to the date of filing for the application; [or]

(b) **{I}**[*i*]f the court denies the application, the **{brief will be deemed stricken}**[*court will strike the brief*];

{(c) The form of the brief is subject to the same rules as those governing briefs of the parties, to the extent practicable.[2]**}**

(4) In the Court of Appeals,

{(a) U}[*u*]nless the court grants leave otherwise for good cause shown, the **{application}**[*amicus brief*] shall be **{filed within}**[*due*] seven days after the **{due}** date **{for}** the brief [*is due*] of the party with whom **{the applicant}**[*amicus curiae*] is aligned or, if **{unaligned}**[*amicus curiae is not aligned with any party*], seven days after the **{due}** date **{for}** the opening brief[*is due*].

{(b) If a party obtains an extension of time for any applicable brief deadline, the time for filing an application is automatically extended accordingly.}

(5) **{I}**[*With respect to cases i*]n the Supreme Court, except as otherwise provided in ORAP 11.35 and ORAP 12.30 [*on petition for review from the Court of Appeals:*]**{,}**

(a) **{An applicant}**[*A person wishing to appear amicus curiae*] may seek to appear in support of or in opposition to**{:}**[*a petition for review, on the merits of the case on review, or both.*]

{(i) a petition for review of a Court of Appeals decision, the merits of that case, or both;

(ii) a petition for a writ, the merits of that case, or both; or

(iii) the merits of any other case before the court on direct appeal, direct judicial review, or direct review or in an original proceeding.}

(b) **{The following apply to an application to support or oppose a petition for review or a petition for a writ:**[*Unless the court grants leave otherwise for good cause shown, an application to appear amicus curiae in support of or in opposition to a petition for review shall be filed within 14 days after the filing of a petition for review.*]

{(i) The application shall be filed within 14 days after the filing of the petition, unless the court grants leave otherwise for good cause shown.

(ii) The applicant may, but need not, file with the application a combined amicus brief in support of, or in opposition to, the petition and also on the merits of the case. The due date set out in subparagraph (i) applies to a combined brief filed with the application.

(iii) If the applicant does not submit a combined amicus brief with the application, and the court allows the application, the applicant may file a brief on the merits without further leave of the court, by the applicable due date set out in paragraph (c).}

(c) [*Unless the court grants leave otherwise for good cause shown, a*]**{A}**n application to appear [*amicus curiae*]on **{only}** the merits of a**{ny}** case [*on review*] shall be filed **{by the following dates, unless the court grants leave otherwise for good cause shown}**:

(i) **{If the applicant is aligned with a party, by the due}**[*On the*] date **{for that party's}**[*the*] brief **{(excluding reply briefs).}**[*is due of the party on review with whom amicus curiae is aligned,*]

(ii) **{If the applicant is not aligned with any party, by}**[*On*] the **{due}** date **{for}** the petitioner['*s*] **{on review's}** brief on the merits **{or the opening brief.}**[*on review is due, if amicus curiae is not aligned with any party on review,*[3] *or*]

(iii) **{If the case is before the court on a petition for}**[*Within 28 days after*] review **{from the Court of Appeals and the}**[*is allowed, if*] petitioner on review has **{stated an intent to rely on the petition and the petitioner's Court of Appeals brief}**[*filed a notice that petitioner does not intend to file a brief on the merits or has filed no notice*], regardless of the **{applicant's}** alignment[*of amicus curiae*], **within 28 days after review is allowed}**.

(d) [*If a person filing an application to appear amicus curiae wishes to file one brief in support of or in opposition to a petition for review and on the merits of the case, the application and brief shall be filed within the same time that an application to appear in support of or in opposition to a petition for review would be filed. If a person has been granted permission to appear amicus curiae in support of or in opposition to a petition for review and the Supreme Court allows review, the person may file an amicus curiae brief on the merits without further leave of the court.*

(e)] If a party obtains an extension of time to file a [*petition for review, a*]response to a petition for review or **{for a writ, or for any of the}**[*a*] brief **{deadlines described in paragraph (c)(i) or (ii)}**[*on the merits and if an amicus curiae brief was due on the same date as the petition, response or brief on the merits*], the time for filing **{an application or amicus}**[*the amicus curiae*]brief is automatically extended **{accordingly}**[*to the same date*].

[*(6) Except as provided in ORAP 11.30(7), with respect to cases in the Supreme Court on direct review or direct appeal, or other proceedings not subject to subsection (5), amicus curiae briefs shall be due as provided in subsection (4) of this rule.*]

(**{6}**[*7*])*Amicus curiae* may file a memorandum of additional authorities under the same circumstances **{in which}**[*that*] a party **{may do so}**[*could file a memorandum of additional authorities*] under ORAP 5.85.

(**{7}**[*8*])**{Unless the court grants leave otherwise, }**[*A*]***{a}****micus curiae* **{may}**[*shall*] not [*be allowed to*]orally argue the case[*, unless the court specifically authorizes or directs oral argument*].**{3}**[*4*]

(**{8}**[*9*])The State of Oregon may appear as *amicus curiae* in any case in **{an appellate court}**[*the Supreme Court and Court of Appeals*] without permission of the court. The state shall comply with all the requirements for appearing *amicus curiae***{ set out in this rule}**, including the time within which to appear[*under subsections (4), (5), and (6) of this rule*]**{, except that, i}**[*. I*]f the state is not aligned with any party, the state's **{amicus}**[*amicus curiae*] brief shall be due on the same date as the respondent's brief**{ on the merits or the answering brief}**.

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1 As used in this rule, "person" includes an organization.

2 *See* ORAP **{Chapters 5 and 9,}**[*5.05 to 5.30, ORAP 5.52, ORAP 5.77, ORAP 5.95, ORAP 9.05, ORAP 9.10, and ORAP 9.17*] concerning requirements for briefs.

3 [*See ORAP 9.17 concerning the due dates of briefs on review.*

4] *See* ORAP 6.10 concerning oral argument.

RULE AS AMENDED *(Originally Proposed)*:

Edited version (new text in **{braces/boldface/underscore}**; omitted text in [*brackets/italics*]:

Rule 8.15

AMICUS CURIAE

(1) A person FN 1 may appear as amicus curiae in any case pending before the appellate court only by permission of the appellate court on written application setting forth the interest of the person in the case. * * *

* * * * *

(2) The application shall be submitted by an active member of the Oregon State Bar. A filing fee is not required. The form of the application shall comply with ORAP 7.10(1) and (2)[*and the applicant shall file the original and one copy of the application*]. A copy of the application shall be served on all parties to the proceeding.

(3) In the Court of Appeals, the application to appear amicus curiae may, but need not, be accompanied by the brief the applicant would file if permitted to appear. In the Supreme Court, the application shall be accompanied by the brief sought to be filed. The form of an amicus brief shall be subject to the same rules as those governing briefs of parties. FN 2 If[, *consistently with this rule,*] a brief is submitted with the application, then:

(a) if the court grants the application, the date of filing for the brief relates back to the date of filing for the application; or

(b) if the court denies the application, the court will strike the brief.

(4) In the Court of Appeals, unless the court grants leave otherwise for good cause shown, an amicus brief shall be due seven days after the date the brief is due of the

party with whom amicus curiae is aligned or, if amicus curiae is not aligned with any party, seven days after the date the opening brief is due.

(5) **{Except as provided in ORAP 11.30(7), with}**[*With*] respect to cases in the Supreme Court [*on petition for review from the Court of Appeals*]:

(a) A person wishing to appear amicus curiae may seek to appear in support of or in opposition to**{:}**

{(i)} a petition for review **{of a Court of Appeals decision}**, [*on*] the merits of the case on review, or both**{; or}**[.]

{(ii) a petition for a writ, the merits of the case on review, or both; or

(iii) the merits of any other case on appeal or review.}

(b) Unless the court grants leave otherwise for good cause shown, an application to appear amicus curiae in support of or in opposition to a petition for review **{or a petition for writ}** shall be filed within 14 days after the filing of **{the}**[*a*] petition [*for review*].

(c) Unless the court grants leave otherwise for good cause shown, an application to appear amicus curiae on the merits of a case [*on review*] shall be filed:

(i) On the date the brief is due of the party [*on review*] with whom amicus curiae is aligned**{;}**[,]

(ii) On the date the petitioner's brief on the merits **{or opening brief}** [*on review*] is due, if amicus curiae is not aligned with any party [*on review,*]**{;}** FN 3 or

(iii) Within 28 days after review is allowed, if **{a}** petitioner on review **{has not notified the court of intent}**[*has filed a notice that petitioner does not intend*] to file a brief on the merits[*or has filed no notice*], regardless of the alignment of amicus curiae.

(d) If a person filing an application to appear amicus curiae wishes to file one brief in support of or in opposition to a petition for review and on the merits of the case, the application and brief shall be filed within the same time that an application to appear in support of or in opposition to a petition for review would be filed. If a person has been granted permission to appear

amicus curiae in support of or in opposition to a petition for review and the Supreme Court allows review, the person may file an amicus curiae brief on the merits without further leave of the court.

(e) If a party obtains an extension of time to file a petition for review, a response to a petition for review **{or writ,}** or a brief**{,}**[*on the merits*] and if an amicus curiae brief was due on the same date as the petition, response**{,}** or brief[*on the merits*], the time for filing the amicus curiae brief is automatically extended to the same date.

[*(6) Except as provided in ORAP 11.30(7), with respect to cases in the Supreme Court on direct review or direct appeal, or other proceedings not subject to subsection (5), amicus curiae briefs shall be due as provided in subsection (4) of this rule.*]

(**{6}**[*7*]) Amicus curiae may file a memorandum of additional authorities under the same circumstances that a party could file a memorandum of additional authorities under ORAP 5.85.

(**{7}**[*8*]) Amicus curiae shall not be allowed to orally argue the case, unless the court specifically authorizes or directs oral argument. FN 4

(**{8}**[*9*]) The State of Oregon may appear as amicus curiae in any case in the Supreme Court and Court of Appeals without permission of the court. The state shall comply with all the requirements for appearing amicus curiae, including the time within which to appear under subsections (4)**{and}**[,] (5)[, *and (6)*] of this rule. If the state is not aligned with any party, the state's amicus curiae brief shall be due on the same date as the respondent's brief.

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FN 1 As used in this rule, "person" includes an organization.

FN 2 See ORAP 5.05 to 5.30, ORAP 5.52, ORAP 5.77, ORAP 5.95, ORAP 9.05, ORAP 9.10, and ORAP 9.17 concerning requirements for briefs.

FN 3 See ORAP 9.17 concerning the due dates of briefs on review.

FN 4 See ORAP 6.10 concerning oral argument.

Clean Version *(Updated, 3/9/20)*:

Rule 8.15

AMICUS CURIAE

(1) A person[1] may appear as *amicus curiae* in any case pending before an appellate court only by permission of the court on written application setting forth the interest of the person in the case. The application shall not contain argument on the resolution of the case and otherwise must:

(a) State whether the applicant intends to present a private interest of its own or a position as to the correct rule of law that does not affect a private interest of its own;

(b) Identify the party with whom the applicant would be aligned or state that the applicant is unaligned;

(c) Identify the date in the case that is relevant to the timeliness of the application (such as the date that the aligned party's brief is due); and

(d) Explain why the application is timely relative to that date.

(2) The application shall be submitted by an active member of the Oregon State Bar. No filing fee is required. The form of the application shall comply with ORAP 7.10(1) and (2), and the applicant shall serve it on all parties to the proceeding.

(3) The application shall be accompanied by the amicus brief sought to be filed.

(a) If the court grants the application, the date of filing for the brief relates back to the date of filing for the application;

(b) If the court denies the application, the brief will be deemed stricken;

(c) The form of the brief is subject to the same rules as those governing briefs of the parties, to the extent practicable.[2]

(4) In the Court of Appeals,

(a) Unless the court grants leave otherwise for good cause shown, the application shall be filed within seven days after the due date for the brief

of the party with whom the applicant is aligned or, if unaligned, seven days after the due date for the opening brief.

(b) If a party obtains an extension of time for any applicable brief deadline, the time for filing an application is automatically extended accordingly.

(5) In the Supreme Court, except as otherwise provided in ORAP 11.35 and ORAP 12.30,

(a) An applicant may seek to appear in support of or in opposition to:

(i) a petition for review of a Court of Appeals decision, the merits of that case, or both;

(ii) a petition for a writ, the merits of that case, or both; or

(iii) the merits of any other case before the court on direct appeal, direct judicial review, or direct review or in an original proceeding.

(b) The following apply to an application to support or oppose a petition for review or a petition for a writ:

(i) The application shall be filed within 14 days after the filing of the petition, unless the court grants leave otherwise for good cause shown.

(ii) The applicant may, but need not, file with the application a combined amicus brief in support of, or in opposition to, the petition and also on the merits of the case. The due date set out in subparagraph (i) applies to a combined brief filed with the application.

(iii) If the applicant does not submit a combined amicus brief with the application, and the court allows the application, the applicant may file a brief on the merits without further leave of the court, by the applicable due date set out in paragraph (c).

(c) An application to appear on only the merits of any case shall be filed by the following dates, unless the court grants leave otherwise for good cause shown:

(i) If the applicant is aligned with a party, by the due date for that party's brief (excluding reply briefs).

(ii) If the applicant is not aligned with any party, by the due date for the petitioner on review's brief on the merits or the opening brief.

(iii) If the case is before the court on a petition for review from the Court of Appeals and the petitioner on review has stated an intent to rely on the petition and the petitioner's Court of Appeals brief, regardless of the applicant's alignment, within 28 days after review is allowed.

(d) If a party obtains an extension of time to file a response to a petition for review or for a writ, or for any of the brief deadlines described in paragraph (c)(i) or (ii), the time for filing an application or amicus brief is automatically extended accordingly.

(6) *Amicus curiae* may file a memorandum of additional authorities under the same circumstances in which a party may do so under ORAP 5.85.

(7) Unless the court grants leave otherwise, *amicus curiae* may not orally argue the case.[3]

(8) The State of Oregon may appear as *amicus curiae* in any case in an appellate court without permission of the court. The state shall comply with all the requirements for appearing *amicus curiae*, including the time within which to appear, except that, if the state is not aligned with any party, the state's amicus brief shall be due on the same date as the respondent's brief on the merits or the answering brief.

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1 As used in this rule, "person" includes an organization.

2 *See* ORAP Chapters 5 and 9, concerning requirements for briefs.

3 *See* ORAP 6.10 concerning oral argument.

ORAP COMMITTEE 2020
(Updated 3/9/20)

PROPOSAL NO.:	12 A & B
PROPOSER:	Lisa Norris-Lampe, Appellate Legal Counsel
AMENDING:	ORAP 9.05 -- Petition for Supreme Court Review of Court of Appeals Decision
DATE:	December 19, 2019 (edited Jan 23, 2020)
	(Updated March 9, 2020)
Workgroup:	***Bill Kabeiseman, Lisa Norris-Lampe***

EXPLANATION:

(3/9/19 Update Note: Upon conferring after the last meeting, the Workgroup confirmed that no change was needed to this proposal. It therefore is being resubmitted in its original form.)

ORAP 9.05(2) governs the filing of petitions for review (PTRVs) in the Supreme Court; paragraph (b) of that rule provides that the Supreme Court may grant an extension of time to file a PTRV. This proposal would clarify the rules that govern the filing of such a motion for extension of time.

Summary of Issue and Proposed Changes:

AGENDA ITEM NO. 12 A:

Although ORAP 9.05(2) implicitly conveys that a motion for extension of time (MOET) should be filed in the Supreme Court, many such motions are filed each year in the Court of Appeals, instead. The proposed amendment therefore would clarify that any MOET to file a PTRV must be filed in the Supreme Court.

AGENDA ITEM NO. 12 B:

The proposal also would delete the text of FN 2, which excludes ORAP 6.25(5) from the timing rules, replacing it with an inclusive reference to ORAP 6.25(2) in new

subparagraph (c). (I think that it is easier for our users if exceptions to rules are part of the rules, rather than set out in footnotes.)

RULE AS AMENDED:

Edited version (new text in **{braces/boldface/underscore}**; omitted text in [*brackets/italics*]:

Rule 9.05

PETITION FOR SUPREME COURT REVIEW OF COURT OF APPEALS DECISION

* * * * *

(2) Time for Filing and for Submitting Petition for Review

(a) Except as provided in ORS 19.235(3) and ORAP 2.35(4), any party seeking to obtain review of a decision of the Court of Appeals shall file a petition for review in the Supreme Court within 35 days after the date of the decision of the Court of Appeals.[*FN1,* Or, alternatively, edit FN 1]

{(b) A party seeking additional time to file a petition for review shall file a motion for extension of time in the Supreme Court, which that court may grant}[*The Supreme Court may grant an extension of time to file a petition for review.*]

(**{c}**[*b*])(i) If a timely petition for reconsideration of a decision of the Court of Appeals is filed **{under ORAP 6.25(2)}** by any party, the time for filing a petition for review concerning that decision for all parties shall not begin to run until the Court of Appeals issues its written disposition of the petition for reconsideration. If a party obtains an extension of time to file a petition for reconsideration and does not file a petition for reconsideration within the time allowed, the time for filing a petition for review shall begin to run on expiration of the extension of time.

(ii) If a petition for review is filed during the time in which a petition for reconsideration in the Court of Appeals may be filed, the petition for review will not be submitted to the Supreme Court until the time for filing a petition for reconsideration expires.

(iii) If a petition for review is filed after the filing of a timely petition for reconsideration, the petition for review will not be submitted to the Supreme Court until the Court of Appeals issues its written disposition of the petition for reconsideration.[*FN 2*]

(**{d}**[*c*]) (i) If a party files a petition for review after the appellate judgment has issued, the party must file with the petition a motion to recall the appellate judgment. The petition and the motion must be filed within a reasonable time after the appellate judgment has issued. The motion to recall the appellate judgment must explain why the petition for review was not timely filed. The party need not file a separate motion for relief from default.

(ii) A party filing a motion to recall the appellate judgment in a criminal case, in addition to serving all other parties to the appeal, shall serve a copy of the motion on the district attorney.

[*2 Paragraph (2)(b) of this rule does not apply to a motion for reconsideration filed under ORAP 6.25(5).*]

Clean Version:

Rule 9.05

PETITION FOR SUPREME COURT REVIEW OF COURT OF APPEALS DECISION

* * * * *

(2) Time for Filing and for Submitting Petition for Review

(a) Except as provided in ORS 19.235(3) and ORAP 2.35(4), any party seeking to obtain review of a decision of the Court of Appeals shall file a petition for review in the Supreme Court within 35 days after the date of the decision of the Court of Appeals. [Alternative, edit FN 1]

(b) A party seeking additional time to file a petition for review shall file a motion for extension of time in the Supreme Court, which that court may grant

(c) (i) If a timely petition for reconsideration of a decision of the Court of Appeals is filed under ORAP 6.25(2) by any party, the time for filing a petition for review concerning that decision for all parties shall not begin to run until the Court of Appeals issues its written disposition of the petition for reconsideration. If a party obtains an extension of time to file a petition for reconsideration and does not file a petition for reconsideration within the time allowed, the time for filing a petition for review shall begin to run on expiration of the extension of time.

(ii) If a petition for review is filed during the time in which a petition for reconsideration in the Court of Appeals may be filed, the petition for review will not be submitted to the Supreme Court until the time for filing a petition for reconsideration expires.

(iii) If a petition for review is filed after the filing of a timely petition for reconsideration, the petition for review will not be submitted to the Supreme Court until the Court of Appeals issues its written disposition of the petition for reconsideration.

(d) (i) If a party files a petition for review after the appellate judgment has issued, the party must file with the petition a motion to recall the

appellate judgment. The petition and the motion must be filed within a reasonable time after the appellate judgment has issued. The motion to recall the appellate judgment must explain why the petition for review was not timely filed. The party need not file a separate motion for relief from default.

(ii) A party filing a motion to recall the appellate judgment in a criminal case, in addition to serving all other parties to the appeal, shall serve a copy of the motion on the district attorney.

ORAP COMMITTEE 2020
(Updated 3/9/20)

PROPOSAL NO.:	15
PROPOSER:	Lisa Norris-Lampe, Appellate Legal Counsel
AMENDING:	ORAP 11.25, 11.27, 11.30, 11.32, 11.34, 12.25 -- Renumbering Several "Original Proceeding" and "Special Supreme Court" Rules
	-- Also including ORAP 11.34
DATE:	December 19, 2019
	(Updated March 3, 2020)
Workgroup:	***Bill Kabeiseman, Lisa Norris-Lampe***

EXPLANATION:

(3/9/20 Update Note: Current ORAP 11.34 was inadvertently omitted from this proposal as initially submitted; it has been added below, see pp 2, 4, and 5. An additional "update" note for the group to consider is set out in boldface/italic type on p 3.)

ORAP Chapter 11 is entitled "Original Proceedings in the Supreme Court," and ORAP Chapter 12 is entitled "Special Supreme Court Rules." Over time, several provisions that were more appropriate for inclusion in Chapter 12 were added to Chapter 11, instead (additional explanation below). This memo proposes moving and renumbering several of the rules.

Summary of Issue and Proposed Changes:

The Supreme Court (in its Appellate Case Management System and otherwise) uses five "case class" categories to identify categories of cases filed in the Supreme Court:

- "Appeal": Cases on appeals of court judgment/orders, on petition for review (PTRV) from the Court of Appeals

- "Judicial Review": Cases on judicial reviews of agency decisions, on PTRV from the Court of Appeals

- "Original Proceedings": Direct review proceedings for which the Oregon Constitution vests original jurisdiction in the Supreme Court (limited to mandamus, habeas corpus, quo warranto, and reapportionment proceedings)

- "Professional Regulation": All matters filed with the court that pertain to the admission, discipline, and reinstatement of lawyers, and judicial fitness and disability matters.

- "Direct Review": All other direct review matters that do not qualify as "original proceedings" or "professional regulation" matters.

Consistently with the above-described class description for "original proceedings," contrasted against professional regulation and other types of direct review cases, the proposal set out below would move four current rules from current Chapter 11 to Chapter 12, as follows:

- Rule 11.25, Bar Admission, Reinstatement, and Disciplinary Proceedings*

- Rule 11.27, Judicial Disability and Disciplinary Proceedings

- Rule 11.30, Ballot Title Review*[1]

- Rule 11.32, Voters' Pamphlet ***Explanatory Statement*** Review

- ***Rule 11.34, Estimate of Financial Impact Review***

The proposal would retain the subnumbering of each rule (*e.g.*, .25, .27, etc., but change the preceding title number (*e.g.*, 12.25, 12.27, etc.).

Then, to accommodate retaining the subnumbering, I propose changing the number of one existing rule in Chapter 12 (not used very often):

- Rule 12.25, Energy Facility Siting and Public Utility Commission (to change to Rule 12.35).

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* Note: I am submitting separate proposals that would amend the wording of each of these rules.

3/9/20 Update Note, for Committee Consideration:

The proposed renumbering is intended to leave almost all of the subnumbering of rules currently in Chapter 11 the same, after they move to Chapter 12. Committee member Cody Hoesly has noted that one rule change -- retaining rule number 12.25, but changing it from an Energy Facility Siting Council (EFSC) rule to a Bar/Board of Bar Examiners (BBX) rule -- may be confusing for practitioners. (Alternatively, he suggests, all numbering could be adjusted so there is no duplication, such as 11.27 for Bar/BBX cases.) The counterargument -- which is reflected in both the original and the updated proposal -- is that it would be more confusing for practitioners in high-volume Bar cases to reorient themselves to a completely different rule number, as opposed to simply a different chapter number. (The same is true for practitioners in Ballot Title cases, also high-volume.) By contrast, the court receives very few EFSC cases, such that those practitioners should not be confused by the fact that their current rule, 12.25, is moving to a new subnumber, 12.35. We wanted to highlight that discussion for the Committee.

RULE AS AMENDED *(Updated 3/9/20)*:

Edited version (new text in **{braces/boldface/underscore}**; omitted text in [*brackets/italics*]:

Moving Rules from Chapter 11 to Chapter 12:

Rule **{12.25}**[*11.25*]

BAR ADMISSION, REINSTATEMENT, AND DISCIPLINARY PROCEEDINGS

* * * * *

Rule **{12.27}**[*11.27*]

JUDICIAL DISABILITY AND DISCIPLINARY PROCEEDINGS

* * * * *

Rule **{12.30}**[*11.30*]

BALLOT TITLE REVIEW

* * * * *

Rule **{12.32}**[*11.32*]

VOTERS' PAMPHLET EXPLANATORY STATEMENT REVIEW

* * * * *

Rule **{12.34}**[*11.34*]

ESTIMATE OF FINANCIAL IMPACT REVIEW

Renumbering Additional Rule in Current Chapter 12:

Rule **{12.35}**[*12.25*]

EXPEDITED JUDICIAL REVIEW OF ORDERS OF THE ENERGY FACILITY SITING COUNCIL AND THE PUBLIC UTILITY COMMISSION

Clean Version:

Moving Rules from Chapter 11 to Chapter 12:

Rule 12.25

BAR ADMISSION, REINSTATEMENT, AND DISCIPLINARY PROCEEDINGS

* * * * *

Rule 12.27

JUDICIAL DISABILITY AND DISCIPLINARY PROCEEDINGS

* * * * *

Rule 12.30

BALLOT TITLE REVIEW

* * * * *

Rule 12.32
VOTERS' PAMPHLET EXPLANATORY STATEMENT REVIEW

* * * * *

Rule 12.34

ESTIMATE OF FINANCIAL IMPACT REVIEW

Renumbering Additional Rule in Current Chapter 12:

Rule 12.35

EXPEDITED JUDICIAL REVIEW OF ORDERS OF THE ENERGY FACILITY SITING COUNCIL AND THE PUBLIC UTILITY COMMISSION

ORAP COMMITTEE 2020
(Updated 3/9/20)

PROPOSAL NO.:	16
PROPOSER:	Lisa Norris-Lampe, Appellate Legal Counsel
AMENDING:	ORAP 11.25 -- Bar Admission, Reinstatement, and Disciplinary Proceedings
DATE:	December 19, 2019 (edited Jan 27, 2020)
	(Updated March 9, 2020)
Workgroup:	***Bill Kabeiseman, Lisa Norris-Lampe***

EXPLANATION:

(3/9/20 Update Note: Lisa Norris-Lampe has made one edit to the proposal, at 11.25(1)(a), to streamline/combine into subparagraph (iii) what had been proposed as (iii) and (iv). See pp 3 and 7 for that change. Otherwise, the Workgroup conferred after the last meeting and determined that no additional changes were needed.)

ORAP 11.25 governs the filing of requests/petitions/responses, records, and briefs in cases on review of opinions or decisions of trial panels of the Disciplinary Board or its Adjudicator, or the Board of Bar Examiners (BBX). The changes proposed in this amendment are intended to make the rule consistent with several recent changes to the Bar Rules of Procedure (BRs), to streamlines certain proceedings on review from the BBX, and otherwise to clarify and make consistent (to the extent possible) various provisions in the rule.

Summary of Issue and Proposed Changes:

Subsection (1) (General): Clarified that a new type of proceeding -- review of interlocutory suspensions ordered by the Disciplinary Board Adjudicator -- are now subject to the rule, per updates to the BRs; clarified references to the BRs, as well as to the Rules for Admission of Attorneys (RFAs), throughout the rule.

Subsection (2) (Bar Proceedings, non-interlocutory suspension): Created a new provision that governs a new type of proceeding under the BRs -- review of interlocutory suspensions ordered by the Disciplinary Board Adjudicator.

Subsection (3) (Bar Proceedings, disciplinary and contested reinstatement): Clarified the specific types of proceedings to which this part of the rule applies; removed the briefing timelines from this subsection and moved them to (and combined them in) new subsection (5), because the same briefing timelines apply to BBX proceedings covered in the next subsection.

Subsection (4) (BBX Character and Fitness Proceedings): Clarified that the BBX need not file a record with the court until a petition is filed; clarified the type of proceeding subject to this rule; clarified various submission and filing timelines. Note: We are also working with the BBX on adopting some conforming updates to the RFAs, to become effective together with these ORAP changes.

Subsection (5) (Briefing and Argument): Combined material from current subsection (2), together with current subsections (4) and (5), into one newly updated subsection that pertains to both briefing and argument.

Throughout: Other minor wording and punctuation updates.[1]

[1] Note: I am submitting a separate proposal that would move this rule to Chapter 12, such that it would be numbered 12.25.

RULE AS AMENDED *(Updated 3/9/20)*:

Edited version (new text in **{braces/boldface/underscore}**; omitted text in [*brackets/italics*]:

Rule 11.25

BAR ADMISSION, REINSTATEMENT, AND DISCIPLINARY PROCEEDINGS

(1) As used in this rule[, *the following are parties*]:

(a) **{The following are parties:}**

(**{i}**[*a*])The Oregon State Bar in a disciplinary, **{interlocutory suspension,}** contested reinstatement, or contested admission proceeding.

(**{ii}**[*b*])The respondent in a disciplinary **{or interlocutory suspension}** proceeding.

(**{iii}**[*c*])The applicant in a contested reinstatement **{or contested admission}** proceeding.

[*(d) The applicant in a contested admission proceeding.*][2]

{(b) "BR" refers to the Oregon State Bar Rules of Procedure.

(c) "RFA" refers to the Supreme Court of the State of Oregon - Rules for Admission of Attorneys.}

(2) **{Interlocutory Suspension Proceedings, Review of Adjudicator Order**

(a) A request concerning review of an order entered by the Bar's Disciplinary Board Adjudicator in an interlocutory suspension proceeding under BR 3.1 shall be filed with the Administrator, with proof of service on all parties and the Disciplinary Board, within 14 days after entry of the order.

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2 ***3/9/20 Update: The original proposal had retained this line, and the one immediately preceding it, as separate subparagraphs; this updated proposal combines them.***

(b) The response is due within 14 days after the request is filed.

(c) If the request seeks de novo review of the record of proceedings before the Adjudicator, upon receipt of service of the request, the Bar's Disciplinary Counsel shall file the record with the Administrator. The preparation, transmission, and service of the record is subject to ORAP 4.20, except that subsections (8) and (9) do not apply. Upon receipt of the record, the Administrator must send written notice to the parties.}

(**{3}**[*2*])Disciplinary and Contested Reinstatement Proceedings**{, Review of Trial Panel Opinion}**

(a) A **{request}**[*petition*] concerning **{review of}** a [*disciplinary proceeding or a*] trial panel opinion in a **{disciplinary proceeding under BR 10.1}** [*former member's contested reinstatement*] shall be filed with the Administrator, with proof of service on all parties, within 30 days after written notice by the Bar's Disciplinary Board Clerk of receipt of the [*trial panel*] opinion.

(b) **{A trial panel opinion in a contested reinstatement proceeding under BR 10.3, following court referral under BR 8.9, shall be filed with the Administrator, with proof of service on all parties, upon conclusion of the hearing.**

(c) Upon receipt of a request filed under subparagraph (a) or a trial panel opinion filed under subparagraph (b), the}[*The*] Bar's Disciplinary Counsel **{shall}**[*must*] file the record of the proceedings before the trial panel **{with the Administrator,}** pursuant to BR 10.4. The preparation, transmission, and service of the record is subject to ORAP 4.20, except that subsections (8) and (9) do not apply. Upon receipt of the record, the Administrator must send written notice to the parties.

[*(c) An opening brief shall be due no later than 28 days after the Administrator's notice to the parties of receipt of the record. An answering brief shall be due 28 days after filing of the opening brief. A reply brief, if any, shall be due 14 days after filing of the answering brief.*

(d) If a respondent files a petition but then fails to file a brief within the time allowed, the Bar must either:

(i) File a brief within the time allowed for filing an answering brief. The brief shall comply with the rules governing petitions and opening briefs. At the time the brief is filed, the Bar must indicate

whether it wishes to waive oral argument and submit the case on the record. Or:

(ii) Submit a letter stating that it wishes the matter submitted to the court on the record without briefing or oral argument. Notwithstanding waiver of briefing and oral argument under this paragraph, at the direction of the Supreme Court, the Bar shall file a petition and brief within the time directed by the court.]

([**{4}**][*3*])Contested Admission Proceedings**{, Board of Bar Examiners Decision}**

[(a) *The Bar must file the decision of the Board of Bar Examiners on reinstatement with the Administrator pursuant to RFA 9.55. The Bar also must file the record with the Administrator. The preparation, transmission, and service of the record is subject to ORAP 4.20, except that subsections (8) and (9) do not apply. Upon receipt of the record, the Administrator must send written notice to the parties.*]

([**{a}**][*b*])A petition concerning a **{review of a Board of Bar Examiners decision in a contested admission, character and fitness review proceeding}[***bar applicant's contested admission*] under Rule for Admission 9.60(1) shall be filed with the Administrator, [*together with an opening brief,*] with proof of service on all parties, within **{30}**[*28*] days after the **{date that the applicant received notice of the Board's decision, pursuant to RFA 9.55(7)}**[*Administrator's written notice to the parties of the court's receipt of the record of the proceedings before the Board*].

{(b) Within 14 days following receipt of service of a petition, the Board must file the record of proceedings before the Board, pursuant to RFA 9.60(2). The preparation, transmission, and service of the record is subject to ORAP 4.20, except that subsections (8) and (9) do not apply. Upon receipt of the record, the Administrator must send written notice to the parties.}

[*(c) An answering brief shall be due 28 days after filing of the opening brief. A reply brief, if any, shall be due 14 days after filing of the answering brief.*]

([**{5}**][*4*])**{Briefing and Argument}**

{(a)} A brief in any [*of the*] proceeding[*s*] described in **{subparagraphs (3) or (4)}**[*this rule*] must conform to ORAP 5.05, ORAP 5.35, and ORAP 9.17(5), except that no excerpt of record is required. The brief must show proof of service on all parties to the proceeding. The Bar shall be served by service on the Bar's Disciplinary Counsel.

{(b) In any proceeding described in subparagraphs (3) or (4):

(i) An opening brief shall be due no later than 28 days after the Administrator's notice to the parties of receipt of the record.

(ii) An answering brief shall be due 28 days after filing of the opening brief.

(iii) A reply brief, if any, shall be due 14 days after filing of the answering brief.

(c) In any proceeding described in subparagraph (3), if a respondent files a petition but then fails to file a brief within the time allowed, the Bar must either:

(i) File a brief within the time allowed for filing an answering brief. The brief shall comply with the rules governing petitions and opening briefs. At the time the brief is filed, the Bar must indicate whether it wishes to waive oral argument and submit the case on the record. Or:

(ii) Submit a letter stating that it wishes the matter submitted to the court on the record without briefing or oral argument. Notwithstanding waiver of briefing and oral argument under this paragraph, at the direction of the Supreme Court, the Bar shall file a petition and brief within the time directed by the court.}

(**{d}**[5])If **{a proceeding described in subparagraphs (3) or (4)}**[*the case*] is argued orally, the party who files the opening brief shall argue first.

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See ORS 9.536, and Oregon State Bar Rules of Procedure, which are found on the Oregon State Bar's website, <https://www.osbar.org>, and in Thomson/West's Oregon Rules of Court.

Clean Version:

Rule 11.25

BAR ADMISSION, REINSTATEMENT, AND DISCIPLINARY PROCEEDINGS

(1) As used in this rule:

(a) The following are parties:

(i) The Oregon State Bar in a disciplinary, interlocutory suspension, contested reinstatement, or contested admission proceeding.

(ii) The respondent in a disciplinary or interlocutory suspension proceeding.

(iii) The applicant in a contested reinstatement or contested admission proceeding.

(b) "BR" refers to the Oregon State Bar Rules of Procedure.

(c) "RFA" refers to the Supreme Court of the State of Oregon - Rules for Admission of Attorneys.

(2) Interlocutory Suspension Proceedings, Review of Adjudicator Order

(a) A request concerning review of an order entered by the Bar's Disciplinary Board Adjudicator in an interlocutory suspension proceeding under BR 3.1 shall be filed with the Administrator, with proof of service on all parties and the Disciplinary Board, within 14 days after entry of the order.

(b) The response is due within 14 days after the request is filed.

(c) If the request seeks de novo review of the record of proceedings before the Adjudicator, upon receipt of service of the request, the Bar's Disciplinary Counsel shall file the record with the Administrator. The preparation, transmission, and service of the record is subject to ORAP 4.20, except that subsections (8) and (9) do not apply. Upon receipt of the record, the Administrator must send written notice to the parties.

(3) Disciplinary and Contested Reinstatement Proceedings, Review of Trial Panel Opinion

(a) A request concerning review of a trial panel opinion in a disciplinary proceeding under BR 10.1 shall be filed with the Administrator, with proof of service on all parties, within 30 days after written notice by the Bar's Disciplinary Board Clerk of receipt of the [*trial panel*] opinion.

(b) A trial panel opinion in a contested reinstatement proceeding under BR 10.3, following court referral under BR 8.9, shall be filed with the Administrator, with proof of service on all parties, upon conclusion of the hearing.

(c) Upon receipt of a request filed under subparagraph (a) or a trial panel opinion filed under subparagraph (b), the Bar's Disciplinary Counsel shall file the record of the proceedings before the trial panel with the Administrator, pursuant to BR 10.4. The preparation, transmission, and service of the record is subject to ORAP 4.20, except that subsections (8) and (9) do not apply. Upon receipt of the record, the Administrator must send written notice to the parties.

(4) Contested Admission Proceedings, Board of Bar Examiners Decision

(a) A petition concerning a review of a Board of Bar Examiners decision in a contested admission, character and fitness review proceeding under Rule for Admission 9.60(1) shall be filed with the Administrator, with proof of service on all parties, within 30 days after the date that the applicant received notice of the Board's decision, pursuant to RFA 9.55(7).

(b) Within 14 days following receipt of service of a petition, the Board must file the record of proceedings before the Board, pursuant to RFA 9.60(2). The preparation, transmission, and service of the record is subject to ORAP 4.20, except that subsections (8) and (9) do not apply. Upon receipt of the record, the Administrator must send written notice to the parties.

(5) Briefing and Argument

(A) A brief in any proceeding described in subparagraphs (3) or (4) must conform to ORAP 5.05, ORAP 5.35, and ORAP 9.17(5), except that no excerpt of record is required. The brief must show proof of service on all parties to the proceeding. The Bar shall be served by service on the Bar's Disciplinary Counsel.

(b) In any proceeding described in subparagraphs (3) or (4):

(i) An opening brief shall be due no later than 28 days after the Administrator's notice to the parties of receipt of the record.

(ii) An answering brief shall be due 28 days after filing of the opening brief.

(iii) A reply brief, if any, shall be due 14 days after filing of the answering brief.

(c) In any proceeding described in subparagraph (3), if a respondent files a petition but then fails to file a brief within the time allowed, the Bar must either:

(i) File a brief within the time allowed for filing an answering brief. The brief shall comply with the rules governing petitions and opening briefs. At the time the brief is filed, the Bar must indicate whether it wishes to waive oral argument and submit the case on the record. Or:

(ii) Submit a letter stating that it wishes the matter submitted to the court on the record without briefing or oral argument. Notwithstanding waiver of briefing and oral argument under this paragraph, at the direction of the Supreme Court, the Bar shall file a petition and brief within the time directed by the court.

(d) If a proceeding described in subparagraphs (3) or (4) is argued orally, the party who files the opening brief shall argue first.

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See ORS 9.536, and Oregon State Bar Rules of Procedure, which are found on the Oregon State Bar's website, <https://www.osbar.org>, and in Thomson/West's Oregon Rules of Court.

ORAP COMMITTEE 2020
(Updated 3/9/20)

PROPOSAL NO.:	18
PROPOSER:	Chief Justice Martha L. Walters; Lisa Norris-Lampe, Appellate Legal Counsel
AMENDING:	ORAP 12.05 -- Direct Appeal or Judicial Review in the Supreme Court
DATE:	December 19, 2019 (edited Jan 27, 2020)
	(Updated March 9, 2020)
Workgroup:	***Ben Gutman, Aaron Landau, Cody Hoesly, Lisa Norris-Lampe, Jason Specht (and consulting Greg Chaimov)***

EXPLANATION:

(3/9/20 Update Note: The Workgroup retained most of the structure and essential content of the original proposal, but reworked some structure/text. See pp 2-5, 8-9).

ORAP 12.05 sets out several default rules for direct review cases in the Supreme Court that are not governed by other rules. This proposal addresses a couple of issues relating to that rule.

Summary of Issue and Proposed Changes:

New Subsection (5):

Most notably, the proposal adds a new subsection (5) that applies to direct review cases in which the legislature has provided for direct review of one of its own enactments -- ordinarily, such challenges are limited to certain operative provisions of a recent enactment that may be challenged on one or more identified bases (*e.g.*, PERS-related changes, breach-of-contract and constitutional challenges; new legislation that arguably raises revenue, etc.) In those types of challenges, the legislature typically provides for the filing of a petition in the Supreme Court, with no development of a factual record below; the court then must develop its own factual record, usually completed with the assistance of a special master.
In processing those types of cases, the court has identified areas in which the parties would benefit from more direction -- specifically relating to the nature and contents of the

initial case filings (typically, a petition and a response), and as to the development of a factual record that can serve as the basis for the court's consideration of the legal issues in the case. Proposed new subsection (5) would provide that type of direction. Generally speaking, the proposal is intended to clarify that the initiating documents in these types of proceedings are, in a way, akin to a complaint and an answer; it also allows for the scenario in which there was some sort of factual record developed below, but one or both parties think that the record is not sufficient for the court's purposes.

Other proposed changes:

The name of the rule has been updated to more accurately reflect the types of direct review cases that are filed in the Supreme Court (e.g., direct "appeals" -- ex: certain state appeals in criminal cases; direct "judicial reviews" -- ex: Energy Facility Siting Council site certificates and rulemaking; and "other direct review proceedings" -- *i.e.*, any other type of direct review case that is neither an "appeal" nor a "judicial review").

An "applicability" provision has been added as new subsection (1), which then permits removal of the repetitive recitation elsewhere in the rule that the cases are "to" or "by" "the Supreme Court."

Old subsection (4), the "expedited by statute" provision, has been removed, because it is unnecessary (it essentially stated that, when a statute requires expedited treatment, the court will comply).

Other minor wording and punctuation updates.

3/9/20 Update Note:

The Workgroup made minor, consistency-related edits to the title and to subsection (1) and (3).

As to new subsection (5), the Workgroup agreed with the proposed concept to require the petition to comply, to the extent practicable, with ORCP 18, and then require the filing of a response that complied, to the extent practicable, with ORCP 19. The Workgroup disagreed, however, with the original proposal's approach in requiring the petition and response to identify which facts were agreed-upon or disputed. The updated proposal instead sets out a two-step process: (1) the filing of a petition, response, and, if desired, a reply (to assert any affirmative allegation in avoidance of any affirmative defense asserted in the response); and then (2) a conferral requirement followed by the filing of a joint statement that sets out stipulated facts, identifies whether any facts remain disputed, and explains positions on the appointment of a special master. Finally, the Workgroup added two new briefing provisions, one to

clarify the time for filing briefs, and one to clarify briefing form and content requirements.

RULE AS AMENDED *(Updated 3/9/20)*:

Edited version (new text in **{braces/boldface/underscore}**; omitted text in [*brackets/italics*]:

Rule 12.05

DIRECT APPEAL**{,}**[*OR*] **{DIRECT}** JUDICIAL REVIEW**{, AND DIRECT REVIEW}** IN THE SUPREME COURT

{(1) This rule governs direct appeal, direct judicial review, and direct review proceedings in the Supreme Court.}

(**{2}**[*1*])**{When}**[*Where*] a statute authorizes a direct appeal from a court of law**{,}** [*to the Supreme Court,*][1] except as otherwise provided by statute or [*by*] rule of appellate procedure, the appeal shall be taken in the manner prescribed in the rules of appellate procedure relating to appeals generally.

(**{3}**[*2*])**{When}**[*Where*] a statute authorizes direct judicial review of an agency order[*or a legislative enactment by the Supreme Court*],[2] except as otherwise provided by statute**{ or rule of appellate procedure}**, the judicial review shall be initiated and conducted in the manner prescribed in the rules of appellate procedure relating to judicial review of agency orders generally.

(**{4}**[*3*])The **{case-initiating document}**[*notice of appeal or petition for judicial review*] shall state the statutory authority under which **{the}**[*a*] direct appeal**{, direct}** [*or*]judicial review**{, or direct review proceeding}** is **{being}** taken **{directly}** to the Supreme Court. Filing fees shall be assessed as provided in ORS 21.010.

{(5) When the legislature provides for direct review of a statute, except as otherwise provided by statute or court order:

(a) The petition shall, to the extent practicable, allege one or more claims for relief as provided in ORCP 18.

(b) A response to the petition shall be filed within 14 days after the petition is filed and shall, to the extent practicable, respond to the petitioner's claims for relief as provided in ORCP 19.

(c) The petitioner may file a reply to assert any affirmative allegations in avoidance of any affirmative defenses asserted in the response. A reply shall be filed within 14 days after the response is filed.

(d) No later than 14 days after the response described in paragraph (b) is filed, the parties shall confer about the facts necessary for the court's resolution of the legal and procedural issues, and the petitioner shall file a joint statement that:

(i) Identifies all stipulated facts;

(ii) States whether any facts are disputed and, if so, explains the parties' respective positions as to those facts; and

(iii) Explains the parties' positions as to whether the court should appoint a special master.

(d) The time for filing briefs set out in ORAP 5.80 applies, except that the opening brief is due 49 days after the court settles the record.

(e) To the extent practicable, the rules set out in ORAP Chapter 5 apply to the form and content of any brief filed. }

[*(4) When required to do so by statute, the court will expedite its disposition of the appeal or judicial review.[FN 3]*]

(**{6}**[*5*])On motion of a party or on the court's own initiative, the court may establish a special briefing schedule [*for the appeal or judicial review*].

FN 1 See, e.g., ORS 305.445 (tax court judgments and orders), ORS 662.120 (injunctions in labor dispute cases), and ORS 138.045(2) (certain pretrial orders in murder and aggravated murder cases).

FN 2 See, e.g., ORS 469.403(3) (**{energy}**[*nuclear*] facility sit**{e}**[*ing*] certificates).

[*3 See, e.g., ORS 138.261(6) and ORS 138.045(2) (requiring expedited disposition on appeal to the Supreme Court of a pretrial order dismissing or setting aside the accusatory instrument or suppressing evidence in a murder case).*]

RULE AS AMENDED *(Original Proposal)*:

Edited version (new text in **{braces/boldface/underscore}**; omitted text in [*brackets/italics*]:

Rule 12.05

DIRECT APPEAL**{,}**[*OR*] JUDICIAL REVIEW**{, OR OTHER REVIEW}** IN THE SUPREME COURT

{(1) This rule governs direct appeal, direct judicial review, or other direct review proceedings in the Supreme Court.}

(**{2}**[*1*])**{When}**[*Where*] a statute authorizes a direct appeal from a court of law**{,}** [*to the Supreme Court,*] FN 1 except as otherwise provided by statute or [*by*] rule of appellate procedure, the appeal shall be taken in the manner prescribed in the rules of appellate procedure relating to appeals generally.

(**{3}**[*2*])**{When}**[*Where*] a statute authorizes direct judicial review of an agency order or a legislative enactment**{,}** [*by the Supreme Court,*] FN 2 except as otherwise provided by statute**{ or rule of appellate procedure}**, the judicial review shall be initiated and conducted in the manner prescribed in the rules of appellate procedure relating to judicial review of agency orders generally.

(**{4}**[*3*])The notice of appeal or petition for judicial review shall state the statutory authority under which a direct appeal or judicial review is taken to the Supreme Court. Filing fees shall be assessed as provided in ORS 21.010.

{(5) When the legislature provides for direct review of a statute, unless the law provides otherwise:

(a) The petition for review shall:

(i) To the extent practicable, allege a claim for relief under ORCP 18; and

(ii) State whether a lower tribunal has developed a factual record that establishes sufficient factual findings necessary for the court's resolution of the legal and procedural issues; and

(iii) If the petitioner contends that a lower tribunal's factual record is not sufficient, allege any additional fact necessary for the court's resolution of the legal and procedural issues; or

(iv) If no lower tribunal has developed a factual record, allege all facts necessary for the court's resolution of the legal and procedural issues.

(b) The responsive pleading shall:

(i) Agree to or deny any fact alleged in the petition and otherwise, to the extent practicable, follow the standards set out in ORCP 19; and

(i) State whether it agrees with a statement in the petition of sufficient factual findings under subparagraph (a)(ii); and

(iii) If any party contends that a lower tribunal's record is not sufficient, or if no lower tribunal has developed a factual record, include any additional fact necessary for the court's resolution of the legal and procedural issues.

(c) Following the filing of the responsive pleading, if any fact is disputed, the court may direct the parties to confer and develop joint stipulated facts or otherwise identify any fact that remains in dispute that is necessary for the court to resolve the legal issues.}

[*(4) When required to do so by statute, the court will expedite its disposition of the appeal or judicial review.[FN 3]*]

(**{6}**[*5*])On motion of a party or on the court's own initiative, the court may establish a special briefing schedule for the appeal or judicial review.

_____

FN 1 See, e.g., ORS 305.445 (tax court judgments and orders), ORS 662.120 (injunctions in labor dispute cases), and ORS 138.045(2) (certain pretrial orders in murder and aggravated murder cases).

FN 2 See, e.g., ORS 469.403(3) (nuclear facility siting certificates).

[*3 See, e.g., ORS 138.261(6) and ORS 138.045(2) (requiring expedited disposition on appeal to the Supreme Court of a pretrial order dismissing or setting aside the accusatory instrument or suppressing evidence in a murder case).*]

Clean Version *(Updated 3/9/20)*:

Rule 12.05

DIRECT APPEAL, DIRECT JUDICIAL REVIEW, AND DIRECT REVIEW IN THE SUPREME COURT

(1) This rule governs direct appeal, direct judicial review, and direct review proceedings in the Supreme Court.

(2) When a statute authorizes a direct appeal from a court of law,[1] except as otherwise provided by statute or rule of appellate procedure, the appeal shall be taken in the manner prescribed in the rules of appellate procedure relating to appeals generally.

(3) When a statute authorizes direct judicial review of an agency order,[2] except as otherwise provided by statute or rule of appellate procedure, the judicial review shall be initiated and conducted in the manner prescribed in the rules of appellate procedure relating to judicial review of agency orders generally.

(4) The case-initiating document shall state the statutory authority under which the direct appeal, direct judicial review, or direct review proceeding is being taken directly to the Supreme Court. Filing fees shall be assessed as provided in ORS 21.010.

(5) When the legislature provides for direct review of a statute, except as otherwise provided by statute or court order:

(a) The petition shall, to the extent practicable, allege one or more claims for relief as provided in ORCP 18.

(b) A response to the petition shall be filed within 14 days after the petition is filed and shall, to the extent practicable, respond to the petitioner's claims for relief as provided in ORCP 19.

(c) The petitioner may file a reply to assert any affirmative allegations in avoidance of any affirmative defenses asserted in the response. A reply shall be filed within 14 days after the response is filed.

(d) No later than 14 days after the response described in paragraph (b) is filed, the parties shall confer about the facts necessary for the court's resolution of

the legal and procedural issues, and the petitioner shall file a joint statement that:

(i) Identifies all stipulated facts;

(ii) States whether any facts are disputed and, if so, explains the parties' respective positions as to those facts; and

(iii) Explains the parties' positions as to whether the court should appoint a special master.

(d) The time for filing briefs set out in ORAP 5.80 applies, except that the opening brief is due 49 days after the court settles the record.

(e) To the extent practicable, the rules set out in ORAP Chapter 5 apply to the form and content of any brief filed.

(6) On motion of a party or on the court's own initiative, the court may establish a special briefing schedule.

FN 1 See, e.g., ORS 305.445 (tax court judgments and orders), ORS 662.120 (injunctions in labor dispute cases), and ORS 138.045(2) (certain pretrial orders in murder and aggravated murder cases).

FN 2 See, e.g., ORS 469.403(3) (energy facility site certificates).

ORAP COMMITTEE 2020
(Updated 3/9/20)

PROPOSAL NO.: 21

PROPOSER: Lisa Norris-Lampe, Appellate Legal Counsel

AMENDING RULE(S): ORAP 12.20(7) -- Delete Subsection Regarding When Court Will Set Oral Argument Date

DATE SUBMITTED: January 24, 2019

(Updated March 9, 2020)

Workgroup: ***Bill Kabeiseman, Lisa Norris-Lampe***

EXPLANATION:

[Taken from Lisa Norris-Lampe's email:]

The certified question rule, ORAP 12.20, says in (7) that the case will be set for oral argument as soon as practicable after the parties' briefs are filed. The subparagraph should be eliminated. (1) The Supreme Court is trying to set argument earlier than once all the briefs are in; (2) subparagraph (3) already tells the parties that there may be argument, so there is no need for a separate section telling them when argument will be set; and (3) the rule creates an unnecessary restriction on the process of setting argument.

3/9/20 Update Note:

In reviewing the proposal, the Workgroup also proposes amending subsection (3) of ORAP 12.20 -- pertaining to whether parties may argue whether (or not) a question should be certified -- for the sake of clarity. (See pp 2, 4) The Workgroup has made no change to the original proposal to remove current subsection (7).

RULE AS AMENDED *(Updated 3/9/20)*:

Rule 12.20
CERTIFICATION OF QUESTION OF LAW TO SUPREME COURT BY FEDERAL COURTS AND OTHER STATE COURTS

The procedure for certifying a question of law to the Supreme Court under ORS 28.200 through 28.255 shall be as follows:

(1) (a) The certification order shall set forth the question of law sought to be answered and a statement of facts relevant to the question, including the nature of the controversy in which the question arose. The statement of facts may be a brief, memorandum, or other material from the file of the certifying court if it contains the relevant facts and shows the nature of the controversy.

(b) The certification order shall be signed by the presiding judge and forwarded to the Supreme Court by the certifying court's clerk of court or court administrator accompanied by a copy of the court's register of the case. If the certifying court's register does not show the names and addresses of the parties or their attorneys, the court clerk or administrator shall separately provide that information.

(2) The filing and first appearance fees in the Supreme Court shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification. The fees shall be collected when the parties file their stipulated or separate designations of record, as provided in subsection (5) of this rule.

(3) In deciding whether to accept a ~~The Supreme Court will consider whether to accept a question~~ certified question, the Supreme Court will not hold ~~to it without~~ oral argument unless it specifically directs otherwise.~~or written argument from the parties unless otherwise directed by the Supreme Court.~~

(4) The Administrator shall send a copy of the court's order accepting or declining to accept a certified question of law to the certifying court and to the parties.

(5) (a) If the court accepts certification of a question of law, the parties to the certified question shall attempt to agree on a designation of the part of the record of the certifying court necessary to a determination of the question. If the parties are unable to agree on a designation of record, each party may file a separate designation of record.

(b) A stipulated designation of record or the parties' separate designations of

record shall be filed within 14 days after the date of the court's order accepting certification.

(c) On receipt of a stipulated designation or separate designations of record, the Administrator shall request from the certifying court's clerk of court or court administrator the part or parts of the record as designated, and any parts of the record that the Supreme Court determines may be necessary in answering the certified question(s). The Administrator shall serve a copy of the request on the parties.

(6) (a) Unless otherwise ordered by the Supreme Court, the certified question of law shall be briefed by the parties. The proponent of the question certified to the court shall file the opening brief and any other party may file an answering brief. If the nature of the question is such that no party is the proponent of the question, the plaintiff or appellant shall file the opening brief and the defendant, respondent, or appellee shall file the answering brief.

(b) The opening brief shall be served and filed within 28 days after the date the Administrator requests the record from the certifying court. The answering brief shall be served and filed within 28 days after the date the opening brief is served and filed. The reply brief, if any, is due within 14 days of the date the answering brief is served and filed.

(c) As nearly as practicable, briefs shall be prepared as provided in ORAP 5.05 through 5.52, except that, in lieu of assignments of error, the brief shall address each certified question accepted by the court.

(7) ~~The case will be set for oral argument as soon as practicable after the parties' briefs are filed.~~

~~(8)~~ The court shall issue a written decision stating the law governing the question certified. Unless specifically ordered by the Supreme Court, costs will not be allowed to either party. The Administrator shall send to the parties copies of the court's decision at the time the decision is issued.

(8~~9~~) Petitions for reconsideration of the court's decision shall be subject to ORAP 9.25. After expiration of the period for filing a petition for reconsideration or after disposition of all petitions for reconsideration, the Administrator shall send a copy of the decision under seal of the Supreme Court to the certifying court and shall send copies thereof to the parties. Issuance of a sealed copy of the court's decision to the certifying court terminates the Supreme Court case.

CLEAN:

Rule 12.20
CERTIFICATION OF QUESTION OF LAW TO SUPREME COURT BY FEDERAL COURTS AND OTHER STATE COURTS

The procedure for certifying a question of law to the Supreme Court under ORS 28.200 through 28.255 shall be as follows:

(1) * * *

* * * * *

(3) In deciding whether to accept a certified question, the Supreme Court will not hold oral argument unless it specifically directs otherwise.

* * * * *

(7) The court shall issue a written decision stating the law governing the question certified. Unless specifically ordered by the Supreme Court, costs will not be allowed to either party. The Administrator shall send to the parties copies of the court's decision at the time the decision is issued.

(8) Petitions for reconsideration of the court's decision shall be subject to ORAP 9.25. After expiration of the period for filing a petition for reconsideration or after disposition of all petitions for reconsideration, the Administrator shall send a copy of the decision under seal of the Supreme Court to the certifying court and shall send copies thereof to the parties. Issuance of a sealed copy of the court's decision to the certifying court terminates the Supreme Court case.

ORAP COMMITTEE 2020
(Updated 3/9/20)

PROPOSAL NO.: 22

PROPOSER: Lisa Norris-Lampe, Appellate Legal Counsel

AMENDING: ORAP 16.03, 16.10, 1.35 -- eFiling, Applicability and eFilers

-- Also including ORAP 1.35

DATE: December 19, 2019 (edited Jan 27, 2020)

(Updated March 9, 2020)

Workgroup: ***Bill Kabeiseman, Lisa Norris-Lampe***

EXPLANATION:

(3/9/20 Update Note: The update proposes a conforming amendment to a footnote in ORAP 1.35. See pp 2, 4-5)

ORAP Chapter 16 governs appellate eFiling and eService. Currently, ORAP 16.03 (Applicability) and ORAP 16.10(1) (eFilers) state that only OSB members who are "authorized to practice law" in Oregon can eFile. This proposal would expand the authority to eFile to all OSB Members.

Summary of Issue and Proposed Changes:

This rule proposal was prompted by at least two cases involving inactive or suspended attorneys who were representing themselves in Bar discipline matters.

Previously, our eFiling system did not permit a nonactive member to register for eFiling; after an upgrade installed this fall, however, the system now permits such registration. As a result, nonactive members now, from a technical perspective, can register and eFile (or, relatedly, continue to use eFiling following a transition to inactive, suspended, or other "nonactive" status).

In light of that technical change, The Appellate eCourt Change Management Committee membership recommends that both ORAP 16.03 and ORAP 16.10(1) be amended to permit any OSB member to eFile, regardless of registration status. The benefits of those

amendments include:

- Eliminates the need for having Records staff manually check the status of lawyer-Filers, to ensure compliance with the current form of the rule.

- Permits suspended or inactive lawyers in active Supreme Court cases to eFile into those cases.

To the extent that any concern arises about suspended lawyers improperly using the system, we think that the risk of such use is exceptionally small and that, even if something like that were to occur, an opposing party would alert the court and appropriate steps would be taken.

3/9/20 Update:

In light of the proposed changes to ORAPs 16.03 and 16.10(1), the Workgroup recommends a conforming amendment to Footnote 1 in ORAP 1.35, which explains who may eFile with the appellate courts.

RULES AS AMENDED *(Updated 3/9/20)*:

Edited version (new text in **{braces/boldface/underscore}**; omitted text in [*brackets/italics*]:

Rule 16.03

APPLICABILITY

These rules apply to electronic filing in the Oregon Court of Appeals and the Oregon Supreme Court. At this time, only [*attorneys who are*] members of the Oregon State Bar [*and are authorized to practice law in Oregon*] are eligible to file documents electronically.

Rule 16.10

eFILERS

(1) Authorized eFilers

(a) Any member of the Oregon State Bar [*who is authorized to practice law*] may register to become an eFiler.

Rule 1.35

FILING AND SERVICE

(1) Filing

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

* * * * *

(ii) Delivery may be made as follows * * *:

(A) Unless an exception applies under ORAP 16.30 or ORAP 16.60(2), an active member of the Oregon State Bar must deliver any document for filing using the appellate courts' eFiling system.[1]

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

Clean Version:

Rule 16.03

APPLICABILITY

These rules apply to electronic filing in the Oregon Court of Appeals and the Oregon Supreme Court. At this time, only attorneys who are members of the Oregon State Bar are eligible to file documents electronically.

Rule 16.10

eFILERS

(1) Authorized eFilers

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

Rule 1.35

FILING AND SERVICE

(1) Filing

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

* * * * *

(ii) Delivery may be made as follows * * *:

(A) Unless an exception applies under ORAP 16.30 or ORAP 16.60(2), an active member of the Oregon State Bar must

deliver any document for filing using the appellate courts' eFiling system.[1]

---

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

ORAP COMMITTEE 2020
(Updated 3/9/20)

PROPOSAL NO.:	24
PROPOSER:	Alice Burnham, Appellate Court Services Division
AMENDING RULE(S):	ORAP 3.33(4)(d), Appendices 3.33-1 and 3.33-2 -- Correcting Citations and Removing Misleading Text from 3.33-1 ***-- Also including ORAP 3.33(4)(d)***
DATE SUBMITTED:	December 31, 2018 ***(Updated March 9, 2020)***
Workgroup:	***Bill Kabeiseman, Cody Hoesly, Lisa Norris-Lampe***

EXPLANATION:

Appendix 3.33-1 has two problems:

(1) It incorrectly states that it is an "Illustration for ORAP 3.33(4)(b)"; because of rule renumbering, it should be for (4)(c).

(2) The wording on the example implies that, when transcribers prepare a full transcript, they do not have to list dates, volume numbers, and page numbers.

Appendix 3.33-2 incorrectly states that it is an "Illustration for ORAP 3.33(4)(c)"; because of rule renumbering, it should be for (4)(d).

3/9/20 Update Note:

The Workgroup noted an incongruity between the two appendices, in that the proposal to amend Appendix 3.33-1 (certificate of preparation and service of transcript) would remove the option for the transcriber to state that he or she prepared all transcripts designated as part of the appeal (leaving only the option to list the transcripts by date, volume number, and page number), whereas Appendix 3.33-2 (certificate of filing transcript) retains the first "all transcripts" option. Appellate Court Records Office staff confirmed that the difference is because current ORAP 3.33(4)(d) -- which

provides the basis for Appendix 3.33-2 -- does not require transcribers to list the transcripts filed by date, volume number, and page number, so the Appendix gives them the option of being that specific or simply saying "all transcripts." (By contrast, the rule underlying Appendix 3.33-1, ORAP 3.33(4)(c), requires transcribers to list transcripts prepared by date, volume number, and page number).

The Workgroup does not see any reason why the two rules should be different; instead, the certificate of filing should include the detailed list of date, volume number, and page number, and then Appendix 3.33-2 should be updated accordingly. The updated proposal therefore includes a proposed amendment to ORAP 3.33(4)(d) (to make consistent with (4)(c)), and then a companion conforming amendment to Appendix 3.33-2.

Otherwise, the Workgroup conferred with Records Office staff and suggests that a sample table (containing volume number, date, and page numbers) be included in each of the appendices.

(The updated proposal does not change any of the other changes already proposed.)

RULE AS AMENDED *(Updated 3/9/20)*:

(Supplemental Proposal, 3/9/20 Update:)
ORAP 3.33
PREPARATION, SERVICE, AND FILING OF TRANSCRIPT

* * * * *

(4) It shall be the responsibility of each court reporter or transcriber with whom arrangements have been made to prepare a transcript to:

* * * * *

(c) Serve a copy of the transcript on each party required by ORS 19.370 and file with the Administrator and serve on each party, the trial court administrator, and the transcript coordinator a certificate of preparation and service of transcript2 within the time provided in ORS 19.370. The certificate of preparation and service of the transcript must list the dates of all proceedings transcribed, the volume numbers of the transcript(s), and the page numbers specific to each transcript. * * *

(d) Upon notice from the Administrator of the settlement of the transcript, file with the Administrator an electronic version of the transcript in the form required by ORAP 3.35(2) and, at the same time, file with the Administrator and serve on each party a certificate of filing of transcript.4 The certificate of filing **{must list the dates of all proceedings transcribed, the volume numbers of the transcript(s), and the page numbers specific to each transcript, and}** must be a separate document [*and may*] not [*be*] included as part of the electronic version of the transcript. Filing an electronic version of the transcript with the Administrator is in lieu of filing a paper transcript and shall be in the form provided in ORAP 3.35(2).
*****

(Updated 3/9/20, to include sample table:)
APPENDIX 3.33-1

Illustration for ORAP 3.33(4)(c~~b~~) and ORS 19.370

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

_____,	)	
Plaintiff-Appellant,	)	
(or Plaintiff-Respondent)	)	_____ County Circuit
	)	Court No. _____
	)	
v.	)	
_____,	)	CA A_____
Defendant-Respondent.	)	
(or Defendant-Appellant)	)	

CERTIFICATE OF PREPARATION
AND SERVICE OF TRANSCRIPT

I certify that I prepared ~~:~~

~~All of the transcript designated as part of the record for this appeal. [or]~~

~~T~~these parts of the transcript designated as part of the record for this appeal: ~~[List the dates of all proceedings transcribed, the volume number of the transcript(s), and the page numbers specific to each transcript.]~~

Volume #	Date	Page #s

I certify that the original of this Certificate was filed with the Appellate Court Administrator and copies were served on the trial court administrator and transcript coordinator on [date].

I certify that on [date] a copy of the transcript or part thereof prepared by me and a copy of this Certificate were served on:

[name and address of each person served]

[Date]

_____
Court Reporter or Transcriber

(Supplemental Proposal, 3/9/20, combined with original proposal:)
APPENDIX 3.33-2

Illustration for ORAP 3.33(4)(dc)

IN THE COURT OF APPEALS OF THE STATE OF OREGON

_____,	)	
Plaintiff-Appellant,	)	
(or Plaintiff-Respondent)	)	_____ County
	)	Circuit Court No. _____
	)	
v.	)	
_____,	)	CA A_____
Defendant-Respondent.	)	
(or Defendant-Appellant)	)	

CERTIFICATE OF FILING OF TRANSCRIPT

I certify that I prepared ~~:~~

~~All of the transcript designated as part of the record for this appeal. [or]~~

~~T~~ these parts of the transcript designated as part of the record for this appeal:

Volume #	Date	Page #s

~~_____.~~

The transcript is now settled.

I certify that on _____[date]_____ the transcript or part thereof prepared by me was filed with the Appellate Court Administrator in electronic form in the form required by ORAP 3.35(2).

I certify that on [date] a copy of this Certificate was served on:

[name and address of each person served]

[Date]

_____
Court Reporter or Transcriber