

## COURT OF APPEALS

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We are pleased to share a draft of a proposed temporary-rule amendment to the Oregon Rules of Appellate Procedure (ORAP). The proposed changes appear in "redline" changes to the current rules. This temporary ORAP will allow our court to issue nonprecedential opinions when it goes into effect. Due to the bar's significant interest in this proposal, we are sharing it with you for comment.

Our court diligently worked over the past year to decrease our time to disposition and issue more timely opinions. As you have heard in the past, our court is one of the busiest intermediate appellate courts in the nation. We also lack comparable staff resources to similar state intermediate appellate courts. Despite our resource challenges, we have had great success in 2021. We had a very productive year getting out opinions without sacrificing quality or attention to our mission of justice. We have accomplished that, in part, by issuing more short *per curiam* opinions that do not always recite all of the facts or provide an exhaustive explanation of the court's analysis on every issue. These opinions are directed to the parties, the trial courts, and other tribunals that already have the background information on the case. The opinions, however, are still considered precedential even though they are not intended to serve as precedent and make no new law.

To address that concern, clarify our jurisprudence, and match our limited resources to our cases while maintaining our focus on justice, we have concluded that we need to add a new form of disposition to those currently available for resolving the matters presented to us: a nonprecedential opinion. This new option will allow us to better match the form of disposition to the nature and complexity of the case at issue. For nonprecedential opinions, we anticipate producing more short, clear, and timely dispositions targeted at resolving the disputes presented to us by the parties rather than announcing law for the entire state. Having a new form of disposition available to us will not change our approach to reviewing briefs, preparing for argument, analyzing cases, or

reaching decisions, but will, in some cases, change how much we write in a particular opinion.

Every case is important to the parties to the case. Not every case sets new law or requires an explanation targeted at an audience beyond the parties and the lower tribunal. A nonprecedential opinion option will allow us to issue more timely opinions through both nonprecedential and precedential dispositions. Significantly, we have researched other similar courts, and every state intermediate appellate court that we examined issues a form of nonprecedential opinion to help ensure the timely and case-appropriate disposition of appeals.

We also anticipate that adopting nonprecedential opinions as an option for our decisions will provide a building block to reduce our "AWOP" rate and to issue more written decisions in the future. That is because a nonprecedential opinion option will allow us to provide the parties with an explanation on cases that are not appropriate for publication and we might otherwise AWOP. Without that option or without further resources, we will not have the ability to make a significant dent in our current AWOP rate.

We understand that this change may be new for some although not different for those who have practiced before other intermediate appellate courts. We would like to hear and consider your comments. To address any concerns, we have provided an extended comment period until March 31, 2022 to provide comments or suggestions on the enclosed text. If you wish to comment, please send any comments to [COA.Rule.Comment@ojd.state.or.us](mailto:COA.Rule.Comment@ojd.state.or.us) by that date. Subject to our consideration of your comments, we expect that a temporary amendment would likely take effect in April or May 2022. Once in effect as a temporary rule, we will continue to analyze whether it makes sense to pursue this option as a permanent rule based on our analysis of the project and your feedback.

Thank you for your work with us in helping us to continue, and improve, the delivery of justice to those who appear before our court. - The Oregon Court of Appeals

## **PROPOSED TEMPORARY AMENDMENTS TO OREGON RULES OF APPELLATE PROCEDURE (REDLINE CHANGES)**

(Markup applied to Amendments Effective January 1, 2021, Version date: July 12, 2021)

### **Rule 5.20**

#### **REFERENCE TO EVIDENCE AND EXHIBITS; CITATION OF AUTHORITIES**

(1) Briefs, in referring to the record, shall make appropriate reference to pages and volumes of the transcript or narrative statement, or in the case of an audio record, to the tape number and official cue or numerical counter number or, in the case of an exhibit, to its identification number or letter.

(2) If the precise location on the audio record cannot be determined, it is permissible to indicate between which cue numbers the evidence is to be found.

(3) In referring to any part of the record transmitted to the Administrator by optical disk or by Secure File Transfer Protocol (SFTP) in Portable Document Form (PDF), the court prefers citation to the page number of the PDF file. In any judicial review in which the agency has served a self-represented party with the record in conventional paper form, a party citing to the record may either:

(a) Include in the party's brief parallel citations to the record in conventional paper form; or

(b) On request of any self-represented party, provide in writing to that party parallel citations to the record in conventional paper form.

(4) The following abbreviations may be used:

"P Tr" for pretrial transcript;

"Tr" for transcript;

"Nar St" for narrative statement;

"ER" for Excerpt;

"App" for Appendix;

"AR Tape No. \_\_\_\_, Cue No. \_\_\_\_" for audio record;

"PAR" for pretrial audio record;

"PDF" for PDF of agency record filed by electronic means with the Administrator;

"TCF" for trial court file;

"Rec" for record in judicial review proceedings only;

"Ex" for exhibit.

Other abbreviations may be used if explained.

(5) Guidelines for style and conventions in citation of authorities may be found in the Oregon Appellate Courts Style Manual.<sup>1</sup>

(6) Cases affirmed without opinion by the Court of Appeals should not be cited as authority. Cases decided by nonprecedential memorandum opinion may only be cited as provided in ORAP 10.30(4).

## **Rule 5.40**

### **APPELLANT'S OPENING BRIEF: STATEMENT OF THE CASE**

The appellant's opening brief shall open with a clear and concise statement of the case, which shall set forth in the following order under separate headings:

(1) A statement, without argument, of the nature of the action or proceeding, the relief sought and, in criminal cases, the indictment or information, including citation of the applicable statute.

(2) A statement, without argument, of the nature of the judgment sought to be reviewed and, if trial was held, whether it was before the court or a jury.

(3) A statement of the statutory basis of appellate jurisdiction and, where novelty or possible doubt makes it appropriate, other supporting authority.

(4) A statement of the date of entry of the judgment in the trial court register, the date that the notice of appeal was served and filed, and, if more than 30 days elapsed between those two dates, why the appeal nevertheless was timely filed; and any other information relevant to appellate jurisdiction.

(5) In cases on judicial review from a state or local government agency, a statement of the nature and the jurisdictional basis of the action of the agency and of the trial court, if any.

(6) A brief statement, without argument and in general terms, of questions presented on appeal.

(7) A concise summary of the arguments appearing in the body of the brief.

(8) (a) In those proceedings in which the Court of Appeals has discretion to try the cause anew on the record and the appellant seeks to have the court exercise that discretion, the appellant shall concisely state the reasons why the court should do so.\*

(b) In those proceedings in which the Court of Appeals has discretion to make one or more factual findings anew on the record and the appellant seeks to have the court exercise that discretion, the appellant shall identify with particularity the factual findings that the appellant seeks to have the court find anew on the record and shall concisely state the reasons why the court should do so.\*

(c) The Court of Appeals will exercise its discretion to try the cause anew on the record or to make one or more factual findings anew on the record only in exceptional cases. Consistently with that presumption against the exercise of discretion, requests under paragraph (a) or (b) of this section are disfavored.

(d) The Court of Appeals considers the items set out below to be relevant to the decision whether to exercise its discretion to try the cause anew on the record or make one or more factual findings anew on the record. These considerations, which are neither exclusive nor binding, are published to inform and assist the bar and the public.

(i) Whether the trial court made express factual findings, including demeanor-based credibility findings.

(ii) Whether the trial court's decision comports with its express factual findings or with uncontroverted evidence in the record.

(iii) Whether the trial court was specifically alerted to a disputed factual matter and the importance of that disputed factual matter to the trial court's ultimate disposition of the case or to the assignment(s) of error raised on appeal.

(iv) Whether the factual finding(s) that the appellant requests the court find anew is important to the trial court's ruling that is at issue on appeal (i.e., whether an

appellate determination of the facts in appellant's favor would likely provide a basis for reversing or modifying the trial court's ruling).

(v) Whether the trial court made an erroneous legal ruling, reversal or modification of which would substantially alter the admissible contents of the record (e.g., a ruling on the admissibility of evidence), and determination of factual issues on the altered record in the Court of Appeals, rather than remand to the trial court for reconsideration, would be judicially efficient.

(9) A concise summary, without argument, of all the facts of the case material to determination of the appeal. The summary shall be in narrative form with references to the places in the transcript, narrative statement, audio record, record, or excerpt where such facts appear.

(10) In a dissolution proceeding or a proceeding involving modification of a dissolution judgment, the summary of facts shall begin with the date of the marriage, the ages of the parties, the ages of any minor children of the parties, the custody status of any minor children, the amount and terms of any spousal or child support ordered, and the party required to pay support.

(11) Any significant motion filed in the appeal and the disposition of the motion. A party need not file an amended brief to set forth any significant motion filed after that party's brief has been filed.

(12) Any other matters necessary to inform the court concerning the questions and contentions raised on the appeal, insofar as such matters are a part of the record, with reference to the parts of the record where such matters appear.

In the Court of Appeals, the appellant's brief may also include, under the heading "ORAP 10.30," a statement explaining whether, in the appellant's view, the court's decision in the case should be precedential under the factors listed in ORAP 10.30(2).

## **Rule 5.55**

### **RESPONDENT'S ANSWERING BRIEF**

(1) (a) The respondent's answering brief must follow the form prescribed for the appellant's opening brief, omitting repetition of the verbatim parts of the record in appellant's assignments of error.

(b) The brief must contain a concise answer to each of the appellant's assignments of error preceding respondent's own argument as to each.

(2) Under the heading "Statement of the Case," the respondent specifically shall accept the appellant's statement of the case, or shall identify any alleged omissions or inaccuracies, and may state additional relevant facts or other matters of record as may apply to the appeal, including any significant motion filed on appeal and the disposition of the motion. The additional statement shall refer to the pages of the transcript, narrative statement, audio record, record, or excerpt in support thereof but without unnecessary repetition of the appellant's statement.

(3) In the Court of Appeals, the respondent's brief may also include, under the heading "ORAP 10.30," a statement explaining whether, in the respondent's view, the court's decision in the case should be precedential under the factors listed in ORAP 10.30(2).

(34) If a cross-appeal is abandoned, the respondent shall immediately notify the appellate court in writing and, if notice has not been given previously, the respondent shall notify the court of the abandonment when the respondent's answering brief is filed, in writing and separately from the brief.

(45) If the court gives an appellant leave to file a supplemental brief after the respondent's answering brief has been filed, the respondent may file a supplemental respondent's answering brief addressing those issues raised in the appellant's supplemental brief.

## **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;  
or-

(f) A claim that a decision issued as a nonprecedential memorandum opinion, as defined in ORAP 10.30, should be designated as precedential under the factors listed in subsection (2) of that rule. A party seeking reconsideration under this paragraph shall prominently display in the caption of the petition the words "SEEKS RECONSIDERATION OF NONPRECEDENTIAL DESIGNATION."

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

(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

(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.<sup>1</sup>

(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.



## **Rule 10.30**

### **NONPRECEDENTIAL MEMORANDUM OPINIONS**

(1) In the Court of Appeals, the judges participating in the decision of an appeal submitted to a department may issue a decision as a nonprecedential memorandum opinion. A decision shall be nonprecedential only if it is designated as such as provided in subsection (5) of this rule, or if it is an affirmance without opinion. A nonprecedential memorandum opinion may be authored or per curiam.

(2) The following factors are relevant in determining whether a written opinion will be precedential:

(a) whether the opinion establishes a new principle or rule of law or clarifies existing case law;

(b) whether the opinion decides a novel issue involving a constitutional provision, statute, administrative rule, or rule of court;

(c) whether the opinion resolves a significant or recurring legal issue for which there is no clear precedent;

(d) whether the opinion criticizes existing law;

(e) whether the opinion is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests that the disposition of the Court be precedential; or

(f) whether the opinion resolves a conflict among existing nonprecedential Court of Appeals' decisions brought to the Court's attention.

(3) All written opinions issued by the Court of Appeals sitting *en banc* are precedential.

(4) (a) Nonprecedential memorandum opinions have no precedential effect in the Oregon appellate courts, nor shall they be considered precedential in other tribunals of this state, except as relevant under the law of the case doctrine or the rules of claim preclusion or issue preclusion. However, nonprecedential memorandum opinions may be cited as persuasive authority if no precedential opinion adequately addresses the issue before the court, in briefing under ORAP 5.40 or 5.55 to argue that a precedential decision is warranted because of conflicting nonprecedential memorandum opinions, or in a petition for reconsideration under ORAP 6.25 claiming that a decision issued as a nonprecedential memorandum opinion should be designated as precedential under the

factors listed in subsection (2) of this rule.

(b) If a party cites a nonprecedential memorandum opinion, the party shall explain the reason for citing it and how it is relevant to the issues presented. Additionally, the case citation must include a parenthetical indicating "nonprecedential memorandum opinion."

(5) An opinion designated as a nonprecedential memorandum opinion under this rule will contain a notation on the title page of the opinion substantially to the effect of the following: "***This is a nonprecedential memorandum opinion pursuant to ORAP 10.30 and may not be cited except as provided in ORAP 10.30(4).***"

(6) The court may, upon a petition for reconsideration under ORAP 6.25 or on the court's own motion, remove the nonprecedential designation from an opinion.