

**Information for Lawyers - Civil Trials**  
**Judge John A. Wittmayer**  
**Multnomah County Circuit Court**

**Contact Information:**

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1021 SW 4<sup>th</sup> Avenue  
Portland, OR 97204

Courtroom: Room 518  
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Judicial Asst.: Sonja Lockhart  
Clerk: Joe Keenan

**Scheduling:**

*Days available for your trial:* Your trial was assigned to this Court because you reported that it would take a certain number of days to complete and we previously told the Presiding Judge we are available for that period of time. You should assume we are not available past that time, as we frequently have specially assigned matters set on our own docket. It is a disaster for the lawyers and litigants to get to the end of their allotted time and not be able to continue because we have other matters set.

*Have your witnesses here and ready:* We expect your trial to move along without gaps, where you need to ask to break early because your next witness is not yet waiting in the hallway. While I understand the difficulty in scheduling witnesses with any precision, considering that we have lawyers, litigants, jurors and court staff available for your next witness to testify, I expect you to have your witnesses available when needed.

*Daily schedule:* We will generally start each morning at 9:00 AM and each afternoon at 1:30 PM. I frequently schedule short civil motions and criminal matters at 8:30 AM each day. Occasionally other matters cause us to start later than 9:00 AM and 1:30 PM each day. We take a mid-morning break and a mid-afternoon break for about 15 minutes each day, and we usually stop each day at approximately 5:00 PM. You should assume your days in trial will not include Fridays, unless you have made special arrangements with my office to use Fridays. I generally have other matters set for most of the day each Friday.

**Settlement:**

If your case settles at any time after it is assigned to us for trial you need to notify us immediately. It is very frustrating to spend time preparing for your case if you have already settled it. During regular office hours call my office immediately if you have a settlement. After regular office hours, both call the

office (leave a voice mail message) *and* send me an email at the email address you will find for me in the Oregon State Bar's on-line member email directory. I will check my office email from home over a weekend or in the evening.

### **Equipment set-up:**

If you plan to use audio-visual equipment in trial you need to coordinate with the courtroom clerk a time to set it up, so as to avoid unnecessary delay. We have a TV/VCR in our courtroom, so you do not need to arrange for one from some other source.

### **Submissions:**

Please deliver to my office by not later than 12:00 Noon the judicial day before trial your trial memorandum (if you are submitting one), requested jury instructions, verdict forms, a copy of your current pleading, and any pre-trial motions that need my attention. Materials in excess of 15 pages may not be sent via FAX or as e-mail file attachments without advance permission from Judicial Assistant, Sonja Lockhart.

### **Motions in Limine:**

My view is that Motions in Limine are very useful to avoid problems in trial about issues that a litigant expects to come up in trial. However, too often I see Motions in Limine about issues that the party making the motion really has no idea might come up. In effect, many Motions in Limine simply ask for an order that material that is not admissible not be "offered up." This is like asking me to order that you follow the law. My solution to this is to require the lawyers to talk to each other about these issues in advance of trial, and only submit and/or argue motions in limine about issues that are expected to come up as a result of their discussions.

### **Jury instructions and verdict forms:**

If you are requesting any special jury instructions, in addition to uniform instructions, you should submit them electronically, in addition to hard-copy form. Electronic submissions may be in either WordPerfect or MS Word format, and may be delivered on CD ROM or via email as file attachments.

You should expect I will review all requested jury instructions well before the end of your trial. I usually assemble all requested instructions, submitted by all litigants, into one draft composite document for review. If we have time, I will give you a copy of this draft and I will expect you to review it before we discuss together which requested instructions will be given to the jury.

I believe it is better for me to instruct the jury after the conclusion of the evidence and before your closing arguments. This makes it easier for you to argue your case to the jury. If you have any objection to me giving the instructions before argument, please advise me well in advance.

If you request UCJI 13.01 "Pleadings and Issues" and/or UCJI 13.02 "Summary of Pleadings Not Evidence" you should also submit a written proposed summary of the pleadings for me to read to the jury immediately before UCJI 13.02. The lawyers need to confer with each other in advance of trial to agree on the summary.

### **Subpoenaed Medical Records:**

If you have subpoenaed medical records to be delivered directly to the Court from a hospital the soonest we can get the records to our courtroom is noon on the day after you call my office and tell us you need the records. We do not know you have subpoenaed hospital records unless you tell us. They will not be here in the courtroom automatically, just because you subpoenaed them. It is essential that you telephone my office the day ahead of the trial so we can get them as soon as possible.

### **Trial Fees:**

The trial fees should be paid in advance of that time so we can get started promptly. You should pay the cashier on the 2<sup>nd</sup> floor, and show the receipt to my courtroom clerk.

### **Court Reporters:**

We no longer have "human being" court reporters available. We operate a digital electronic recording system to create the record. If you wish to hire a private court reporter to appear, I am open to that possibility. ORS 8.340(7) permits me to allow a "human being" reporter, at the request of the litigants, with reasonable notice to the Court in advance. I do not consider it "reasonable notice" to have a court reporter show up at the time of the trial or hearing.

### **Juror Questions:**

I permit jurors to ask questions of witnesses during trial. This is the procedure I use:

1. I explain the procedure to the jurors after voir dire. I tell jurors that all their questions may not be able to be answered because of the rules of evidence, and if their question is not asked, there will be no mention of it. I tell the jurors to limit their questions so as to not unduly prolong the trial.
2. All questions from jurors are to be in writing, and signed by the juror.
3. The juror writes the question on a full sheet from a spiral notebook and passes it to the clerk, who passes it to me.
4. Questions from jurors must be submitted before the witness is excused, and should be submitted as the witness is testifying, not upon completion to the witness' testimony.
5. I read the question (not aloud), and then the clerk passes it to the lawyers to read. This occurs while the witness is on the witness stand and the examination of the witness by the lawyers is taking place.
6. Each of the lawyers note in writing on the question either "no objection" or "objection." If an objection is noted, the grounds are also noted.
7. The sheet is returned to me. If there are no objections to the question, after completion of re-direct examination I read the question to the witness to be answered. The lawyers are allowed brief

follow-up questions to the witness, within the scope of the written question.

8. If there are objections from any of the lawyers, I will rule on the objection (usually without argument) by either asking the question or by declining to do so.
9. As the lawyers will be seeing the question while their examination of the witness is on-going, the lawyers are not to incorporate the juror's question into their own examination of the witness, unless, in good faith, the lawyer had intended to ask that question as a part of his/her examination.

### **Perpetuated Testimony by Video:**

If you have in advance taken perpetuation depositions, which have been videoed, I expect the lawyers to discuss any objections with each other and attempt to agree on which portions of the video need to be redacted before it is played for the jury. If you are unable to agree, you should submit to me a transcript with the disputed issues clearly marked for me to rule upon in advance of trial. This needs to be done early enough so that the video can be redacted to delete any inadmissible material.

### **Jury Selection:**

*Summary of the case for jurors before voir dire:* In my opening remarks to the group of potential jurors I always give them a brief summary of the case. The lawyers need to agree in advance and submit to me in advance an appropriate summary.

*Identifying your witnesses:* To assist with the voir dire process, I prefer to have the lawyers tell the potential jurors who the witnesses will be in advance of voir dire. If you have any objection to this, you must bring it to my attention in advance. I am willing to consider your objections to disclosing your expert witnesses during voir dire. If you do not want to disclose your experts you need to tell me that in advance of voir dire.

*Alternate Jurors:* If your trial is expected to last more than a few days, or if it will span over a weekend, you should discuss with the other lawyers whether you think it advisable to empanel one or more alternate jurors. When I have alternate jurors, I never tell the jurors which of them is an alternate. I think it best that all jurors pay attention during the trial, as though they were all going to be deciding the case. For example, if we are going to have 2 alternates, in advance of receiving our potential jurors from the first floor main jury room, my clerk will draw at random 2 numbers from numbers 1 - 14. The jurors who end up in those seats will be our alternate jurors. Alternates will become regular jurors in numerical order if we lose a regular juror.

*Courtroom seating chart for potential jurors:* When we call for a group of potential jurors from the first floor juror assembly room the clerk will give you a list of their names, in the order in which they are randomly assigned to us. The clerk will seat the potential jurors, 12 in the jury box and the rest in the back of the courtroom in the order in which they are assigned. The clerk will give you a seating chart so you will know their order.

*Challenges for Cause:* If you believe you need to make a challenge for cause, you must do so in the courtroom on the record, when you believe grounds are established for the challenge. If you "save" the challenge for cause until we are in chambers doing the peremptory challenges, I will not have an

opportunity to follow-up with the juror to help me to determine whether the challenge for cause is appropriate. During voir dire I will intervene with a juror if I think I need to ask questions touching on whether a challenge for cause might be appropriate.

**Peremptory Challenges:** I generally take peremptory challenges orally in chambers. ORCP 57 D(2) gives plaintiff and defendant each 3 peremptory challenges as to the 12 regular jurors. If we have alternates, ORCP 57 F says that with 2 alternates, plaintiff gets one peremptory challenge for the alternates, as does the defendant. The 12 regular jurors are subject to the peremptory challenges first, and then the alternates are subject to peremptory challenges. Of course, you will know which seats are occupied with alternates. If we have 2 alternate jurors, and you wish to have 4 peremptory challenges as to the entire group of 14 jurors, instead of taking the challenges separately as to the 12 regular jurors and the 2 alternates, I am willing to do so, if all agree. Before you exhaust your number of peremptory challenges, if you “pass” you are noting you are satisfied with the jurors. If you do this, you retain your opportunity to exercise any remaining peremptory challenges as to any new jurors coming “into the box” as a result of challenges exercised by the other lawyer, but you may not challenge any jurors who were “in the box” when you passed.

### **Opening statements:**

It is my view that your opening statement is your opportunity to outline for the jurors what you expect the evidence to be. I do not permit argument during opening statement.

If you plan to use demonstrative materials during opening statement, e.g. Power Point materials, photos, diagrams, printed material, etc., you need to show these materials to adverse counsel in advance so any objections can be resolved without delay.

### **Qualifying your expert witness:**

Whether a witness is qualified as an expert is a preliminary question of fact for the trial judge to decide under OEC 104(1). (“Preliminary questions concerning the qualification of a person to be a witness....shall be determined by the court..”) But how often is this really in controversy? Rarely. Most of the time there is no question about the expert witness’s qualifications.

In my view, much time is wasted in trial by what seems to be rote preliminary questions from counsel to the expert to establish the expert’s qualification, e.g. “Doctor, tell the jury your profession,” and “tell the jury about your education,” etc.

The lawyer calling the witness can, after the witness is sworn and before asking any questions, simply recite to the jury in an organized and concise manner the witness’s qualification, following which the lawyer can ask the witness if that is correct. For instance, it might go as follows: “*Dr. Jones is a medical doctor specializing in orthopedics. She got her bachelor’s degree in pre-med at Portland State University in 1973 and graduated from medical school at Oregon Health Sciences University in 1977. She completed an orthopedic residency at Oregon Health Sciences University in 1982 and since then has been in the private practice of orthopedics in Portland. She is Board Certified in orthopedics, and is a member of (list whatever she belongs to).*” You can then ask the doctor “*Is that correct, doctor?*” The witness can confirm you got it right, and can add or correct anything necessary.

Yes, this is a classic leading question. But the trial judge has broad discretion about whether to allow leading questions. OEC 611(3), ORS 40.370. “Courts are likely to allow leading questions when the testimony relates only to undisputed preliminary or background matters...” Kirkpatrick, Oregon Evidence, Fifth Edition, at p.538. In my view the uncontroversial qualifications of most expert witnesses are such “undisputed preliminary or background matters...”

### **Review of expert witness’ file before cross-examination:**

Too often after direct examination of an expert witness we endure much delay while opposing counsel reviews the expert witness’ file before cross examination. To avoid this delay, I expect you to have the expert’s file available for review by opposing counsel during the break before the expert’s direct examination, e.g., if you expect to call your expert at 11:00 AM, the expert’s file needs to be available to review by the other lawyer by 10:00 AM, when we are likely to take a mid-morning break. Likewise, if you expect to call your witness first thing after lunch, the file needs to be available for review by 12:00 noon. This likely means your expert witness must get her/his file to you in advance of arriving at the courthouse to testify. If you have any special need for relief from this requirement we can discuss it in advance.

### **Conduct in Courtroom:**

Lawyers are free to move about the courtroom as they please during trial. Don’t ask for permission to approach the witness. UTCR 3.050(3) has allowed this for years. As required by UTCR 3.050(1), lawyers should stand when addressing the Court. It’s not necessary for the lawyers and their clients to stand when the jury enters or leaves the courtroom.

I permit the jurors, lawyers, and clients at counsel table to bring coffee, tea or soft drinks into the courtroom during trial. We have always permitted people to drink water in the courtroom, and, frankly, I can’t imagine what difference it makes what is in the cup.

### **Exhibits:**

Pre-mark your exhibits as noted in UTCR 6.080. If you expect to have more than a few exhibits, you need to prepare an exhibit list for the clerk that identifies each exhibit by number and description. The lawyers need to confer in advance of trial about the exhibits, and identify those exhibits about which there are no objections. These exhibits can then be received into evidence on stipulation before we start trial. This saves time in trial.