APPELLATE PRACTICE SECTION
FALL CLE AND SOCIAL

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CHANGES TO THE OREGON RULES OF APPELLATE PROCEDURE

Stephen Armitage, Staff Attorney, Oregon Supreme Court
Sara Kobak, Schwabe Williamson Wyatt PC

The ORAP Committee has proposed a slate of rule amendments for the consideration and approval of the appellate courts. The appellate courts are not required to adopt the amendments as proposed, and they have not yet acted on the amendments, so the following list must be considered preliminary. Assuming that the amendments are adopted by the courts, they will become effective January 1, 2017.

Note: Two of the amended rules shown below, new Rule 8.47 and a conforming amendment to Rule 6.15 (requiring parties to give notice of related cases), will be presented as temporary amendments only. If adopted by the Chief Justice and Chief Judge, those temporary amendments will be considered by the 2018 ORAP Committee as to whether to be made permanent.

Amended rules and appendices are show below with material to be deleted in ~~strikeout~~ print and material to added in **bold underlined** print.

Rule 1.35
FILING AND SERVICE

(1) Filing

(a) ~~Any thing to be filed~~**Filing Defined: Delivery, Receipt, and Acceptance**

(i) A person intending to file a document in the ~~Supreme~~**appellate court must cause the document to be delivered to the Appellate** Court ~~or Court of Appeals shall~~**Administrator.**

(ii) Delivery may be ~~delivered~~**made as follows and otherwise as provided under subsection (2) of this rule:**

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

(B) Any other person must file any document in conventional form, by delivering the document to the Appellate Court Administrator, Appellate Court Records Section, 1163 State Street, Salem, Oregon 97301-2563.

~~(b) If, pursuant to law or order of the court, a party's address and telephone number are not subject to public disclosure, the party filing any thing in the Supreme Court or Court of Appeals shall provide an alternative contact address that the court may make available for public inspection and for purpose of service under paragraph (2)(a) of this rule. The court shall not make the party's telephone number or actual address available for public inspection.~~

~~(c) A person filing a notice of appeal, petition for judicial review or petition under the original jurisdiction of the Supreme Court may file by mail and the filing shall be complete on deposit in the mail if mailed in accordance with ORS 19.260(1). If the person relies on the date of mailing as the date of filing under ORS 19.260(1), the person shall certify the date of mailing and shall file the certificate, together with acceptable proof from the post office of the date of mailing, with the Administrator with proof of service on the parties to the appeal, judicial review or original proceeding. Acceptable proof from the post office of the date of mailing shall be a receipt for certified or registered mail, with the certified or registered mail number on the envelope or on the item being mailed, with the date of mailing either stamped by the United States Postal Service on the~~

~~receipt or shown by a United States Postal Service postage validated imprint on the envelope received by the Administrator.~~

~~(d) Filing of briefs, petitions for attorney fees, statements of costs and disbursements, motions, petitions for review, and all other things required to be filed within a prescribed time, shall be complete if mailed or dispatched to a third-party commercial carrier on or before the due date if the method of mailing or delivery is at least as expeditious as first-class mail.~~

~~(e) If filing is not done as provided in paragraph (c) or (d) of this subsection, then the thing shall not be deemed filed until the thing actually is received by the Administrator.~~

(f

(iii) The Administrator or the Administrator's designee must endorse upon any document delivered for filing the day and month, and the year the Administrator received the document.

(iv) Filing is complete when the Administrator has accepted the document. Except as otherwise provided by law or these rules, when the Administrator has accepted a document for filing, the filing date relates back to the date the Administrator received the document for filing.

~~(v~~) A correction ~~or amendment~~ to a previously filed document must be made by filing the entire corrected or amended document with the court. ~~Any copy requirement or any eFiling document recovery charge that applied to the original document also applies to the corrected or amended version of the document.~~ The caption of a corrected or amended ~~filing~~**document** must prominently display the word "CORRECTED" or "AMENDED," as applicable.

(b) Manner of Filing

(i) As used in this rule, "case initiating document" means a document that initiates a new case in an appellate court, including but not necessarily limited to a notice of appeal; a petition for judicial review; a petition for writ of mandamus, habeas corpus, or mandamus; and any other petition invoking the original jurisdiction of the appellate court.

(ii) Using Appellate Courts' eFiling System

Delivery for filing using the eFiling system is subject to Chapter 16 of these rules.

(iii) Using United States Postal Service or Commercial Delivery Service

(A) A person may deliver a case initiating document for filing via the U.S. Postal Service, and delivery is complete on the date of mailing if mailed or dispatched for delivery in accordance with ORS 19.260(1)(a). If the Administrator receives the case initiating document within the time prescribed by law, the person need not submit proof of the date of mailing. If the Administrator does not receive the document within the time prescribed law and the person must rely on the date of mailing as the date of delivery, the person must file with the Administrator acceptable proof from the U.S. Postal Service of the date of mailing. Acceptable proof from the U.S. Postal Service of the date of mailing must be a receipt for certified or registered mail or other class of service for delivery within three calendar days, with the mail number on the envelope or on the item being mailed, and the date of mailing either stamped by the U.S. Postal Service on the receipt or shown by a U.S. Postal Service postage validated imprint on the envelope received by the Administrator or the U.S. Postal Service's online tracking system.

(B) A person may deliver a case initiating document for filing via commercial delivery service, and the delivery is complete on the date of dispatch for delivery by the delivery service if dispatched for delivery in accordance with ORS 19.260(1)(a). If the Administrator receives the case initiating document within the time prescribed by law, the person need not submit proof of the date of delivery for dispatch. If the Administrator does not receive the document within the time prescribed by law and if the person must rely on the date of delivery for dispatch, the person must file with the Administrator proof from the commercial delivery service of the date of delivery for dispatch, which may include the commercial delivery service's online tracking service.

(C) A person involuntarily confined in a state or local government facility may deliver a case initiating document for filing via the U.S. Postal Service and the date of filing relates

back to the date of delivery for mailing if the person complies with ORS 19.260(3). If the person relies on the date of delivery for mailing, the person must certify the date of delivery to the person or place designated by the facility for handling outgoing mail.

(D) Filing of any other document required to be filed within a prescribed time, including any brief, petition for attorney fees, statement of costs and disbursements, motion, or petition for review, is complete if mailed via the U.S. Postal Service or dispatched via commercial delivery service on or before the due date if the class of mail or delivery is calculated to result in the Administrator receiving the document within three calendar days.

(iv) Conventional Filing Not Using U.S. Postal Service or Commercial Delivery Service

If a person does not deliver a document for filing via the eFiling system, the U.S. Postal Service, or commercial delivery service as provided in this paragraph, then the document is not deemed filed until the document is actually received by the Administrator.

(v) Delivery by email is not permitted unless specifically authorized elsewhere in these rules.

(2) Service ~~Generally~~

(a) (i) Except as provided in clause (2)(a)(ii) of this ~~rule, a~~ **subsection, a party filing a document with the court must serve a true** copy of ~~any thing delivered for filing under these rules must also be served by~~ the **document on each other** party or attorney ~~delivering it~~**for a party** to the ~~other parties to the cause.~~[1] **case.**[2]

(ii) A party filing a motion for waiver or deferral of court fees and costs under ORS 21.682 need not serve on any other party to the ~~cause~~**case** a copy of the motion or any accompanying documentation of financial eligibility.[23] After the court has ruled on the motion, if another party to the ~~cause~~**case** requests a copy of the motion or documentation of financial eligibility for the purpose of challenging the court's ruling, the filing party must comply with the request but may redact protected personal information as described in ORAP 8.50(1). As used in this clause,

"documentation of financial eligibility" means a document showing eligibility for a government benefit based on financial need or an affidavit or declaration showing the income, assets, and financial obligations of a party and the party's household.

(b) Except as otherwise provided by law,[3] ~~service~~[4] **a party** may ~~be in~~ **serve a document on another** person~~, by mail,~~ **as provided in ORCP 9** or by commercial ~~carrier for~~ delivery ~~within three calendar days. Unless otherwise provided by law, service by mail~~**service.**

(i) If a party serves a copy of a document by the U.S. Postal Service or ~~by~~ commercial ~~carrier shall be complete on deposit in the mail or on dispatch to the carrier if the method of mailing or~~ delivery ~~is at least as expeditious as first~~ **service, the** class ~~mail.~~

(c) All**of** service ~~copies~~**must be calculated to result in the person receiving the document within three calendar days.**

(ii) Electronic service via the eFiling system is permitted only on attorneys who are authorized users of the eFiling system and as provided in ORAP 16.45. A person may not serve a case initiating document via the eFiling system, as set out in ORAP 16.45(3)(a).

(iii) Service by e-mail or facsimile communication is permitted only on an attorney as, and in the manner, provided by ORCP 9 G.

(c) Each service copy must include a certificate showing the date ~~of~~ **that the party delivered the document for** filing.

(d) Any ~~thing~~**document** filed with the Administrator ~~shall~~**must** contain either an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service, and the names and addresses of the persons served, certified by the person who made service~~.~~**, except that:**

(~~3~~**i) If a person was served by the appellate courts eFiling system, the certificate must state that service was accomplished at the person's email address as recorded on the date of service in the appellate eFiling system, and need not include the person's email address or mailing address.**

(ii) If a person was served by email or by facsimile communication, the proof of service must state the email address or

telephone number used to serve the person, as applicable, and need not include the person's mailing address.

(e) Service on Trial Court Administrators and Transcript Coordinators

(~~a~~**i**) When a copy of a notice of appeal is required to be served on the trial court administrator, service is sufficient if it is mailed or delivered to the person serving in the capacity of trial court administrator for the county in which the judgment or appealable order is entered.

(~~b~~**ii**) When a copy of a notice of appeal is required to be served on the transcript coordinator ~~for the court from which the appeal~~ **, service** is ~~taken, the notice shall be~~**sufficient if it is** mailed or delivered to the office of the trial court administrator**,** addressed to "transcript coordinator."

~~(4) With respect to a person confined in an institution of confinement who files and serves a thing in the appellate court, the thing shall be deemed filed in the appellate court and served on another person when the original of the thing and the appropriate number of copies are delivered, in a form suitable for mailing, to the person or place designated by the institution for handling outgoing mail.~~

~~(5) (a) Parties filing any thing in the Supreme Court or Court of Appeals, including but not limited to notices of appeal, petitions for judicial review, and petitions invoking original jurisdiction, motions, and briefs, are~~

~~(i) Required to use recycled paper if recycled paper is readily available at a reasonable price in the party's community. Further, parties are encouraged to use paper containing the highest available content of post-consumer waste, as defined in ORS 459A.500(3), that is recyclable in the office paper recycling program in the party's community, and~~

~~(ii) Encouraged to print on both sides of each sheet of paper of the thing being filed.~~

~~(b) The court will not decline to accept any filing on the ground that the filing does not comply with paragraph (a) of this subsection.~~[4]

~~(6) Except as otherwise provided in these rules, parties may prepare any thing to be filed in the Supreme Court or Court of Appeals using either uniformly spaced type (such as produced by typewriters) or proportionally spaced type (such as produced by commercial printers and many computer printers). Uniformly spaced type shall not exceed 10 characters per inch (cpi) for both the text of the thing filed and footnotes. If proportionally spaced type is used, it shall not be smaller than 13 point for both the text~~

~~of the thing filed and footnotes. This subsection does not apply to the record on appeal or review.~~

[1]

(iii) An authorized user of the trial court electronic filing system may serve the trial court administrator and the transcript coordinator by using the "Courtesy Copies" e-mail function of that system, to send separate courtesy copies to the trial court administrator and to the transcript coordinator. The e-mail address for each judicial district's trial court administrator and transcript coordinator are available on the judicial district's website.

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

[2] Whenever these rules authorize or require service of a copy of any ~~thing~~**document** on the Attorney General, the copy ~~shall~~**must** be served at this address: Attorney General of the State of Oregon, Office of the Solicitor General, 400 Justice Building, 1162 Court Street, NE, Salem, Oregon 97301-4096.

[2~~3~~] *See* Chief Justice Order No. 07-056 (order adopted pursuant to ORS 21.682(4) prescribing standards and practices for waiver or deferral of court fees and costs).

[3~~4~~] *See, e.g.*, ORS 183.482(2), relating to cases arising under the Administrative Procedures Act and ORS 197.850(4), relating to judicial review of Land Use Board of Appeals orders, each of which requires service of petitions for judicial review by registered or certified mail.

RULE 1.45
FORM REQUIREMENTS

(1) Any document intended for filing with an appellate court must be legible and include:

(a) A caption containing the name of the court; the case number of the action, if one has been assigned; the title of the document; and the names of the parties displayed on the front of the document.

(b) The name, address, and telephone number of the party or the attorney for the party, if the party is represented.

(2) As provided in ORAP 1.35(1)(a)(v), the caption of a corrected or amended filing must prominently display the word "CORRECTED" or "AMENDED," as applicable, and the entire corrected or amended document must be filed with the court.

(3) Except as otherwise provided in Rule 5.05, parties may prepare any document to be filed in the appellate court using either uniformly spaced type (such as produced by typewriters) or proportionally spaced type (such as produced by commercial printers and many computer printers). Uniformly spaced type must not exceed 10 characters per inch (cpi) for both the text of the thing filed and footnotes. If proportionally spaced type is used, it must not be smaller than 13 point for both the text of the thing filed and footnotes. This subsection does not apply to the record on appeal or review.

(4) Parties conventionally filing any document in the appellate courts are

(a) Encouraged to print on both sides of each sheet of paper of the document being filed, and

(b) Required to use recycled paper if recycled paper is readily available at a reasonable price in the party's community. Further, parties are encouraged to use paper containing the highest available content of post-consumer waste, as defined in ORS 459A.500(3), that is recyclable in the office paper recycling program in the party's community. The court will not decline to accept any filing on the ground that the filing does not comply with paragraph (a) or (b) of this subsection.[1]

[1] **See ORS 7.250.**

Rule 2.15
FILING FEES IN CIVIL CASES

(1) This rule:

(a) does not apply to **appeals or petitions for judicial review in** criminal, habeas corpus, post-conviction relief, juvenile court, civil commitment of ~~allegedly mentally ill persons~~**persons with mental illness (as defined in ORS 426.005)** or persons with an intellectual disability (as defined in ORS 427.005), Psychiatric Security Review Board, and State Board of Parole cases;[1]

(b) does apply to **appeals and petitions for judicial review in** all other civil proceedings.[2]

(2) One filing fee is required for each appellant appearing separately or for two or more appellants appearing jointly. When two or more notices of appeal are filed under ORAP 2.10(1), a filing fee is required for each notice of appeal. When a notice of appeal has been filed and a notice of appeal subsequently is filed in circumstances resulting in the creation of a new appellate court case,[3] the appellant is required to pay a filing fee at the time of the subsequent notice of appeal.

(3) Except as provided in subsection (4) of this rule, a respondent's appearance fee is required for each respondent appearing separately or for two or more respondents appearing jointly. When a notice of appeal has been filed and a notice of appeal subsequently is filed in circumstances resulting in the creation of a new appellate court case, the respondent shall pay an appearance fee at the time of the appearance in the subsequent appeal.

(4) (a) If two or more respondents appearing jointly submit a single brief or other first appearance, only one appearance fee is required.

(b) If a respondent concurs in a brief but does not join in submitting it, no appearance fee is required from the concurring respondent but the concurring respondent is deemed to have waived appearance and oral argument.

(c) After a brief is filed, if a stipulation is filed allowing a second respondent to join in the brief, the second respondent is deemed to have appeared, and an appearance fee is required from that party.

(5) If a party fails to pay the appearance fee, the court will not consider any thing filed by that party, and that party will not be allowed to argue the appeal.

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[1] *See* ORS 21.010(~~3), (4~~2).

[2] *See generally* ORS 21.010(1), ORS 21.480(3). *See* ORS 21.010(~~4~~3) regarding filing fees in an appeal from an appeal to a circuit court from a justice or municipal court involving a state violation or infraction or involving violation of a city charter or ordinance. *See* ORS 21.010(~~5~~4) regarding filing fees in contempt cases.

[3] For example, appeals taken from judgments entered under ORCP 67 B at significantly different times.

Rule 2.22
APPEALS IN JUVENILE CASES

(1) For any eFiled document in any juvenile dependency case that must be served on the parties to the appeal under ORAP 1.35:

(a) The party filing the document must use the "notification information" function of the appellate courts' eFiling system to notify the attorney for any person who was a party under ORS 419B.875(1)(a)(A)-(C), (H), or ORS 419B.875(1)(b) to the case in the juvenile court from which the appeal was taken, when

(i) that person was not designated in the notice of appeal as a party to the appeal; and

(ii) that person has not filed a notice of intent to participate on appeal under ORAP 2.25(3).

(b) The notification sent to an attorney under subsection (a) will notify that attorney that the document has been eFiled, but will not permit the attorney to view the document, due to security that applies to juvenile cases in the eFiling system. The notification does not operate as service.[1] The attorney may access the document through the appellate courts' remote electronic access system, if the attorney has juvenile case permissions in that system.

(c) The certificate of service for a document eFiled must contain proof of the notification required by this subsection.

(2) If an appeal is pending from an order or judgment of a juvenile court, the juvenile court enters a subsequent appealable order or judgment, and a party to the juvenile court case wishes to appeal from the subsequent order or judgment:

(a) If the party who wishes to appeal is the appellant in the pending appeal, the appellant shall serve and file an amended notice of appeal from the subsequent order or judgment.

(b) If the party who wishes to appeal is the cross-appellant in the pending appeal, the cross-appellant shall serve and filed an amended notice of cross-appeal from the subsequent order or judgment.

(c) If the party who wishes to appeal is any other party to the case, that party shall file a notice of appeal from the subsequent order or judgment.

(d) Any such notice of appeal, amended notice of appeal, or amended

notice of cross-appeal shall contain the appellate case number of the pending appeal and shall be served and filed within 30 days after entry of the subsequent order or judgment.[~~1~~2]

(~~2~~3) This subsection applies to a motion for relief from an order or judgment filed in juvenile court under ORS 419B.923 during the pendency of an appeal.

(a) If the copy of the motion required to be served on the appellate court is not entitled "MOTION FOR RELIEF FROM ORDER OR JUDGMENT UNDER ORS 419B.923," the copy shall be accompanied by a letter of transmittal identifying the motion as a motion for relief under ORS 419B.923.

(b) Any party to the appeal may request the appellate court to hold the appeal in abeyance pending disposition of the motion or allow the appeal to go forward. In the absence of a request from a party, the court on its own motion will review the motion for relief from judgment and decide whether to hold the appeal in abeyance. If the court does not order the appeal to be held in abeyance, the appeal will go forward.

(c) If the appellate court holds an appeal in abeyance pending disposition of a motion for relief from order or judgment and subsequently the court receives a copy of the juvenile court's order deciding the motion, after expiration of the period within which an appeal from the order may be filed, the appellate court will decide whether to reactivate the case or take other action.

(d) A party wishing to appeal an order deciding a motion for relief from order or judgment under ORS 419B.923 during the pendency of an appeal shall file a notice of appeal within the time and in the manner prescribed in ORS chapter 19. The notice of appeal as filed shall bear the same appellate case number assigned to the original notice of appeal.

(~~3~~4) At the request of a party to a juvenile case or on the court's own motion, the Chief Judge may refer the case to the Appellate Settlement Conference Program under ORAP 15.05.

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[11] ***See* ORAP 16.45.**

[2] *See* ORS 419A.205.

See ORAP 10.15 regarding expediting dependency cases.

See ORAP 7.50 regarding summary affirmance in juvenile cases.

Rule 5.05
SPECIFICATIONS FOR BRIEFS

~~(1) Briefs, including petitions for review or reconsideration in the Supreme Court, shall be reproduced by any duplicating process that makes a clear, legible, black image; the Administrator will not accept carbon copies, copies on slick paper, or copies darkened by the duplicating process.~~

(2) (a) Except as provided in paragraph (~~2~~1)(c) of this subsection, an opening, answering, combined, or reply brief ~~shall~~**must** comply with the word-count limitation in paragraph (~~2~~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:

(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.

(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 ~~in the case of~~**as to a** supplemental ~~pro se briefs~~**brief filed by a self-represented party**, an attorney or ~~unrepresented~~**self-represented** party ~~shall~~**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 (~~2~~**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 ~~an unrepresented~~**a self-represented** party, does not have access to a word-processing system that provides a word count, the certificate ~~shall~~**must** indicate that the attorney, or ~~unrepresented~~**self-represented** party, does not have access to such a system and that the brief complies with paragraph (~~2~~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 ~~excerpt of record or~~ appendix ~~or combined excerpt of record and appendix shall~~**may** not exceed ~~50~~**25** pages.

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

(~~3~~**2**) (a) On motion of a party stating a specific reason for exceeding the prescribed limit, the court may permit the filing of a brief~~, an excerpt of record,~~ **or** an appendix~~, or a combined excerpt of record and appendix~~ exceeding the limits prescribed in subsection (~~2~~**1**) of this rule or prescribed by order of the court. A

party filing a motion under this subsection ~~shall~~**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 ~~excerpt of record, appendix, or combined excerpt of record and~~ appendix, if filed in paper form, the ~~excerpt of record, appendix, or combined excerpt of record and appendix shall~~**appendix must** be printed on both sides of each page and may be bound separately from the brief.[3]

~~(4) All briefs shall conform to these requirements:~~

~~(a) If filed~~**3) As used** in ~~paper form, the original of all briefs, including~~**this subsection, "brief" includes** a petition for review or reconsideration ~~in the Supreme Court,~~ or a response to a petition for review or reconsideration ~~in the Supreme Court, .~~ **All briefs** must ~~have a cover of white bond, regular finish without glaze, and at least 20-pound weight.~~**conform to these requirements:**

~~(b) If filed in paper form, the front and back covers of copies of briefs must be paper of at least 65-pound weight. The cover of the brief copies must be:~~

~~(i) For an opening brief, blue;~~

~~(ii) For an answering brief, red;~~

~~(iii) For a combined answering brief and cross-opening brief, violet;~~

~~(iv) For a reply brief, a combined reply brief and answering brief on cross-appeal, or an answering brief to a cross-assignment of error under ORAP 5.57(3)(b), gray;~~

(v) For the brief

(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 ~~an intervenor,~~being read without difficulty. The print must be black, except for hyperlinks.

(ii) Briefs may be prepared using either monospaced type (such as Courier or Courier New) or proportionally spaced type (such as Times New Roman). Monospaced type may not exceed 10 characters per inch (cpi) for both the text of the brief and footnotes. If proportionally spaced type is used, the style must be Arial, Times New Roman, or Century Schoolbook, and the ~~color of~~**size may not be smaller than 14 point for both** the ~~brief~~**text** of the ~~party on whose side~~**brief and footnotes. Reducing or condensing** the ~~intervenor is appearing;~~**typeface in a manner that would increase the number of words in a brief is not permitted.**

~~(vi) For the brief of *amicus curiae*, green;~~

~~(vii) For a supplemental brief, the same color as the primary brief;~~

~~(viii) For a brief on the merits of a petitioner on review in the Supreme Court, white;~~

(ix) For a brief on the merits of a respondent on review**(iii) Briefs may not be prepared entirely or substantially** in ~~the Supreme Court, tan~~**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 ~~shall~~**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 ~~shall~~**must**

state the month and year in which the brief was filed.[4]

~~(d) Pages and covers shall be a uniform size of 8-1/2 x 11 inches.~~

~~(e) Paper for the text of the brief shall be white bond, regular finish without glaze, and at least 20-pound weight with surface suitable for both pen and pencil notation. If both sides of the paper are used for text, the paper shall be sufficiently opaque to prevent the material on one side from showing through on the other.[5]~~

~~(f) Printed or used area on a page shall not exceed 6-1/4 x 9-1/2 inches, exclusive of page numbers, with inside margin 1-1/4 inches, outside margin 1 inch, top and bottom margins 3/4 inch.~~

~~(g) Briefs shall be legible and capable of being read without difficulty. Briefs may be prepared using either uniformly spaced type (such as produced by typewriters) or proportionally spaced type (such as produced by commercial printers and many computer printers). Uniformly spaced type shall not exceed 10 characters per inch (cpi) for both the text of the brief and footnotes. If proportionally spaced type is used, the style shall be either Arial or Times New Roman and the size shall be not 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. Briefs printed entirely or substantially in uppercase are not acceptable. All briefs shall be double-spaced with double space above and below each paragraph of quotation.~~

(h) The last page of the brief shall **(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.

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

~~(j) A brief shall be bound in a manner that allows the pages of the brief to lie flat when the brief is open, as provided in this paragraph. Regardless of whether a brief is prepared with text on one or both sides of the pages, the brief may be bound with a plastic comb binding, with the binding to be within 3/8 inch from the left edge of the brief. A brief also may be bound by stapling (1) if the brief is prepared with text only on one side of each page or (2) if the brief is~~

~~prepared with text on both sides of the pages and does not exceed 20 pages (10 pieces of paper), excluding the cover but including the index, the excerpt of record and any appendix. A brief bound by stapling shall be secured by a single staple placed as close to the upper left-hand corner as is consistent with securely binding the brief.~~

~~(5~~

(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 by binderclip and must not contain staples.

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

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[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] S*ee* 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 7.25 and ORAP 1.35(5) regarding use of recycled paper and printing on both sides of a page.

See Appendix 5.05-1.

Rule 5.10
NUMBER OF COPIES OF BRIEFS;
PROOF OF SERVICE

(1) Any party filing a brief on appeal or on judicial review in the Court of Appeals shall file with the Administrator* one brief~~, marked as the original, and five copies, except as provided in paragraphs (1)(a) and (1)(b) of this rule~~.

~~(a) The original and five copies only need be filed for:~~

~~(i) A brief submitted pursuant to ORAP 5.90 and a brief filed in response;~~

~~(ii) A respondent's answering brief confessing error and not opposing the relief sought in the opening brief;~~

~~(iii) A brief submitted by a party who is not represented by an attorney and who has been determined to be indigent by the court or whose brief has been copied at the expense of the public institution of which the party is a resident, and a brief filed in response.~~

~~(b) The original and five copies only need be filed for any case in which the state, a state agency, or a county juvenile department is represented by the Attorney General and the adverse party is represented by appointed counsel compensated by the Office of Public Defense Services at state expense. Under this paragraph the Administrator may provide additional copies of briefs as needed and bill the parties for the additional copies.~~

(2) Any party filing a brief on appeal, judicial review, or other proceeding originally heard in the Supreme Court[1] shall file with the Administrator* one brief~~, marked as the orginal~~.

(3) Any party filing a brief shall serve two copies of the brief on every other party to the appeal, judicial review, or proceeding.

(4) The original ~~of each~~ brief shall contain proof of service on all other parties to the appeal. The proof of service shall be the last page of the brief or printed on or affixed to the inside of the back cover of the brief.

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[1] For example, appeals from the Tax Court, judicial review of orders of the Energy Facility Siting Council relating to site certificate applications, bar admission, and disciplinary proceedings and original jurisdiction cases under Article VII (Amended),

section 2, of the Oregon Constitution.

* *See* ORAP 1.35(1)(a) for the filing address of the Administrator.

Rule 5.15
~~**DESIGNATION OF PARTIES IN BRIEFS**~~

REFERENCES IN BRIEFS TO PARTIES AND CRIME VICTIMS OF OFFENSES AGAINST PERSONS

(1) In the body of a brief, parties shall not be referred to as appellant and respondent, but as they were designated in the proceedings below, except that in domestic relations proceedings the parties shall be referred to as husband or wife, father or mother, or other appropriate specific designation.

(2) In the body of a brief on appeal in a criminal, post-conviction, or habeas corpus case or on judicial review of an order of the Board of Parole and Post-Prison Supervision that includes a conviction for an offense, or attempt to commit an offense, compiled in ORS Chapter 163, any references to the victim of the offense must not include the victim's full name.

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 ~~an~~**a plain** error~~ of law apparent on the record.~~**.**[1]**

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

(4) (a) Each assignment of error ~~shall~~**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 ~~shall~~**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 ~~shall~~**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 ~~shall~~**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 ~~shall~~**must** identify where in the record the evidence was admitted.

~~(b) An assignment of error for~~**Where a party has requested that the court review** a claimed error ~~apparent on the record shall comply with~~**as plain error,** the ~~requirements for assignments of error generally by identifying~~**party must identify** the precise ~~ruling, specifying~~**error, specify** the state of the proceedings when the ~~ruling~~**error** was made, and ~~setting~~**set** forth pertinent quotations of the record where the challenged ~~ruling~~**error** was made.[1]

~~(c) 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.~~

(5) Under the subheading "Standard of Review," each assignment of error ~~shall~~**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 shall~~**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. ~~The argument in support of a claimed error apparent on the record shall demonstrate that the error is of the kind that may be addressed by the court without the claim of error having been preserved in the record.~~

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

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[1] ~~*See State v. Brown*, 310 Or 347, 355-56, 800 P2d 259 (1990~~**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. Tilden*, 252 Or App 581, 587-94, 288 P3d 567 (2012) (discussing cases in which Court of Appeals declined to review for plain error absent a request from the appellant).

Rule 5.50
THE EXCERPT OF RECORD

~~(1) After~~**Except in** the ~~conclusion of the substance~~**case** of ~~the~~**a self-represented party, the appellant must include in the opening** brief~~, the appellant shall set forth~~ an excerpt of record.~~*~~

~~(2) When preparing an excerpt of record, the appellant shall be guided by the following considerations:~~

~~(a)~~ **.**[1] The **parties to an appeal are encouraged to confer regarding the content of the excerpt of record, including whether to file a joint** excerpt of record ~~shall include the pleadings relevant to the issue or issues raised on appeal, any written opinion or findings of fact issued by the trial judge addressing a ruling to which error is assigned, any order disposing of the claim to which an assignment of error relates, and the judgment document or order being appealed~~**to be included in the opening brief**.

~~(b~~**2**) The excerpt of record ~~shall include any other document and~~ **must contain:**[2]

(a) The judgment or order on appeal or judicial review.

(b) Any written or oral rulings by the lower tribunal or agency addressing the issues presented by the assignments of error.

~~**(c) Any pleading or excerpt of pleadings, particular**~~ part of ~~a document that either is essential to or significantly helpful in~~ **the transcript, exhibit, evidentiary submission and other filing necessary for reviewing and** understanding the ~~arguments developed in the brief, particularly for purposes of assisting the court~~**assignments of error** in advance of oral argument~~. The issues on appeal and the procedural posture of the case should determine the contents of the excerpt of record. The full record is available to and used by the court after submission of a~~ **, if the parties anticipate that the case will be orally argued.**[3]

(d) If preservation of error is or is likely to be disputed in the case~~; therefore,~~ **, parts of memoranda and** the ~~appellant should exercise judgment regarding~~ **transcript pertinent to** the ~~content~~**issue** of **preservation presented by** the ~~excerpt~~**case.**

(e) A copy of ~~record, rather than merely duplicate~~ the ~~entire trial court file~~.

~~(c) It generally is not necessary to include in the excerpt of record memoranda of law filed in the trial court, unless the fact that a particular argument was or was not made in a memorandum has independent significance (*e.g.*, a dispute over preservation of an issue).~~[4]

~~(3) (a) In criminal, civil commitment, and juvenile cases, the excerpt of record shall contain the judgment document or order being appealed, and such other parts of the record as are appropriate to include.~~

(b~~(f~~) In criminal cases in which the defendant appealed after entering a conditional plea of guilty or no contest under ORS 135.335(3), the defendant ~~shall~~**must** include in the excerpt of record the writing in which the defendant reserved for review on appeal the trial court's adverse determination of a pretrial motion.

~~(4) In agency review cases, including workers' compensation and Land Use Board of Appeals cases, the excerpt of record shall include the order of the administrative law judge, the agency, and other administrative tribunal, if part of the lower tribunal's record, together with such other parts of the record as are appropriate to include.[2]~~

(5) If the appellant has failed to prepare an excerpt of record, the

(3) The excerpt of record must not contain memoranda of law filed in the trial court unless such memoranda are pertinent to a disputed or likely to be disputed issue of preservation.

~~**(4) A**~~ respondent may ~~move the court to require appellant to do so. If the excerpt of record prepared by the appellant does not include materials that the respondent believes to be essential to or significantly helpful in the court's preparation for oral argument, the respondent may prepare~~**file, as part of the respondent's brief,** a supplemental excerpt of record~~. The respondent shall set forth the~~ **containing those materials required by ORAP 5.50(2) that were omitted from the excerpt of record.**

~~**(5) The excerpt of record and any**~~ supplemental excerpt of record ~~after the conclusion of the substance of the respondent's answering brief.*~~

(6) The excerpt of record shall**must** be in the following form:

(a) All documents or parts of documents ~~shall~~**must** be copies of documents included in the record, rather than summarized or paraphrased. Omissions, if not apparent, ~~shall~~**must** be noted. No matter ~~shall~~**may** be omitted if to do so would change the meaning of the matter included.

~~(b) Contents shall~~**must** be set forth in chronological order~~.~~**, except that the OECI case register must be the last document in** the excerpt ~~shall~~**of record. The excerpt must** be consecutively paginated, with the first page being page ER-1. The excerpt ~~shall~~**must** begin with an index organized chronologically, describing each item and identifying where the item may be found in the trial court or agency record, and the page where the item may be found in the excerpt. **The index may include bookmarks as described in ORAP 16.50. A supplemental excerpt of record must substantially conform to the same requirements, except that a supplemental excerpt must be paginated using "SER," *e.g.*, SER-1, SER-2, SER-3.**

(c) The materials included ~~shall~~**must** be reproduced on 8-1/2 x 11 inch white paper by any duplicating or copying process that produces a clear, black, legible image.

(d) The excerpt of record ~~shall~~**must** comply with the applicable requirements~~, including page limitations,~~ of ORAP 5.05.

(6) Self-represented parties are not required to file an excerpt of record or a supplemental excerpt of record. If a self-represented party files an excerpt of record or a supplemental excerpt of record, it must contain only those documents specified in ORAP 5.50(2)(a) and (b), must contain no other documents, and must otherwise comply with this rule.[4]

(7) The appellate court may strike any excerpt of record or supplemental excerpt of record that does not substantially comply with the requirements of this rule.

_____

[1] Any brief containing an excerpt of record filed through the eFiling system that exceeds 25 megabytes must be filed in compliance with ORAP 16.15(1).

[2] For other requirements for the excerpt of record in Land Use Board of Appeals cases, *see* ORAP 4.67.

[3] *See* Appendix 5.50, which sets forth examples of documents that a party should consider including in the excerpt of record depending on the nature of the issues raised in the briefs. **The full record is available and used by the court after submission of a case; therefore, the excerpt of record need include only those parts of the record that will be helpful to the court and the parties in preparing for and conducting oral argument.**

~~[2] For other requirements for the excerpt of record in Land Use Board of Appeals cases, *see* ORAP 4.67.~~

~~* *But see* ORAP 5.05(3)(b) relating to separately binding an excerpt of record in excess of the page limit prescribed in ORAP 5.05(2)(e).~~

[4] Under ORAP 6.05(2), cases in which a self-represented party files a brief are submitted without argument by any party. For that reason, any excerpt or supplemental excerpt of record submitted by a self-represented party shall not contain any of the documents otherwise required by ORAP 5.50(2)(c) to (f) to assist the appellate court in preparing for oral argument.

Rule 5.57
RESPONDENT'S ANSWERING BRIEF:
CROSS-ASSIGNMENTS OF ERROR

(1) A respondent must cross-assign as error any trial court ruling described in subsection (2) of this rule in order to raise the claim of error in the appeal.[1]

(2) A cross-assignment of error is appropriate:

(a) If, by challenging the trial court ruling, the respondent does not seek to reverse or modify the judgment on appeal; and

(b) If the relief sought by the appellant were to be granted, respondent would desire reversal or modification of an intermediate ruling of the trial court.

(3) The appellant's answer to a cross-assignment of error shall be in the form prescribed by ORAP 5.55 for a respondent's answering brief and shall be:

(a) Contained in a separate section of the appellant's reply brief, if a reply brief is permitted under ORAP 5.70, and designated "response to cross-assignment of error;" or

(b) Filed within 21 days after the filing of the respondent's answering brief, if a reply brief is not permitted under ORAP 5.70, and entitled "appellant's answer to cross-assignment of error."

(4) A respondent may file a reply to an appellant's answer to a cross-assignment of error only if the nature of the case is one in which a reply brief is permitted under ORAP 5.70 and ORAP 5.80(3). The reply ~~shall be no longer than 15 pages~~**must comply with the requirements for a reply brief prescribed by ORAP 5.05,** and ~~shall~~**it must** be filed within 21 days after the filing of the appellant's answer to a cross-assignment of error.[2]

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[1] This rule does not apply to a respondent who also is a cross-appellant and is assigning error as a cross-appellant.

~~[2] A brief under this rule is required to have a gray brief cover. ORAP 5.05(4)(b)(iv).~~

Rule 5.85
ADDITIONAL AUTHORITIES

(1) Any party filing a memorandum of additional authorities or a response memorandum shall submit the memorandum in the manner provided in this rule, subject to any instructions of the court. A party may submit a memorandum of additional authorities after the filing of the party's brief but before oral argument without leave of the court. After oral argument, a party must file a motion for leave to file a memorandum of additional authorities. If the party submits a memorandum of additional authorities with the motion, then:

(a) if the court grants the motion, the date of filing for the memorandum of additional authorities relates back to the date of filing for the motion; or

(b) if the court denies the motion, the court will strike the memorandum of additional authorities.

(2) A memorandum of additional authorities and a response, if any:

(a) Shall include citations to relevant cases and statutes and shall identify the issue that has been previously briefed to which the new citations apply;

(b) Shall not exceed two pages, without leave of the court;

(c) Shall be filed with the Administrator ~~together with five copies, if filed in the Court of Appeals~~.[1]

(d) If filed less than five business days before oral argument, shall include in the caption the words "ORAL ARGUMENT SCHEDULED FOR [DATE]."

(3) If a party files or is given leave to file a memorandum of additional authorities, any other party to the case who has filed a brief may file a response. Unless the court directs otherwise, a response is due

(a) 14 days after the date of filing of the memorandum of additional authorities to which the party is responding; or

(b) if the date of filing of the memorandum of additional authorities relates back to the date of filing of the motion under paragraph (1)(a) or this rule, 14 days after the date of entry of the order granting the motion.

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

Rule 5.92
SUPPLEMENTAL *PRO SE* BRIEFS

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

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

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

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

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

Rule 5.95
BRIEFS CONTAINING CONFIDENTIAL MATERIAL

(1) Except as provided in subsection (6) of this rule, if a brief contains material that is, by statute or court order, confidential or exempt from disclosure,[1] the party submitting the brief shall file two original briefs:

(a) One brief shall contain the material that is confidential or exempt from disclosure. The title page of the brief shall contain in or under the case caption the words "CONFIDENTIAL BRIEF UNDER _____" followed by the statutory citation or a description of the court order under which confidentiality is claimed.* The original of the brief shall be placed in a sealed envelope marked "CONFIDENTIAL BRIEF."

(b) One brief shall have the material that is confidential or exempt from disclosure removed or marked out. The title page of the brief shall contain in or under the case caption the words "REDACTED BRIEF UNDER _____" followed by the statutory citation or a description of the court order under which confidentiality is claimed.*

~~(2) (a) If a brief described in subsection (1) of this rule is filed in the Court of Appeals, the party filing the brief shall file the original and five copies of the confidential brief and the original of the redacted brief.~~

(b**(2)** A party filing a brief under this rule shall serve two copies of the confidential brief and two copies of the redacted brief on each other party to the case on appeal or review.

(3) The Administrator shall keep both original briefs in the appellate file for the case. The Administrator shall make the redacted version of the brief available for public inspection and copying.

(4) (a) On motion of a person, the court shall make available for public inspection and copying a confidential brief based on a showing that the brief does not contain matter that is confidential or exempt from disclosure.

(b) On motion of a person and under such conditions as the court may deem appropriate, the court may authorize inspection or copying of a confidential brief based on a showing that the person is entitled as a matter of law to inspect or copy the material that is confidential or exempt from disclosure.

(5) When the appellate judgment issues terminating a case, the Administrator shall distribute to brief storage facilities only the redacted copies of a brief filed under paragraph (1)(b) of this rule.

(6) Briefs in the following categories of cases are entirely confidential, and so are exempt from the requirements of subsections (1) to (5) of this rule: adoption, juvenile dependency (including termination of parental rights), juvenile delinquency, civil commitment of allegedly mentally ill persons and persons with an intellectual disability (as defined in ORS 427.005), and appeals from orders of the Psychiatric Security Review

Board and State Hospital Review Panel. Parties filing in the Court of Appeals briefs in those categories of cases must comply with ORAP 5.10(1) and (3) regarding the original and number of copies to be ~~filed and~~ served on other parties to the case.

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[1] *See, e.g.*, ORS 36.222(5) regarding confidential mediation communications and agreements; ORS 135.139, ORS 433.045(3), and ORS 433.055 regarding records revealing HIV testing information; ORS 137.077 regarding presentence investigation reports; ORS 179.495 and ORS 179.505 regarding medical records maintained by state institutions; ORS 412.094 regarding nonsupport investigation records; ORS 419B.035 regarding abuse investigation records; ORS 426.160 and ORS 426.370 regarding records in civil commitment cases; and ORS 430.399(5) regarding alcohol and drug abuse records.

* *See* Appendix 5.95.

(Proposed Temporary Amendment)
Rule 6.15
PROCEDURE AT ORAL ARGUMENT

(1) In all cases in the Supreme Court:

(a) The appellant, petitioner, or petitioner on review shall have not more than 30 minutes to argue; and the respondent or respondent on review shall have not more than 30 minutes to argue.

(b) The appellant, petitioner, or petitioner on review shall argue first and may reserve not more than 10 minutes of the time allowed for argument in which to reply.

(c) If there are two or more parties on one side, they shall divide their allotted time among themselves, unless the court orders otherwise.

(2) (a) Unless the court otherwise orders, on oral argument in the Court of Appeals in all cases the appellant or petitioner shall have not more than 15 minutes and the respondent shall have not more than 15 minutes to argue.

(b) The appellant or petitioner may reserve not more than five minutes of the time allowed for argument in which to reply.

(3) A motion for additional time for argument shall be filed at least seven days before the time set for argument.

(4) No point raised by a party's brief shall be deemed waived by the party's failure to present that point in oral argument.

(5) For the purpose of this rule, a cross-appellant shall be deemed a respondent.

(6) It is the general policy of Oregon appellate courts to prohibit reference at oral argument to any authority not cited either in a brief or in a pre-argument memorandum of additional authorities.[1] If a party intends to refer in oral argument to an authority not previously cited, counsel shall inform the court at the time of argument and shall make a good faith effort to inform opposing counsel of the authority at the earliest practicable time. The court may, in its discretion, permit reference at argument to that authority and may give other parties leave to file a post-argument memorandum of additional authorities or a memorandum in response.

~~(7) The Court of Appeals encourages any party who is aware of another case pending under advisement in the Court of Appeals raising the same or a similar issue as the case being argued to bring that fact to the attention of the court at oral argument, or in writing after oral argument or after submission without oral argument.~~

(8) If counsel desires to have present at oral argument an exhibit that has been retained by the trial court, it is counsel's responsibility to arrange to have the exhibit transmitted to the appellate court.[2]

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[1] See ORAP 5.85 regarding memoranda of additional authorities.

[2] See ORAP 3.25 regarding arranging to have exhibits transmitted to the appellate court.

Rule 6.25
RECONSIDERATION BY COURT OF APPEALS

(1) As used in this rule, "decision" means an opinion, per curiam opinion, affirmance without opinion, and an order ruling on a motion or an own motion matter that disposes of the appeal. A party seeking reconsideration of a decision of the Court of Appeals shall file a petition for reconsideration. A petition for reconsideration shall be based on one or more of these contentions:

(a) A claim of factual error in the decision;

(b) A claim of error in the procedural disposition of the appeal requiring correction or clarification to make the disposition consistent with the holding or rationale of the decision or the posture of the case below;

(c) A claim of error in the designation of the prevailing party or award of costs;

(d) A claim that there has been a change in the statutes or case law since the decision of the Court of Appeals; or

(e) A claim that the Court of Appeals erred in construing or applying the law. Claims addressing legal issues already argued in the parties' briefs and addressed by the Court of Appeals are disfavored.

(2) A petition for reconsideration shall be filed within 14 days after the decision. The petition shall have attached to it a copy of the decision for which reconsideration is sought. The form of the petition and the manner in which it is served and filed shall be the same as for motions generally, except that ~~:~~

~~(a) The petition shall be accompanied by four copies, if the case was decided by a department of the court, or by 10 copies, if the case was decided by the full court, and~~

(b) the petition shall have a title page printed on plain white paper and containing the following information:

(~~i~~**a**) The full case caption, including appropriate party designations for the parties as they appeared in the court from which the appeal was taken and as they appear on appeal, and the trial and appellate court case numbers; and

(~~ii~~**b**) A title designating the party filing the petition, such as "Appellant's Petition for Reconsideration" or "Respondent's Petition for Reconsideration."

(3) The filing of a petition for reconsideration is not necessary to exhaust remedies or as a prerequisite to filing a petition for review.

(4) If a response to a petition for reconsideration is filed, the response shall be filed within seven days after the petition for reconsideration was filed. The court will proceed to consider a petition for reconsideration without awaiting the filing of a response, but will consider a response if one is filed before the petition for reconsideration is considered and decided.[1]

(5) A request for reconsideration of any other order of the Court of Appeals ruling on a motion or an own motion matter shall be entitled "motion for reconsideration." A motion for reconsideration is subject to ORAP 7.05 regarding motions in general.

[1] *See* ORAP 9.05(2) regarding the effect of a petition for reconsideration by the Court of Appeals on the due date and consideration of a petition for review by the Supreme Court.

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 ~~shall~~**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 ~~shall~~**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 opposing counsel objects to, concurs in, or has no position regarding the motion. If opposing counsel objects to the motion, the motion must include a statement whether opposing counsel intends to file a response to the motion. If the moving party has not been able to learn opposing counsel's position on the motion, then the motion must so state.

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

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[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.

Rule 7.25
MOTION FOR EXTENSION OF TIME

(1) Only the appellate court may grant an extension of time for the performance of any act pertaining to an appeal.

(2) A motion for an extension of time shall contain:

(a) The date the notice of appeal was filed (or in the case of a petition for review;

(b) The date of the decision of the Court of Appeals for which review is being sought);

(c) The date the brief or other action is due;

(d) The date to which the extension is requested;

(e) Whether it is the first or other request;

(f) The specific circumstances which caused the act not to be completed in the allotted time; and

(g) In a criminal case, whether the defendant is incarcerated.

~~(3) A statement whether opposing counsel objects to, concurs in or has no position regarding the extension of time requested is required for any motion other than a first motion for 28 days or less to file a brief.~~

(4**(3)** An objection to a motion for extension of time shall articulate specific grounds for the objection and shall identify how an extension of time will prejudice the objector's interest. An attorney may object on the ground that the client has instructed counsel to object to any extension, but that alone will not be a sufficient ground to deny or reduce any extension of time.

(~~5~~**4**) An objection to a request for an extension of time may be filed by facsimile transmission,[1] provided that the objection does not exceed five pages. Filing shall be deemed complete when the entirety of the objection being transmitted has been received by the Administrator. The facsimile transmission shall have the same force and effect as filing of the original.

(~~6~~**5**) A motion for an extension of time generally will be decided within a few days after it is filed. An objection to a motion for an extension of time filed after the court has granted the extension will be treated as a motion for reconsideration of the ruling. On reconsideration, if the court modifies the extension of time, the parties to the appeal will be notified; otherwise, the objection will be noted and placed in the appellate file.

(~~7~~**6**) Requests for extensions of time for preparation of transcripts shall be made in accordance with ORAP 3.30.

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

***See* ORAP 7.10(1)(c) concerning captions of motions for extension of time and Appendix 7.10-3 for illustrations of motions for extension of time.**

Rule 8.15
AMICUS CURIAE

(1) A person[1] may appear as *amicus curiae* in any case pending before the appellate court only by permission of the appellate court on written application setting forth the interest of the person in the case. The application ~~shall~~ **must:**

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

(b) identify the party with whom the amicus is aligned or state that the amicus is unaligned;

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

(d) explain why the application is timely relative to that deadline.

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

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

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

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

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

(4) In the Court of Appeals, unless the court grants leave otherwise for good cause shown, an *amicus* brief shall be due seven days after the date the brief is due of the party with whom *amicus curiae* is aligned or, if *amicus curiae* is not aligned with any party, seven days after the date the opening brief is due.

(5) With respect to cases in the Supreme Court on petition for review from the Court of Appeals:

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

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

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

(i) On the date the brief is due of the party on review with whom *amicus curia*e is aligned,

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

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

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

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

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

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

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

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

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

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

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

[4] *See* ORAP 6.10 concerning oral argument.

(Proposed Temporary Amendment)
Rule 8.47
NOTIFICATION OF RELATED CASES

When a party files a brief in the Court of Appeals, if the party is aware of another case pending in an appellate court that arises out of the same case or consolidated case, or that involves the same transaction or event, the party must file a notice with the Court of Appeals identifying the related case by case title and appellate case number. The notice must be a separate document from the party's brief. A party may likewise notify the Court of Appeals if the party is aware of another case pending in an appellate court that raises the same or a closely related issue. A party need not notify the Court of Appeals of a related case if another party has already done so.

Rule 9.17
BRIEFS ON THE MERITS ON REVIEW

(1) After the Supreme Court allows review, the parties to the case on review may file briefs on the merits of the case, as provided in this rule. A respondent may file a brief on the merits on review even if the petitioner on review elects not to do so.

(2) (a) If a petitioner on review has given notice of intent to file a brief on the merits as provided in ORAP 9.05(3)(a)(v), the petitioner shall have 28 days after the date that the Supreme Court allows review to file the brief.

(b) The petitioner's brief on the merits on review shall contain:

(i) Concise statements of the legal question or questions presented on review and of the rule of law that petitioner proposes be established. The questions should not be argumentative or repetitious. The phrasing of the questions need not be identical with any statement of questions presented in the petition for review, but the brief may not raise additional questions or change the substance of the questions already presented.

(ii) A concise statement of:

(A) The nature of the action or proceeding, the relief sought in the trial court, and the nature of the judgment rendered by the trial court; and

(B) All the facts of the case material to determination of the review, in narrative form with references to the places in the record where the facts appear.

(iii) A summary of the argument.

(iv) The argument.

(v) A conclusion, specifying with particularity the relief which the party seeks.

(c) The petitioner's brief on the merits on review shall conform to ORAP 5.05, ORAP 5.35, ORAP 5.95, and ORAP 9.05(3~~), except that the cover of the brief shall be white.~~).

(3) (a) The respondent's brief on the merits on review shall be filed within these time limits:

(i) If petitioner files a brief on the merits on review, respondent's brief on the merits on review is due within 28 days thereafter;

(ii) If petitioner gives notice of intent to file a brief on the merits on review but ultimately either does not do so or does not do so within the time allowed, respondent's brief on the merits on review is due within 28 days after the date on which petitioner's brief on the merits on review was due;

(iii) If petitioner either has failed to give notice of intent to file a brief on the merits on review as provided in ORAP 9.05(3)(a)(v) or has given notice of intent not to file a brief on the merits on review, respondent's brief on the merits on review is due within 28 days after review is allowed.

(b) Items required by paragraph (2)(b) of this rule need not be included in respondent's brief on the merits on review unless respondent is dissatisfied with their presentation in petitioner's brief on the merits on review.

(c) The respondent's brief on the merits on review shall conform to ORAP 5.05, ORAP 5.35, and ORAP 5.95~~, except that the cover of a brief shall be tan~~.

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(4) The petitioner on review may file an optional reply brief to the respondent's brief on the merits. The petitioner's reply brief on the merits shall conform to ORAP 5.05, ORAP 5.35, and ORAP 5.95. The reply brief on the merits, if any, is due within 14 days of the date on which respondent's brief on the merits on review was due.

(5) In complex cases, such as cases with multiple parties, multiple petitions, or both, the parties may confer and suggest an alternative briefing schedule as provided in ORAP 5.80(8).

(~~5~~**6**) The original shall be filed with the Administrator, together with proof of service. Two copies of the brief shall be served on each party to the review.

BRIEF TIME CHART 2

CASE TYPE	Opening Brief	Answering and Cross-Opening Brief	Reply Brief	Answering Brief to Cross-Assignment of Error	Petition for Review	Response to Petition for Review	Petitioner's Brief on the Merits	Respondent's Brief on the Merits	**Reply Brief on the Merits**	Petition for Reconsideration	**DATE FROM WHICH SCHEDULE IS CALCULATED** The opening brief due date is calculated by counting from the date that any of the following has occurred. See chart for appropriate number of days. The answering brief due date is calculated by counting from the date the opponent's brief was filed. *See* ORAP 1.35(1)(d) regarding the date of filing.
Judicial Review of all other Agency Action	49	49	21	21							Date record has been deemed settled. ORAP 4.22.
Petition for Review Response Petitioner's Brief on the Merits Respondent's Brief on the Merits **Reply Brief on the Merits** Petition for Reconsideration					35	14	28	28	**14**	14	Date of Court of Appeals decision. Date petition for review was filed. Date petition for review allowed by Supreme Court. Date petitioner's brief on the merits filed. Date of Supreme Court decision.
Bar Discipline Judicial Discipline and Disability Certified Questions of Law	28 28	28 28	14 0								Date of acknowledgment of receipt of record.
Mandamus Habeas Corpus Quo Warranto Energy Facility Siting Council/Public Utility Commission Reapportionment Review Legislative Secretary of State	28 14 8/1 9/15	28 14 10*	0 0 5*								Date that the case is at issue Date petition for review is filed. Legislative Assembly enacts reapportionment. Secretary of State adopts reapportionment.

* Business days. *See* ORAP 1.15(3)(i).

Rule 9.25
RECONSIDERATION IN SUPREME COURT

(1) A party seeking reconsideration of a decision of the Supreme Court shall file a petition for reconsideration within 14 days after the date of the decision. The petition shall be in the form of a brief, prepared in conformity with ORAP 5.05 and ORAP 5.95, insofar as they are applicable. The petition must be no longer than a petition for review in the Supreme Court as prescribed by ORAP 9.05(3)(a). The petition shall include a copy of the court's decision. A petitioner shall identify on the cover which party is the petitioner, the date of the decision, and, if there is an opinion or if there are opinions, the judges who joined therein.

~~(2) The petitioner shall file the original petition with the Administrator. The original shall show proof of service of two copies on every other party to the appeal or review.~~

(3**(2)** Any response to a petition for reconsideration must be filed within seven days after the filing of the petition for reconsideration.

(**43**) The court shall either deny or allow reconsideration. If the court allows reconsideration, the court may reconsider with or without further briefing or oral argument. Reconsideration shall result in affirmance, modification, or reversal of the decision that has been reconsidered.

Rule 11.05
MANDAMUS:
INITIATING A MANDAMUS PROCEEDING

(1) A party seeking a writ of mandamus in the Supreme Court shall apply by filing a petition substantially in the form prescribed by this rule.

(2) Except as otherwise provided in this rule, a petition for writ of mandamus shall comply as to form with ORAP 5.05(4)(c) through (h). The petition shall also include, in addition to any matters required by law:

(a) A title page including a caption containing the title of the proceeding, a heading indicating the type of writ requested (*e.g.*, "petition for alternative writ of mandamus," "petition for peremptory writ of mandamus"), and, if the mandamus proceeding arises from a matter before a lower court or administrative agency, the identifying number, if any, assigned to the matter below.

(i) In a mandamus proceeding that challenges the action of a judge in a particular case in the circuit court, the Tax Court, or the Court of Appeals, the case title of the proceeding shall be the same as the case title in the lower court, except that the party seeking relief shall be designated as the "relator" in addition to that party's designation in the trial court, and the adverse real party in interest shall be designated as the "adverse party" in addition to that party's designation in the trial court. The judge or court shall not be named as a defendant in the mandamus proceeding.[1]

(ii) In any other mandamus proceeding,[2] the case title of the proceeding shall be "State ex rel _____, Plaintiff-Relator, v. _____, Defendant," which title shall appear on the petition and all other documents filed in the proceeding.[3]

(b) On the title page, the relator shall include the litigant contact information required by ORAP 1.30. If any party is not represented by an attorney, the title page shall include the party's name, mailing address, and telephone number.

(c) A statement in support of the petition, containing:

(i) A concise but complete statement of facts material to a determination of the question or questions presented and the relief sought;

(ii) A statement why the petition is timely.[4]

(iii) A statement why application was not made to the circuit court for relief; and

(iv) A statement why appeal or any other applicable potential remedy is not a plain, speedy and adequate remedy in the ordinary course of law, precluding issuance of the writ.[5]

(d) Proof of service as follows:

(i) In a mandamus proceeding that challenges the action of a judge in a particular case in the circuit court, the Tax Court, or the Court of Appeals, the relator shall accompany the petition with proof of service on the adverse party, any other party (if any) to the proceeding in the lower court, and the judge or court whose action is challenged in the mandamus proceeding.

(ii) In any other mandamus proceeding, the relator shall

accompany the petition with proof of service on the defendant and, if the mandamus proceeding arises from another proceeding or controversy, proof of service on any other party to the proceeding or controversy.

(iii) If the state, a state officer, or a state agency is a party to the case, proceeding, or controversy from which the mandamus proceeding arises, the relator shall include proof of service on the Attorney General.[6]

(e) If the relator seeks a stay in the proceedings from which the mandamus proceeding arises, the caption shall indicate "STAY REQUESTED," and the relator shall show, in the statement in support of the petition, that the relator requested a stay from the court, judge, or administrative agency or official whose order or decision is being challenged and that the request for a stay was denied, or that it would be futile to request a stay from the court, judge, or administrative agency or official. If the relator seeks to have the Supreme Court stay the proceedings from which the mandamus proceeding arises, the relator shall file a motion pursuant to chapter 7 of the Oregon Rules of Appellate Procedure.

(f) If the mandamus proceeding challenges a written order or decision, a copy of the order or decision shall be attached to the petition.

(3) The relator shall accompany the petition:

(a) With a memorandum of law with supporting arguments and citations. The form of the memorandum shall comply with ORAP 7.10(1) and (2).

(b) If the mandamus proceeding arises from a matter in which a record has been made, the relator must assemble an excerpt of record containing such parts of the record relating to the matter as is necessary for a determination of the question or questions presented and the relief sought. The excerpt of record must comply with ORAP 5.50(5~~6~~)~~., except that the excerpt may be up to 100 pages. If a longer excerpt is necessary, the relator may seek leave of the court.~~

(c) In a mandamus proceeding that challenges the action of the Court of Appeals, the Tax Court, or a judge in a particular case in the circuit court, the relator need not accompany the petition with a proposed form of writ of mandamus; in any other mandamus proceeding, the relator shall do so.

(4) (a) The caption of any memorandum, motion, or any other document filed in the mandamus proceeding, except the petition for a writ of mandamus, shall display prominently the words "MANDAMUS PROCEEDING."[7]

(b) If no record was made below, the petition, memorandum, and other

supporting material may be submitted as a single document.

(c) If a record was made in the matter from which the mandamus proceeding has arisen, the relator shall assemble and submit the petition, the memorandum in support of the petition, and the excerpt of record as separate documents.

(d) The original petition and accompanying documents shall be filed with the Administrator.

(5) If the petition, memorandum, or an accompanying motion in a mandamus proceeding includes an attachment containing material that is, by statute or court order, confidential, sealed, or otherwise exempt from disclosure,[8] the filing must comply with the requirements of ORAP 8.52.

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[1] *See* Illustration 1a in Appendix 11.05.

[2] For example, mandamus proceedings that challenge the act or failure to act of a public official or administrative agency, or that challenge administrative action of a judge or other action of a court of an institutional nature.

[3] *See* Illustrations 2 and 3 in Appendix 11.05.

[4] *See State ex rel Redden v. Van Hoomissen*, 281 Or 647, 576 P2d 355 (1978), and *State ex rel Fidanque v. Paulus*, 297 Or 711, 688 P2d 1303 (1984), regarding timeliness. As a rule of thumb, the relator usually should file the petition within 30 days after the date of the action that the relator seeks to challenge in mandamus.

[5] *See* ORS 34.110; *State ex rel Automotive Emporium v. Murchison*, 289 Or 265, 611 P2d 1169 (1980).

[6] *See* footnote 1 to ORAP 1.35 for the service address of the Attorney General.

[7] *See* Illustration 1b in Appendix 11.05.

[8] *See, e.g.*, ORS 36.222(5) regarding confidential mediation communications and agreements; ORS 135.139, ORS 433.045(3), and ORS 433.055 regarding records revealing HIV test information; ORS 137.077 regarding presentence investigation reports; ORS 179.495 and ORS 179.505 regarding medical records maintained by state institutions; ORS 412.094 regarding nonsupport investigation records; ORS 419B.035 regarding abuse investigation records; ORS 426.160 and ORS 426.370 regarding records in civil commitment cases; and ORS 430.399(5) regarding alcohol

and drug abuse records. *See generally* ORAP 16.15(5)(b) for procedure for eFiling attachments that are confidential or otherwise exempt from disclosure.

***See* ORS 34.105 to 34.250 regarding procedure in certain Supreme Court mandamus proceedings; ORS 34.120(2) regarding the Supreme Court's original mandamus jurisdiction; and ORS 34.250 regarding procedure in Supreme Court mandamus proceedings.**

***See* ORS 21.010(1), (5) regarding filing fees.**

Rule 11.30
BALLOT TITLE REVIEW

The practice and procedure governing a petition to the Supreme Court to review a ballot title shall be:

(1) Any elector dissatisfied with a ballot title provided by the Attorney General under ORS 250.067 or ORS 250.075(2), or by the Legislative Assembly under ORS 250.075(1), may file with the Administrator a petition to review the ballot title.

(2) The petition must be filed within 10 business days after the day upon which the Attorney General certifies the ballot title to the Secretary of State, or the Legislative Assembly files the ballot title with the Secretary of State. If a petition is mailed to the Administrator in compliance with ORAP 1.35(1)(c), then the petition is deemed filed when mailed; otherwise, a petition is deemed filed when actually received by the Administrator.

(3) The form of the petition shall comply with ORAP 7.10 governing motions. The petition shall have a title page containing:

(a) A case title in which the party petitioning for review is designated as the petitioner and the Attorney General is designated as the respondent.

(b) The title "Petition to Review Ballot Title Certified by the Attorney General" or "Petition to Review Ballot Title Certified by the Legislative Assembly," as the case may be.

(c) The date the ballot title was certified.

(d) The chief petitioner referred to in ORS 250.045.

(e) The litigant contact information required by ORS 1.30.

(4) The body of the petition shall be no longer than 10 pages and:

(a) Shall state the petitioner's interest in the matter, whether the petitioner is an elector, and whether the petitioner timely submitted written comments on the draft ballot title.

(b) Shall include the reason the ballot title does not substantially comply with the requirements of ORS 250.035, and a request that the Supreme Court certify to the Secretary of State a ballot title that complies with the requirements of ORS 250.035 in lieu of the ballot title challenged by petitioner or refer the ballot title to the Attorney General for modification.

(c) May include under the heading "Arguments and Authorities" legal arguments and citation of legal authorities.

(5) (a) The petition shall have attached to it a copy of the ballot title as certified to or filed with the Secretary of State and containing the full text of the ballot title and a photocopy of the text of the measure as submitted to the Secretary of State.

(b) The petition shall show proof of service on ~~the Secretary of State and~~ the Attorney General,[1] as well as any chief petitioner who did not file the petition to review the ballot title **and proof of written notification to the Secretary of State that the petition has been filed**.

(c) The original petition shall be filed. The petition shall be accompanied by the filing fee required for an original proceeding in the Supreme Court.

(6) The Attorney General has ~~five~~**seven** business days after the filing of the petition, unless a shorter time is ordered by the court, to:

(a) File the draft ballot title, the certified ballot title, the Attorney General's letter of transmittal to the Secretary of State and, if not overly lengthy, written comments received by the Secretary of State concerning the draft ballot title. In addition, the Attorney General may provide the court with the text of the certified ballot title, and any subsequent modified ballot title, by electronic mail.

(b) File an answering memorandum. If the Attorney General claims that text as contained in the petition is in error, the Attorney General must file an answering memorandum pointing out the discrepancy; otherwise, the Attorney General may submit a letter waiving the filing of an answering memorandum.

Any answering memorandum must be in the form prescribed by ORAP 7.10 for answers to motions and may not be longer than 10 pages, except that when the court has consolidated review of more than one petition to review a ballot title in one proceeding, the length of the answering memorandum may be increased by five pages per each additional petition. The Attorney General must file the original answering memorandum, with proof of service on counsel for the petitioner. The answering memorandum may set forth concisely the reasons why the Attorney General believes the ballot title filed with the Secretary of State substantially complies with the requirements of ORS 250.035 or, alternatively, may suggest alterations that in the Attorney General's judgment would make the ballot title substantially comply. The answering memorandum may also contain under separate heading legal arguments and citation to legal authorities.

(7) Any person who is interested in a ballot title that is the subject of a petition, including the chief petitioner of a measure, may file a motion in the form prescribed by ORAP 7.10, asking leave of the Supreme Court to submit a memorandum as an *amicus curiae*. The motion must be accompanied by the proposed memorandum that the *amicus curiae* intends to submit. The proposed memorandum must be in the form prescribed by ORAP 7.10 for answers to motions and may not be longer than 10 pages. The motion and proposed memorandum must be filed and served on or before the date that the answering memorandum is due. If a party seeks to appear as an *amicus curiae* after the Attorney General has filed a modified ballot title after referral from the Supreme Court, then the motion and memorandum must be filed with and actually received by the Administrator and must be served on and actually received by all parties within five business days after the date that a party has filed an objection.

(8) The petitioner has five business days after the filing of the answering memorandum, unless a shorter time is ordered by the court, to file a reply memorandum. Any reply memorandum must be in the form prescribed by ORAP 7.10 for answers to motions and must not be longer than five pages. The petitioner must file the original reply memorandum, with proof of service on the Attorney General.

(9) After the filing of all memoranda permitted, the Supreme Court will consider the matter without the filing of briefs or presentation of oral argument unless otherwise ordered by the court, either on its own motion or on request of a party. If the court orders oral argument, the petitioner shall argue first. Unless otherwise ordered by the court, an *amicus curiae* may not participate in oral argument.

(10) (a) For ballot title review proceedings in which the Supreme Court has referred the Attorney General's certified ballot title to the Attorney General for modification, the Attorney General must prepare ~~and~~**a** modified ballot title. The modified ballot title must be filed with and actually received by the Administrator, and it must be served on and actually received by all parties, within five business

days after the date of the referral.

(b) The petitioner, or an intervenor under paragraph (10)(c), may file an objection to the modified ballot title within five business days after the date of filing of the modified ballot title. An objection or proposed objection under paragraph (10)(c) must be in the form prescribed by ORAP 7.10, and it may not exceed 10 pages. The objection or proposed objection must be filed with and actually received by the Administrator within the time required. The objection or proposed objection must be served on and actually received by all parties within five business days after the date of filing of the modified ballot title. The objection or proposed objection may be filed and served by telephonic facsimile communication as provided by ORAP 7.35(3).[2] A party may file a response to the objection or proposed objection within five business days after the date of filing of the objection, unless the court otherwise directs.

(c) A person who submitted written comments to the Secretary of State under ORS 250.067 regarding the original ballot title, or the chief petitioner, may seek to intervene as a party to object to a modified ballot title when the Supreme Court has referred the Attorney General's certified ballot title to the Attorney General for modification. The person must file a motion to intervene, together with a proposed objection to the modified ballot title, within five business days after the date the modified ballot title has been filed. The motion and proposed objection must comply with the filing and service requirements prescribed by paragraph (10)(b). The proposed objection may assert only that the modifications by the Attorney General themselves have caused the modified ballot title to not comply substantially with the requirements of ORS 250.035.

(11) (a) If the Supreme Court issues a dispositional decision in which the court dismisses the petition, certifies the Attorney General's certified ballot title or certifies the Attorney General's modified ballot title, with or without additional modification, the Administrator will issue the appellate judgment on the next judicial day after the filing date of the decision.

(b) If the court refers the Attorney General's certified ballot title to the Attorney General for modification or refers the Attorney General's modified ballot title to the Attorney General for further modification and no party files a timely objection to a modified ballot title, then the Supreme Court will certify the modified ballot title, and the Administrator will issue the appellate judgment, on the next judicial day after the time for filing an objection expires.

(c) The court's decision shall become effective in accordance with ORAP 14.05(2)(c).

[1] *See* footnote 1 to ORAP 1.35 for the service address of the Attorney General.

[2] The facsimile transmission number for the Administrator is (503) 986-5560. The facsimile transmission number for the Attorney General (Appellate Division) is (503) 378-6306.

Rule 12.10
AUTOMATIC REVIEW IN
DEATH SENTENCE CASES

(1) Whenever a defendant is sentenced to death, the judgment of conviction and sentence of death are subject to automatic and direct review by the Supreme Court without the defendant filing a notice of appeal.

(2) If, in addition to a conviction for aggravated murder forming the basis for the death sentence, a defendant is convicted of one or more charges arising from the same charging instrument, the Supreme Court shall have jurisdiction to review any such conviction without the filing of a notice of appeal.

(3) Immediately after entry of the judgment of conviction and sentence of death, the trial court administrator shall prepare a packet consisting of the following:

(a) A copy of the judgment of conviction.

(b) A copy of the order of sentence of death unless that sentence is contained in the judgment of conviction.

(c) A certificate by the trial court administrator stating:

(i) the date of entry of each writing described above.

(ii) the names, mailing addresses, telephone numbers, and e-mail addresses of the attorneys of record for the state and for the defendant at the date of entry of each writing described above.

(d) A cover sheet captioned "In the Supreme Court of the State of Oregon" and showing the court in which the judgment of conviction and sentence of death were made, the title of the case, the trial court case number, the name of the judge who imposed the sentence of death and the caption: "Automatic Death Sentence Review."

(4) The trial court administrator shall serve a true copy of the packet on the defendant and on each attorney and the transcript coordinator. The trial court administrator shall endorse proof of service on the original of the packet and send the original to the Administrator, who shall immediately notify the Chief Justice of receipt thereof.

(5) (a) Service of a copy of the packet on the transcript coordinator shall be deemed to be authorization for the transcript coordinator to arrange for preparation of a transcript of all parts of the criminal proceeding, including all pretrial hearings and selection of the jury.

(b) A transcript shall meet the specifications of ORAP 3.35.

(c) A transcript shall be filed within 60 days after the date the packet is served on the transcript coordinator.

(d) Transcripts shall be settled in the same manner as on an appeal pursuant to ORS 138.185 and ORS 19.370, except that a first extension of time of 30 days to file a motion to correct the transcript or add to the record will be deemed granted if, within 15 days after the transcript is filed, a party files a notice of need for additional time to file such a motion.

(6) (a) If the defendant desires to file an opening brief, the brief is due 180 days after the transcript is settled.

(b) If the state desires to file an answering brief, the brief is due:

(i) When the defendant does not desire to file an opening brief, 180 days after the transcript is settled.

(ii) When the defendant files an opening brief, 180 days after the defendant serves and files the defendant's opening brief.

(c) If the defendant has filed an opening brief, the defendant may file a reply brief, which shall be due 90 days after the state serves and files its answering brief.

(d) Specifications for briefs shall be those set forth in ORAP 5.05, except that the maximum length of a brief without obtaining leave of the court for a longer brief is 28,000 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, 100 pages.

(7) **Notwithstanding UTCR 6.120(1),** the trial court administrator shall send the trial court file and exhibits to the Administrator ~~at the request of the Administrator~~.

(8) Preparation, service, and sending of the packet, the trial court file and exhibits offered, preparation of transcripts, preparation of briefs, and review by the Supreme Court shall be accorded priority over all other cases by all persons concerned.

Rule 13.05
COSTS AND DISBURSEMENTS

(1) As used in this rule, "costs" includes costs and disbursements. "Allowance" of costs refers to the determination by the court that a party is entitled to claim costs. "Award" of costs is the determination by the court of the amount that a party who has been allowed costs is entitled to recover.[1]

(2) The court will designate a prevailing party and determine whether the prevailing party is allowed costs at the time that the court issues its decision.

(3) When an allowance of costs is dependent on identification of a party as a prevailing party, the appellant or petitioner (or cross-appellant or cross-petitioner, as appropriate) is the prevailing party only if the court reverses or substantially modifies the judgment or order from which the appeal or judicial review was taken. Otherwise, the respondent (or cross-respondent, as appropriate) is the prevailing party.

(4) 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 court may allow costs to abide the outcome of the case. If the court allows costs to abide the outcome of the case, the prevailing party shall claim its costs within the time and in the manner prescribed in this rule. The appellate court may determine the amount of costs under this subsection, and may condition the actual award of costs on the ultimate outcome of the case. In that circumstance, the award of costs 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 costs.

(5) (a) A party seeking to recover costs shall file a statement of costs and disbursements within 21 days after the date of the decision. The filing of a petition for review or a petition for reconsideration does not suspend the time for filing the statement of costs and disbursements.

(b) A party must file the original statement of costs and disbursements,

~~without copies, but~~ accompanied by proof of service showing that a copy of the statement was served on every other party to the appeal.

(c) A party objecting to a statement of costs and disbursements shall file objections within 14 days after the date of service of the statement. A reply, if any, shall be filed within 14 days after the date of service of the objections. The original objection or reply shall be filed with proof of service.

(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 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.

(b) If the party who has been allowed costs has incurred transaction charges or document recovery charges in connection with electronically filing any document, the party is entitled to recover any such charge so incurred.

(c) If the prevailing party who has been allowed costs has paid for copies of audio or video tapes in lieu of a transcript or incident to preparing a transcript, the party is entitled to recover any such charge so incurred.

(d) (i) For the purposes of awarding the prevailing party fee under ORS 20.190(1)(a), an appeal to the Court of Appeals and review by the Supreme Court shall be considered as one continuous appeal process and only one prevailing party fee per party, or parties appearing jointly, shall be awarded.

(ii) The prevailing party fee will be awarded only to a party who has appeared on the appeal or review.

(iii) A prevailing party is not entitled to claim more than one prevailing party fee, nor may the court award more than one prevailing party fee against a nonprevailing party, regardless of the number of parties in the action.[2]

(e) If a prevailing party who has been allowed costs timely files a statement of costs and disbursements and no objections are filed, the court will award costs in the amount claimed, except when the entity from whom costs are sought is not a party to the proceeding or when the court is without authority to award particular costs claimed.

(f) If a prevailing party who has been allowed costs untimely files a statement of costs and disbursements, that party is entitled to recover the party's filing or first appearance fee and the prevailing party fee under ORS 20.190(1).

(g) If a prevailing party who has been allowed costs does not file a statement of costs and disbursements, the court shall award that party's filing or first appearance fee and the prevailing party fee under ORS 20.190(1) as part of the appellate judgment.

(7) Parties liable for payment of costs and disbursements shall be jointly liable.

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[1] *See generally* ORS 20.310 to 20.330 concerning costs and disbursements on appeal and in cases of original jurisdiction.

[2] *See* ORS 20.190(4).

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 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 ~~the petition for review or~~ a response to the petition for review ~~shall~~**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~~, accompanied by four copies if filed in the Court of Appeals,~~ 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.

16. FILING AND SERVICE BY ELECTRONIC MEANS

Rule 16.15
FORMAT OF DOCUMENTS TO BE FILED ELECTRONICALLY

(1) Any document filed via the eFiling system must be in a Portable Document Format (PDF) or Portable Document Format/A (PDF/A) that is compatible with the eFiling system requirements and that does not exceed 25 megabytes. An eFiler should break down a document that exceeds the size limit into as few smaller separate documents as possible, which the filer may upload as supporting documents under ORAP 16.15(5).[1] The PDF document shall allow text searching and shall allow copying and pasting text into another document.

(2) A submitted document, when viewed in electronic format and when printed, shall comply, to the extent practicable, with the formatting requirements of any applicable Oregon Rule of Appellate Procedure. Except as provided in ORAP 16.40, a document submitted for electronic filing need not contain a physical signature.

(3) An eFiler who submits a document that does not comply with an applicable Oregon Rule of Appellate Procedure will receive from the court an acknowledgement of the electronic filing and a notice of the deficiency or deficiencies to be corrected.[2]

(4) The court may require that an eFiler submit, in the manner and time specified by the court, an electronic version of a document in its original electronic format.

(5) Except as provided in subsection (1) and paragraphs (5)(a) through (c) of this rule, to the extent practicable, an electronic filing must be submitted as a unified single PDF file, rather than as separate eFiled documents or as a principal eFiled document with additional supporting documents attached through the eFiling system.[3]

(a **(a) The following documents must be submitted as supporting documents through the eFiling system:**

(i) One or more parts of an eFiled document that exceeds the size limit set out in subsection (1) of this rule, as a supporting document to the initial eFiled document.

~~(ii)~~ A memorandum of law accompanying a petition in a mandamus, habeas corpus, or quo warranto proceeding in the Supreme Court under ORAP 11.05 or ORAP 11.20 ~~must be submitted~~, as a supporting document to the eFiled petition ~~attached through the eFiling system~~.

(b) For an electronic filing containing an attachment that is confidential or otherwise exempt from disclosure, the eFiler must eFile the attachment separately from the principal document, not as a supporting document attached through the eFiling system. For the principal document, the eFiler must include a comment that the related eFiling is a confidential attachment to the principal document. For the eFiled attachment, the eFiler must select the document name "Notice to Court Confidential Attachment."

(c) For an electronically filed motion seeking approval to file another document, including an application to appear *amicus curiae* with an accompanying brief, where the eFiler intends to submit the brief or other document for filing at the same time, the brief or other document must be electronically filed separately from the motion seeking approval or application to appear *amicus curiae*, rather than being submitted as a supporting document attached to the motion. For each electronic filing transaction under this paragraph, the eFiler must include the following comments:

(i) For the motion seeking approval or application to appear *amicus curiae*, a comment that the eFiler is submitting the brief or other document through a separate eFiling transaction; and

(ii) For the brief or other document, a comment that the electronic filing transaction relates to the earlier electronic filing transaction that submitted the motion or application to appear *amicus curiae*.

(6) An eFiled document may not contain an embedded audio or video file.

(7) Unless otherwise provided by these rules or directed by the court, an eFiler shall not submit to the court paper copies of an eFiled document.

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[1] *See* <*http://tinyurl.com/eFileFAQpage*> (<*http://courts.oregon.gov/OJD/OnlineServices/eFile/electronicFilingFAQs.page?*>) for more information about the technical requirements of eFiling.

[2] *See* ORAP 1.20.

[3] Examples of content that should be included as part of a unified single PDF file include: (1) notice of appeal, judgment being appealed, and certificate of service; (2) petition for judicial review, agency order as to which review is sought, and certificate of service; (3) petition for reconsideration, underlying decision as to which reconsideration is sought, and certificate of service; (4) petition for review, Court of Appeals decision as to which review is sought, and certificate of service; (5) motion, affidavit or declaration (if any) and certificate of service; (6) Supreme Court mandamus or habeas corpus petition, copy of order or written decision, and certificate of service; (7) Supreme Court memorandum in support of a mandamus or habeas corpus petition, excerpt of record, and certificate of service.

Rule 16.20
FILING FEES AND eFILING CHARGES

(1) The appellate courts may impose a transaction charge for using the eFiling system, as prescribed by order of the Chief Justice.

(2) The appellate courts may collect a document recovery charge. The document recovery charge shall be at the rate prescribed by Chief Justice Order, multiplied by the number of copies required for a particular document. The number of copies, if any, varies based on the type of document that is eFiled.[1]

(3) An eFiler shall pay any required filing fees or eFiling charges at the time of the electronic filing, by using the electronic payment system, unless otherwise directed by the court. Charges for electronic filing may be recovered in the manner provided by ORAP 13.05.

(4) If an eFiler seeks to waive or defer filing fees, the eFiler shall apply for a waiver or deferral of filing fees by eFiling an application to waive or defer filing fees at

the time of filing a document electronically.

~~(5) If the court rejects an eFiled document, the court may, upon request, refund any fees paid.~~

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[1] A link to a chart outlining the number of printed copies required for each eFiled document is available at <*http://tinyurl.com/eFileFAQpage*> (<*http://courts.oregon.gov/OJD/OnlineServices/eFile/electronicFilingFAQs.page?*>).

Rule 16.30
SPECIAL<u>CONVENTIONAL</u> FILING ~~AND SUBMISSION~~ REQUIREMENTS

<u>(1) **The following documents must be conventionally filed:**</u>

(a) A document filed under seal, including a motion requesting that a simultaneously filed document be filed under seal or a document with an attachment that is sealed by statute or court order~~, must be filed conventionally~~.

~~(2) An eFiler shall file conventionally any~~**<u>b) An</u>** oversized demonstrative exhibit or oversized part of an appendix or excerpt of record**<u>. Such a document must be filed</u>** within three business days of eFiling~~.~~ **<u>the document to which the oversized document relates.</u>** An eFiler may note, in the "comments" section of the eFiling screen, that an oversized appendix or excerpt of record will be filed conventionally.

<u>(3) For all documents, unless otherwise provided by these rules or directed by **(c) An opinion of a trial panel of** the ~~court,~~ **Disciplinary Board filed with the State Court Administrator under Bar Rule of Procedure 10.1.**</u>

(2) An eFiler ~~shall~~<u>who is</u> not ~~submit to the court paper copies of an eFiled~~<u>a **lawyer of record for a party in a case must conventionally file any** document **in any case that is confidential by law or court order**</u>.

<u>~~(4) An~~**a) The conventional filing requirement in this subsection applies to a lawyer for a person or entity appearing as amicus curiae.**</u>

<u>**(b) The Administrator is authorized to develop a means of electronic transmission for the filing of a notice of appointment of counsel in a confidential case, for the purpose of documenting a lawyer of record on the case.**</u>

(3) The following documents may be conventionally filed or eFiled**:**

(a) A notice of appeal, petition for judicial review, cross-petition for judicial review, or petition under original Supreme Court or Court of Appeals jurisdiction.[1]

~~**(b) A request or motion for waiver of the mandatory eFiling requirement, as set out in ORAP 16.60(2). If the request is approved or the motion granted, then the approval or order filed in a case under ORAP 16.60(2)(c) or (d), and any**~~ document ~~may not contain an embedded audio or video file~~**subject to that approval or order may be conventionally filed.**

[1] ORS 19.260(1) provides that the filing of a notice of appeal may be accomplished by mail; ORS 19.260(4) provides that, except as otherwise provided by law, subsection (1) applies to petitions for judicial review, cross-petitions for judicial review, and petitions under original jurisdiction of the Supreme Court or Court of Appeals.

Rule 16.45
ELECTRONIC SERVICE

(1) Registration as an eFiler with the eFiling system constitutes consent~~, within the meaning of ORCP 9 G,~~[1] to receive service via the electronic mail function of the eFiling system.

(2) (a) ~~A~~ **Except as provided in subsection (3), a** party ~~electronically filing~~**eFiling** a document~~, other than an initiating document,~~ with ~~an~~**the** appellate court may accomplish service of that document on any other party's attorney, if that attorney is a registered eFiler, by using the ~~electronic service~~**eService** function of the eFiling system. The eFiling system will generate an e-mail to the attorney ~~to be~~**being** eServed that includes a link to the document that was ~~electronically filed~~**eFiled**. To access the ~~electronically filed~~**eFiled** document, the attorney who has been eServed must log in to the eFiling system.

(b) Notwithstanding ORCP 9 G, electronic service **(b) eService** is effective under this rule when the eFiler has received a confirmation e-mail stating that the eFiled document has been received by the eFiling system.

(3) A party ~~electronically filing~~**eFiling** a document ~~with the court~~ must accomplish service ~~as to parties who do not qualify for eService under subsection (2)(a) of this rule~~ via the conventional manner**,** as provided by ~~the~~ **ORAP 1.35 and other** applicable **rules and** statutes ~~and by the Oregon Rules of Appellate Procedure, which may include service via electronic mail as provided by ORCP 9 G. Parties who do not~~

~~qualify for eService include parties represented by attorneys who are not registered eFilers and parties who are~~**, if:**

(a) The document to be served is an initiating document;

(b) The party to be served is self-represented~~. Parties who electronically file initiating documents must accomplish service conventionally.~~**; or**

(c) The attorney to be served is not a member of the Oregon State Bar or has obtained a waiver to the mandatory eFiling requirement under ORAP 16.60.

(4) All ~~electronically filed~~**eFiled** documents must be accompanied by a proof of service under ORAP 1.35(2)(~~d~~e). The proof of service must certify service on all parties regardless of the means by which service was accomplished, including eService. **The proof of service must state that service was accomplished at the person's email address as recorded on the date of service in the eFiling system, and need not include that person's email address or mailing address.**

(5) If an eFiled document is not ~~electronically served~~**eServed** by the eFiling system because of an error in the transmission of the document or other technical problem experienced by the eFiler, the court may, upon satisfactory proof, permit the service date of the document to ~~relatevback~~**relate back** to the date that the eFiler first attempted to ~~serve~~**eServe** the document ~~electronically~~. A party must show satisfactory proof by filing and serving an accompanying letter explaining the circumstances, together with any supporting documentation.

~~[1] *See generally* ORCP 9 G, cross-referenced in ORCP 9 B, made applicable to the appellate courts by ORS 19.500.~~

Rule 16.55
RETENTION OF DOCUMENTS BY eFILERS
AND CERTIFICATION OF ORIGINAL SIGNATURES

(1) Unless **the court orders** otherwise ~~ordered by the court, any party who~~ **, if an eFiler** electronically files **an image of** a document that contains the original signature of a person other than the eFiler ~~shall~~ **, the eFiler must** retain the document in **the eFiler's possession in** its original paper form for ~~two years from the date of issuance of the appellate judgment for the case in which the document was filed~~**no less than 30 days**.

(2) ~~Upon reasonable notice, the eFiler must provide a printed copy of a~~

~~document filed electronically for inspection by another party or by the court~~**When an eFiler electronically files a document described in subsection (1) of this rule, the eFiler certifies by filing that, to the best of the eFiler's knowledge and after appropriate inquiry, the signature purporting to be that of the signer is in fact that of the signer**.

Rule 16.60
MANDATORY ELECTRONIC FILING

(1) Except for a document that must or may be conventionally filed under ORAP 16.30, an active member of the Oregon State Bar must file a document using the eFiling system.

(2) A person may obtain a waiver of the requirement in subsection (1) of this rule as follows:

(a) The person must file one of the following:

(i) a request for waiver in all cases before the Court of Appeals, or the Supreme Court, or both, for a specific period of time; or

(ii) a motion in an existing case for waiver in that specific case.

(b) A request or motion must include an explanation describing good cause for the waiver.

(c) The Administrator is authorized to approve or deny a request filed under subparagraph (a)(i) of this subsection. If the court or the Administrator approves the request, the person must

(i) file a copy of the court's or the Administrator's approval in each case subject to the waiver; and

(ii) include the words "Exempt from eFiling per Waiver Approved [DATE]" in the caption of all documents conventionally filed during the duration of the waiver.

(d) If the court grants a motion filed under subparagraph (a)(ii) of this subsection, the person must include the words "Exempt from eFiling per Waiver Granted [DATE]" in the caption of all documents conventionally filed

in the case.

(3) The Administrator is authorized to suspend subsection (1) of this rule when the eFiling system is unavailable for technical reasons other than regularly scheduled weekend maintenance.[1]

(a) If the Administrator suspends subsection (1) of this rule, then the Administrator will provide 24-hour advance notice of the suspension to registered eFilers via email and to the public via notice on the Oregon Judicial Department's website.

(b) If the Administrator suspends subsection (1) of this rule, then an active member of the Oregon State Bar may conventionally file a document until 5:00 p.m. on the first full business day after the day on which the electronic filing system becomes available.

(4) If a filer submits a document for conventional filing in contravention of subsection (1) of this rule and the filer has not obtained a waiver pursuant to subsection (2) of this rule, nor is the electronic system unavailable as described in subsection (3) of this rule, then the Administrator is authorized to take any of the following actions:

(a) Accept the document for filing and provide notice to the filer that the Administrator will reject future conventional submissions by the filer that are subject to subsection(1) of this rule.

(b) Refuse to accept the document for filing.

(c) Return the document to the filer as unfiled.

(d) Refer the filing to the court for consideration of sanctions under ORAP 1.20(2).

[1] The regularly scheduled weekend maintenance schedule is posted on the Oregon Judicial Department's website.

APPENDIX 5.05-2
Illustration for ORAP 5.05(2~~)(d~~)

~~[a certificate in the form below shall be attached to each opening, answering, combined, or reply brief; this certificate shall immediately precede or~~

~~be on the same page as the proof of service]~~

COMBINED CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS, AND CERTIFICATES OF FILING AND SERVICE

[Brief length]

I certify that ~~(1)~~ this brief complies with the word-count limitation in ORAP 5.05~~(2)(b) and (2) the~~**, which** word count ~~of this brief (as described in ORAP 5.05(2)(a))~~ is ~~_____ words.~~ _____.

[or]

I certify that (1) I do not have access to a word-processing system that provides a word count; (2) this brief complies with the page limitation in ORAP 5.05~~(2)(c);~~ and ~~(3)~~ the number of pages ~~in~~**of** this brief is ~~_____ pages.~~ _____.

[or]

The court granted a motion to exceed the length limit for this brief. The order granting that motion was dated [date] and permits a brief of up to [number of words /pages] . I certify that (1) this brief complies with that order and (2) the word count of this brief ~~(as described in ORAP 5.05(2)(a))~~ is _____ ~~words~~ [OR] the number of pages in this brief is ~~_____ pages.~~ _____.

[Type size ~~[~~; exclude if brief is prepared using uniformly spaced type]

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes ~~as required by ORAP 5.05(4)(f).~~ .

[Filing]

I certify that I filed this brief with the Appellate Court Administrator on this date.

[Service]

[When the case party or participant is being eServed using the appellate courts' eFiling system]

I certify that service of a copy of this brief will be accomplished on the following participant(s) in this case, who is a registered user of the appellate courts' eFiling system, by the appellate courts' eFiling system at the participant's email address as

recorded this date in the appellate eFiling system:

[*List name of each party or participant who is being eServed*]

[When the case party or participant is not being eServed using the appellate courts' eFiling system]

I certify that I have this date served each participant in this case who is not being served by the appellate courts' eFiling system by [specific method] at the following address:

[*List name and address of each party or participant who is not being eServed*]

DATED:

_____
[Signature of attorney or unrepresented party]

_____
[Typed or printed name of attorney or unrepresented party]

APPENDIX 5.45
Illustration for ORAP 5.45
Model Complete Assignment of Error (Ill. 1);
Other Partial Assignments of Error (Ill. 2-6)

(Model Complete Assignment of Error)
Illustration 1

FIRST ASSIGNMENT OF ERROR

The trial court erred in declining to give defendant's requested menacing instruction on the ground that menacing is not a lesser included offense of robbery in the first and second degrees.

A. Preservation of Error

At the close of the evidence, defendant submitted a requested instruction on menacing.
(ER-___.) By way of memorandum in support of the requested instruction, defendant argued to the trial court that menacing is necessarily included in the statutory definition of robbery in the first degree (the crime with which defendant was charged) and that the

record contained evidence from which a jury could find defendant guilty of the lesser charge and not guilty of the greater charge. (ER-___.) The trial court declined to give the instruction, stating:

> "I'm not going to give the requested instruction on menacing. Menacing is not expressly included in the charging instrument and, in my view, is not a statutorily lesser-included offense of the crime of robbery because it does not share all of the same elements as robbery. The prosecutor could have charged defendant with menacing, but didn't. And without a match on the elements of the two offenses, a lesser-included instruction isn't proper."

(Tr 142.)

B. Standard of Review

The court reviews the trial court's decision either to give or to decline to give a requested jury instruction pursuant to a combination of standards of review. Regarding review of the record to support such an instruction, the court "review[s] the evidence in the light most favorable to the establishment of facts that would require those instructions." *State v. Boyce*, 120 Or App 299, 302, 852 P2d 276 (1993). Whether the language of the statute defining the lesser offense is necessarily included in the greater offense is a pure question of law, one that the court decides without any particular deference to its resolution below. *See State v. Cunningham*, 320 Or 47, 57, 880 P2d 431 (1994), *cert den*, 514 US 1005 (1995); *State v. Mose*s, 165 Or App 317, 319, 997 P2d 251, *rev den*, 331 Or 334 (2000).

ARGUMENT

(Other Partial Forms for Assignments of Error)

Illustration 2

The court erred in denying (or allowing) the following motion:
[Show that the error was preserved, including setting forth verbatim the motion and the ruling of the court.]

Illustration 3

The court on examination of witness _____ erred in sustaining (or failing to sustain) objection to the following question:

[Show that the error was preserved, including setting forth verbatim the question, the objection made, the answer given, if any, offer of proof, if any, and the ruling of the court.]

Illustration 4

The court erred in denying (or sustaining) the motion for dismissal or directed verdict:

[Show that the error was preserved, including setting forth verbatim the motion and the ruling of the court.]

Illustration 5

The court erred in giving the following instruction:
[Show that the error was preserved, including setting forth verbatim the instruction (or citing to the excerpt of record, if the instruction is set forth verbatim in the excerpt of record), and the exception made to the instruction.]

Illustration 6

The court erred in **granting plaintiff's motion for summary judgment based on its** holding **that** ORS _____ (or Oregon Laws __[year]__ , chapter ___, section ___) **is** unconstitutional (or constitutional):

[Show that the error was preserved, including setting forth verbatim the statutory provision and the manner in which constitutionality was challenged.]

PRE-BRIEFING ISSUES: STAYS AND UNDERTAKINGS

Cody Hoesly, Larkins Vacura Kayser LLP

ORCP 82

A Security required.

A(1) **Restraining orders; preliminary injunctions.**

A(1)(a) No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs, damages, and attorney fees as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

A(1)(b) No security will be required under this subsection where:

A(1)(b)(i) A restraining order or preliminary injunction is sought to protect a person from violent or threatening behavior; or

A(1)(b)(ii) A restraining order or preliminary injunction is sought to prevent unlawful conduct when the effect of the injunction is to restrict the enjoined party to available judicial remedies.

A(2) **Receivers.** No receiver shall be appointed except upon the giving of security by the receiver in such sum as the court deems proper for the payment of any costs, damages, and attorney fees as may be sustained or suffered by any party due to the wrongful act of the receiver.

A(3) **Attachment or claim and delivery.**

A(3)(a) Before any property is attached under Rule 84 or taken by the sheriff under Rule 85, the plaintiff must file with the clerk a surety bond or an irrevocable letter of credit issued by an insured institution, as defined in ORS 706.008, in an amount fixed by the court, and to the effect that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which the defendant may sustain by reason of the attachment or taking, if the same be wrongful or without sufficient cause, not exceeding the sum specified in the bond or letter of credit.

A(3)(b) Upon motion by the defendant and a showing that defendant's potential costs or damages exceed the amount of the bond or letter of credit, the court may require the plaintiff to give additional security.

A(3)(c) No bond or letter of credit shall be required before property is taken by the sheriff under Rule 85 if the court, in the order authorizing issuance of provisional process, finds that the claim for which probable cause exists is that defendant acquired the property contrary to law.

A(4) **Other provisional process.** No other provisional process shall issue except upon the giving of security by the plaintiff in such sum as the court deems proper, for payment of such costs, damages, and attorney fees as may be incurred or suffered by any party who is wrongfully damaged by such provisional process.

A(5) **Form of security or bond.** Unless otherwise ordered by the court under subsection (6) of this section, any security or bond provided for by these rules shall be in the form of a security bond issued by a corporate surety qualified by law to issue surety insurance as defined in ORS 731.186, or a letter of credit issued by an insured institution, as defined in ORS 706.008.

A(6) **Modification of security requirements by court.** The court may waive, reduce, or limit any security or bond provided by these rules, or may authorize a non-corporate surety bond

or deposit in lieu of bond, or require other security, upon an ex parte showing of good cause and on such terms as may be just and equitable.

B Security; proceedings against sureties. Whenever these rules or other rule or statute require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, or in the form of an irrevocable letter of credit issued by an insured institution, as defined in ORS 706.008, each surety and each letter of credit issuer submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as such surety's or such issuer's agent upon whom any papers affecting the surety's or issuer's liability on the bond, undertaking or letter of credit may be served. Any surety's or issuer's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties or issuers if their addresses are known.

C Approval by clerk. Except where approval by a judge is otherwise required, the clerk is authorized to approve all irrevocable letters of credit, undertakings, bonds, and stipulations of security given in the form and amount prescribed by statute, rule, or order of the court, where the same are executed by a corporate surety under subsection D(2) of this rule, or where the same are issued by an insured institution, as defined in ORS 706.008.

D Qualifications of sureties.

D(1) **Individuals.** Each individual surety must be a resident of the state. If there is one individual surety, that surety must be worth twice the sum specified in the undertaking, exclusive of property exempt from execution, and over and above all just debts and liabilities; where there is more than one individual surety, each may be worth a lesser amount if the total net worth of all of them is equal to twice the sum specified in the undertaking. No attorney at law, peace officer, clerk of any court, or other officer of any court is qualified to be surety on the undertaking.

D(2) **Corporations.** A corporate surety must be qualified by law to issue surety insurance as defined in ORS 731.186.

E Affidavits or declarations of sureties.

E(1) **Individuals.** The bond or undertaking must contain an affidavit or a declaration of each surety which shall state that such surety possesses the qualifications prescribed by section D of this rule.

E(2) **Corporations.** The bond or undertaking of a corporate surety must contain affidavits or declarations showing the authority of the agent to act for the corporation and stating that the corporation is qualified to issue surety insurance as defined in ORS 731.186.

E(3) **Service.** When an irrevocable letter of credit, bond or undertaking is given for the benefit of a party, a copy of such letter of credit, bond or undertaking shall be served on that party promptly in the manner prescribed in Rule 9 A. Proof of service thereof shall thereupon be filed promptly in the court in which the letter of credit, bond or undertaking has been filed.

F Objections to sureties. If the party for whose benefit an irrevocable letter of credit, bond or undertaking is given is not satisfied with the sufficiency of the issuers or sureties, that party may, within 10 days after the receipt of a copy of the letter of credit or bond, serve upon the party giving the letter of credit or bond, or the attorney for the party giving the letter of credit or bond,

a notice that the party for whose benefit the letter of credit or bond is given objects to the sufficiency of such issuers or sureties. If the party for whose benefit the letter of credit or bond is given fails to do so, that party is deemed to have waived all objection to the issuers or sureties.

G Hearing on objections to sureties.

G(1) **Request for hearing.** Notice of objections to an issuer or a surety as provided in section F of this rule shall be filed in the form of a motion for hearing on objections to the irrevocable letter of credit or bond. Upon demand of the objecting party, each issuer or surety shall appear at the hearing of such motion and be subject to examination as to such issuer's or surety's pecuniary responsibility or the validity of the execution of the letter of credit or bond. Upon hearing of such motion, the court may approve or reject the letter of credit or bond as filed or require such amended, substitute, or additional letter of credit or bond as the circumstances will warrant.

G(2) **Information to be furnished.** Sureties on any bond or undertaking and any irrevocable letter of credit issuers shall furnish such information as may be required by the judge approving the same.

G(3) **Surety insurers.** It shall be sufficient justification for a surety insurer when examined as to its qualifications to exhibit the certificate of authority issued to it by the Director of the Department of Consumer and Business Services or a certified copy thereof.

UNDERTAKINGS ON APPEAL AND STAYS OF JUDGMENT

(Undertakings)

19.300 Undertakings on appeal generally; filing and service. (1) An appellant must serve and file an undertaking for costs within 14 days after the filing of a notice of appeal. Unless the undertaking is waived, reduced or limited under ORS 19.310, an undertaking for costs must be in the amount of $500.

(2) A supersedeas undertaking may be served and filed by an appellant at any time while a case is pending on appeal.

(3) The original of an undertaking on appeal, with proof of service, must be filed with the trial court administrator. A copy of the undertaking must be served on each adverse party on appeal in the manner prescribed by ORCP 9 B. [1997 c.71 §2; 1999 c.367 §7]

19.305 Qualifications of sureties; objections. (1) Undertakings on appeal are subject to the provisions of ORS 22.020 to 22.070.

(2) A surety for an undertaking on appeal must be qualified as provided in ORCP 82. The amount of liability assumed by a surety or letter of credit issuer must be stated in the undertaking. The liability of a surety or letter of credit issuer is limited to the amount specified in the undertaking.

(3) Objections to the sufficiency of an undertaking on appeal, including the objections to the amount of the undertaking and to the sufficiency of the security for the undertaking, must be filed in and determined by the trial court in the manner provided by ORCP 82. Notwithstanding

ORCP 82 F, objections to the undertaking must be filed within 14 days after the date on which a copy of the undertaking is served on the party who objects to the undertaking. [1997 c.71 §3]

19.310 Waiver, reduction or limitation of undertaking. (1) By written stipulation of the parties, an undertaking on appeal may be waived, reduced or limited. The stipulation must be filed with the trial court administrator within 14 days after the filing of the notice of appeal. Unless disapproved or modified by the trial court, the stipulation has the effect specified by the terms of the stipulation.

(2) The trial court may waive, reduce or limit an undertaking on appeal upon a showing of good cause, including indigence, and on such terms as are just and equitable. [1997 c.71 §4; 1999 c.367 §8]

19.312 Supersedeas undertaking in certain actions against tobacco product manufacturer. (1) The provisions of this section apply only to civil actions against a tobacco product manufacturer as defined in ORS 323.800, or against an affiliate or successor of a tobacco product manufacturer, in which:

(a) The tobacco product manufacturer is subject to the requirements of ORS 323.806; and

(b) The state is not a plaintiff.

(2) In any civil action described in subsection (1) of this section, the supersedeas undertaking required of the tobacco product manufacturer, or of an affiliate or successor of the tobacco product manufacturer, as a condition of a stay of judgment throughout all appeals or discretionary appellate review, shall be established in the manner provided by the laws and court rules of this state applicable to supersedeas undertakings, but the amount of the supersedeas undertaking may not exceed $150 million.

(3) If at any time after the posting of the supersedeas undertaking pursuant to the provisions of this section the court determines that a tobacco product manufacturer, affiliate or successor, outside of the ordinary course of its business, is purposely dissipating or diverting assets for the purpose of avoiding payment on final judgment in the action, the court may condition continuance of the stay on an order requiring that the tobacco product manufacturer, affiliate or successor post a supersedeas undertaking in an amount up to the full amount of the judgment.

(4) The provisions of this section apply to any supersedeas undertaking required for a judgment entered by a court of this state and to any security required as a condition of staying enforcement of a foreign judgment under the provisions of ORS 24.135 (2). [2003 c.804 §87; 2005 c.22 §9]

(Letter of Credit in Support of Undertaking)

19.315 Requirements for use of letter of credit. (1) Except as provided in subsection (4) of this section, an irrevocable letter of credit filed in support of an undertaking on appeal must contain:

(a) The name and address of the issuing bank, the date of issuance and the limit of the bank's liability under the letter of credit.

(b) The name of the court that entered the judgment being appealed and the title and file number of the case for which the judgment was entered.

(c) The name and address of the party who is filing the undertaking or, if the party is represented by an attorney, the name and address of the attorney.

(d) The name and address of the beneficiary or, if the beneficiary is represented by an attorney, the name and address of the attorney for the beneficiary.

(e) A statement that the issuing bank will pay to the beneficiary, up to the limit stated in the letter of credit, the amount of any drafts submitted to the issuing bank under ORS 19.325.

(2) An irrevocable letter of credit filed in support of an undertaking on appeal may be issued only by an insured institution, as defined in ORS 706.008, that has an office or other facility in this state or that has a registered agent in this state.

(3) A letter of credit under this section may contain an expiration date. Any letter of credit containing an expiration date must comply with ORS 19.320.

(4) A party filing a letter of credit in support of an undertaking on appeal and the party for whose benefit an undertaking is filed may by agreement waive any of the requirements of subsection (1) of this section. [1997 c.172 §2; 1999 c.59 §10]

19.320 Expiration and renewal of letter of credit. (1) If a letter of credit issued under ORS 19.315 contains an expiration date, the letter of credit must also state an automatic renewal period and contain a statement that the issuing bank will automatically renew the letter of credit on the expiration date and at the end of each automatic renewal period thereafter unless the bank has elected not to renew the letter in the manner provided by subsection (2) of this section.

(2) A bank that issues a letter of credit may elect not to renew a letter of credit by giving written notice to the following persons:

(a) To the party that files the letter of credit, at the address stated in the letter of credit, or, if the attorney for the party is named in the letter of credit, to the attorney at the address stated in the letter of credit.

(b) To the beneficiary, at the address stated in the letter of credit, or, if the attorney for the beneficiary is named in the letter, to the attorney at the address stated in the letter of credit.

(3) Notice of nonrenewal under subsection (2) of this section must be given by certified mail. The notice must be mailed at least 60 days before the expiration date reflected on the letter of credit or 60 days before the end of any subsequent automatic renewal period.

(4) If an issuing bank has given notice of nonrenewal under the provisions of this section, the bank must pay to the trial court administrator who is holding the letter of credit the amount stated in the letter of credit as the limit of the bank's liability unless the beneficiary gives written notice to the bank that the letter of credit has been released. A beneficiary shall promptly notify the issuing bank in writing if the court has entered an order releasing the letter of credit.

(5) Any amount paid by an issuing bank to a trial court administrator under subsection (4) of this section shall be treated as a deposit of money under ORS 22.020. Any amount that is not paid out to the beneficiary pursuant to the appellate judgment shall be refunded to the bank making the deposit. [1997 c.172 §3; 1999 c.367 §9]

19.325 Payment on letter of credit. (1) If an appellate judgment entitles a beneficiary to payment from the issuing bank of a letter of credit, the appellate judgment must direct the trial court administrator to release the letter of credit to the beneficiary. Upon issuance of the appellate judgment, the beneficiary may enforce the letter of credit by submitting a draft to the issuing bank in accordance with the terms of the letter of credit. The amount of the draft must include all amounts determined necessary to cover the interest that will accrue until the date that disbursement will be made to the beneficiary.

(2) Except as provided in this section, a draft submitted by a beneficiary under this section need not be in any particular form. The draft must be dated, must be for a specific sum of money and must contain the following language:

Pay to the order of the undersigned beneficiary the amount of this draft. The undersigned beneficiary hereby certifies that there is now an appellate judgment in this case pursuant to which the amount of the draft stated above is now due and owing to the beneficiary from the party on whose behalf the letter of credit was issued.

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(3) In addition to the requirements of subsection (2) of this section, the following items must be attached to a draft submitted by a beneficiary under this section:

(a) The original letter of credit under which the draft is drawn.

(b) A copy of the appellate judgment certified by the State Court Administrator that shows the amount that the beneficiary is entitled to recover under the letter of credit.

(4) If the issuing bank of a letter of credit does not honor a letter of credit, on motion of the beneficiary the trial court shall enter judgment against the issuing bank unless the bank establishes that the bank is not required under the law to honor the letter of credit. [1997 c.172 §4; 1999 c.367 §10]

(Stays)

19.330 Stays generally. The filing of a notice of appeal does not automatically stay the judgment that is the subject of the appeal. A party may seek to stay a judgment in the manner provided by ORS 19.335, 19.340 or 19.350, or as provided by other law. [1997 c.71 §5]

19.335 Stay by filing of supersedeas undertaking. (1) If a judgment is for the recovery of money, a supersedeas undertaking acts to stay the judgment if the undertaking provides that the appellant will pay the judgment to the extent that the judgment is affirmed on appeal.

(2) If a judgment requires the transfer or delivery of possession of real property, a supersedeas undertaking acts to stay the judgment if the undertaking provides that the appellant will not commit waste or allow waste to be committed on the real property while the appellant possesses the property, and the appellant will pay the value of the use and occupation of the property for the period of possession if the judgment is affirmed. The value of the use and occupation during the period of possession must be stated in the undertaking.

(3)(a) If a judgment requires the transfer or delivery of possession of personal property, a supersedeas undertaking acts to stay the judgment if the undertaking provides that the appellant will obey the judgment of the appellate court, and that if the appellant does not obey the judgment, the appellant will pay an amount determined by the trial court and stated in the undertaking.

(b) If a judgment requires the transfer or delivery of possession of personal property, the judgment is stayed without the filing of a supersedeas undertaking if the appellant transfers or delivers the personal property to the court or places the property in the custody of an officer or receiver appointed by the trial court.

(4) If a judgment requires the foreclosure of a mortgage, lien or other encumbrance, and also requires payment of the debt secured by the mortgage, lien or other encumbrance, a supersedeas undertaking acts to stay that portion of the judgment that requires payment of the debt if the undertaking provides that the appellant will pay any portion of the judgment remaining unsatisfied after the sale of the property subject to the mortgage, lien or other encumbrance. The amount of the undertaking must be stated in the undertaking. The requirements of this subsection are in addition to any provisions in a supersedeas undertaking that may be required under subsection (2) or (3) of this section to stay delivery or transfer of property.

(5) If a judgment requires the execution of a conveyance or other instrument, the judgment is stayed without the filing of a supersedeas undertaking if the appellant executes the instrument and deposits the instrument with the trial court administrator. Unless otherwise directed by the appellate court, the instrument must be held by the trial court administrator until issuance of the appellate judgment terminating the appeal.

(6) Except as provided in ORCP 72, a stay of judgment described in this section takes effect only after the party has filed a notice of appeal and filed any supersedeas undertaking required for the stay. [1997 c.71 §6; 1999 c.367 §11; 2007 c.547 §5]

19.340 Waiver of supersedeas undertaking; sale of perishables. (1) The trial court, in its discretion, may stay a judgment without requiring a supersedeas undertaking, or reduce the amount of the supersedeas undertaking required of the appellant, if the appellant is an executor, administrator, trustee or other person acting on behalf of another.

(2) If a judgment that has been stayed requires the sale of perishable property, or if perishable property has been seized to satisfy or secure a judgment that has been stayed, the trial court may order that perishable property be sold and the proceeds of the sale deposited or invested until issuance of the appellate judgment terminating the appeal. [1997 c.71 §7]

19.345 Enforcement of judgment in contract action notwithstanding appeal. If the judgment has been given in an action or suit upon a contract, notwithstanding an appeal and supersedeas undertaking, the respondent may proceed to enforce such judgment, if within 10 days from the time the appeal is perfected the respondent files with the trial court administrator an undertaking to the effect that if the judgment is reversed or modified the respondent will make such restitution as the appellate court may direct. Such undertaking may be excepted to by the appellant in like manner and with like effect as the undertaking of an appellant, and the sureties therein shall have the same qualifications. [Formerly 19.060; 1999 c.367 §12; 2003 c.576 §281]

19.350 Discretionary stay by court. (1) A party may seek a stay of judgment pending a decision on appeal in the manner provided by this section only if the judgment may not be stayed under the provisions of ORS 19.335 or 19.340, or under any other provision of law specifying a procedure or grounds for staying the judgment. A stay of judgment may not be granted under this section if any other provision of law specifies that a stay may not be granted pending a decision on appeal.

(2) Except as provided in subsection (5) of this section, a party seeking a stay under the provisions of this section must first request a stay from the trial court. The trial court may act on a request for a stay before or after a notice of appeal is filed. The time for filing a notice of appeal is not tolled by the making of a request for a stay under this section or by the trial court's action on the request.

(3) The trial court shall consider the following factors in deciding whether to grant a stay under this section, in addition to such other factors as the trial court considers important:

(a) The likelihood of the appellant prevailing on appeal.

(b) Whether the appeal is taken in good faith and not for the purpose of delay.

(c) Whether there is any support in fact or in law for the appeal.

(d) The nature of the harm to the appellant, to other parties, to other persons and to the public that will likely result from the grant or denial of a stay.

(4) The trial court has discretion to impose reasonable conditions on the grant of a stay under the provisions of this section. The court may require that a supersedeas undertaking be filed in a specified amount as a condition of granting a stay under the provisions of this section.

(5) A party may request a stay pending appeal from the appellate court in the first instance, and the appellate court may act on that request without requiring the party to seek a stay from the trial court, if the party establishes that the filing of a request for a stay with the trial court would be futile or that the trial court is unable or unwilling to act on the request within a reasonable time. In considering a request for a stay under this subsection, the appellate court shall consider the factors set out in subsection (3) of this section in addition to any other factors the court considers important. [1997 c.71 §8]

19.355 Stay of domestic relations judgment. (1) The provisions of this chapter relating to stays on appeal apply to a domestic relations judgment.

(2) If an appellant seeks a stay of only specific provisions of a domestic relations judgment, the motion seeking the stay must identify those provisions of the judgment that are to be stayed. If the court allows a stay of only certain provisions of the judgment, the order of the court must specifically indicate those provisions. If a supersedeas undertaking is filed with the court for the purpose of staying specific provisions of the judgment, the undertaking must indicate the specific provisions of the judgment covered by the undertaking. A stay of any specific provision of a domestic relations judgment may be granted only if:

(a) The specific provision is subject to stay under the provisions of this chapter; and

(b) All requirements of this chapter for a stay of the provision are satisfied.

(3) For the purposes of this section, "domestic relations judgment" means a judgment entered in proceedings under ORS chapter 107, 108 or 109. [1997 c.71 §10; 2003 c.576 §282]

(Appellate Review of Trial Court Orders Relating to Undertakings and Stays)

19.360 Appellate review of trial court orders relating to undertakings and stays. (1) Any party aggrieved by the trial court's final order relating to an undertaking on appeal, the trial court's grant or denial of a stay or the terms and conditions imposed by the trial court on the granting of a stay may seek review of the trial court's decision by filing a motion in the appellate court to which the appeal is made. The motion must be filed within 14 days after the entry of the trial court's order. During the 14-day period after the entry of the trial court's order, the judgment shall automatically be stayed unless the trial court orders otherwise. The trial court may impose terms or conditions on the stay or take such other action as may be necessary to prevent prejudice to the parties.

(2) The appellate court may review the decision of the trial court under the provisions of this section at any time after the filing of the notice of appeal. Notwithstanding ORS 19.415 (3), the appellate court shall review the decision de novo upon the record.

(3) On de novo review under subsection (2) of this section, the record shall be restricted to the record made before the trial court unless:

(a) There is additional relevant information relating to the period of time following the decision of the trial court that the appellate court determines to be important to review of the decision; or

(b) The party submitting new information establishes that there was good cause for not submitting the information to the trial court.

(4) On review of a trial court's decision relating to a request for a stay pending appeal, an appellate court may remand the matter to the trial court for reconsideration, may vacate a stay granted by the trial court, may grant a stay, and may impose or modify terms and conditions on a stay. Upon receipt of a request for a stay pending appeal made to the appellate court in the first instance, the appellate court may remand the matter to the trial court for consideration in the first instance, may grant or deny a stay, and may impose terms and conditions on a stay issued by the appellate court. [1997 c.71 §9; 1999 c.294 §1; 2009 c.231 §4]

22.010 State, county or city not required to furnish any bond in any action. The state, or any county or incorporated city, shall not be required to furnish any bond or undertaking upon appeal or otherwise in any action or proceeding in any court in this state in which it is a party or interested.

22.020 Deposit of money, letter of credit, checks or federal or municipal obligations, in lieu of security or bond. (1) In any cause, action, proceeding or matter before any court, board or commission in this state or upon appeal from any action of any such court, board or commission, where bond or security deposit of any character is required or permitted for any purpose, it is lawful for the party required or permitted to furnish such security or bond to deposit, in lieu thereof, in the manner provided in ORS 22.020 to 22.070, money, an irrevocable letter of credit issued by an insured institution, as defined in ORS 706.008, a certified check or checks on any state or national bank within this country payable to the officer with whom such check is filed, satisfactory municipal bonds negotiable by delivery, or obligations of the United States Government negotiable by delivery, equal in amount to the amount of the bond or security deposit so required or permitted.

(2) Notwithstanding subsection (1) of this section, an irrevocable letter of credit may not be furnished to a court in lieu of other security or bond to be deposited in any criminal offense, action, proceeding or matter before any court, in a protective proceeding under ORS chapter 125, or in any cause, action, proceeding or matter before any court under ORS 105.395, 111.185, 113.005, 113.035, 113.105, 113.115, 114.325 and 125.715. In any other type of civil cause, action, proceeding or matter before any court, an irrevocable letter of credit may be furnished pursuant to subsection (1) of this section subject to approval of its terms by the parties and to its being in the form and amount prescribed by statute, rule or order of the court. [Amended by 1973 c.836 §316; 1991 c.331 §8; 1995 c.664 §73; 1997 c.631 §368; 1999 c.1051 §236]

22.030 Officers with whom deposit is made; duplicate receipts. (1) Any party desiring to make use of the provisions of ORS 22.020 to 22.070 shall, except as provided in subsection (2) of this section, make or cause to be made, with the treasurer of the county or city within which the bond is to be furnished, or, in any case, with the State Treasurer, the deposit authorized by

ORS 22.020. The treasurer, upon tender, must accept such money or securities and deliver to the depositor a duplicate receipt reciting the fact of such deposit; provided, that in case of bond or security deposit is required after the office hours of any such treasurer with whom it is desired to make the deposit, the deposit may be made with the chief clerk of such court, board or commission or with the sheriff of the county or the deputy in charge of the county jail or the sheriff's office, who shall accept the same, giving duplicate receipts therefor, and cause such money or securities to be delivered to the proper treasurer within 48 hours thereafter.

(2) In any criminal case or in any proceeding in any court the deposit may be made with the court or clerk thereof, with the same effect and result as though made with such treasurer, and it shall not be necessary for the money or securities to be delivered to the treasurer. [Amended by 1973 c.836 §317; 1999 c.1051 §237]

22.040 Filing duplicate receipt. The filing of one of such duplicate receipts with the court, board or commission with which such bond or security deposit is required or permitted to be filed shall have the same effect as the furnishing of such bond or security deposit and shall be taken and accepted by the court, board or commission or by the chief clerk in lieu of such bond or security deposit. [Amended by 1973 c.836 §318; 1999 c.1051 §238]

22.050 Discharge or forfeiture of bond or security; garnishment. If the bond or security deposit is discharged, an order to that effect shall be entered upon the records of the court, board or commission with a statement of the amount to be returned to the person making the deposit. Upon presentation to the treasurer of a copy of such order, duly certified by the clerk of the court, board or commission making the same, the treasurer shall pay to the person named therein or to the order of the person the amount specified or shall return the securities, as the case may be. If the bond or security deposit is forfeited, an order to that effect shall be entered upon the records of the court, board or commission, and upon presentation to the treasurer of a copy of such order, certified by the chief clerk of the court, board or commission making the same, the treasurer shall make such disposition of the money or securities as the order shall provide. In case the money or securities are in the hands of the clerk of the court, board or commission at the time the bond or security deposit is declared discharged or forfeited, the clerk shall make the same disposition of the money or securities as the treasurer would be required to make in similar circumstances. Whenever the order of the court, board or commission requires or contemplates the same, the treasurer or clerk shall indorse to the proper party any certified check deposited with the treasurer or clerk as security. Money or securities deposited under ORS 22.020 to 22.070 shall not be subject to garnishment. [Amended by 1973 c.836 §319; 1999 c.1051 §239]

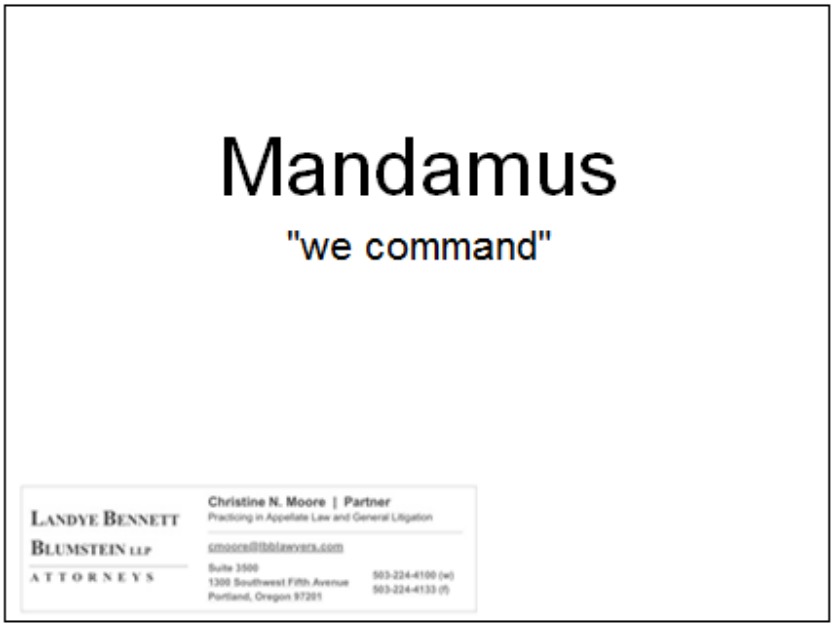
22.060 Deposit to be in special fund or depository; interest. Any money or securities received by any treasurer under the provisions of ORS 22.030 shall be deposited in a special fund or place of deposit subject to the order of the proper court, board or commission. Any interest accumulating upon such fund shall be paid into the general fund or corresponding fund of the state, county or city, according to the nature of the case or in accordance with the order of the proper court, board or commission; provided, however, that when bonds or other securities are deposited the interest coupons shall not be detached therefrom but shall follow the disposition of the securities.

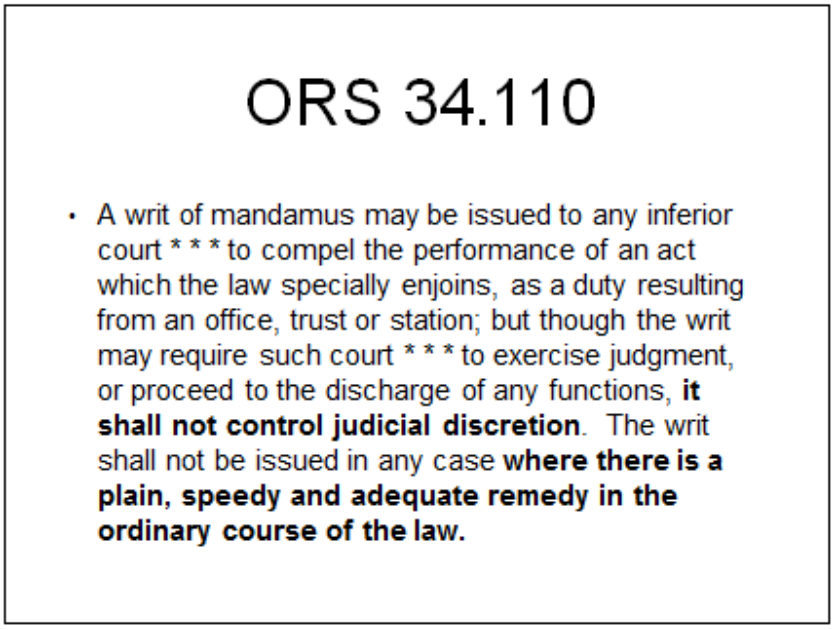
22.070 Redemption of money or securities; exchange of securities. Any party making use of the provisions of ORS 22.020 to 22.070 may, at any time before forfeiture of the same, redeem any money or securities so deposited by submitting the bond originally required or permitted, or may exchange such securities for others of equal value if satisfactory to the officer with whom the same have been deposited. [Amended by 1999 c.1051 §240]

22.090 Qualifications and justification of surety. References in the statute laws of this state to the qualifications of a surety in a bond or undertaking as in bail on arrest and the justification of that surety are intended to be and shall be considered, except where and to the extent that the context of a reference requires otherwise, references to the qualifications and justification of a surety as provided in ORCP 82 D through G. [1981 c.898 §14]

MANDAMUS MECHANICS

Christine Moore, Landeye Bennett Blumstein LLP





Do I have a plain, speedy, and adequate remedy?

- An adequate remedy is one that "affords any and all relief to which the relator is entitled." *State ex rel. Anderson v. Miller*, 320 Or 316 (1994).
- An appeal usually affords a plain, speedy, and adequate remedy.
- Suffering the burden of litigation, such as delay and expense, is not sufficient injury to justify mandamus. *State ex rel. Automotive Emporium, Inc. v. Murchison*, 289 Or 265 (1980).

Legal issues the Court has considered appropriate for mandamus:

- Venue
- Personal jurisdiction
- Double jeopardy
- Discovery - Disclosure of privileged information, protective orders, allowing or prohibiting depositions of certain persons.
- Refusal to order witness in criminal case to testify
- Orders barring press, public or attorneys from attending judicial proceedings

When do I file a petition?

- Obtain an order first unless it's an emergency. *Brewer v. Beers*, 280 Or 251 (1977).
- No rule governs when a petition must be filed.
- Laches is a bar to mandamus, "must act promptly." *Paine v. Wells*, 89 Or 695 (1918).
- Delay, unless "satisfactorily explained," may equate denial, "particularly when the delay has been prejudicial to the rights of the respondent." *State ex rel Fidanque v. Paulus*, 297 Or 711 (1984).
- Generally, follow 30-day appeal period. Nelson v. Baker, 112 Or 79, 94-95 (1924); *State ex rel Redden v. Van Hoomissen*, 281 Or 647, 649 (1978).

What should I include in the petition?

- Petition for Writ: ORAP 11.05(2); ORAP 5.05(4)(c)-(h); Appendix 11.05; ORS 34.130
- Memorandum of Law: ORAP 11.05(3); ORAP 7.10(1)-(2)
- Excerpt of Record: ORAP 11.05(3); ORAP 5.50(6)
- Don't forget to seek a stay from the lower court! ORS 34.130(5).

How do I respond to a petition?

- An adverse party may file a memorandum in opposition within 14 days. ORAP 11.10(1).
- Form of memorandum must comply with ORAP 7.10(1) and (2).
- Relator may not file a reply unless the court has requested one.

What does the court do with the petition?

- The court considers the petition and opposition without oral argument unless otherwise ordered. ORAP 11.10(2).
- If court accepts jurisdiction, it will issue an order allowing petition. If not, the court denies the petition.
- Court will also issue with the order an alternative writ of mandamus. Generally, lower court given a time frame in which to comply or show cause for not doing so. ORS 34.150(2).
- If the inferior court performs the act at issue in the petition, relator must notify the court. ORAP 11.10(5).

What happens if the inferior court does not comply?

- Relator must file an opening brief within 28 days after issuance of the writ. ORAP 11.15(1)(a). MOETs allowed.
- Adverse party has 28 days to file an answering brief. ORAP 11.15(2).
- Reply brief: Must request leave to file within 7 days after the filing of the answering brief. ORAP 11.15(3).
- Briefs must conform with ORAP 5.35 - 5.50.

What is a peremptory writ of mandamus?

- The Final Command!
- If relator entitled to peremptory writ, court administrator issues writ. May be combined with appellate judgment. ORAP 11.17; ORS 34.150(3).

A FEW KEY DISTINCTIONS BETWEEN STATE AND FEDERAL APPELLATE PRACTICE

Aaron Landau, Harrang Long Gary Rudnick PC

Many differences exist between the rules governing appeals in Oregon's courts and those governing appeals in the federal courts. Some are more technical in nature or are relatively easily to find, such as the time limits for filing a notice of appeal, the methods of obtaining extensions of time, or word limits applicable to briefs. Others, however, are more substantive and less obvious. Here are a few such distinctions that are particularly important for appellate practitioners to keep in mind.

- ***What's Appealable:*** In the Oregon courts, the law defines clearly what may and may not be appealed. In federal court, the distinction can be much less clear.

    - Oregon: One may appeal from only (a) a judgment (limited, general, or supplemental) as defined by ORS 18.005; (b) an "order that affects a substantial right" that either follows or effectively prevents entry of judgment; or (c) the conclusive document in a "special statutory proceeding." ORS 19.205. The requirements are straightforward, and they are construed relatively strictly.

    - Federal: Under 28 USC §1291, federal circuit courts of appeals have jurisdiction over appeals from all "final decisions" of the district courts -- a term that is not statutorily defined and encompasses more than judgments alone. The federal courts give the "final decision" rule "a practical rather than a technical construction." *Mohawk Indus., Inc. v.* Carpenter, 558 U.S. 100, 106 (2009). The question of "finality" is often a fact-intensive one. *E.g.*, *Skagin Cnty. Pub. Hosp. Dis. No. 2 v. Shalala*, 80 F3d 379, 384 (9th Cir. 1996). As a result, the Oregon practitioner may be caught unaware that a decision of the district court is in fact appealable.

- ***Trial Court Jurisdiction:*** In the Oregon courts, trial courts' jurisdiction during an appeal is limited by statute. The Ninth Circuit takes a more flexible approach.

    - Oregon: Once a notice of appeal is filed, the trial court's jurisdiction "is sharply limited" by statute. *Rains v Stayton Builders Mart, Inc*, 258 Or App 652, 663 (2013). The trial court has jurisdiction only to "exercise those powers in connection with the appeal as are conferred by law," including ruling on fee petitions, enforcing the judgment (if not stayed), and deciding certain post-trial motions under ORCP 63 (judgment notwithstanding the verdict), ORCP 64 (new trial), and ORCP 71 B (relief from judgment). ORS 19.270.

    - Federal: District courts' jurisdiction during an appeal is not limited by statute. Under the rule of divestiture, "the filing of a notice of appeal … divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident*

Consumer Discount Co., 459 U.S. 56, 58 (1982). The rule is a judicially-created one, however, and it is not applied mechanically. Exceptions exist, for example, "where the district court action aids [the Court of Appeals'] review," *In re Silberkraus*, 336 F3d 864, 869 (9th Cir 2003), or where the action secures the rights of a party that has been granted an injunction, FRCP 62(c).

- ***Form of Opening Brief***: Oregon's rules are quite specific as to form, and courts adhere strictly to their requirements. Federal rules are less specific, and the Ninth Circuit takes a generally more permissive approach.

    - Oregon: After setting forth the "statement of the case" (including specific summaries and statements in the order indicated in ORAP 5.40), the substantive portions of an appellant's opening brief must be organized according to "assignments of error." Each assignment of error must be separately stated and numbered; must "identify precisely the legal, procedural, actual, or other ruling that is being challenged"; must "specify the stage in the proceedings" where the question was raised and how it was ruled on, including citations to the record; and must identify the standard of review applicable to that question. ORAP 5.45. The Oregon courts adhere strictly to the requirements of Rule 5.45 and have often declined to reach questions that do not adhere to the rule. *E.g.*, *Vill at N Pointe Condominiums Ass'n v Bloedel Const Co*, 278 Or App 354, 360, 374 P3d 978, 984 (2016), *adh'd to as modified on recons*, 281 Or App 322 (2016).

    - Federal: The Federal Rules direct appellants to raise not assignments of error but "issues." FRAP 28. Ninth Circuit Rule 28-2 goes a bit farther, requiring appellants to state where in the record each issue was raised and ruled on, as well as the applicable standard of review for each. However, the Ninth Circuit has historically taken a relatively permissive approach to the formal requirements of the opening brief. *E.g.*, *Thys Co v Anglo California Nat Bank*, 219 F2d 131, 133 (9th Cir 1955) ("Where, as here, the brief for appellant exhibits a gross disregard of the requirements of our rules, a dismissal of his appeal is warranted. Nevertheless we have considered the general contention here made [on appeal]…"). And today, dismissal of appeals by the Ninth Circuit are rare in all but the most egregious violations. *E.g.*, *In re O'Brien*, 312 F.3d 1132 (9th Cir. 2002).

- ***Oral Argument:*** In contrast to Oregon, the Ninth Circuit can decide that an appeal does not warrant oral argument.

    - Oregon: If a party timely requests oral argument, then the case "will be argued," and all parties filing a brief may argue. ORAP 6.05.

    - Federal: A three-judge panel has the power *not* to schedule oral argument if each judge agrees that oral argument is unnecessary, such as when the question at issue already has been "authoritatively decided," or when "the facts and legal arguments are adequately presented in the briefs and record" and the appeal "would not be significantly aided by oral argument." FRAP 34.

- ***Reversible Error and the "We Can't Tell" Rule:*** When a general verdict is supported by multiple potential bases, the Ninth Circuit has greater freedom to disregard error as to one potential basis in favor of another that is free from error.

    - Oregon: ORS 19.415: "No judgment shall be reversed or modified except for error *substantially affecting the rights of a party*." That standard "requires the party seeking reversal to show that the error skewed the odds against a legally correct result," or in other words, "that there is a significant likelihood that the error affected the result." *Rowlett v Fagan*, 358 Or 639, 667 (2016).

    - Federal: The Supreme Court has taken a strict approach requiring *all* potential bases for a general verdict to be supported by substantial evidence and be free from legal error. *E.g. Sunkist Growers v. Winckler & Smith Citrus Prod's Co.*, 370 U.S. 19 (1962) ("Since we hold erroneous one theory of liability upon which the general verdict may have rested … it is unnecessary for us to explore the legality of the other theories."). However, the Ninth Circuit takes a different approach: "Where more than one theory of recovery has been submitted to the jury in a civil case, and where on appeal it is claimed that as to one of the theories there was a lack of evidential support or an error of law in submitting the theory to the jury, *the reviewing court* has *discretion to construe a general verdict as attributable to another theory* if it was supported by substantial evidence and was submitted to the jury free from error." *Traver v. Meshriy*, 627 F2d 934, 938 (9th Cir. 1980). Note that this approach has been criticized -- even by judges within the Ninth Circuit -- as inconsistent with Supreme Court law. However, it continues to be applied.

- ***Stare Decisis:*** Whereas the Oregon Court of Appeals may revisit and overturn prior decisions, the Ninth Circuit may not do so in the absence of clear *en banc* or Supreme Court authority.

    - Oregon: Prior decisions of the Court of Appeals do not bind later panels, which are free to reconsider issues that the court concludes were incorrectly decided. *See, e.g.*, *Hostetter v Bd of Parole & Post-Prison Supervision*, 255 Or App 328 (2013), *rev den*, 353 Or 747 (2013).

    - Federal: A prior published Ninth Circuit decision binds later panels, which cannot reconsider a decided issue unless its precedential value is undermined by an *en banc* decision, a U.S. Supreme Court decision, or subsequent legislation. *Ritchie v. U.S.*, 733 F.3d 871 (9th Cir. 2013). That is true even if all three judges firmly agree that the prior case was incorrectly decided.

PRO BONO PROGRAM UPDATE

Derek Green, Davis Wright Tremaine LLP

Oregon Appellate Court Pro Bono Program
Statement of Program Principles

Primary Purpose: To assist the appellate courts of the State of Oregon by connecting volunteer appellate attorneys with pro se clients in cases where pro bono representation by counsel would be helpful to the Court.

Secondary Purpose: To provide attorneys in the state with experience in appellate representation, and provide a further opportunity to meet pro bono goals in the state.

I. Creation of Program

The Oregon Appellate Court Pro Bono Program is a volunteer project managed with the assistance of the Executive Committee of the Appellate Practice Section of the Oregon State Bar, and in cooperation with the Oregon Supreme Court and Court of Appeals.

The Appellate Practice Section Executive Committee shall identify a volunteer attorney or attorneys to serve as program managers for the Program.

A Program Committee is established, consisting of the program managers, the Appellate Commissioner, designees of the Chief Justice and Chief Judge, and a member of the Appellate Practice Section Executive Committee, as well as such other individuals that the named members may choose to invite. The Program Committee shall meet at least yearly in order to review the program and propose changes to the program as appropriate or necessary.

II. Identification of Cases

A) The appellate courts have discretion to identify cases appropriate for inclusion in the program. A case may be appropriate for inclusion in the program if the Court believes that referral of a case to volunteer counsel would be helpful to the Court.

B) The program is not intended to supplant established programs for representation of criminal defendants or any other pro bono programs established in the state.

C) The appellate courts may identify internal processes, procedures, and individuals responsible for the identification of appeals appropriate for the program.

D) The Appellate Commissioner and designees of the Chief Justice and Chief Judge have responsibility for contacting the program managers in order to request assignment of volunteer attorneys through the program.

E) The Appellate Commissioner and designees of the Chief Justice and Chief Judge should notify the judges of the Courts on a yearly basis of the availability of the program.

F) In appropriate cases, the appellate courts may request participation of counsel through the program as "amicus to the court," rather than as a representative of any particular party.

G) Selection of case for the program does not reflect a determination of the merit of any party's position or theory, but rather simply indicates that the referral of a case to pro bono counsel is considered to be of potential benefit to the court.

III. Volunteer Attorney Participation

A. Participation Requirements for Volunteer Attorneys

Volunteer participation in the program is open to (1) active members of the Oregon State Bar, and (2) law school clinical programs, as addressed below. In addition, participation is subject to the following terms and conditions:

1) Neither the court, bar, nor program managers are able to reimburse the volunteer attorney for expenses (e.g., travel for argument, copy costs, etc.) incurred during the course of representation.

2) No fees for the attorney's time may be charged to the client. If a relevant provision permits recovery of attorney fees by counsel, the volunteer attorney may request and receive such fees as provided by applicable law. Counsel must evaluate the costs of the appeal, including the cost for preparation of the record, and address payment of those costs in the initial representation letter.

3) The volunteer attorney is always responsible for ultimate compliance with ethics rules, including rules regarding the evaluation of conflicts, personal interest, and maintenance of PLF and any other relevant insurance.

4) The program managers, in cooperation with the Program Committee and State Bar, should evaluate whether the program would benefit from being officially sponsored as a Bar pro bono program. If so, the program managers may, in cooperation with the Executive Committee of the Appellate Practice Section, file the necessary application with the Bar.

B. Identifying Volunteer Attorneys

The program managers shall distribute information about the program to all active members of the Oregon State Bar through a yearly email. The email should include relevant information about the program, instructions on how to register as a volunteer attorney, and contact information. The website for the Bar's Appellate Section should also include information about the program and contact information. Attorneys who are interested in volunteering for the program would need to respond by registering with the program managers.

C. Registering Volunteer Attorneys

To register, an attorney must sign and submit a simple registration form to the program managers. In the registration, the volunteer attorney shall provide contact and bar membership information, and sign a statement confirming that she or he (1) meets the eligibility requirements, and (2) agrees to abide by the terms and conditions of the program.

The program managers should compile and maintain a list of the registered volunteers. Although the volunteer attorneys must continue to affirm that they meet the eligibility requirements, the program managers should check bar membership records to confirm active bar membership. The program managers should update and purge the list of volunteers on a yearly basis.

D. Law School Clinical Programs

Law school clinical programs, or faculty members who are active members of the bar and willing to supervise student participants, may request assignment of cases during the year as appropriate. Faculty or staff advisors of students participating in the program through this mechanism must comply with all relevant requirements regarding the representation of clients under this program, and are ultimately responsible for the representation.

IV. Assignment of Cases to Volunteer Attorneys

A) The court shall notify the parties and the program manager when a case has been identified for possible inclusion in the pro bono program. The program managers shall then provide the pro se party with a consent form to sign if the party is interested in participating in the program, and send an email notice about the case to the list of registered volunteers. The email will include general, objective information about the case generated by the court and program managers, and include the names of the parties and any counsel, the case's current procedural posture (e.g., whether briefs have been filed, any upcoming time deadlines, etc.), and the general issues presented. The goal of the email is merely to provide an overview of the case and conflict information, not to provide any legal assessment. The email shall state that any attorney interested in volunteering to take on the case should email the program manager.

B) The program managers shall then randomly select an attorney to the case from those who have volunteered to take on the case, subject to three exceptions: (1) registered volunteers who have not had an active case through the program in the last three years will be given preference over those who have, (2) registered volunteers who have previously requested and not been assigned an active case through the program will be given preference over those who are requesting participation for the first time, and (3) if the court specifically requests referral to an experienced appellate attorney due to the complexity of an appeal, the program managers shall select an experienced appellate attorney. (However, given that one of the purposes of this program is to provide less experienced appellate attorneys with appellate opportunities, this last exception is intended to be rare.)

C) The program managers shall notify the selected volunteer attorney of their selection for a particular case once the pro se party has agreed to be included in the program. If the selected attorney is interested in proceeding with representation, she or he should contact the pro

se party and establish representation. Within 14 days, the attorney should either establish representation and file a notice of appearance with the Court, or notify the program managers regarding progress on the issue of representation.

D) Counsel is encouraged to review the case prior to agreeing to representation in order to clear conflicts and to ensure the issues are appropriately presented for appellate review. If counsel believes that their representation is impermissible, or otherwise unlikely to aid in the court's review of the case, they may decline representation and so inform the program managers. The program managers may, if appropriate, select another attorney pursuant to section (B) in order to evaluate representation.

V. Terms of Representation.

A. Representation Letter

The program managers shall draft a model representation letter that volunteer attorneys may use for guidance. The model letter shall specify that the volunteer attorney has agreed to represent the client on a *pro bono* basis and that the representation is limited to the appellate proceedings in which the Court has requested assistance. The model letter should address payment of costs on appeal. The model letter shall also state that the attorney has discussed, and the client has agreed, that the attorney may consult with the program coordinators on non-privileged matters, but that the client understands that such consultation does not create an attorney-client relationship between the coordinators and the client. Willamette Law or other law school programs may volunteer to provide moot courts for program participants on terms to be identified later.

B. Procedural Matters

Counsel that is participating through the program should anticipate that the Court will manage any identified case as it would any other appeal. That said, however, the Court may recognize in evaluating requests for extension and other procedural matters that counsel is performing volunteer service and may need some additional flexibility in managing the case. If pro bono counsel establishes representation under this program after briefing at a particular stage is complete, the Court may request supplemental briefing from the parties.

C. Further representation

If the case continues beyond the stage for which representation under the program was initially established, appropriate further representation may be established between counsel and the client outside of this program. If further representation within the auspices of the program is desired by counsel, counsel should contact the program managers regarding such representation.

D. Recognition

On an annual basis, the Executive Committee of the Appellate Practice Section of the State Bar should acknowledge the work of pro bono counsel who provide their services under this program.