



COURT OF APPEALS

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NOTICE OF PROPOSED RULEMAKING -- PROPOSED AMENDMENTS TO OREGON RULES OF APPELLATE PROCEDURE OPEN FOR PUBLIC COMMENT THROUGH AUGUST 31, 2020

The ORAP Committee, which meets in even years, has prepared proposed 2020 amendments to the Oregon Rules of Appellate Procedure (ORAP). Those proposed amendments are now available for review, and the public may submit comments through August 31.

The rules proposed to be amended are:

1.15; 1.35; 1.40; 2.05; 2.15; 2.25; 2.40; 3.10; 3.15; 3.33; 3.40; 3.50; 4.15; 4.20; 4.22; 4.60; 4.64; 4.66; 4.68; 4.70; 4.72; 5.05; 5.45; 5.70; 5.80 Brief Time Chart 1; 5.92; 5.95; 6.10; 7.10; 7.35; 7.55; 8.15; 8.28; 8.52; 9.05; 10.15; 10.25; 10.35; 11.05; 11.20; 11.25; 11.27; 11.30; 11.32; 11.34; 11.35; 12.05; 12.07; 12.10; 12.20; 12.25; 15.05; 16.03; 16.10; 16.15; 16.30; Appendix 3.33-1; and Appendix 3.33-2.

The following table groups the rules being amended with a brief summary of the reason for those amendments:

RULES AMENDED	SUMMARY
1.15; 1.35; 1.40; 2.05; 2.15; 2.25; 2.40; 3.10; 3.15; 3.40; 3.50; 4.60; 4.64; 4.66; 4.68; 4.70; 4.72; 5.05; 5.45; 5.95; 7.10; 8.28; 8.52; 10.25; 10.35; 11.05; 11.20; 11.25; 11.30; 11.34; 11.35; 12.05; 12.07; 12.10; 16.30.	Temporary amendments adopted in 2018 being made permanent.
1.35, 16.03, 16.10	eFiling: expands to all Oregon State Bar members.

3.33, Appendices 3.33-1 and 3.33-2	Transcript preparation: correct citation in appendix, make rule and appendices consistent.
4.15; 11.25; 15.05	Temporary amendments adopted in 2018 being made permanent
4.20	Temporary amendments adopted in 2019 being made permanent
4.20; 4.22	Agency review: Correct terminology and clarify regarding agency submission of record.
5.05; 12.10	Automatic review in death sentence cases: revised brief length, extensions of time.
5.45	Correct citation in footnote.
5.70; 10.15	Briefing: allow reply briefs as matter of right in several classes of cases.
5.92; 16.15	Supplemental pro se briefs not required to be text-searchable.
6.10	Correct typographical errors.
7.35	Emergency motions: Expands notice requirements for motion in certain circumstances.
7.55; 9.05	Clarify rules regarding review of Appellate Commissioner orders.
8.15	Amicus curiae: restructured, additional changes.
9.05	Petitions for review: clarify that motions to extend time are filed with Supreme Court.
10.25	Conform citation to amended statute.
10.35	Temporary rule originally adopted in 2016, readopted and amended in 2018, being made permanent.
11.25, 11.27, 11.30, 11.32, 11.34, 12.25	Renumbering several "original proceeding" and "special Supreme Court" rules.
11.25	Bar proceedings: Conform to changes to the Bar Rules of Procedure, streamline proceedings on review from the BBX, other changes..
11.30	Ballot title review: clarify court authority to modify timeline for amicus filing.
12.05	Supreme Court direct appeals, direct judicial review, and direct review cases: clarifies and adds factfinding provisions.
12.20	Supreme Court certified questions: clarify, remove reference to setting oral argument.
16.30	Remove item from list of documents that must be conventionally filed.

PDF copies of the "Notice of Proposed Rulemaking" are available for download at

<https://www.courts.oregon.gov/courts/appellate/rules/Pages/orap.aspx>

and

<https://www.courts.oregon.gov/publications/other/Pages/misc.aspx>

Please submit any comments by August 31 to

ORAP.committee@ojd.state.or.us

Amendments that are adopted by the Supreme Court and the Court of Appeals will become effective on January 1, 2021.

For more information about the ORAP Committee generally, see

<https://www.courts.oregon.gov/courts/appellate/rules/Pages/orap-committee.aspx>

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The Court of Appeals issued these opinions:

H. K. v. Spine Surgery Center of Eugene, LLC

(A164453 - Lane County Circuit Court)

State of Oregon v. Larry James Wilder

(A167948 - Yamhill County Circuit Court)

State of Oregon v. Jordan Justice Odneal

(A168341 - Clackamas County Circuit Court)

State of Oregon v. Joseph Daniel Brown

(A168297 - Deschutes County Circuit Court)

The Court of Appeals affirmed these cases without opinion:

Destiny Renee Morgan v. Zachary Dalton Phibbs

(A168893 - Lane County Circuit Court)

Michael Thrasher v. Department of Human Services

(A169023 - Marion County Circuit Court)

Michael Irvine v. Oregon Department of Human Services

(A169088 - Washington County Circuit Court)

Sally Swindler v. A. O. L. Services, Inc.

(A169230 - Multnomah County Circuit Court)

Department of Human Services v. C. J. A.

(A172920 - Multnomah County Circuit Court)

Department of Human Services v. J. D. G.

(A173260 - Lane County Circuit Court)

Buffalo-Bend Associates, LLC v. Clackamas County
(A173452 - Land Use Board of Appeals)
Department of Human Services v. C. N. W.
(A173500 - Lake County Circuit Court)
Kevin Dressel v. City of Tigard
(A173743 - Land Use Board of Appeals)

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H. K. v. Spine Surgery Center of Eugene, LLC
(Armstrong, P. J.)

Defendants Spine Surgery Center of Eugene, LLC, and its owner Glen Keiper appeal from a judgment against the clinic for sexual harassment, ORS 659A.029 and ORS 659A.030, and for intentional infliction of emotional distress and battery, arising out of Keiper's alleged sexual harassment of plaintiff, a former employee. Defendants assign error to the trial court's admission into evidence of documents related to a Bureau of Labor Industries (BOLI) investigation of a sexual harassment complaint against the clinic by another former employee. The trial court concluded that the evidence was relevant to the sexual harassment claim for the limited purpose of showing defendants' notice or knowledge of Keiper's harassment of plaintiff. Held: The evidence was not relevant to the claim of sexual harassment, which does not include an element of notice or knowledge when the person creating the hostile working environment is the employer or someone who stands in the employer's shoes, as was the case here. The trial court therefore erred in admitting the BOLI documents for that purpose. The error was not harmless. Reversed and remanded.

State of Oregon v. Larry James Wilder
(DeVore, P. J.)

Defendant appeals a judgment of conviction for felon in possession of a firearm, ORS 166.270, which followed a separate prosecution for unlawful hunting, ORS 496.992. Defendant assigns error to the trial court's denial of his motion to dismiss the possession charge on the basis that the former jeopardy statute, ORS 131.515(2), required the state to bring the charges together. Held: Defendant failed to prove that the charges arose from the same criminal episode under any of the relevant tests. The record supports the conclusion that the charges were neither cross-related, nor predicated on conduct directed towards a single criminal objective, nor based on possession of contraband alone. The separate prosecutions were permissible. Accordingly, the trial court did not err in denying defendant's motion. Affirmed.

State of Oregon v. Jordan Justice Odneal
(Tookey, J.)

Defendant appeals a judgment of conviction for one count of stalking, ORS 163.732, and one count of second-degree criminal mischief, ORS 164.354. On appeal, defendant assigns error to the trial court's denial of his motion for a judgment of acquittal with respect to the stalking count. In particular, defendant argues that there was not a second actionable contact between defendant and the alleged victim to support his conviction for stalking. Held: The trial court erred in denying defendant's motion for a judgment of acquittal. The state did not present legally sufficient evidence from which a rational trier of fact could have found, beyond a reasonable doubt, that defendant was aware that his conduct would result in a second contact with the alleged victim. Stalking conviction reversed; remanded for resentencing; otherwise affirmed.

State of Oregon v. Joseph Daniel Brown
(Kistler, S. J.)

Defendant appeals a judgment of conviction for driving under the influence of intoxicants (DUII) and reckless driving. At trial, evidence was presented that defendant was driving between 15 and 18 miles per hour (MPH) in a 25 MPH zone when he took a sharp corner. In doing so, defendant turned into the lane for oncoming traffic and grazed or nearly hit the curb before correcting course. The arresting officer administered a breath test, which indicated a blood alcohol content of .19 percent. However, there was no evidence of oncoming vehicle or pedestrian traffic. Defendant moved for a judgment of acquittal on the reckless driving charge, which the court denied. On appeal, defendant assigns error to that denial, arguing that no reasonable trier of fact could find that he drove "in a manner that endangers the safety of persons or property" because the only evidence to support that contention is that he was driving 8 to 10 MPH under the speed limit and that he took a sharp corner. Alternatively, defendant argues that the crime of reckless driving can only be proven if there was evidence that his car hit or came close to hitting an identified person or object. Held: The trial court did not err in denying defendant's motion for a judgment of acquittal, because to survive that motion it is sufficient that a reasonable trier of fact can infer that there was a substantial risk of endangering persons or property. Here, in an area frequented by people, defendant nearly hit the curb on the wrong side of the intersection, drove a substantial distance in that lane, and was highly intoxicated. Affirmed.

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