

Written Advocacy in the Oregon Supreme Court

Chief Justice Paul J. De Muniz¹

I. Introduction

The appellate brief is the most powerful tool at an advocate's disposal. It is the written account of the relevant facts, legal reasoning, and supporting authority that will persuade the court to rule in favor of the advocate's client and to advance the law in a particular direction. The brief is "written for one audience, and one audience only--judges and their law clerks."² The written brief has four advantages over oral argument: (1) it aids with absorption of the advocate's position because the court is able to "read, re-read, and study it as necessary[;]"³ (2) it provides the judge to whom the case has been assigned with "the working materials"⁴ for the written opinion; (3) it permits the judge to absorb the materials at "the most convenient time in his [or her] schedule[;]"⁵ and (4) it provides the advocate an opportunity to communicate with staff members who assist the court with deciding the case, but who do not attend oral arguments. The less effectively that the brief communicates the advocate's position, the greater the chance that the outcome will not be favorable to the client. The following are suggestions on using written advocacy to obtain a desired result in the Oregon Supreme Court.

II. Motion Practice

- A. **Follow the Rules and Observe the Proper Format.** The rules are set out at ORAP, Section 7. In addition, ORAP 1.20(2) allows the court, on its own motion, to strike a motion for failure to comply with the rules.

¹Justices Balmer and Kistler helped in the initial preparation of these materials.

² Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* 19 (2nd ed. NITA, 2003)

³ Carrington, Meador and Rosenberg, *Justice on Appeal* 25-26 (West 1976).

⁴ Id.

⁵ Id.

B. General Tips

1. **Present a Thorough and Accurate Synopsis of the Relevant Facts.**
2. **Be Aware of Proper Use.** Do not use the motion to address issues that the court will need to address on their merits.
3. **Include all Necessary Attachments.**
4. **Be Aware of Other Parties' Response Time.** ORAP 7.05(3) gives other parties 14 days to respond. The court generally will not review a motion until it has received a response. To obtain the speediest action, therefore, if counsel knows that other parties do not intend to respond to the motion, counsel should so note in the motion.
5. **Specify all Desired Relief.** Failure to do so may preclude particular types of relief (e.g., if a party desires to stop a particular event from occurring and files a petition for a writ of mandamus in the court, the party probably should also request a stay because the court may not be able to consider the merits of the petition before the event occurs).

C. Specific Types of Motions

1. **Motions for Extension of Time.** ORAP 7.25 sets out the requirements. Note that, for motions requesting a second extension of time, the rule requires "[a] statement whether opposing counsel objects to, concurs in or has no position regarding the extension of time requested[.]" ORAP 7.25(3).
2. **Emergency Motions.** ORAP 7.35 sets out the applicable rules. Be sure that a true emergency exists. The court probably will not look favorably upon emergencies of a party's own creation. If a true emergency exists, act accordingly. Indicate clearly that there is an emergency (ORAP 7.35(1)); indicate important deadlines; give the court ample time to meet deadlines (it is not advisable to file the motion a day, or two, before the matter must be resolved); and, in extreme emergencies, with notice to opposing counsel, contact the court. ORAP 7.35(3) also provides for

facsimile transmission in certain circumstances.

III. Obtaining Supreme Court Review

The Oregon Supreme Court is a law-announcing court. *1000 Friends of Oregon v. Board of County Com'rs, Benton County*, 284 Or 41, 47, 584 P2d 1371 (1978). Thus the petition for review should do more than merely request that the court reverse the decision of the Court of Appeals (or other lower court). It must address the court's law-announcing function.

A. Petition for Review

1. **Statutory Provision.** ORS 2.520 provides that “[a]ny party aggrieved by a decision of the Court of Appeals may petition the Supreme Court for review within 35 days after the date of the decision, in such manner as provided by the rules of the Supreme Court.” Counsel should note, however, any potential impediments to review (e.g., preservation, jurisdiction).
2. **Applicable rules.** ORAP 9.05 - 9.30 govern petitions for review.
 - a. **Time for Filing Petition.** ORAP 9.05 (2) requires party seeking Supreme Court review of decision of the Court of Appeals to file the petition within 35 days from the date of the Court of Appeals decision.
 - b. **Form.** The petition for review must be in form of a brief and must, among other things, identify the parties, identify the date of lower court’s decision, and identify the lower court’s disposition of the case. ORAP 9.05(5). The Oregon appellate courts also have their own style manual that includes, among other things, the preferred method of case citation, and the court's preferred use of certain terminology. It is well worth the investment.
 - c. **Contents.** The petition should be brief and should explain the importance of the legal issue(s) presented. ORAP 9.05(7) requires, among other things, that the petition contain: (1) “concise statements of the legal question or questions presented on review

and of the rule of law that petitioner proposes be established, if review is allowed[;]” (2) “a concise statement of each reason asserted for reversal[;] and (3) “a statement of specific reasons why the issues have importance beyond the particular case.”

- d. **Criteria for Granting Discretionary Review.** ORAP 9.07 lists the criteria. The court always refers to those criteria when deciding whether to grant or deny review in a particular case. Thus, if an advocate fails to state the specific reasons why the issues presented have importance beyond the particular case, their case will be handicapped. However, even assuming that a case meets some of the ORAP 9.07 criteria, the court also may consider whether there are issues present that could prohibit reaching the issue that the court wants to consider on review. The court also may take into consideration whether there may be amicus briefing assistance. Assuming that all seven members of the court participate in a case, three affirmative votes are required to allow review.

3. **Helpful Hints**

- a. Identify clearly the rule of law sought and establish why the case is a good vehicle for adopting that rule.
- b. Acknowledge the Court of Appeals opinion and explain why its approach and/or decision is not correct.
- c. Acknowledge any omissions in the record that might affect review (e.g., preservation)
- d. Do not merely make cosmetic changes to the Court of Appeals brief. Write the petition to this court.
- e. Focus only on the relevant facts, and determine whether the case is too fact-bound for review.
- f. Present an accurate account of the facts.

- g. Distill complexities into simple, easily visualized legal arguments.
- h. Remain focused on the central issues in the case.
- I. Never quote the law out of context in order to persuade the court to grant review.
- j. Include necessary attachments, including the Court of Appeals opinion if there is one.
- k. Proofread.

B. Response to Petition for Review

1. **The Decision to Respond.** If an advocate chooses to respond to a petition for review, the advocate should emphasize the law-announcing potential, or absence thereof, of the case. A response also may be tactically appropriate for pointing out why the particular case is confined to its facts and may not be appropriate for Supreme Court review, even though the case meets some of the ORAP 9.07 criteria. The advocate also should highlight any procedural impediments to review.
2. **Applicable Rules.** ORAP 9.10 makes a response discretionary and provides that, in the absence of one, “the party’s brief in the Court of Appeals will be considered as the response.” The rule also gives a party 21 days to respond.
3. **Helpful Hints**
 - a. Many of the tips above in the Petition for Review section apply here also.
 - b. Explain why the case is not a good one for review, but address the merits nonetheless.
 - c. Acknowledge the strengths of the petitioner’s arguments and any areas of agreement.

C. The Process of Reviewing Petitions

1. **Petitions Assigned and Memorandum Prepared.** Petitions for review are assigned randomly to six of the seven chambers. The Chief

Justice is not responsible for initially evaluating petitions for review. The manner of processing the petitions varies among the judges. Some judges evaluate all petitions themselves. Others assign petitions to their law clerk to prepare an evaluative memorandum that the judge will review before forwarding it to the other members of the court. In preparing the memorandum, the judge or clerk will read the petition, the Court of Appeals opinion, and conduct other research, if necessary.

2. **Merits of Petition Discussed at Conference.** Once petition memoranda are completed, they are circulated to the other members of the court to review and later discuss at conference. The “Petitions Agenda” is the first item considered at most conferences, and that part of the court’s work can take hours, with up to fifty or more petitions discussed in one day. The justice responsible for a memorandum leads any discussion regarding the petition. At the end of the discussion of each petition, the justices vote to allow or deny the petition.
3. **If Review is Allowed.** The case is “passed” to a petition clerk who will prepare a memorandum that details any impediments to review (e.g., lack of jurisdiction, issue(s) not preserved). The court also will set the case for oral argument at the earliest possible date. The court hears arguments in September, November, January, March, and May.
4. **If Review is Denied.** ORAP 9.25 allows a party to seek, within 21 days, reconsideration of the court’s decision to deny the petition for review. The court rarely allows petitions on reconsideration.

III. Briefing

A. Brief on the Merits

1. **Generally.** The parties should file briefs on the merits in most cases. The briefs that were filed in the Court of Appeals may be of limited value because they tend to stress authorities decided by that court. Often, the issue, or issues, have been narrowed through the Court of Appeals’

arguments and opinion, and the petition for review process. Thus the merits briefs in the Supreme Court may have a much different emphasis than the previous briefing.

2. **Applicable Rules.** ORAP 1.20-1.40 set out the basic rules that govern filing briefs. ORAP 9.17 sets out the specific rules that govern briefs on the merits.
 - a. **Follow Them.** Failure to do so can have dire consequences. For example, ORAP 1.20(1) provides that “[t]he Administrator may refuse to file any thing delivered that does not comply with these rules or applicable rules.” In addition ORAP 1.20(2) allows the court, “on its own motion” to “strike, with or without leave to refile, any brief [that] does not conform to the applicable statutes or these rules.” Further, the court may, “on its own motion[,] dismiss an appeal * * * if the appellant has failed to comply with the applicable statutes or these rules.”
 - b. **Substance of Brief.** ORAP 9.17 requires the brief on the merits to contain “[c]oncise statements of the legal question or questions presented on review and of the rule of law that petitioner proposes to establish.” The rule specifies that “[t]he questions should not be argumentative or repetitious.” The rule also requires that the brief contain a statement of the nature of the action, the relief sought, the relevant facts, a summary of the argument, an argument, and a conclusion that specifies the desired relief. Each element of the brief is discussed in more detail below.
3. **Purpose.** Your goal is to persuade and to educate the court using logical and persuasive arguments.
4. **Preparation.**
 - a. Envision what you would like to see in the written opinion and be prepared to pursue the logical implications of any rule that you

intend to propose.

- b. Begin to write only after you are clear about your theory of the case, what you seek to accomplish, and the rule that you are asking the court to adopt.
- c. Know all the legal and factual aspects of your case.
- d. Be, and remain, aware of your audience—the judges and their clerks.

5. **Questions Presented**

- a. Identify clearly the rule of law that you want the court to adopt and explain why that rule of law makes sense in the law-making context in which the issue arises (e.g., statutory interpretation, civil procedure, common law).
- b. State each issue as narrowly as possible and present dispositive issues first. Be succinct, yet informative. “Did the Court of Appeals err in affirming the trial court’s grant of summary judgment?” is not helpful. Nor is it helpful to state the issue in a fact-laden, two paragraph question presented.

6. **Summary of the Argument.** This can be the most important part of the brief because it affords counsel the opportunity to demonstrate succinctly the logical flow of the argument, as well as why he or she should win. After the facts, it is often the second part of the brief that a judge will read. As Judge Aldisert explains, the summary of argument “must let the reader know, in a few sentences, the scope, theme, content, and outcome of the brief. It sets the stage for the discussion to follow. It dispatches your argument to the reader at once in succinct, concise, and minimal terms. It describes the equitable heart of the appeal.”⁶

7. **Statement of Facts**

- a. This is, arguably, the most important section of the brief. It is here

⁶ Aldisert, *supra* note 1, at 184.

that the court gets a sense of the real merits of the case, and, it is here that credibility can be gained or lost.

- b. Include a thorough, accurate synopsis of the facts with citations to the record. Refer to the lower court's findings, either to endorse them as correct or to challenge them as incorrect for some legal reason. Do not present a personal view of the evidence or withhold unfavorable facts, the court will find them.
- c. Tailor the facts to fit the issues raised.
- d. Name the parties in a useful and consistent manner (e.g., “defendant,” “plaintiff,” or identify parties by last name).
- e. The statement of facts should generally follow the chronology of the proceedings below and should touch on every procedural aspect of the litigation.

8. **Argument.** As a preliminary matter, the lower court's legal conclusions enjoy a kind of assumptive validity even if those conclusions do not bind the court. Ultimately, the court may decide that the lower court's legal conclusion is incorrect, but the court, as an initial matter, will tend to sympathize with the lower court's resolution of legal questions. With that in mind, the following list includes the court's suggested approach to crafting the argument.

- a. Keep your eye on the ball. Remember that your goal is to persuade the court that your position is the right one.
- b. Adhere to the Oregon analytical hierarchy of analyzing rules, then statutes, then the state constitution, then the federal constitution.
- c. Present your most persuasive argument first.
- d. As early as possible, set out, in any decisive text that governs your case (i.e., the contract provision, the will provision, or the constitution, statute or rule), and analyze the pertinent text in its context.
- e. Ensure that each issue presented is preserved (ORAP 5.45), and if

not preserved, explain why the error is one that is apparent on the face of the record. *See State v. Hitz*, 307 Or 183, 766 P2d 373 (1988) (discussing importance).

- f. Include headings and sub-headings that flow logically.
- g. Always include the applicable standard of review at the beginning of each issue addressed.
- h. If the court has announced a methodology for addressing a particular legal question (e.g., statutory interpretation), follow it or explain why you are not following it.
- I. Use legal terminology accurately.
- j. Try to avoid repetition. Repeating a good argument can dilute its effectiveness and repeating a bad argument can imperil your credibility with the court.
- k. Cite adverse holdings and make concessions where appropriate. Do not attempt to ignore or minimize an important adverse case in a footnote. Again, your credibility is at stake.
- l. Cite more cases for more important points and only one case for less important points.
- m. Do not focus on case-matching. In most cases, the issue(s) on review will be unresolved.
- n. Check old briefs in which the same arguments may have been raised. They may offer perspectives that you did not think of and help you to prepare an even more sophisticated argument.
- o. Conclude briefly with a statement of your desired relief.

9. **Style and Organization**

- a. As stated above in the section on petitions for review, invest in a copy of the style manual that is used by the Oregon appellate courts.
- b. Include pinpoint citations to cases in legal analysis.
- c. Present, in full, the text of relevant constitutional provisions,

statutes, rules, and court decisions. It is not helpful for counsel to state that "a seizure of evidence under these circumstances is unlawful," and cite a case. Instead, demonstrate by quoting the court's own words.

- d. Use active voice as much as possible.
- e. Avoid humor, poems, or other "cute" tricks.
- f. Ensure that the brief is self-contained; all relevant facts and legal points should be in the body of the brief.
- g. Include necessary attachments—judgments, motions, statutes—in an appendix.
- h. Compile a good table of contents to help the judges shift easily between briefs when analyzing specific issues.
- i. Edit mercilessly. After finishing the brief, you should put yourself in your opponent's position and annotate the brief with questions and criticisms. More practically, the brief also can usually be shorter.
- j. Proofread at least one day after drafting is complete to avoid sloppiness.

B. Response Brief. ORAP 9.17 sets out the requirements for the response brief.

The brief must be filed within 28 days of the brief on the merits. The response brief, however, does not need to include all of the sections that are required for the brief on the merits "unless the respondent is dissatisfied with their presentation in the petitioner's brief."

C. Reply Brief. If you file a reply brief, ensure that it responds to arguments in the response brief rather than rearguing the points in the initial brief on the merits.

D. Amicus Briefs. Amicus briefs can be an invaluable aid. Be aware of other parties and organizations that may support your position and invite them to present a perspective about why a rule of law is necessary. That perspective should augment what is already in the brief on the merits. Do not include letters

from people interested in the outcome of the case. The court does not view that as a proper form of amicus advocacy.