ORAP COMMITTEE 2022

Agenda Materials
Thursday, February 17, 2022

SUBSTANTIVE AMENDMENTS
(may appear to, or do, involve policy changes or considerations)

- Proposal # 1 -- ORAP 2.05(1) -- Service on Non-Appearing Parties

- Proposal # 2 -- ORAP 3.05(1) -- Remove Automatic Designation of Record

- Proposal # 5 -- ORAP 5.40(8)(c) -- Expand De Novo Review in Court of Appeals

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

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

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

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

- Proposal # 12 -- ORAP 11.35, 11.40 -- Possible Revisions re: Reapportionment Review

- Proposal # 15 -- ORAP 13.10, 14.05 -- Extend Time to Petition for Attorney Fees

ORAP COMMITTEE 2022
February 17 Materials

AMENDING RULE(S): Proposal # 1 -- ORAP 2.05(1) -- Service on Non-Appearing Parties

PROPOSER: Hon. Meagan A. Flynn, Supreme Court (additional research and details by S Armitage)

EXPLANATION:

The question here involves service requirements for a notice of appeal when the trial court rules before another party has appeared in the case.

ORAP 2.05(10)(a), which applies to service of the notice of appeal in civil cases, only requires service "on all other parties who appeared in the trial court." That tracks ORS 19.240(2)(a):

> "(2) The appeal shall be taken by causing a notice of appeal, in the form prescribed by ORS 19.250, to be served:
>
> "(a) On all parties who have appeared in the action, suit or proceeding[.]"

ORS 19.270(2)(a), however, suggests that there is an expanded service requirement, necessary for appellate jurisdiction:

> "(2) The following requirements of ORS 19.240, 19.250 and 19.255 are jurisdictional and may not be waived or extended:
>
> "(a) Service of the notice of appeal ***on all parties identified in the notice of appeal as adverse parties or***, if the notice of appeal does not identify adverse parties, on all parties who have appeared in the action, suit or proceeding, as provided in ORS 19.240 (2)(a), within the time limits prescribed by ORS 19.255."

(Emphasis added.)

On quick research, it does not appear that either the Court of Appeals or the Supreme Court has determined how this applies if no party has appeared in opposition.

If ORS 19.270(2)(a) may impose a jurisdictional requirement to serve identified parties regardless of whether they have appeared, then perhaps ORAP 2.05(10)(a) should be amended to direct it (on the theory that it is better to serve someone unnecessarily than to risk losing jurisdiction for failure to serve a necessary party).

Alternatively, perhaps a footnote should be added to note that ORS 19.270(2)(a) may require service on named parties whether or not they have appeared.

RULE AS AMENDED:

None. Current rule is:

Rule 2.05
CONTENTS OF NOTICE OF APPEAL

The notice of appeal shall be served and filed within the time allowed by ORS 19.255, ORS 138.071, or other applicable statute. Only the original need be filed. The notice of appeal shall be substantially in the form illustrated in Appendix 2.05 and shall contain:

(1) The complete title of the case as it appeared in the trial court, naming all parties completely, including their designations in the trial court (*e.g.*, plaintiff, defendant, cross-plaintiff, intervenor), and designating the parties to the appeal, as appropriate (*e.g.*, appellant, respondent, cross-appellant, cross-respondent). The title also shall include the trial court case number or numbers.

(2) The heading "Notice of Appeal" or "Notice of Cross-Appeal," as appropriate.

(3) A statement that an appeal is taken from the judgment or some specified part of the judgment,[1] the name of the court and county from which the appeal is taken, and the name of the trial judge or judges who signed the judgment being appealed.

(4) A designation of the adverse parties on appeal.

(5) The litigant contact information required by ORAP 1.30.

(6) A designation of those parts of the proceedings to be transcribed[2] and exhibits[3] to be included in the record in addition to the trial court file. If the record includes an audio or video recording played in the trial court, the designation of record should identify the date of the hearing at which the recording was played and, if the appellant wants the transcript to include a transcript of the recording, a statement to that effect.

(7) A plain and concise statement of the points on which the appellant intends to rely; but if the appellant has designated for inclusion in the record all of the testimony and all of the instructions given and requested, no statement of points is necessary.

(8) If more than 30 days has elapsed after the date the judgment was entered, a statement as to why the appeal is nevertheless timely.

(9) If appellate jurisdiction is not free from doubt, citation to statute or case law to support jurisdiction.

(10) Proof of service, specifying the date of service.

(a) In a civil case, the notice of appeal shall contain proof of service on all other parties who appeared in the trial court.

(b) In any civil case in which the adverse party is a governmental unit and an attorney did not appear, either in writing or in person, on behalf of the governmental unit in the proceedings giving rise to the judgment or order being appealed (for instance, in the prosecution of a violation, a contempt proceeding, or a civil commitment proceeding);

(i) The notice of appeal shall contain proof of service on the attorney for the governmental unit (for instance, the city attorney as to a municipality, the district attorney as to a county or the state); and

(ii) If the governmental unit is the state or a county, the notice of appeal shall also contain proof of service on the Attorney General.[4]

(c) In a criminal case, the notice of appeal shall contain proof of service on:

(i) The defendant, in an appeal by the state. The notice of appeal in such an appeal also shall contain proof of service of a copy of the notice of appeal on the Office of Public Defense Services when the defendant was represented by court-appointed counsel.[5]

(ii) The district attorney, in an appeal by the defendant. The notice of appeal in such an appeal also shall contain proof of service of a copy of the notice of appeal on the Attorney General.[6]

(d) In a juvenile dependency case, including a case involving the termination of parental rights, the notice of appeal shall contain proof of service on the Office of Public Defense Services when a parent was represented by court-appointed counsel.[7]

(e) In all cases, in addition to the foregoing requirements, the notice of appeal shall contain proof of service on:

(i) The trial court administrator; and

(ii) The transcript coordinator, if any part of the record of oral proceedings in the trial court has been designated as part of the record on appeal.[8]

(11) A certificate of filing, specifying the date the notice of appeal was filed with the Administrator.

(12) A copy of the judgment, decree or order appealed from and of any other orders pertinent to appellate jurisdiction.

[1] *See* ORAP 2.10 regarding filing separate notices of appeal when there are multiple judgments entered in a case, including multiple judgments in consolidated cases.

[2] *See* ORAP 3.33 regarding the appellant's responsibility to make financial arrangements with either the court reporter or the transcript coordinator for preparation of a transcript of oral proceedings.

[3] *See* ORAP 3.25 regarding making arrangements for transmitting exhibits to the appellate court for use on appeal. *See also* Uniform Trial Court Rule (UTCR) 6.120(2) and (3) regarding retrieval of exhibits by trial court administrators for use on appeal.

[4] Service of the notice of appeal on the Attorney General is for the purpose of facilitating the appeal and is not jurisdictional. *See* footnote 2 to ORAP 1.35 for the service address of the Attorney General.

[5] Service of the notice of appeal on the Office of Public Defense Services is for the purpose of facilitating the appeal and is not jurisdictional. The service address of the Office of Public Defense Services is 1175 Court Street, NE, Salem, Oregon 97301-4030.

[6] *See* footnote 4 to subparagraph (10)(b)(ii) of this rule.

[7] *See* footnote 5 to subparagraph (10)(c)(i) of this rule.

[8] *See* ORAP 1.35(2)(e).

See ORS 19.240(3) and ORS 19.250; *see also* ORAP 8.20 regarding bankruptcy. In a criminal case, if a defendant appeals a judgment of conviction based only on a plea of guilty or no contest, see ORS 138.085.

See Appendix 2.05 for a form of notice of appeal.

ORAP COMMITTEE 2022
February 17 Materials

AMENDING RULE(S): Proposal # 2 -- ORAP 3.05(1) -- Remove Automatic Designation of Record

PROPOSER: Charles Hinkle

EXPLANATION:

[Quoted from email:]

> Greetings. I want to try once more to persuade the committee to amend ORAP 3.05. In February 2020, as noted below, the committee declined to do so. Mr. Armitage explained the committee's reasoning as follows:
>
> > "While I cannot speak for what motivated individual votes, my sense of the discussion was that the committee was concerned about administrative aspects of the change. Treating the trial court file and exhibits as essentially automatically designated is administratively simple; breaking the file into pieces based on a designation would be administratively complex and expensive; and the committee saw little harm in treating the entire trial court file as if it had been designated."
>
> That statement is based on two erroneous assumptions. First, it assumes that under current law, trial court exhibits are "automatically designated" as part of the record on appeal. Second, Mr. Armitage's reference to "breaking the file into pieces based on a designation" apparently assumes that exhibits that have been admitted into evidence at trial remain physically as part of the trial court file.
>
> Neither of those assumptions is correct. As for the second assumption, trial court exhibits are returned to the attorneys at the conclusion of the trial. They aren't retained in the courthouse as part of the court file. "Unless otherwise ordered ***, all exhibits shall be returned to the custody of counsel for the submitting parties upon conclusion of the trial or hearing." UTCR 6.120(1). Thus, when a notice of appeal is filed and the trial court clerk or administrator prepares "the file" to send to the Court of Appeals, the exhibits are not "broken" away from the file. They aren't in the file.
>
> The committee's first assumption, that trial court exhibits are "automatically designated" as part of the record on appeal, is more troubling, because it is flatly contrary to law. There is no such thing as "automatic" designation of exhibits; if trial exhibits are not designated, they are not part of the record on appeal, and they are not before the appellate court.
>
> Several appellate opinions illustrate the point. In Hersey v. Leon, 314 Or App 227 (2021), the court did not consider the appellant's first assignment of error, solely for the reason

that the appellant did not designate the trial exhibits as part of the record:

> "We conclude that **plaintiff's failure to designate the trial exhibits as part of the appellate record** renders her assignment of error unreviewable on appeal. 'An appellant bears the burden of providing a record sufficient to demonstrate that error occurred.' Ferguson v. Nelson, 216 Or App 541, 549, 174 P3d 620 (2007). Plaintiff's arguments are dependent on the relevant documents admitted as exhibits at trial ***. Plaintiff was aware of the appellate record deficiency at least by the time she prepared the opening brief but did not seek to correct it. *** **We do not have the trial exhibits before us** and attaching in the excerpt of record some of the documents that plaintiff asserts were admitted at trial as exhibits is not a sufficient alternative. *** We disagree with any assessment of the parties that any portion of plaintiff's first assignment of error on appeal is reviewable without the relevant trial exhibits. We thus decline to address plaintiff's first assignment of error." 314 Or App at 229-30 (footnote omitted; boldface added).

The ruling in Hersey v. Leon was not new. Sixty years ago, the Supreme Court held: "These exhibits have not been made a part of the agreed narrative statement **nor have they been designated by either party** to be included in the record as provided in ORS 19.074. **They are, therefore, not before the court**." Lang v. Hill, 226 Or 371, 378 (1961) (boldface added).

The Court of Appeals has reiterated the point. "However, defendants, as appellants, did not designate the exhibits introduced at trial as part of the record on appeal. It was their duty to do so. ORS 19.029(1)(d). Without those exhibits we cannot review the trial court's decision except to determine if the pleadings are sufficient to support the holding." Troutman v. Erlandson, 44 Or App 239, 245 (1980).

In a case in which "[n]o evidence exhibits were designated, *** our review is limited to the sufficiency of the pleadings and whether the pleadings support the judgment." Reeves v. National Hydraulics Co., 153 Or App 639, 641-42 (1981).

These cases demonstrate that Oregon law does not recognize an "automatic" designation of trial exhibits as part of the record on appeal. If an appellant wants the Court of Appeals to review the contents of trial exhibits, the appellant must designate them in the notice of appeal as part of the record on appeal.

ORAP 3.05(1) currently states that "the trial court record on appeal shall consist of the trial court file [and] exhibits ***." That is not correct, and it should be amended. There is no good reason not to use the wording of the opening sentence of ORS 19.365(2):

"The record on appeal consists of those parts of the trial court file, exhibits and record of oral proceedings in the trial court that are designated under ORS 19.250."

Because its wording differs from the statute, ORAP 3.05(1) suggests that a different meaning is intended. That is the normal understanding of changes in statutory language:

"Ordinarily, any essential change in the phraseology of a statutory provision indicates an intention on the legislature's part to change the meaning of such provision rather than to interpret it." Roy L. Houck & Sons v. Tax Com., 229 Or 21, 32, 366 P2d 166 (1961). But the Appellate Rules Committee has no authority to amend a statute, and the wording of ORAP 3.05(1) should track the wording of the controlling statute, ORS 19.365(2), especially since the Committee's assumption about the current law relating to the necessity for designating exhibits, as expressed in Mr. Armitage's email of February 24, 2020, is erroneous.

RULE AS AMENDED:

[Taken from 2020 materials:]

Rule 3.05
TRIAL COURT RECORD ON APPEAL;
SUPPLEMENTING THE RECORD

(1) In any appeal from a trial court, the trial court record on appeal shall consist of as much of the trial court file, exhibits, and ~~as much of the~~ record of oral proceedings as has been designated in the notice or notices of appeal filed by the parties.

(2) (a) Except as provided in this subsection, the record of oral proceedings shall be a transcript

(b) When the oral proceedings were recorded by audio or video recording equipment, on motion of a party showing good cause, the appellate court may waive preparation of a transcript and order that the appeal proceed on the audio or video record alone.

(c) When an audio or video recording is played in court, the recording is part of the record, but arrangements may be made for preparation of a transcript of the recording as provided in ORAP 3.33.

(d) The parties may file an agreed narrative statement in lieu of or in addition to a transcript, as provided in ORS 19.380 and ORAP 3.45.

(3) The appellate court, on motion of a party or on its own motion, may order that any thing in the record in the trial court whether or not designated as part of the record in the notice of appeal, be transmitted to it or that parts of the oral proceedings be copied or transcribed, certified and transmitted to it.[1]

[1] *See* ORS 19.365(4) regarding supplementation and correction of the record; *see also* ORAP 3.40 regarding correction of transcripts.

ORAP COMMITTEE 2022
February 17 Materials

AMENDING RULE(S): Proposal # 5 -- ORAP 5.40(8)(c) -- Expand De Novo Review in Court of Appeals

PROPOSER: Laura Graser

EXPLANATION:

[See attached letter from Ms. Graser, as well as the attached letter in support from Andrew McLain.]

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. ~~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 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.

---

[*] *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.

Andrew McLain
McLain Legal Services PC
620 SW 5th Ave, Suite 912
Portland, Oregon 97204
andy@mclainlegal.com

Mr. Stephen P. Armitage
Oregon Supreme Court
1163 State St.
Salem, Oregon 97301
EMAIL: stephen.p.armitage@ojd.state.or.us BY EMAIL ONLY

December 31, 2021

RE: Comments to the ORAP committee regarding ORAP 5.40(8)(c)

Mr. Armitage,

At the urging of my longtime friend and appellate partner Laura Graser, I am writing to urge the committee to adopt a rule change she has proposed, to ORAP 5.40(8)(c). The proposed change would give the Courts of Appeals in Oregon, a wider latitude to review errors of fact, not only in "exceptional cases" but also, to aid in the development of the law.

> Current:
>
> (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 in exceptional cases. Consistently with that presumption against the exercise of discretion, requests under paragraph (a) or (b) of this section are disfavored.
>
> Proposed:
>
> 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.*

I have been trying domestic relations cases in Oregon courts for 15 years, and it is my perception that, though Oregon families continue to change and evolve, it is increasingly rare that judge-made law facilitates this evolution.

Oregon families would wait a long time, if they were relying on the legislature to make important and nuanced changes to the way Oregon's law impacts their arrangements. For example, though *Beal and Beal* created a cause of action to equitably resolve domestic partnerships in 1978, the legislature's only addition to that doctrine has been to confuse the nomenclature by adopting a "domestic partnership" law that is now essentially a dead letter.

Family law is one of the most pressing agendas with which Oregon's circuit courts must be concerned, so common is its application, but though the swift administration of justice is aided by treating most families the same, this expediency does not provide justice for all. The current standard, extant since 2009, has allowed Circuit Court Judges to feel confident that, by cloaking their substantive decisions in the language of discretion, their decisions are beyond review. Most judges of course seek to do substantial justice, but when an official of any rank believes their decisions are beyond review, the decisions become arbitrary—and the potential for injustice grows.

The change Ms. Graser suggests may not lead to a great many more cases reviewed under a *de novo* standard, but the change would signal to the Circuit Courts, that "some evidence" to support a discretionary call on the part of an individual judge, may not be sufficient to protect that ruling from appellate review. The Courts of Appeals would not have to find a case to be "extraordinary" in order to exercise discretion to review some or all of the factual determinations, meaning that the law could resume its evolution through considered appellate decisions.

I urge the committee to make this change. 12 years have gone by since the legislature and the Rules committee significantly curtailed appellate review of domestic relations cases, and in my opinion the expediency obtained, was at too high a cost to the individuals and families who seek relief in the Oregon circuit courts. A minor course correction at this point, as suggested above, would be worthy.

Sincerely,

/S/
Andrew McLain, OSB #064324
Principal Attorney
McLain Legal Services PC

Laura Graser
Attorney at Law
graser@lauragraser.com
503-287-7036

Comments to the ORAP committee regarding ORAP 5.40(8)(c) (review *de novo*)

December 31, 2021

Mr. Armitage,

I wish to resubmit the comment I made last cycle about review *de novo* in family law cases. I am hoping that the passage of time might make a difference. I believe the problem that I described last cycle continues.

I have no opinion about review *de novo* in parental termination cases. For what it's worth, I have heard TPR appellate practitioners say they would like to get rid of review *de novo* in those cases. In addition, I have heard juvenile appellate practitioners who are happy with review only for errors of law. My concern is for appeals for custody, parenting time, spousal support, and the like, between private parties.

My argument, in sum, is that in family law, the statute says that the judge can divide property, determine custody, award support, and so on, but it is case law that fleshes that out. Oregon families are changing, and the law needs to change with them. With effectively no review *de novo*, that cannot happen. Also, the law needs to develop uniformly throughout the state. This can only be done in the courts, on a case-by-case basis.

The law was frozen, as a practical matter, in 2009, when the Court of Appeals stopped reviewing *de novo*.

Nothing has changed (except the passage of time) since I last commented on this ORAP, so I am making the same comments, as follows.

December 31, 2019

Mr. Armitage,

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.

I propose the following.

ORAP 5.40(8)

> (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.
>
> ---
>
> <u>Current:</u>
>
> <u>(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 in exceptional cases. Consistently with that presumption against the exercise of discretion, requests under paragraph (a) or (b) of this section are disfavored</u>.

Proposed:

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*.

(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.

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.

So for these reasons, I ask the ORAP committee to consider these thoughts.

Respectfully,
Laura Graser
graser@lauragraser.com

ORAP COMMITTEE 2022
February 17 Materials

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

PROPOSER: Hon Robyn Ridler Aoyagi, Court of Appeals

EXPLANATION:

[Quoted with minor edits from Judge Aoyagi's email:]

> My understanding of the intent of the current rule is that a party may do a combined ***argument*** section but not combined ***preservation*** or ***standard of review*** sections. But people don't read it that way, which often results in inadequate "combined" preservation and standard of review sections that make a lot more work for the Court of Appeals, particularly in civil cases (and noncriminal cases generally). And I think that the current phrasing of the rule is somewhat ambiguous, so one can't fault parties too much.
>
> The proposal would be to make the point clear by adding a sentence to existing ORAP 5.45(6).

RULE AS AMENDED:

Rule 5.45
ASSIGNMENTS OF ERROR AND ARGUMENT

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

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

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

(4) (a) Each assignment of error must demonstrate that the question or issue presented by the assignment of error timely and properly was raised and preserved in the

lower court. The court may decline to consider any assignment of error that requires the court to search the record to find the error or to determine if the error properly was raised and preserved. Under the subheading "Preservation of Error":

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

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

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

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

(5) Under the subheading "Standard of Review," each assignment of error must identify the applicable standard or standards of review, supported by citation to the statute, case law, or other legal authority for each standard of review.[2]

(6) Each assignment of error must be followed by the argument. If several assignments of error present essentially the same legal question, the argument in support of them may be combined so far as practicable. Only the argument may be combined; each assignment of error must still have its own preservation and standard-of-review sections.

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

---

[1] For an error to be plain error, it must be an error of law, obvious and not reasonably in dispute, and apparent on the record without requiring the court to choose among competing inferences; in

determining whether to exercise its discretion to consider an error that qualifies as a plain error, the court takes into account a non-exclusive list of factors, including the interests of the parties, the nature of the case, the gravity of the error, and the ends of justice in the particular case. *See State v. Vanornum*, 354 Or 614, 629-30, 317 P3d 889 (2013).

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

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

ORAP COMMITTEE 2022
February 17 Materials

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

PROPOSER: Thomas M. Christ

EXPLANATION:

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

[Quoted from Mr. Christ's letter:]

> One [proposal] is to change the rule that denies pro se litigants the opportunity for oral argument as a matter of right. See ORAP 6.10(4) ("Only active members of the Oregon State Bar shall argue unless the court, on motion***, orders otherwise."). I believe oral argument is an important part of appellate practice, especially for appellants. It's their last chance to persuade the Court of Appeals that something went awry in the proceedings below, and their only chance to respond to any questions or concerns the judges might have about their argument for reversal. It shouldn't be left to the court's discretion whether to offer oral argument to unrepresented litigants. That opportunity is as important to their cases on appeal as it is to their cases in the trial courts, where there are no lawyer-only restrictions on oral argument. Just today, while sitting as a pro tern judge in Multnomah County Circuit Court, I heard two arguments by pro se litigants. They weren't the best arguments I've ever heard, but they were still helpful to me in understanding their cases. Indeed, I might not have understood them without those arguments and their answers to my questions from the bench, given the quality of their written submissions. So, allowing them to be heard improved my decision-making. The generally poor quality of written submissions by non lawyers is, if you think about it, all the more reason to allow them to argue their cases orally.
>
> I've heard concerns that nonlawyers can be disruptive when allowed to speak in court, but that has not been my experience. To be sure, they are less familiar with procedures and protocols, like when to speak and when not. But, on the whole, I've found them no more difficult than some members of the Bar.
>
> The real benefit, however, to allowing nonlawyer litigants to argue their cases is that it will help them to feel that they got a fair hearing - that they were given as much respect and courtesy as litigants who can afford counsel. And that, in turn, will help promote confidence in the judiciary and respect for its rulings.

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

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

RULE AS AMENDED:

None. Current rule provides:

Rule 6.10
WHO MAY ARGUE;
FAILURE TO APPEAR AT ARGUMENT

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

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

(3) An attorney who was a witness for a party, except as to merely formal matters

such as attestation or custody of an instrument, shall not argue the cause without leave of the court.

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

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

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

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

ORAP COMMITTEE 2022
February 17 Materials

AMENDING RULE(S): Proposal # 10A -- ORAP 8.45 -- Delete or Amend Duty to Notify Court of Mootness

PROPOSER: Ernest Lannet, Office of Public Defense Services

EXPLANATION:

See also Proposal 10B, Solicitor General proposal for amendment to same rule.

[Quoted from email:]

> Given the change in the law in Couey v. Atkins, and mootness is a jurisprudential and not jurisdictional question, ORAP 8.45's imposition of a duty to inform the court of the facts giving rise to a question about mootness does not reflect the correct legal analysis and allocation of the burden of proof/persuasion, as described in *Dept. of Human Services v. A.B.*, 360 Or 412 (2018). The rule can also introduce ethical issues for attorneys, for example, when the basis for probable mootness is information related to the representation of a client (duty to disclose and candor to the court vs. duty to maintain client confidentiality) or, alternatively, when an attorney believes that the opposing party would believe that the case is moot based on information known to the attorney but the attorney also has legitimate legal arguments that the case is *not* probably moot.
>
> The first recommendation is to repeal ORAP 8.45 in its entirety.
>
> Alternatively, the second recommendation is to substantially amend it to reflect the proper burden and to avoid any implied directive to disclose information related to the representation of a client. The proposed amendments below explicitly requires the filing of a motion to dismiss to ensure a consistent procedure for resolving the matter. The costs question is addressed below, but it may need additional analysis and input from practitioners who do not represent financially qualified persons.

RULE AS AMENDED:

- Primary recommendation: Repeal ORAP 8.45.
- Alternative recommendation: Amend rule as follows:

Rule 8.45
~~**DUTY TO SERVE NOTICE OR**~~

~~FILE~~ MOTION ON OCCURRENCE OF EVENT RENDERING APPEAL MOOT

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

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

ORAP COMMITTEE 2022
February 17 Materials

AMENDING RULE(S): Proposal # 10B -- ORAP 8.45 -- Revise Procedures for Notice of Probable Mootness

PROPOSER: Ben Gutman, Solicitor General

EXPLANATION:

See also Proposal 10A, OPDS proposal for amendment to same rule.

ORAP 8.45 requires a party that "becomes aware of facts that probably render an appeal moot" to file a notice to that effect with the court, and it permits the party to move to dismiss the appeal. But it does not set forth any procedure for litigating the mootness issue when no motion is filed. That can lead to confusion especially in cases where there may be collateral consequences of the judgment that prevent the appeal from going moot, which the party asserting mootness may not know about. In *Dept. of Human Services v. A.B.*, 362 Or 412 (2018), the Supreme Court suggested a burden-shifting framework where the party asserting mootness initially explains why the appeal is moot, the opposing party identifies any continuing practical effects or collateral consequences, and the first party then has an opportunity to show that those effects or consequences are legally insufficient or factually incorrect. But the appellate courts do not always sequence the filings on mootness that way.

I propose that a provision be added to ORAP 8.45 providing a procedure for addressing questions of mootness. For example, the rule could specify that after a party files a notice of probable mootness, any other party opposing dismissal on mootness grounds may file a response within 14 days explaining why the appeal is not moot, and giving the first party seven days to file a reply.

RULE AS AMENDED:

No language proposed at this time. If the committee thinks that this is a concept worth pursuing, I suggest putting together a subcommittee to draft a specific proposal.

ORAP COMMITTEE 2022
February 17 Materials

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

PROPOSER: Tiffany Keast

EXPLANATION:

None provided.

RULE AS AMENDED:

Rule 10.15
JUVENILE DEPENDENCY AND ADOPTION CASES

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

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

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

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

(b) When the appellant is eligible for court-appointed counsel on appeal, the preparation of transcript at state expense is governed by the policies and procedures of

the Office of Public Defense Services.[2]

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

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

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

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

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

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

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

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

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

(8) Notwithstanding ORAP 7.30, a motion made before oral argument shall not toll

the time for transmission of the record, filing of briefs, or hearing argument.

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

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

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

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

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

---

[1] *See* Appendix 10.15.

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

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

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

ORAP COMMITTEE 2022
February 17 Materials

AMENDING RULE(S): Proposal # 12 -- ORAP 11.35, 11.40 -- Possible Revisions re: Reapportionment Review

PROPOSER: Ben Gutman, Solicitor General

EXPLANATION:

Every ten years the state must implement new legislative and congressional district maps to account for population changes. ORAP 11.35 and 11.40 govern the Supreme Court's expedited review of the maps. We conducted the 2021 redistricting litigation under temporary rules that accounted for the delayed census data that year, and it is worth considering whether some of the features of that rule (such as electronic service of all documents) should be made permanent.

As a practical matter, we probably do not need amendments in place before 2030. But I think it makes sense to consider amendments now while the experience is fresh in the minds of those who worked on the cases, so that we can implement any lessons learned.

If the committee is interested in the concept I can reach out to the other attorneys who worked on both sides of the litigation for their ideas, and it would be helpful to hear from court staff as well.

RULE AS AMENDED:

No language proposed at this time. If the committee thinks that this is a concept worth pursuing, I suggest putting together a subcommittee to draft a specific proposal.

ORAP COMMITTEE 2022
February 17 Materials

AMENDING RULE(S): Proposal # 15 -- ORAP 13.10, 14.05 -- Extend Time to Petition for Attorney Fees

PROPOSER: Hon Lynn Nakamoto, Supreme Court

EXPLANATION:

Justice Nakamoto suggested that the current 21 days to file a petition for attorney fees is insufficient, thus generating motions to extend time. She suggests amending ORAP 13.10(2) to make the period 28 days. Conforming change needed to ORAP 14.05(3)(b) regarding time to issue appellate judgment.

RULE AS AMENDED:

Rule 13.10
PETITION FOR ATTORNEY FEES

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

(2) A petition for attorney fees shall be served and filed within 28 ~~21~~ days after the date of decision. The filing of a petition for review or a petition for reconsideration does not suspend the time for filing the petition for attorney fees.

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

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

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

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

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

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

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

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

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

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

---

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

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

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

See Appendix 13.10.

Rule 14.05
APPELLATE JUDGMENT

(1) As used in this rule,

(a) "Appellate judgment" means a decision of the Court of Appeals or Supreme Court together with a final order and the seal of the court.

(b) "Decision" means a designation of prevailing party and allowance of costs together with,

(i) In an appeal from circuit court or the Tax Court, or on judicial review of an agency proceeding, an order disposing of the appeal or judicial review or affirming without opinion; or with respect to a per curiam opinion or an opinion indicating the author, the title page of the opinion containing the court's disposition of the appeal or judicial review.

(ii) In a case of original jurisdiction in the appellate court, in addition to the documents specified in subparagraph (i) of this paragraph, an order denying, dismissing, or allowing without opinion the petition or other document invoking the court's jurisdiction. An order allowing a petition for an alternative writ of mandamus or writ of habeas corpus is not a decision within the meaning of this rule.

(c) "Designation of prevailing party and allowance of costs" means that part of a decision indicating, when relevant, which party prevailed before the appellate court, whether costs are allowed, and, if so, which party or parties are responsible for costs.

(d) "Final order" means that part of the appellate judgment ordering payment of costs or attorney fees in a sum certain by specified parties or directing entry of judgment in favor of the Judicial Department for unpaid appellate court filing fees, or both.

(2) The decision of the Supreme Court or Court of Appeals is effective:

(a) With respect to appeals from circuit court or the Tax Court, on the date that the Administrator sends a copy of the appellate judgment to the court below.

(b) With respect to judicial review of administrative agency proceedings, on the date that the Administrator sends a copy of the appellate judgment to the administrative agency.

(c) With respect to original jurisdiction proceedings, within the time or on the date specified in the court's decision or, if no time period or date is specified, on the date of entry of the appellate judgment. When the effective date is specified in the court's decision, the decision is effective on that date notwithstanding the date the appellate judgment issues.

(3) The Administrator shall prepare the appellate judgment, enter the appellate judgment in the register, send a copy of the appellate judgment with the court's seal affixed thereto to the court or administrative agency from which the appeal or judicial review was taken, and send a copy of the appellate judgment to each of the parties.

(a) With respect to a decision of the Court of Appeals, the Administrator will not issue the appellate judgment for a period of 35 days after the decision to allow time for a petition for review pursuant to ORS 2.520 and ORAP 9.05. If a petition for review is filed, the appellate judgment will not issue until the petition is resolved.

(b) With respect to an order of the Supreme Court denying review or a decision of the Supreme Court, the Administrator will not issue the appellate judgment for a period of 28 ~~21~~ days after the order or decision to allow time for a petition for reconsideration under ORAP 9.25 or a petition for attorney fees or submission of a statement of costs and disbursements under ORAP 13.05 and ORAP 13.10.

(c) If one or more statements of costs and disbursements, petitions for attorney fees, or motions or petitions for reconsideration are filed, the Administrator will not issue the appellate judgment until all statements of costs and disbursements, petitions for attorney fees, or petitions for reconsideration are determined by order of the court.

(d) Notwithstanding paragraphs (a), (b), and (c) of this subsection, a party may request immediate issuance of the appellate judgment based on a showing that no party intends to file a petition for review, petition for attorney fees, or any other thing requiring a judicial ruling.

(4) (a) The money award part of an appellate judgment for costs, attorney fees, or both, in favor of a party other than the Judicial Department that has been entered in the judgment docket of a circuit court may be satisfied in the circuit court in the manner prescribed in ORS 18.225 to 18.238, or other applicable law.

(b) The money award part of an appellate judgment for an unpaid filing fee or other costs in favor of the Judicial Department shall be satisfied as follows. Upon presentation to the Administrator of sufficient evidence that the amount of the money judgment has been paid:

(i) The Administrator shall note the fact of payment in the appellate court case register; and

(ii) If requested by the party and upon payment of the certification fee, the Administrator shall issue a certificate showing the fact of satisfaction of the money award. As requested by the party, the Administrator shall issue a certificate to the party, to the court or administrative agency to which a copy of the appellate judgment was sent, or to both.

See generally ORS 19.450 regarding appellate judgments in appeals from circuit court and Tax Court. A party considering petitioning the United States Supreme Court for a writ of certiorari with respect to an Oregon appellate court decision should review carefully 28 USC § 2101(c) and the United States Supreme Court Rules, currently US Sup Ct Rule 13, to determine the event that triggers the running of the time period within which to file the petition. *See also International Brotherhood v. Oregon Steel Mills, Inc.*, 180 Or App 265, 44 P3d 600 (2002) (majority, concurring, and dissenting opinions).