

**Testimony before the House Committee on Judiciary
In support of HB 2336
On behalf of the OSB Appellate Practice Section
February 4, 2015**

Chair Barker and members of the committee:

My name is Jordan R. Silk, and I am an attorney with Schwabe, Williamson & Wyatt, PC. I am here as a representative of the Appellate Practice section of the Oregon State Bar in support of HB 2336.

The Oregon State Bar

The Oregon State Bar (OSB) is a public corporation and an instrumentality of the court with over 14,000 active members. The mission of the Oregon State Bar is to serve justice by promoting respect for the rule of law, by improving the quality of legal services, and by increasing access to justice. Among its core values are fairness and diversity. The Oregon State Bar licenses and disciplines lawyers and performs other functions to benefit the public: including lawyer referral services, modest means and veterans programs, and legal education for attorneys and members of the public.

Appellate Practice Section

The Appellate Practice section of the Oregon State Bar was originally formed in 1993, and today is made up of over 350 attorneys who practice appellate litigation in Oregon. Our members represent clients from eastern Oregon to Hood River, to the Portland metro area and out to the coast. The Appellate Practice section's executive committee is comprised of 16 members who represent private clients, public agencies, public corporations, and the Oregon Judicial Department (OJD).

The Executive Committee of the Appellate Practice section supports HB 2336. We have shared the draft legislation with the Oregon Judicial Department, and it is our understanding that OJD plans to monitor the issue.

The Problem

The timely filing and service of a notice of appeal is critical because, under Oregon law, a party loses the right to appeal if the notice of appeal is not filed and served within 30 days after entry of judgment. Although federal law provides federal courts with discretion to forgive untimely notices of appeal in some circumstances, the Oregon Court of Appeals and the Oregon Supreme Court lack statutory jurisdiction over untimely appeals, and they lack discretion to excuse untimely filing or service of notices of appeal, no matter the reason.

This bill is aimed at reducing legal malpractice associated with filing and serving notices of appeal. Currently, parties may rely on the date of mailing for timely filing and service, but only if mailing is done in a certain way. Specifically, under ORS 19.260, parties may not rely on the date of mailing if they file or serve notices of appeal via third-party commercial carriers, even though the Oregon Rules of Appellate Procedure expressly permit the use of third-party commercial carriers to file and serve other appellate documents. See ORAP 1.35(1)(d), (2)(b).

As currently written, ORS 19.260(1) provides that a notice of appeal in the Court of Appeals and the Oregon Supreme Court may be filed only through the United State Postal Service, either registered or certified mail, to rely on the date of mailing as the filing date. Similarly, under ORS 19.260(2), a notice of appeal may be served only through the United State Postal Service, either registered or certified mail, or first-class mail, for the service date to be the date of mailing. As a result, parties have forever lost the right to appeal simply because they used a third-party commercial for filing and service.

This distinction on the type of mailing exists for initiating document for an appeal. Currently, many appellate practitioners utilize third-party commercial carriers to mail and deliver documents in the ordinary course of business for pending appeals. For practitioners who do not handle appeals on a frequent basis, this is a trap for the unwary with very serious consequences.

The Solution

HB 2336 will amend ORS 19.260 to allow appellate practitioners to file and serve a notice of appeal or initiating document by third-party commercial carriers, just as practitioners are allowed to do with other documents while an appeal is pending.

Under ORAP 16.05, “initiating document” is defined as “any document that initiates a case, including but not limited to a notice of appeal; a petition for review; a petition for judicial review; a petition for a writ of mandamus, habeas corpus or quo warranto; and a recommendation for discipline from the Oregon State Bar or the Commission on Judicial Fitness and Disability.”

Passing HB 2336 will simplify and clarify the process for filing and serving initiating documents with the Oregon Court of Appeals and the Oregon Supreme Court. HB 2336 will remove a potential “malpractice trap” for Oregon lawyers that results in the complete loss of appellate rights based on a technical defect. Further, by mandating a consistent filing process regardless of what document is filed, HB 2336 will allow for increased efficiencies for lawyers and the courts.

On behalf of the Appellate Practice Section of the Oregon State Bar, I thank the committee for its consideration and urge the passage of HB 2336. I am happy to answer any questions.