NOT IN, BUT LARGELY ABOUT, THE APPELLATE COURTS IN THE STATE OF OREGON

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Robyn Ridler Aoyagi, Chair

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Chair's Note - 2015

Happy New Year, Appellate Section members! The last fourteen months have been quite remarkable for the Oregon appellate courts. The Court of Appeals looks very different now than it did in 2013, and Chief Judge Haselton tells us that the court has made major progress on its backlog thanks to the addition of an entire new panel. While Judges Devore, Lagesen, Tookey, Garrett, and Flynn have been settling in, we have said a fond farewell to now-retired Judges Schuman and Wollheim.

The Appellate Almanac has also been in transition. Instead of publishing a paper almanac every other year, the Executive Committee decided last year to move to an electronic format so that articles could be published on a rolling basis. Alas, that transition has not gone quite as smoothly as the transitions at the Court of Appeals. While the court has been getting more done than ever, the almanac did not immediately adapt to its new format and ended up pretty skinny. As Chair this year, one of my goals is to really get the Appellate Almanac going in its new format. We intend to have profiles posted of all of the judges on both appellate courts by year end, as well as publish articles throughout the year. The first article is in fact being posted today—"Practice Tips from the Oregon Supreme Court and Oregon Court of Appeals"—for which we very much thank Lisa Norris-Lampe and Lora Keenan.

The Appellate Almanac presents an excellent opportunity for publishing articles of interest to the appellate bar. If you would like to contribute an article, please contact me (robyn.aoyagi@tonkon.com).

The Executive Committee is looking forward to a great year. We hope to see you at our CLEs, at the annual Fall Social, and, if you'd like, on the pages of the Appellate Almanac. Looking forward to 2015!

Robyn Ridler Aoyagi
Chair, 2015

PRACTICE TIPS FROM THE OREGON SUPREME COURT AND OREGON COURT OF APPEALS*

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*Adapted from materials presented
at the Appellate Practice Section's fall CLE,
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SECTION I: PRACTICE TIPS FROM THE SUPREME COURT

The tips set out below are those suggested by members of the Oregon Supreme Court before the Appellate Practice Section fall CLE.

Briefs

In General, Engage the Other Side: If you are the answering or responding party, ensure that your brief responds in a clear and coherent way to the opening brief or petitioner's brief on the merits. It is distracting, time-consuming, and frustrating to work through an answering or responding brief that does not address the opening assignments of error in a logical fashion or that fails entirely to address a particular assignment of error. You do not want the structure of your brief to frustrate the reader.

Table of Contents: The Court of Appeals section, below, contains several useful tips for organizing and structuring the Table of Contents that apply equally in the Supreme Court. The Supreme Court and its legal staff regularly refer back to the Table of Contents -- both when working on a first draft opinion and redrafts -- essentially using the Table of Contents as the map of your view of the case. In addition to the tips mentioned in the Court of Appeals section, ensure that your final version of the Table of Contents matches your final version of the brief

(sometimes, the Table of Contents is not subject to a final edit and refers to incorrect assignments or sections of briefing).

Citation: Unless circumstances require otherwise, include case and statutory citations in the text of your brief, instead of in a footnote. Relatedly, do not include only case names in the text with related citations in a footnote.

Extensions: Unlike the Court of Appeals, which schedules argument only after all briefing is complete, the Supreme Court schedules argument for cases on petitions for review (which comprise 60-70 percent of the court's opinion work) for a date certain at the same time that it establishes the briefing schedule. If the parties jointly agree to an extended briefing period and file a motion for extension of time to that effect, they should ensure that at least three weeks remain between the filing of the reply brief and the oral argument date. So long as such a time gap is provided in the proposed extension, the court ordinarily will grant a joint extension motion.

Oral Argument

Court Preargument Preparation: The Oregon Supreme Court justices prepare for oral argument by thoroughly reviewing all briefs filed in the case and any accompanying staff memo prepared in the case. Similarly to the Court of Appeals (discussed below), the court typically does not begin drafting an opinion until after oral argument, although the justices' review of the briefs and preargument conference enables them to focus on the key issues and questions of concern that must be addressed in the course of drafting a dispositional opinion. Their questions during argument thus show the attorneys the topic areas potentially important -- to each justice -- for resolving the case. Attorneys therefore always should view each question during argument as an opportunity to provide clarity and assist each justice's understanding of the facts and issues involved.

Attorney Oral Argument Preparation: Thoroughly prepare for argument: Know the record, know the facts, and know the law. As an aside, knowing the record helps the justices during argument to answer questions that might have arisen as they reviewed the briefs and that are important to them in helping to either understand the legal issue or otherwise to understand the nature of facts that might be disputed.

Oral Argument Focus: Focus on legal issues that the case presents. Do not use precious argument time discussing facts or issues that are irrelevant to the issue on appeal or review or are undisputed.

Oral Argument as Conversation: Remember that argument is a conversation. Anticipate questions and engage in conversation with the justices. Do not "read" a preprepared argument. Be flexible.

Other Nuts and Bolts

Oral Argument Scheduling: Please note that the Oregon Supreme Court no longer schedules oral arguments for a time certain on a particular argument date. Instead, the court typically sets two cases for the morning, and two cases for the afternoon, each designated as the "first" and "second" case of the morning or afternoon, beginning at 9:00 a.m. and 1:30 p.m., respectively. Unless the court has ordered otherwise, an hour is allotted for each case for oral argument -- although parties do not always use the full hour -- with a short break in between. As a result of that scheduling structure, and particularly because argument for the first case may not take the full hour -- attorneys arguing the second case of a morning or afternoon session should arrive shortly after (or before) the time set for the first case of that session.

ORAPs Online: The best resource for the most updated version of the Oregon Rules of Appellate Procedure (ORAPs) is the ORAP page on the OJD website, <http:tinyurl.com/orappage>. Temporary rules -- particularly pertaining to the transition to Oregon eCourt -- sometimes are adopted out-of-cycle, and the website contains Chief Justice Orders

adopting temporary amendments and also combined documents that set out both the updated permanent rules with the temporary amendments incorporated.

eFiling: If you electronically file any document, the Appellate Records Office asks that you please do not also follow up with a hard copy mailing or other conventional filing of the same document.

SECTION II:
PRACTICE TIPS FROM THE COURT OF APPEALS

When I was invited to speak at the Appellate Practice Section fall CLE, I asked the judges and staff of the Court of Appeals to share their tips and pet peeves on briefing and oral argument. I've collected and organized those tips, and edited them only very minimally. -- Lora

Briefs

If you agonize over every part of your brief and sometimes wonder (or are asked) if that agony makes a difference, good news! -- given that the tips on briefing range from the table of contents to the except of record, attention to each part of the brief is a good practice. Generally, a party is well advised to be clear about the purpose of each part of a brief and how each may help create a path for the court to decide in its favor. A useful practice, if time permits, is "reverse engineering": draft the opinion you'd like to see, and craft the brief in a way that leads to that opinion. If the parts of the brief present a consistent and clear legal theory, the court generally will be able to resolve the case more quickly.

Tip -- start advocating from page 2 -- put substance into the table of contents.

It is not very helpful when the table of contents in a brief simply labels assignments as "First Assignment of Error" etc. In single issue cases it

isn't that big of a deal, but it's nice in bigger cases to be able to look at the table of contents and get a feel for the issues. Of course you can do so in the first few pages of a brief, but it seems like a practitioners could use the TOC better.

Pet peeve: Too many facts in briefs beyond what is needed to resolve the issues.

Pet peeve: Boiler plate standard of review that isn't put in the context of the rulings challenged in the case at hand.

De novo review: If you don't explain why you should get it, you won't get it. (You may not get it anyway, but explaining why is a necessary prerequisite to getting it. ORAP 5.40(8)(a))

What came to mind instantly in the pet peeves category was practitioners who "combine argument" on multiple assignments of error (in my current case it was 9!), especially when the standards of review and legal arguments are significantly distinct. Also, raising an argument but not developing it--the throwing everything up against the wall syndrome. My tip is to stop doing both.

It is very frustrating when parties do not give (at least) a quick run-through of the relevant legal standard or test that is applied to the facts. For example, I had a case a while ago dealing with a multi-factor test. At no point in the brief did the party take the time to give a quick numbered list of the factors relevant to the analysis. It sure would have been helpful to have up front!

Please, please, please do not try to mislead or take out of context the authority cited! I too often ask myself in the midst of an appeal, "Does this attorney really think that I don't thoroughly read the case/statute/rule/legislative history?"

Based on my most recent case, I would suggest that lawyers avoid using long, single-spaced quotations in their briefs. And I would especially suggest not using, as an argument on an assignment of error, a long single-spaced quote from a trial memorandum, followed by a one sentence conclusion, "For those reasons, the trial court erred."

Briefs with incorrect (or missing) numbering. For example, the ER cites in the brief don't match up with the actual documents in the ER. I also once had a brief in which the pages weren't numbered at all and had to hand-number the brief and ER.

The following are not helpful:

- Putting case names or party names (or just about anything else) in bold.
- Putting "*passim*" in the table of authorities instead of specifying all of the page numbers.
- Not stating the assignments of error in the table of contents.
- Not including the subsections in the table of contents.
- Noting facts that make the other party look bad but aren't relevant to the issues on appeal.
- Pointing out insignificant errors in the other party's brief.
- Including an "extract of record" (*i.e.*, a written summary of relevant documents) instead of an "excerpt of record" (copies of the relevant documents).

Pet peeves:

- Treating ORAP 5.45 as merely a rule regarding what a brief should *look* like, and not understanding that it's *essential* to the very core of what we do as an appellate court. That is, we *must* know what specific rulings are being challenged on appeal and the standards that govern our review of those rulings.
- Setting out the standards of review but not applying them, usually by describing the facts in the way that are most advantageous to the party on whose behalf the brief is filed, whether or not that is appropriate.

- Along the same lines, making arguments better directed to a fact-finder than to the appellate court.
- Writing the brief as though it's going to be read by somebody who already understands what the case is about; neglecting to tell us that. *I.e.*, not "telling the story" (keeping in mind, of course, the need to frame everything in light of the applicable standard of review).

<u>Oral argument</u>

"Correct effort without over-attachment to the goal." Be prepared to discuss the record, the procedural history, and all authorities cited in the briefing. Undoubtedly, you will also have a list of points you would like to emphasize. However, you cling to only the points you believe are important at your peril. At the Court of Appeals, it is rare for opinion drafting to begin before oral argument. However, the judges will have read the briefs carefully at least once before oral argument. They also meet (usually in the morning before oral argument) to discuss each case on the day's docket. In those conversations, the judges pinpoint areas of concern and identify some of the questions they intend to ask during oral argument. Accordingly, at the time of oral argument, the judges are already thinking about what an opinion might look like. Thus questions from the bench during oral argument often reflect issues that the judges believe that they will need to grapple with in order to resolve your case. Even if those questions divert you from the points you wanted to raise during oral argument -- and even if you believe the questions don't relate to the most important issues in the case -- helping the judges by fully addressing those questions means that they will have your input. If the judges continue to believe an issue is important to resolving a case, they will resolve it. You get to choose whether to provide input about how to resolve it or to let the court resolve it without you.

1. My personal tip is to have your argument begin with an attention-getting introduction that shows organization and captures the heart of your case ... then you might get a little more time to develop your argument before the questions interrupt.

2. If your case or argument is complicated -- if you've first discarded all the lesser arguments -- and if you're still sure there isn't enough time, move (before argument day) to extend the 15 minute arguments longer. This is not to be confused with just wanting time to argue more but lesser assignments of error; nor should it be confused with wanting to dig down arguing facts. Rather, think about whether you might have an unanswered question of law or difficult issue about which the judges will likely *want* more time to explore with questions to both sides. Case of first impression? Truly conflicting precedents? Ask for more time.

Pet peeve: Not addressing all judges at oral argument

Pet peeves:

- Not knowing the record.
- Not understanding the applicable standards of review; not framing arguments in terms of those standards.
- Saying "that's an excellent question," or other "complimentary" things, as a replacement for "um." Lawyers should learn not to fear being silent for a few seconds, or to say "please bear with me as I take a moment to gather my thoughts."
- Not answering the questions that we've actually asked, before answering the questions the lawyer *wishes* we had asked.
- Continuing to argue once the red light is on, without asking leave to do so or otherwise alerting a PJ who seems not to have noticed that the lawyer is out of time.
- Being oblivious to judges who are waiting for the lawyer to pause before asking questions -- or intentionally ignoring the judges' signals that they are eager to ask questions -- requiring us to interrupt. Worse, responding to a judge's attempt to ask a question by talking loudly over the judge.

Helpful resources

- *Appeal and Review: Beyond the Basics* (OSB CLE 2014)

  This guide, written by appellate judges and experienced practitioners, includes detailed chapters covering effective written and oral advocacy with tons of real-life pointers.

- *A Day with the Court of Appeals* (OLI 2014)

  This day-long CLE presented by Court of Appeals judges and the Appellate Commissioner covers court processes and suggestions for practitioners. Recordings and/or the 129-page book written by judges and staff are available from OLI.

- *The Oregon Rules of Appellate Procedure (ORAPs)*

  Know them, cite them, love them. Available online at <http://tinyurl.com/orappage>.

- *The Oregon Appellate Courts' Style Manual*

  Citations in briefs must conform to the courts' Style Manual. ORAP 5.35(3). It's a good idea to conform your filings to the style conventions used by the courts. Available online at <https://publications.ojd.state.or.us>.