

Multnomah County Circuit Court
Guidelines for Department 38
Judge Marilyn E. Litzenberger

GENERAL INFORMATION

1. Staff

Judicial Assistant (JA): Claudia Cogle

Judicial Clerk: Serena L. Liss

2. Chambers/Courtroom

Room 550 (chambers); Room 548 (courtroom)

3. Telephone and Fax Number

Our phone number is 503.988.3365. This phone is answered and monitored for voice mail messages by JA Claudia Cogle. Our fax number is 503.276.0979. Ms. Cogle's email address is: Claudia.Cogle@ojd.state.or.us. Our Judicial Clerk, Serena Liss, may be reached via e-mail at: Serena.L.Liss@ojd.state.or.us.

Your office, witnesses and family may leave messages with the court's Judicial Assistant during trial.

4. E-Mail

Please note that the court cannot receive any correspondence, including e-mail about a particular case, unless copies are provided to all parties to that case. Any e-mail sent to the court must certify that a copy has been provided to all counsel by email. All e-mails about a particular case must contain the case number for that case.

5. Beverages

Beverages may be brought into the courtroom, at your own risk. The water pitchers at counsel table and on the witness stand are refilled daily.

6. Courtroom Decorum

(a) Please stand when the judicial clerk calls the proceedings to order, when you are presenting argument to the court, and when the jury enters the

courtroom for morning and again for afternoon session; however, you may remain seated when the judge enters and exits the courtroom at various times throughout the trial after the proceedings have been called to order.

- (b) You may move freely about the courtroom; however, the Courtroom Clerk may ask that you use a handheld or lapel microphone when you step away from the microphones at counsel table. You have permission to approach testifying witnesses when necessary to hand the witness an exhibit or to assist in clarifying a question directed to the witness. Keep in mind that the court's recording equipment may not record your voice if you do so and therefore your record for appeal may not be complete.
- (c) Bench conferences are a necessary part of almost every trial. Depending on which courtroom we are using, it may be preferable to request a conference in chambers. If the matter is likely to take more than a minute or two, please advise the court and the jury will be excused while we are on the record in the courtroom.
- (d) No speaking objections. State your objection citing the evidence rule supporting your objection or one or two words (e.g. relevance, foundation, hearsay) that will alert the court to the legal basis for your objection.

It is the court's responsibility to restrict counsels' objections to a statement of the antiseptic legal grounds supporting the objection without comment or explanation proffered in the presence of the jury. *Jefferis v. Marzano*, 298 OR 782,792, 696 P2d 1097 (1985).

- (e) Please remove your hats and overcoats while you are in the courtroom.
- (f) Addressing Parties or Witnesses. Please refer to witnesses and to the parties by their proper names (*i.e.* Mr./Ms. _____). UTCR 3.030.

It is not appropriate to refer to a party or a witness as "defendant" or "suspect" or "plaintiff" or "victim" or "complainant."

Children under the age of 18 years may be referred to by their first names.

TRIAL SUBMISSIONS AND PRELIMINARY MATTERS

1. Trial Submissions

The following documents are **DUE in chambers by 12:00 noon on the day before the trial**, unless otherwise permitted by Judge Litzenberger. To ensure timely filing, all original documents should be e-filed. Bench copies of your

submissions are to be delivered to the Judge's JA in Room 554 immediately after the documents are e-filed).

(a) Trial Memoranda

Trial Memoranda, if any, must be properly filed and delivered, concurrently, to the court and opposing counsel. UTCR 6.050.

(b) Exhibits and Exhibit Lists

(1) Exhibit Lists

The parties are expected to meet and confer prior to trial regarding exhibits. If there are contested issues remaining with respect to any exhibits either party intends to offer, those should be highlighted in yellow on the exhibit list submitted to the court.

In document intensive cases, the court prefers the parties submit their exhibit lists in an electronic form that allows the exhibit number and description to be imported into the official exhibit log maintained by the courtroom clerk.

(2) Court Copies of Exhibits

Submit copies of any exhibits you expect to offer at trial to the court prior to opening statements. This requirement applies to demonstrative exhibits as well as those exhibits that will be offered as substantive evidence.

Exhibits must be pre-marked pursuant to UTCR 6.070(1) and lodged with the court bailiff until they are needed.

Exhibit Numbering: Plaintiff starts with 1 and Defendant starts with 101; however, if there are going to be more than 100 plaintiff exhibits, the parties should confer and select a different numbering scheme, i.e. plaintiff takes 1-199 and defendant takes 200-__.

All exhibits (demonstrative or substantive) must be approved by the Court before they are published to the jury, with the exception of exhibits used solely for impeachment of an adverse witness.

The court prefers paper copies of exhibits. In document intensive cases, the court will consider waiving this requirement if the exhibits are provided in an alternate form (web access, CD-rom, etc.).

(c) Motions in Limine

The court's "meet and confer" requirement also applies to *in limine* motions.

Motions *in limine* hearings may be held in chambers or in the courtroom on the record. If motions are heard in chambers, prior to commencement of the trial, the court will summarize its rulings on the record and provide counsel an opportunity to supplement the record by summarizing the arguments they presented in chambers prior to the court's rulings.

(d) Motions to Suppress in Criminal Cases

Copies of pending omnibus motions or motions to suppress evidence must be delivered to the Court via Judge Litzenberger's J.A. in Rm. 554 immediately after call and trial assignment.

A copy of any written response filed by the prosecutor should be provided to the Court immediately after call and trial assignment. If the State has not filed a written response, the prosecutor should provide the Court with copies of the legal authorities the State intends to rely on during its oral argument in opposition to the motion immediately following call and trial assignment.

(e) Jury Instructions and Verdict Forms

All requested jury instructions and verdict forms must be in writing with copies delivered concurrently to the court and opposing counsel. UTCR 6.060(1). Judge Litzenberger requests paper copies for her use.

To the extent there are any disagreements with respect to requested jury instructions or verdict form, those will need to be brought to the Court's attention well before closing arguments.

Prior to closing arguments, the judicial clerk will distribute copies of the written jury instructions to each juror. Absent extenuating circumstances, the Court will provide counsel with an advance copy of its written jury instructions.

A final jury instruction conference will be conducted thereafter, at which time the Court will entertain exceptions to those instructions and may modify them accordingly. After the jury is instructed, counsel may ask to approach the bench for the purpose of preserving exceptions previously stated on the record. *See, State v. Guardipee*, 239 Or App 44, 243 P3d 149 (2010).

To expedite preparation of the jury's written instructions, please provide electronic copies of your requested jury instructions, including the list of Uniform Jury Instructions you are requesting, to the court's Judicial Assistant via e-mail: Claudia.Cogle@ojd.state.or.us.

2. Subpoenaed Records

Counsel shall advise the court's judicial assistant the **day prior to trial** of medical or other records that have been subpoenaed to the courthouse for trial. Without this information, the records may not be available for your use during the trial.

3. Transcripts of Videotaped Testimony

If either side intends to use videotaped testimony, a transcript should be provided to the Court with objections marked. These are due at least one day prior to the presentation of the testimony to the jury. Video and audio recorded statements by witnesses or a party generally will not be available to the jury during its deliberations, absent stipulation by the parties.

4. Special Accommodations

(a) Equipment

Technical equipment is available through the Supplies office, in Room 210A. Counsel must contact Supplies personnel directly at 503.988.3179 or 503.988.3774 to reserve their equipment prior to trial. Please note that reservations should be made as early as possible to ensure the availability of equipment. **The parties are responsible for transporting any reserved equipment to the courtroom and returning it to room 210A after the trial.** Please notify the judge's staff prior to trial if you intend to use technical equipment.

(b) Courtroom

Special requests relating to the use of the courtroom must be brought to the court's attention **immediately**.

(c) Child witnesses

The court will attempt to accommodate special requests made pursuant to ORS 40.460(24) as long as the prerequisites set forth in subsection (24) have been met by the party making this request. Because of the practical logistics involved, the **Court must receive this request by noon on the day of call.**

5. Payment of Fees

Court fees are paid to the cashier in Room 210. The cashier opens at 8:30 am. The trial fee for the first day of trial must be paid prior to the commencement of trial. The party responsible for the trial fee shall present the fee receipt to the judicial clerk prior to the commencement of trial. *ORS 21.270*. The trial fees for subsequent days of trial are due in full by 5:00 pm on the day trial concludes. *Mult. Co. SLR 6.025(2)*. If trial concludes after business hours, the remaining balance shall be paid by morning of the first business day thereafter. *Id.*

6. Settlement Conferences

When you arrive in the courtroom and check in with the judicial clerk, please indicate whether you have a need for further settlement discussions with a judge. We may be able to arrange for a judicial settlement conference if the parties believe those services would be mutually beneficial.

TRIAL PROCEEDINGS

The court conducts trials according to the best practice recommendations for civil jury trials, which are published at:

http://courts.oregon.gov/Multnomah/docs/CivilCourt/CivilJuryTrials_RecommendedPracticesForCivilJuryTrials.pdf

1. Stipulations

Stipulations regarding admission or exclusion of evidence, or with respect to scheduling or the manner in which witnesses will be called, will be put on the record at the commencement of the trial proceedings each morning outside the presence of the jury.

Stipulated facts should be read to the jury at the time authorized by the Court after discussions with counsel.

2. Exclusion of Witnesses

The court will exclude witnesses from the trial proceedings, if requested, unless there is an objection supported by good cause. *OEC 615*. Expert witnesses are permitted to remain in the courtroom during trial proceedings.

3. Expert Testimony

The court will conduct a Rule 104 hearing, prior to counsel's opening statements, to establish the foundation for and the admissibility of expert testimony offered to prove a matter that falls within the definition of scientific evidence. @ *State v. O=Key*, 321 or 285, 899 P2d 663(1995); *Jennings v. Baxter*, 331 or 332, 33 P3d 596(2000).

4. Other Preliminary Evidentiary Hearings

Preliminary hearings regarding the admissibility of other evidence will be held outside the presence of the jury; therefore, counsel should advise the Court if and when a hearing of this nature is requested so the Court can arrange the jury's schedule accordingly and jurors will not be kept waiting while the hearing takes place.

5. Preliminary Jury Instruction Conference

In every case, before prospective jurors are called to the courtroom, the court will conduct a preliminary jury instruction conference. The purpose of this conference is to identify which proposed instructions (uniform or special) are objectionable to the parties.

The court may entertain argument on certain proposed instructions at that time or it may invite counsel to present arguments after the close of all of the evidence. Preliminary arguments on the parties' proposed special jury instructions allows the court to consider the legal authorities cited by counsel during the course of the trial.

6. Juror Questionnaires - Procedure

(a) Questionnaire

The court may use a juror questionnaire in cases where jurors are likely to be asked to disclose uncomfortably sensitive information about them (e.g., prior sex abuse). This questionnaire is available for the parties to review as soon as the case is assigned off the call docket. The court will consider proposed modifications to the questionnaire so long as they are timely received.

If the parties wish to submit their own juror questionnaire, it must be provided to opposing counsel and received in chambers by 12:00 noon the day prior to trial, unless additional time is granted by Judge Litzenberger. Counsel should identify any potential for cause or hardship challenges, as well as any jurors whom they wish to *voir dire* individually. The court and counsel will then conduct individual *voir dire* for those jurors identified. If appropriate, individual jurors will be excused. The full jury panel will then be returned to the courtroom and *voir dire* will begin as usual.®

Juror questionnaires are designed to streamline jury selection. The court urges counsel to take advantage of the information provided and to modify their traditional *voir dire* questions accordingly.

(b) Procedure

Once the juror questionnaire is in final form, copies will be distributed to the jury panel in the following manner. Potential jurors will be identified, brought to the courtroom and given the preliminary oath. The court will give the Uniform Criminal Introductory Instruction (in criminal cases), incorporating the purpose of the questionnaire, explaining the logistics as to how the questionnaire is to be completed, and giving the potential jurors a time line for them to report to the courtroom for individual questioning and panel *voir dire*.

7. Jury Selection

(a) Do NOT ask questions designed to:

Educate the jurors about the law.

“The court will instruct you regarding the law that you will be required to follow in this case, but let me ask if _____.”

You may inquire about a juror’s knowledge of the law so long as you do not instruct them about the law in doing so.

Condition a response from the jury or a juror based on the facts of the case.

“Would you expect a person, or yourself, to have a hard time walking a straight line when they are nervous or tired?” or “As a bartender, what signs would you look for to determine if a person is intoxicated?”

Ask questions of a juror with special expertise intended to educate other jurors about the issues in your case.

“In your practice as a chiropractor, I imagine you see people who have been injured in motor vehicle accidents. What is your experience/opinion regarding how long it should take for a person to recover from those injuries?”

Exact a promise from the jury.

“Can you promise me you will be able to return a not guilty verdict if the state does not prove its case?”

Ask a juror for an opinion about evidence that will be introduced at trial.

“In this case, you will learn that Mr. _____ previously completed a court-ordered educational class designed to inform him of the consequences of driving while intoxicated. Do you think that experience is enough to establish that his conduct here was reckless?”

Argue the facts of the case.

“Would it surprise you to learn that the police did not collect fingerprints when they learned the car was stolen?”

Suggest facts not in evidence.

“Can you imagine why my client would not want to testify?”

- or -

“Can you think of reasons why the victim would not be here?”

(b) For Cause Challenges.

Challenges for cause will be heard in the courtroom on the record outside the presence of the prospective jurors. Counsel shall advise the Court of any motion to exclude for cause at the end of *voir dire* before preemptory challenges are taken. The Court may invite the challenged juror back into the courtroom, if necessary, for further questioning.

Challenges may be made only to the first 12 (or) 6 jurors who are seated in the box.

(c) Peremptory Challenges

Peremptory challenges will in the courtroom on the record after the jury is excused.

Challenges may be made only to the first 12 (or) 6 jurors who are seated in the box.

(d) Alternate Jurors

The parties should confer on the number of alternate jurors necessary based on the expected length of the trial. Generally, the Court does not seat an alternate juror unless the trial is expected to last more than 2 days or other circumstances justify doing so.

(e) Seating Order of Prospective Jurors

Jurors will be seated in order according to the number they have been randomly assigned by the court's jury software program. Jurors 1-7 will be seated in the back row of the jury box. Jurors 8-14 will be seated in the front row. The remaining jurors will sit in order in the benches reserved for public viewing of the proceedings. Anyone assisting with the trial or associated with a party to the proceedings may not sit in a row reserved for prospective jurors.

When a motion to remove a prospective juror for cause is allowed, or when the court accepts a peremptory challenge, the numbering of jurors will change. This is best explained by example. If juror #4 is excused, juror #5 will become juror #4, juror #6 will become juror #5, etc. Subsequently, if juror #8 is excused next, juror #9 will become juror #8 and so on.

8. Questions by Jurors

While jurors will not be allowed to conduct an independent investigation into the facts of the case, they will be allowed to ask questions aimed at clarifying the response of a witness. The Court will instruct jurors to write down their questions on a piece of paper and then signal the judicial clerk so that the questions can be presented to the Judge and to counsel.

9. Showing Respect for Jurors

Counsel, their clients, and their witnesses are expected to show respect for the jury's time and commitment to the judicial process by standing when jurors enter or leave the courtroom.

Jurors frequently complain when the lawyers infringe on their personal space by standing close to or touching the jury box. For this reason, the court prefers that counsel present their opening statements and closing arguments no closer than the clock recording the proceedings which is located on the courtroom clerk's desk.

Counsel should also take into account and respect the jury's time by bringing matters to the Court for hearing at times that will not keep jurors waiting. To avoid wasting jurors' time, the parties are encouraged to resolve matters prior to the jury being seated each day of trial. If that cannot be done, counsel should alert the Court that the parties will have a matter for the judge before the jury is brought back into the courtroom.

10. Opening Statements

Opening statements are intended to be a concise statement of the case and the issues to be tried. ORCP 58B(3). Your opening statement should be a summary of the evidence you expect to present during the trial. It should provide the jury with a road map for the trial by identifying witnesses, what they are expected to say, estimating when they will be testifying, and by identifying key exhibits that have been pre-received as evidence in the case.

The court will entertain objections during opening statements on grounds that counsel is prematurely arguing his/her client's case to the jury by explaining how jurors should interpret the evidence that will be presented during the trial.

Please do not block the court's view of opposing counsel during your opening statements and closing arguments.

11. Witnesses

(a) Preliminary Rulings

The court expects counsel to advise their witnesses (before they take the witness stand) of any rulings the court has made *in limine* and will presume this obligation has been met, unless the court is advised otherwise by counsel.

(b) Competency

The court presumes that all witnesses are competent to testify because they are knowledgeable about the facts relevant to the issues in the case. For this reason, witnesses may not bring notes or other documents with them to the witness stand.

(c) Use of Exhibits or Other Documents with Witnesses

1. Witnesses may identify exhibits presented to them, but they are not allowed to read from exhibits unless the exhibit has been received in evidence.

2. Neither counsel, nor a witness, may publish an exhibit to the jury until after the exhibit has been received as evidence by the court.

3. A witness's memory may be refreshed with a document (or anything else) after the proper foundational questions have been asked to establish the witness does not have a present memory of the event. Once the witness has reviewed the document, the witness should be asked if his/her memory has been refreshed. If so, the witness may then relate his/her independent recollection of the facts or event(s) responsive to the question asked. A witness may not read from the document used to refresh the witness's recollection while testifying unless an adequate foundation has been established for the court to receive the statements contained in the documents as evidence in the case.

12. Jury Instructions - Timing

(a) Preliminary Instructions

The court will instruct the jury preliminarily before *voir dire* and before opening statements.

(b) Summary of the Pleadings

Unless presented with a neutral statement of the case, the court will summarize the pleadings, including the specifications of negligence, as part of its preliminary instructions before opening statements.

In criminal cases, the court will advise the jury of the material elements of each crime alleged in the charging instrument.

(c) Written Jury Instructions

Written jury instructions will be provided to individual jurors (and counsel) prior to closing arguments, after the court has received all evidence offered by the parties. The court will read the written instructions to the jury at the time the instructions are distributed by the courtroom clerk.

Counsel should be aware of the time needed by the court to prepare written instructions and to copy them. If the final instructions have not been approved by the close of all evidence, there may be a delay of 20 minutes or more before the instructions will be ready to distribute to jurors.

13. Preserving the Record

(a) FTR Recording

For several years, the court's official record of the proceedings has been by audio-recording. For this reason, it is critical that counsel stand or sit where their voices can be accurately recorded by the microphones at counsel table. It is also for this reason that the courtroom clerk will ask counsel to wear or hold a microphone when they step away from those microphones (*e.g.*, during opening statements and closing arguments, when approaching a witness, when directing a witness who has been permitted to step down from the witness box during the witness's testimony, etc.).

(b) In Chambers and Bench Conferences

There are times during trial when the court will ask counsel to step into chambers to discuss a matter outside the presence of the jury. If requested, the court will provide an opportunity for counsel to restate the arguments presented in chambers on the record at a time when the jury has been excused.

Bench conferences are preferable to excusing the jury from the courtroom if the issue presented can be dealt with expeditiously that way.

Should you have a matter you wish to address on the record, outside the presence of the jury instead of discussing the matter in chambers or at the bench, please ask to approach the bench and make the request at that time. The court will decide whether the jury should be excused at that time or at a more appropriate time, reserving the matter for later.

(c) Exceptions to Jury Instructions

The court will provide counsel with a copy of the final jury instructions before the instructions are distributed (and read) to the jurors. The court will ask the parties to state their exceptions to the instructions outside the presence of the jury, but on the record, *immediately after the jury is excused to begin its deliberations*. This is intended to be a formality, as the

court and counsel will have discussed the instructions sufficiently in advance of the court instructing the jury so that all objections or exceptions will have been presented to the court before that time. In the rare instance where an instruction has been overlooked or omitted as the instructions are read, the court will instruct the jury accordingly and supplement its instructions in writing.

NOTE: ORCP 59 H(1) requires a party to take exception to any asserted error in the court's instructions to the jury immediately after the court has instructed the jury. The court understands the purpose of this rule is to allow the court to correct any errors in the instructions before the jury begins its deliberations. Because the procedure described above effectuates the purpose of the rule, the court does not ask for exceptions immediately after the jury has been instructed since that is when counsel will be presenting their closing arguments. Having said that, if a party is concerned they may be waiving an issue for appeal if the exception is not taken immediately after the jury is instructed, please ask to approach the bench for that purpose.

(revised 9.7.16)