

MEMORANDUM

TO: ORAP Committee
FROM: S.P. Armitage
RE: Public Comment to Proposed ORAP Amendments
DATE: August 14, 2024

1 The period for public comment has now expired. The committee received
2 only one comment, from Kyle Krohn with Oregon Public Defense Corporation. The
3 comment relates to the proposed amendments to ORAP 9.05, 9.17, and Appendix 9.05,
4 which would require certain Supreme Court filings to include citations to the underlying
5 Court of Appeals decision. His express concern is that the rules are ambiguous about
6 which citations are being required:

7 "The requirement that a Supreme Court petition for review or brief
8 on the merits include the 'citation' for any 'reported' Court of Appeals
9 decision might benefit from a definition or explanatory footnote for those
10 terms. First, whether the 'citation' required is just the Or App citation or
11 whether a Pacific reporter citation is also required if available. Second,
12 whether 'reported' means anything listed in the Oregon reporter (which
13 includes both nonprecedential memorandum opinions and AWOPs) or
14 whether it is limited to decisions published in the Pacific reporter (which
15 includes AWOPs but not nonprecedential opinions). I would guess that the
16 rules apply only to the Oregon reporter, but the common practice of
17 including parallel Pacific reporter citations, and the Pacific reporter's
18 inclusion of AWOPs but not nonprecedential decisions, makes me
19 uncertain and could cause confusion about these rules."

20 The proposed rule amendments are attached below. Lisa Norris-Lampe,
21 who had originally proposed the amendment, has reviewed the comment and
22 recommends that ORAP 9.05(3)(a)(D) be amended from:

1 "(D) If a reported decision, the citation.

2 To (bold showing new text):

3 "(D) If a reported decision **of any type**, the **full** citation, **including**
4 **any Pacific Reporter citation.**"

5 Thank you.

Rule 9.05
PETITION FOR SUPREME COURT REVIEW OF
COURT OF APPEALS DECISION

(1) Reviewable Decisions

As used in this rule, "decision" means a decision of the Court of Appeals in the form of an opinion, per curiam opinion, nonprecedential memorandum opinion, or affirmance without opinion, or an order ruling on a motion, own motion matter, petition for attorney fees, or statement of costs and disbursements, including an order of the Chief Judge or Motions Department on reconsideration of a ruling of the appellate commissioner under ORAP 7.55(4)(c) or an order of the appellate commissioner if it is designated a "summary determination," as specified in ORAP 7.55(4)(d). Except as provided in ORAP 7.55(4)(d), a decision of the appellate commissioner may be challenged only by a petition or motion for reconsideration in the Court of Appeals as provided by ORAP 6.25.

(2) Time for Filing and for Submitting Petition for Review

(a) Except as provided in ORS 19.235(3) and ORAP 2.35(4), any party seeking to obtain review of a decision of the Court of Appeals shall file a petition for review in the Supreme Court within 35 days after the date of the decision of the Court of Appeals.¹

(b) A party seeking additional time to file a petition for review shall file a motion for extension of time in the Supreme Court, which that court may grant.

(c) (i) If a timely petition for reconsideration of a decision of the Court of Appeals is filed under ORAP 6.25(2) by any party, the time for filing a petition for review concerning that decision for all parties shall not begin to run until the Court of Appeals issues its written disposition of the petition for reconsideration. If a party obtains an extension of time to file a petition for reconsideration and does not file a petition for reconsideration within the time allowed, the time for filing a petition for review shall begin to run on expiration of the extension of time.

(ii) If a petition for review is filed during the time in which a petition for reconsideration in the Court of Appeals may be filed, the petition for review will not be submitted to the Supreme Court until the time for filing a petition for reconsideration expires.

(iii) If a petition for review is filed after the filing of a timely petition for reconsideration, the petition for review will not be submitted to the Supreme Court until the Court of Appeals issues its written disposition of the petition for reconsideration.

(d) (i) If a party files a petition for review after the appellate judgment

has issued, the party must file with the petition a motion to recall the appellate judgment. The petition and the motion must be filed within a reasonable time after the appellate judgment has issued. The motion to recall the appellate judgment must explain why the petition for review was not timely filed. The party need not file a separate motion for relief from default.

(ii) A party filing a motion to recall the appellate judgment in a criminal case, in addition to serving all other parties to the appeal, shall serve a copy of the motion on the district attorney.

(3) Form and Service of Petition for Review

(a) The petition shall be in the form of a brief prepared in conformity with ORAP 5.05 and ORAP 5.35. For purposes of ORAP 5.05, the petition must not exceed 5,000 words or (if the certification under ORAP 5.05(2)(d) certifies that the preparer does not have access to a word-processing system that provides a word count) 15 pages. The cover of the petition shall:

(i) Identify which party is the petitioner on review, including the name of the specific party or parties on whose behalf the petition is filed, if there are multiple parties on the same side in the case.

(ii) Identify which party is the respondent on review.

(iii) Identify the date of the decision of the Court of Appeals.

(iv) Identify the means of disposition of the case by the Court of Appeals, including the following information:

(A) Whether the challenged decision was an opinion, nonprecedential opinion, per curiam opinion, affirmance without opinion, or order;

(B) The members of the court who entered the decision;

(C) The author of any opinion, and any judges separately concurring or dissenting;² and

(D) If a reported decision of any type, the full citation, including any Pacific Reporter citation.

~~(A) If by opinion, the author of the challenged opinion and the other members of the court who concurred in or dissented from the court's decision;~~

~~(B) If by per curiam opinion, affirmance without opinion, or by~~

~~order, the members of the court who decided the case.~~²

(v) Contain a notice whether, if review is allowed, the petitioner on review intends to file a brief on the merits or to rely on the petition for review and brief or briefs filed in the Court of Appeals.³

(vi) For a case expedited under ORAP 10.15, prominently display the words "JUVENILE DEPENDENCY CASE EXPEDITED UNDER ORAP 10.15," "TERMINATION OF PARENTAL RIGHTS CASE EXPEDITED UNDER ORAP 10.15," or "ADOPTION CASE EXPEDITED UNDER ORAP 10.15," as appropriate.

(vii) Comply with the requirements in ORAP 5.95 governing briefs containing confidential material.

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

(4) Contents of Petition for Review

The petition shall contain in order:

(a) A short statement of the historical and procedural facts relevant to the review, but facts correctly stated in the decision of the Court of Appeals should not be restated.

(b) Concise statements of the legal question or questions presented on review and of the rule of law that the petitioner on review proposes be established, if review is allowed.

(c) A statement of specific reasons why the legal question or questions presented on review have importance beyond the particular case and require decision by the Supreme Court.⁴

(d) If desired, and space permitting, a brief argument concerning the legal question or questions presented on review.

(e) A copy of the decision of the Court of Appeals, including the court's opinion and any concurring and dissenting opinions.

¹ See generally ORS 2.520. See ORAP 7.25(2) regarding information that must be included in a motion for extension of time to file a petition for review.

² See Appendix 9.05.

³ See ORAP 9.17 regarding briefs on the merits.

⁴ See ORAP 9.07 regarding the criteria considered by the Supreme Court when deciding whether to grant discretionary review. An assertion of the grounds on which the decision of the Court of Appeals is claimed to be wrong, without more, does not constitute compliance with this paragraph.

~~See ORAP 5.90(5) regarding filing a petition for review where a "Balfour" brief was filed on behalf of the appellant in the Court of Appeals.~~

**Rule 9.17
BRIEFS ON THE MERITS ON REVIEW**

* * * * *

(2) * * * * *

(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). The cover of the brief also shall include the citation to the Court of Appeals decision that is the subject of the petition for review, if that decision was reported.

* * * * *

APPENDIX 9.05

Illustration for ORAP 9.05

[The case title of a petition for review is to appear as shown on the appellate decision in substantially the following form:]

IN THE SUPREME COURT
OF THE STATE OF OREGON

Respondent,)	
(or Petitioner) on Review,)	
v.)	_____ County Circuit
Petitioner)	Court No. _____
(or Respondent) on Review.)	CA A _____

PETITION FOR REVIEW OF

[NAME OF PARTY]

Petition for review of the decision of the Court of Appeals on appeal from a judgment of the Circuit Court for _____ County, Honorable _____, Judge (or an order of [name of agency]). [Citation for the Court of Appeals decision, if any.]

Opinion Filed: [date]

Decision by [Opinion / Nonprecedential Memorandum Opinion / Per Curiam Opinion / Affirmance Without Opinion / Order]

Panel: _____

Authoring Judge: _____

Separate Opinions by: _____

~~[If the court decided the case by opinion indicating its author]~~

~~Author of Opinion:~~ _____

~~Concurring Judge(s):~~ _____

~~Dissenting Judge(s):~~ _____

~~[or]~~

~~[If the court affirmed without opinion or decided the case by per curiam opinion]~~

~~Before _____, Presiding Judge~~

~~_____~~
~~_____~~

Attorney(s) for Petitioner on Review [if more than one petitioner on review, identify which; include separate listing for each petitioner on review represented by a different attorney]
[Mailing address, bar number, telephone number, and email address]

[ord]

[name of self-represented petitioner on review; include separate listing for each self-represented petitioner on review]
[Mailing address and telephone number]

Attorney(s) for Respondent on Review [if more than one respondent on review, identify which; include separate listing for each respondent on review represented by a different attorney]
[Mailing address, bar number, telephone number, and email address]

[or]

_____ [name of self-represented respondent on review; include
separate listing for each self-represented respondent on review]
[Mailing address and telephone number]

PETITIONER ON REVIEW
[INTENDS/DOES NOT INTEND]
TO FILE A BRIEF ON THE MERITS