

ORAP COMMITTEE 2022

Agenda Materials
Thursday, February 17, 2022

TECHNICAL AMENDMENTS

(do not appear to involve policy changes or seem likely to be approved without need for committee discussion)

- Proposal # 3 -- ORAP 3.30(2) -- Clarify Party Responsible to File Motion to Extend Time to Prepare Transcript
- Proposal # 4 -- ORAP 5.05(3)(d) -- Delete Cover Page Requirement for Date and Month of Brief Filing
- Proposal # 7 -- ORAP 5.95(2) etc. -- Change Service Requirements from Two Copies to One
- Proposal # 9 -- ORAP 7.05(1)(d), Appendix 7.10-3 -- Change Terminology from "Opposing Counsel" to "Opposing Party"
- Proposal # 13 -- ORAP 12.07, Reply Briefs in Certain Expedited Appeals
- Proposal # 14 -- ORAP 12.20 -- Party Designation in Certified Question Cases

ORAP COMMITTEE 2022
February 17 Materials

AMENDING RULE(S): Proposal # 3 -- ORAP 3.30(2) -- Clarify Party Responsible to File Motion to Extend Time to Prepare Transcript

PROPOSER: Daniel Parr, Appellate Court Administrator

EXPLANATION:

There is confusion on who is responsible for filing a MOET to prepare a transcript. This change will ensure that a transcriber is not responsible to file a MOET when no payment arrangements have been made.

RULE AS AMENDED:

Rule 3.30
EXTENSION OF TIME FOR PREPARATION OF TRANSCRIPT

(1) Except as provided in [ORAP 3.40\(3\)](#), only the appellate court may grant an extension of time for the preparation of a transcript.

(2) A request for an extension of time to prepare a transcript may be filed by:

(a) a party responsible for causing the transcript to be prepared,

(b) the transcriber or court reporter (in audio and video record cases) responsible for preparing a transcript if the party responsible for causing the transcript to be prepared has made payment arrangements, or

(c) the transcript coordinator if the transcript coordinator has not assigned a transcriber.

~~(2) A request for an extension of time to prepare a transcript may be filed by the party responsible for causing the transcript to be prepared or by the court reporter or transcriber (in audio and video record cases) responsible for preparing the transcript.~~

(3) A request for an extension of time shall include the amount of time sought, the number of previous extensions obtained and the reason for the extension of time.

(4) If all or part of the need for an extension of time is the failure to make satisfactory
Proposal # 3 -- ORAP 3.30(2) -- Clarify Party Responsible to File Motion to Extend Time
to Prepare Transcript

arrangements for payment of the transcript, the request shall so state. If a party makes a request for an extension of time under this rule, the party shall show why appropriate arrangements have not been made. The court in its discretion may deny the extension of time and direct that the appeal proceed without the transcript.

(5) A court reporter's or transcriber's request for an extension of time shall include the date on which the transcript was ordered, the number of days of proceedings designated on appeal, the approximate number of pages of transcript to be prepared, and information about other transcripts due on appeal. The request shall be substantially in the form illustrated in Appendix 3.30 and shall show proof of service on the parties and, for the second or any subsequent request for extension of time, on the trial court administrator.

(6) Any party may file an objection to a court reporter's or transcriber's request for an extension of time within 14 days after the request is filed. The objection must be served on all other parties, the court reporter or transcriber, and the trial court administrator. An objection received after the court has granted the request will be treated as a motion for reconsideration of the ruling. On reconsideration, if the court modifies the extension of time, the court reporter or transcriber and the parties will be notified; otherwise, the objection will be noted and placed in the file.

See generally [ORS 19.395](#).

ORAP COMMITTEE 2022
February 17 Materials

AMENDING RULE(S): Proposal # 4 -- ORAP 5.05(3)(d) -- Delete Cover Page Requirement for Date and Month of Brief Filing

PROPOSER: Daniel Parr, Appellate Court Administrator

EXPLANATION:

Change: Remove the last sentence of 5.05(3)(d) requiring parties to add the month and year that the brief is filed.

Reason: We no longer need this information from the parties.

RULE AS AMENDED:

Rule 5.05
SPECIFICATIONS FOR BRIEFS

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

(b) (i) In the Supreme Court, except for cases subject to ORAP 12.10 (automatic review of a death sentence):

(A) An opening brief may not exceed 14,000 words.

(B) An answering brief may not exceed 14,000 words.

(C) A combined respondent's answering brief and cross-petitioner's opening brief may not exceed 22,000 words, with the answering brief part of the combined brief limited to 14,000 words.

(D) A combined cross-respondent's answering brief and petitioner's reply brief may not exceed 12,000 words, with the reply brief part of the combined brief limited to 4,000 words.

Proposal # 4 -- ORAP 5.05(3)(d) -- Delete Cover Page Requirement for Date and Month of Brief Filing

(E) A reply brief may not exceed 4,000 words.

(ii) In the Court of Appeals:

(A) An opening brief may not exceed 10,000 words.

(B) An answering brief may not exceed 10,000 words.

(C) A combined respondent's answering brief and cross-appellant's opening brief may not exceed 16,700 words, with the answering brief part of the combined brief limited to 10,000 words.

(D) A combined cross-respondent's answering brief and appellant's reply brief may not exceed 10,000 words, with the reply brief part of the combined brief limited to 3,300 words.

(E) A reply brief may not exceed 3,300 words.

(c) If a party does not have access to a word-processing system that provides a word count, in the Supreme Court, an opening, answering, or combined brief is acceptable if it does not exceed 50 pages, and a reply brief is acceptable if it does not exceed 15 pages; in the Court of Appeals, an opening, answering, or combined brief is acceptable if it does not exceed 35 pages, and a reply brief or reply part of a combined reply and cross-answering brief is acceptable if it does not exceed 10 pages.

(d) Except as to a supplemental brief filed by a self-represented party, an attorney or self-represented party must include at the end of each brief a certificate in the form illustrated in Appendix 5.05-2 that:

(i) The brief complies with the word-count limitation in paragraph (1)(b) of this subsection by indicating the number of words in the brief. The person preparing the certificate may rely on the word count of the word-processing system used to prepare the brief. If the attorney, or a self-represented party, does not have access to a word-processing system that provides a word count, the certificate must indicate that the attorney, or self-represented party, does not have access to such a system and that the brief complies with paragraph (1)(c) of this subsection.

(ii) If proportionally spaced type is used, the size is not smaller than 14 point for both the text of the brief and footnotes.

(e) A party's appendix may not exceed 25 pages.

(f) Unless the court orders otherwise, no supplemental brief may exceed five pages.

(2) (a) Except for cases subject to ORAP 12.10 (automatic review of a death sentence), on motion of a party stating a specific reason for exceeding the prescribed limit, the court may permit the filing of a brief or an appendix exceeding the limits prescribed in subsection (1) of this rule or prescribed by order of the court. A party filing a motion under this subsection must make every reasonable effort to file the motion not less than seven days before the brief is due. The court may deny an untimely motion under this paragraph on the ground that the party failed to make a reasonable effort to file the motion timely.

(b) If the court grants permission for a longer appendix, if filed in paper form, the appendix must be printed on both sides of each page and may be bound separately from the brief.³

(3) As used in this subsection, "brief" includes a petition for review or reconsideration, or a response to a petition for review or reconsideration. All briefs must conform to these requirements:

(a) Briefs must be prepared such that, if printed:

(i) All pages would be a uniform size of 8-1/2 x 11 inches.

(ii) Printed or used area on a page would not exceed 6-1/4 x 9-12 inches, exclusive of page numbers, with inside margins of 1-1/4 inches, outside margins of 1 inch, and top and bottom margins of 3/4 inches.

(b) Legibility and Readability Requirements

(i) Briefs must be legible and capable of being read without difficulty. The print must be black, except for hyperlinks.

(ii) Briefs must be prepared using proportionally spaced type. The style must be Arial, Times New Roman, or Century Schoolbook. The size may not be smaller than 14 point for both the text of the brief and footnotes. Reducing or condensing the typeface in a manner that would increase the number of words in a brief is not permitted.

(iii) Briefs may not be prepared entirely or substantially in uppercase.

(iv) Briefs must be double-spaced, with a double-space above and below each paragraph of quotation.

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

(d) The front cover must set forth the full title of the case, the appropriate party designations as the parties appeared below and as they appear on appeal, the case number assigned below, the case number assigned in the appellate court, designation of the party on whose behalf the brief is filed, the court from which the appeal is taken, the name of the judge thereof, and the litigant contact information required by ORAP 1.30. ~~The lower right corner of the brief must state the month and year in which the brief was filed.~~⁴

(e) The last page of the brief must contain the name and signature of the author of the brief, the name of the law firm or firms, if any, representing the party, and the name of the party or parties on whose behalf the brief is filed.

(f) If filed in paper form:⁵

(i) The paper must be white bond, regular finish without glaze, and at least 20-pound weight.

(ii) If both sides of the paper are used for text, the paper must be sufficiently opaque to prevent the material on one side from showing through on the other.

(iii) The brief must be bound either by binderclip or by staples. Binderclips are preferred.

(4) The court on its own motion may strike any brief that does not comply with this rule.

(5) (a) A party filing a brief in the appellate court must file one brief with the Administrator* and serve one copy of the brief on every other party to the appeal, judicial review, or other proceeding.

(b) The brief filed with the Administrator must contain proof of service on all parties served with a copy of the brief. The proof of service must be the last page of the brief or printed on or affixed to the inside of the back cover of the brief.

¹ Briefs to which this restriction applies include, but are not limited to, a combined respondent's answering/cross-appellant's opening brief, a combined appellant's reply/cross-respondent's

answering brief, and a brief that includes an answer to a cross-assignment of error.

² See [ORAP 5.75](#) regarding setting out reply brief and cross-answering brief as separate parts of a combined reply and cross-answering brief.

³ See [ORAP 5.50](#) regarding the excerpt of record generally.

⁴ See [ORAP 5.95](#) regarding the title page of a brief containing confidential material.

⁵ See [ORS 7.250](#) and [ORAP 1.45\(b\)](#) regarding use of recycled paper and printing on both sides of a page.

* See [ORAP 1.35\(1\)\(a\)\(ii\)\(B\)](#) for the filing address of the Administrator.

See [Appendix 5.05-1](#).

ORAP COMMITTEE 2022
February 17 Materials

AMENDING RULE(S): Proposal # 7 -- ORAP 5.95(2) etc. -- Change Service Requirements from Two Copies to One

PROPOSER: Daniel Parr, Appellate Court Administrator

EXPLANATION:

Remove the requirement to provide more than one paper copy of a document from the ORAPs.

RULE AS AMENDED:

ORAP 5.95 (2)

A party filing a brief under this rule shall serve ~~two copies~~ a copy of the confidential brief and ~~two copies~~ a copy of the redacted brief on each other party to the case on appeal or review.

ORAP 9.05(3)(b)

Any party filing a petition for review shall serve ~~two copies~~ a copy of the petition on every other party to the appeal or judicial review, and file with the Administrator an original petition with proof of service.

ORAP 9.10(3)

A response shall be in the form of a brief prepared in conformity with ORAP 5.05 and ORAP 5.35. For purposes of ORAP 5.05, the response must not exceed 5,000 words or (if the certification under ORAP 5.05(2)(d) certifies that the preparer does not have access to a word-processing system that provides a word count) 15 pages. Any party filing a response shall file with the Administrator one original response, serve ~~two copies~~ a copy of the response on every other party to the review, and file proof of service.

ORAP 11.05(5)

All briefs shall be prepared in substantial conformity with ORAP 5.35 through 5.50. An original brief shall be filed with the Administrator with proof of service showing that ~~two copies were a~~ copy was served on each party.

ORAP 13.05(6)(a)

(i) Except as provided in paragraph (ii) of this subsection, whether a brief is printed or reproduced by other methods, the party allowed costs is entitled to recover 10 cents per page for the number of briefs required to be filed or actually filed, whichever is less, plus ~~two copies~~ for each party served and ~~two copies~~ for each party on whose behalf the brief was filed.

(ii) If a party filed a brief using the eFiling system, the party allowed costs is entitled to recover the amount of the transaction charge and any document recovery charge* incurred by that party for electronically filing the brief, as provided in subsection (b) of this section. The party allowed costs is not entitled to recover for the service copy of any brief served on a party via the eFiling system, but is entitled to recover for ~~two copies for~~ each party served conventionally.

**ORAP COMMITTEE 2022
February 17 Materials**

AMENDING RULE(S): Proposal # 9 -- ORAP 7.05(1)(d), Appendix 7.10-3 -- Change Terminology from "Opposing Counsel" to "Opposing Party"

PROPOSER: Daniel Parr, Appellate Court Administrator

EXPLANATION:

Change: Change “opposing counsel” to “opposing party” and add a clarification that if represented counsel should be contacted.

Reason: The existing rule creates different requirements between litigants. Self-Represented litigants are required to follow the rule while a strict reading of the rule allows represented parties to ignore the rule when the opposing side is not represented by counsel.

RULE AS AMENDED:

**Rule 7.05
MOTIONS IN GENERAL**

- (1) (a) Unless a statute or these rules provide another form of application, a request for an order or other relief must be made by filing a motion in writing.
- (b) A party seeking to challenge the failure of another party to comply with any of the requirements of a statute or these rules must do so by motion.
- (c) A party may raise an issue of the jurisdiction of the appellate court by motion at any time during the appellate process.
- (d) Other than a first motion for an extension of time of 28 days or less to file a brief, a motion must contain a statement whether ~~the opposing party opposing counsel~~ objects to, concurs in, or has no position regarding the motion. If ~~the opposing party opposing counsel~~ objects to the motion, the motion must include a statement whether ~~the opposing party opposing counsel~~ intends to file a response to the motion. If the moving party has not been able to learn ~~the opposing party's opposing counsel's~~ position on the

Proposal # 9 -- ORAP 7.05(1)(d), Appendix 7.10-3 -- Change Terminology from "Opposing Counsel" to "Opposing Party"

motion, then the motion must so state. If the opposing party is represented, counsel should be contacted for their position.

(2) (a) Generally, a party seeking relief in a case pending on appeal should file the motion in the court in which the case is pending.¹ A party seeking relief from a court other than the court in which the case is pending must, on the first page of the motion, separately and conspicuously state that the party is seeking relief from a court other than the court in which the case is pending.

(b) A case is considered filed in the Supreme Court if the motion is captioned "In the Supreme Court of the State of Oregon" and in the Court of Appeals if the motion is captioned "In the Court of Appeals of the State of Oregon." Notwithstanding the caption, the Administrator has the authority to file a motion in the appropriate court, provided that the Administrator must give notice thereof to the parties.

(3) Any party may, within 14 days after the filing of a motion, file a response.² The court may shorten the time for filing a response and may grant temporary relief pending the filing of a response, as circumstances may require.

(4) The moving party may, within seven days after the filing of a response, file a reply. The filing of a reply is discouraged; a reply should not merely restate argument made in the motion, and should be confined to new matter raised in the response.

(5) Unless the court directs otherwise, all motions will be considered without oral argument.

(6) Parties must be referred to by their designation in the appellate court. Hyphenated designations are discouraged. However, in motions in domestic relations cases, parties must be referred to as husband or wife, mother or father, or other appropriate specific designations.

¹ See [ORAP 9.30](#) to determine in which appellate court a case is pending when a petition for review has or may be filed.

² But see [ORAP 7.25\(6\)](#) regarding time for responding to a motion for an extension of time.

APPENDIX 7.10-3

Illustration for ORAP 7.10(1)(c) and ORAP 7.25—Motions for Extension of Time

Illustration 1

Proposal # 9 -- ORAP 7.05(1)(d), Appendix 7.10-3 -- Change Terminology from "Opposing Counsel" to "Opposing Party"

IN THE SUPREME COURT (COURT OF APPEALS)
OF THE STATE OF OREGON

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

**APPELLANT'S [RESPONDENT'S] MOET-
FILE OPENING [ANSWERING] BRIEF
(OR OTHER ITEM-SEE LIST OF
MOET TITLES IN APPENDIX 7.10-1)**

Appellant (Respondent) moves this court for an extension of time of ____ days, from ____ through ____, within which to serve and file the appellant's opening (or respondent's answering) brief (or other item) in this case.

The Notice of Appeal in this case was filed on [date] . The brief (or other item) is due on [date] . This is the first (or second or third) request for a time extension and one is now sought because [set out the reason].

[In a criminal case, indicate whether defendant is incarcerated or under what terms defendant has been released.]

Opposing (party/counsel) in this case informs me that (the party/counsel) (has no objection to/concurs in/has no comment on) this request for extension of time.

Date _____

Attorney for Petitioner
[Sign and print/type name,
bar number, address,
telephone number, and email address]

ORAP COMMITTEE 2022
February 17 Materials

AMENDING RULE(S): Proposal # 13 -- ORAP 12.07, Reply Briefs in Certain Expedited Appeals

PROPOSER: Lisa Norris-Lampe

EXPLANATION:

ORAP 12.07 governs expedited state appeals to the Oregon Supreme Court, challenging certain pretrial orders in criminal cases.

First issue: Direct appeals in the Oregon Supreme Court follow ordinary appeal briefing rules, unless a special rule in chapter 12 applies. ORAP 12.05(2). As noted, ORAP 12.07 is one of those "special rules; it sets out a 28-28-day briefing schedule for expedited state criminal appeals, ORAP 12.07(1)((b)-(c), but it does not contain any "reply brief" provision, which suggests that reply briefs are not permitted as a matter of course. However, the briefing rule that applies to ordinary appeals -- ORAP 5.70 -- does permit reply briefs in criminal cases (it does so as of 2020, when ORAP 5.70(3) was amended to eliminate several categories of cases for which a reply brief previously was not permitted except on court approval). The same disparity arises with the cross-appeals. And, those competing briefing provisions create somewhat of an ambiguity, such that it is unclear (1) whether the state may file a reply brief as a matter of course in an expedited state appeal or, instead, must seek leave from the court to do so, and also when such a brief might be due; and (2) how the briefing schedule may be affected if the defendant files a cross-appeal, to the extent permitted by ORS 138.035(5). The proposed amendment to ORAP 12.07(1) set out below would (1) add a new paragraph (d), to expressly provide that reply briefs are permitted as a matter of course; and (2) add a new paragraph (e), to address cross-appeals.

Second issue: ORAP 12.07(2)(b) contains wording that reflects an old chapter 9 requirement that a petitioner on review file a separate notice declaring an intent to file a brief on the merits if the petition were allowed. Such a formal notice is no longer required; instead, petitioners now are required to include a "notice" about briefing as part of filing the petition. ORAP 9.05(3)(a)(v); *see also* ORAP 9.17(3)(iii) (setting out implications following failure to "give notice of intent to file a brief on the merits on review"). The proposed amendment to ORAP 12.07(2)(b) set out below therefore updates the outdated wording.

RULE AS AMENDED:

New text in **{braces/bold/underscored}**; deleted text in [*brackets/italics*]:

Rule 12.07

EXPEDITED APPEAL OF CERTAIN PRETRIAL ORDERS IN CRIMINAL CASES

- (1) On appeal under ORS 138.045(2) from a pretrial order dismissing or setting aside the accusatory instrument or suppressing evidence, when a defendant is charged with murder or aggravated murder and is in custody:
 - (a) * * *
 - (b) Appellant's opening brief shall be due 28 days after the transcript settles. Failure to file the opening brief within the prescribed time will result in automatic dismissal of the appeal.
 - (c) Respondent's answering brief shall be due 28 days after appellant's opening brief is served and filed. If respondent fails to file a brief within the prescribed time, the appeal will be submitted on appellant's opening brief and oral argument, and respondent will not be allowed to argue the case.
 - {(d) Appellant's reply brief, if any, shall be due 14 days after respondent's answering brief is served and filed.**
 - {(e) If respondent has filed a cross-appeal, respondent's opening brief on cross-appeal is due when appellant's opening brief is due, and appellant's answering brief on cross appeal is due when respondent's answering brief is due. Any reply brief on cross appeal is due when appellant's reply brief is due.**

- (2) On a petition for review of a decision of the Court of Appeals in an appeal under ORS 138.045(1)(a) or (d) from a pretrial order dismissing or setting aside the accusatory instrument or suppressing evidence, when a defendant is charged with a felony and is in custody:
 - (a) * * *
 - (b) If the petitioner on review **{gives}**[*files a*] notice of intent to file a brief on the merits and fails to file a brief within the time prescribed by ORAP 9.17,

the review, if allowed, will be submitted to the court on the petitioner's petition for review, the response to the petition for review (if any), the brief on the merits filed by respondent (if any), the parties' briefs in the Court of Appeals, and oral argument.

ORAP COMMITTEE 2022
February 17 Materials

AMENDING RULE(S): Proposal # 14 -- ORAP 12.20 -- Party Designation in Certified Question Cases

PROPOSER: Lisa Norris-Lampe, Supreme Court Appellate Legal Counsel

EXPLANATION:

Under ORS 28.200, federal courts and other state courts may certify questions of law to the Oregon Supreme Court, which has discretion to accept such questions. The case titles and party roles vary -- for example, questions can be submitted from an initial tribunal (*e.g.*, federal District Court) and also from an appellate court (*e.g.*, Ninth Circuit). In creating such cases over the years, the Oregon Supreme Court has used a variety of party roles to create its own cases, but those can cause confusion -- such as using "plaintiff" and "defendant" in an appellate question from the Ninth Circuit, where those roles have little meaning for purposes of the certified appeal.

This proposal therefore would clarify that both the certifying court's case title and party roles should be used when creating an Oregon Supreme Court case. For example, a certified question from a District Court would typically use the roles of "plaintiff" and "defendant" only, whereas a certified question from the Ninth Circuit would use the roles of "[lower court role]-appellant" and "[lower court role]-appellee." That should eliminate confusion for purposes of our own case record -- including clarifying which party will file the opening brief and the answering brief.

RULE AS AMENDED:

New text in **{braces/bold/underscored}**:

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:

* * * * *

(3) **{(a) The case title and party roles shall be the same as those designated by the certifying court.}**

{(b)} In deciding whether to accept a certified question, the Supreme Court will
Proposal # 14 -- ORAP 12.20 -- Party Designation in Certified Question Cases

not consider written argument from the parties or hold argument unless it specifically directs otherwise.