

OREGON TRIAL OBJECTIONS

2009 Edition

Oregon
State
Bar

Legal
Publications

The Oregon State Bar legal publications are designed to help lawyers maintain their professional competence. Although all material in this book is reviewed carefully before publication, in dealing with specific legal matters the lawyer should research original sources of authority. Neither the Oregon State Bar nor the contributors make either express or implied warranties regarding the use of these materials. Each lawyer must depend on his or her own research, knowledge of the law, and expertise in using or modifying these materials.

The cases in this book were Shepardized through November 2009. The ORS citations were checked through 2009.

All URLs cited were accurate as of November 2009.

Printing History:

First edition 2009

Adapted from WAYNE T. WESTLING, ANTHONY J. BOCCHINO & DAVID A. SONENSHEIN,
OREGON EVIDENCE CODE WITH OBJECTIONS (2d ed 1997), published by the
National Institute for Trial Advocacy.

This handbook may be cited as:

OREGON TRIAL OBJECTIONS (OSB Legal Pubs 2009)

Library of Congress Control Number: 2009937683

ISBN-10: 1-879049-05-8

ISBN-13: 978-1-879049-05-5

© 2009 by the Oregon State Bar. All rights reserved.

Printed in the United States of America.

Editors:

SUSAN K. EGGUM, B.A., M.A., University of California, Berkeley (1976, 1977); J.D., Georgetown University (1982); member of the Oregon State Bar since 1982; partner, Cosgrave Vergeer Kester LLP, Portland.

STEPHEN A. HOUZE, B.A., Brown University (1969); J.D., Vanderbilt University School of Law (1972); member of the Oregon State Bar since 1972; sole practitioner, Portland.

JAMES A. WALLAN, B.A., Western Oregon University (1981); J.D., Willamette University School of Law (1985); member of the Oregon State Bar since 1986; partner, Hornecker, Cowling, Hassen and Heysell, Medford.

**OREGON STATE BAR
LEGAL PUBLICATIONS STAFF**

Linda L. Kruschke, Publications Manager

Lorraine Jacobs, Publications Attorney

Dean Land, Publications Attorney

Cheryl L. McCord, Publications Attorney

Karen L. Zinn, Legal Publications Research Editor

Solange Lédée, Publications Administrative and Marketing Specialist

Stacey Malagamba, Publications Production Coordinator

Rosina Busse, Publications Assistant Editor

CONTENTS

INTRODUCTION TO OREGON TRIAL OBJECTIONS	1
EVIDENTIARY ISSUES GENERALLY	1
AMBIGUOUS QUESTIONS	5
ARGUMENTATIVE QUESTIONS	7
ASKED AND ANSWERED QUESTIONS	9
AUTHENTICATION OF INSTRUMENTS	11
AUTHENTICATION OF TELEPHONE CONVERSATION AND VOICES	13
BURDEN OF PERSUASION	15
CHARACTER EVIDENCE: GENERALLY	17
CHARACTER EVIDENCE: ACCUSED OR VICTIM IN A CRIMINAL CASE	19
CHARACTER EVIDENCE: OTHER CRIMES, WRONGS, OR ACTS	21
CHARACTER EVIDENCE: OTHER CRIMES, WRONGS, OR ACTS BY CRIMINAL DEFENDANT	23
CHARACTER EVIDENCE: PATTERN OF ABUSE	25
CHARACTER EVIDENCE: PRIOR SEXUAL ACTIVITY OR MANNER OF DRESS OF ALLEGED VICTIM	27
COMPETENCE TO TESTIFY	31
COMPOUND QUESTIONS	33
COMPROMISE/OFFERS OF COMPROMISE	35
CROSS-EXAMINATION: GENERALLY	37
CROSS-EXAMINATION: SCOPE	39
EXHIBITS: DEMONSTRATIVE	41
EXHIBITS: ILLUSTRATIVE	45
EXHIBITS: TANGIBLE OBJECTS	47
EXHIBITS: WRITINGS—AUTHENTICITY	49
EXHIBITS: WRITINGS—HEARSAY	53
EXHIBITS: WRITINGS—ORIGINAL DOCUMENT	63
EXHIBITS: WRITINGS	67

EXPERT OPINION	69
FIRSTHAND KNOWLEDGE	71
GUILTY PLEAS—OFFERS OF PLEAS AND RELATED STATEMENTS	73
HABIT AND ROUTINE PRACTICE	75
HEARSAY: GENERALLY	77
HEARSAY: ATTACKING AND SUPPORTING THE CREDIBILITY OF A HEARSAY DECLARANT	79
HEARSAY: NONHEARSAY COCONSPIRATOR STATEMENTS	81
HEARSAY: NONHEARSAY PARTY OPPONENT STATEMENTS AND ADMISSIONS	83
HEARSAY: NONHEARSAY PRIOR STATEMENTS	85
HEARSAY WITHIN HEARSAY	87
HEARSAY EXCEPTION: ABSENCE OF ENTRY IN BUSINESS RECORDS	89
HEARSAY EXCEPTION: ABSENCE OF PUBLIC RECORDS OR ENTRY	91
HEARSAY EXCEPTION: CLOSED-CIRCUIT TESTIMONY	93
HEARSAY EXCEPTION: COMPLAINT OF SEXUAL MISCONDUCT OR ABUSE	95
HEARSAY EXCEPTION: EXCITED UTTERANCE	99
HEARSAY EXCEPTION: FAMILY RECORDS	101
HEARSAY EXCEPTION: FORMER TESTIMONY	103
HEARSAY EXCEPTION: JUDGMENT RELATING TO PERSONAL, FAMILY, OR GENERAL HISTORY, OR BOUNDARIES	105
HEARSAY EXCEPTION: JUDGMENT OF PREVIOUS CONVICTION	107
HEARSAY EXCEPTION: LEARNED TREATISES	109
HEARSAY EXCEPTION: MARKET REPORTS AND COMMERCIAL PUBLICATIONS	111
HEARSAY EXCEPTION: MARRIAGE, BAPTISMAL, AND SIMILAR CERTIFICATES	113
HEARSAY EXCEPTION: PROMPT COMPLAINT OF SEXUAL MISCONDUCT	115
HEARSAY EXCEPTION: PUBLIC RECORDS AND REPORTS	119
HEARSAY EXCEPTION: RECORDS OF DOCUMENTS AFFECTING AN INTEREST IN PROPERTY	121
HEARSAY EXCEPTION: RECORDED RECOLLECTION	123
HEARSAY EXCEPTION: RECORDS OF REGULARLY CONDUCTED ACTIVITY	125

HEARSAY EXCEPTION: RECORDS OF RELIGIOUS ORGANIZATIONS	127
HEARSAY EXCEPTION: RECORDS OF VITAL STATISTICS	129
HEARSAY EXCEPTION: REPUTATION AS TO CHARACTER	131
HEARSAY EXCEPTION: REPUTATION CONCERNING BOUNDARIES OR GENERAL HISTORY	133
HEARSAY EXCEPTION: REPUTATION CONCERNING PERSONAL OR FAMILY HISTORY	135
HEARSAY EXCEPTION: REQUIREMENT OF UNAVAILABILITY FOR RULE 804 HEARSAY EXCEPTIONS	137
HEARSAY EXCEPTION: RESIDUAL EXCEPTION	141
HEARSAY EXCEPTION: STATE POLICE DATA	143
HEARSAY EXCEPTION: STATEMENT AGAINST INTEREST	145
HEARSAY EXCEPTION: STATEMENTS IN ANCIENT DOCUMENTS	147
HEARSAY EXCEPTION: STATEMENT IN DOCUMENTS AFFECTING AN INTEREST IN PROPERTY	149
HEARSAY EXCEPTION: STATEMENT OF PERSONAL OR FAMILY HISTORY	151
HEARSAY EXCEPTION: STATEMENT MADE IN PROFESSIONAL CAPACITY	153
HEARSAY EXCEPTION: STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT	155
HEARSAY EXCEPTION: STATEMENT UNDER BELIEF OF IMPENDING DEATH	157
HEARSAY EXCEPTION: THEN-EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION	159
IMPEACHMENT: BIAS, PREJUDICE, INTEREST, AND IMPROPER MOTIVE	161
IMPEACHMENT: CHARACTER EVIDENCE	163
IMPEACHMENT: MEMORY	165
IMPEACHMENT: PERCEPTION	167
IMPEACHMENT: PRIOR CONVICTIONS	169
IMPEACHMENT: PRIOR INCONSISTENT STATEMENTS	173
IMPEACHMENT: SPECIFIC INSTANCES OF MISCONDUCT	175
INSURANCE AGAINST LIABILITY	177
JUDICIAL NOTICE	179

LAY OPINION EVIDENCE	181
LEADING QUESTIONS	183
MISQUOTING THE WITNESS	185
NARRATIVES	187
NONRESPONSIVE ANSWERS	189
OPINION	191
ORIGINAL DOCUMENT RULE	193
PAYMENT OF MEDICAL AND SIMILAR EXPENSES	197
PRIVILEGE: CLERGY-PENITENT	199
PRIVILEGE: CLINICAL SOCIAL WORKER-CLIENT	201
PRIVILEGE: COUNSELOR-CLIENT	203
PRIVILEGE: HUSBAND-WIFE	205
PRIVILEGE: INTERPRETER	207
PRIVILEGE: LAWYER-CLIENT	209
PRIVILEGE: NURSE-PATIENT	213
PRIVILEGE: PHYSICIAN-PATIENT	215
PRIVILEGE: PSYCHOTHERAPIST-PATIENT	219
PRIVILEGE: PUBLIC OFFICER	223
PRIVILEGE: SCHOOL EMPLOYEE-STUDENT	225
PRIVILEGE: STENOGRAPHER-EMPLOYER	227
REFRESHING PRESENT RECOLLECTION	229
RELEVANCE: GENERALLY	231
RELEVANCE: CONDITIONAL ADMISSIBILITY	233
RELEVANCE: EXCLUSION ON GROUNDS OF PREJUDICE, CONFUSION, OR UNDUE DELAY	235
RELEVANCE: LIMITED ADMISSIBILITY	237
RELEVANCE: RULE OF COMPLETENESS	239
SUBSEQUENT REMEDIAL MEASURES	241

I. INTRODUCTION TO OREGON TRIAL OBJECTIONS

A. OBJECTIONS

This publication is organized alphabetically by the common name of each possible objection to evidence that is offered at trial. Objections range from ambiguous questions to subsequent remedial measures. The proper form of the objection, often with several options, is at the top of each new entry.

B. RESPONSES

Following each objection are the possible appropriate responses to the objection, which also often have several options. When opposing counsel raises an objection at trial, this section provides a quick reference for the proper response.

C. EXPLANATION AND OTHER RESOURCES

Each objection also includes a brief explanation of the objection and response. This section includes a cross-reference to the relevant section or sections of LAIRD C. KIRKPATRICK, OREGON EVIDENCE (5th ed 2007) (Supplemented periodically). The lawyer is strongly encouraged to use this resource to research anticipated objections before trial so that OREGON TRIAL OBJECTIONS serves as a quick reference reminder of issues with which the lawyer is familiar.

Each objection also includes a *Notes* column for the lawyer to record specific cases or other resources that are directly on point in the case he or she is trying.

D. OREGON EVIDENCE CODE RULE NUMBERS

The full text of the Oregon Evidence Code provisions Supporting each objection or response is included below the Explanation section. In addition, all relevant Rule numbers are listed in the right-hand margin for easy access to relevant objections, responses, and rules by Rule number.

II. EVIDENTIARY ISSUES GENERALLY

A. OBJECTIONS TO PRESERVE ERROR

The Oregon Evidence Code provides a framework for the admissibility of evidence in civil and criminal trials. If evidence is offered by a party that is not admissible under the rules, the other party must object to admission of that evidence. A lawyer should stand when objecting. UTCR 3.050(1). Generally, failure to object waives appellate consideration of any error in the admission of evidence at trial. ORAP 5.45(2); *Ailes v. Portland Meadows, Inc.*, 312 Or 376, 823 P2d 956 (1991); APPEAL AND REVIEW §9.11 (Oregon CLE 1993 & Supp 2002); 2 CRIMINAL LAW §20.52 (Oregon CLE 2005 & Supp 2006).

Objections must state the specific ground for exclusion of evidence unless the ground for objection is obvious. Objections must be timely, in that they must be stated as soon as the objectionable nature of the question or answer becomes apparent. *See State v. Montez*, 309 Or 564, 601, 789 P2d 1352 (1990); *Blanton v. Union Pacific Railroad Co.*, 289 Or 617, 623, 616 P2d 477 (1980). Continuing objections are permissible as a device for preserving error.

However, certain issues can be raised on appeal even if not preserved. *See OREGON CIVIL LITIGATION MANUAL App 32C* (Oregon CLE 2004 & Supp 2009).

B. OFFERS OF PROOF

When the trial court sustains an objection and excludes evidence offered by a party, that party must provide the court with an offer of proof to make the court aware of the substance of the evidence, and provide the appellate court with sufficient information to review the ruling on appeal. *See* OEC 103; APPEAL AND REVIEW §14.32 (Oregon CLE 1993 & Supp 2002); 2 CRIMINAL LAW §§20.52–20.54 (Oregon CLE 2005 & Supp 2006).

The offer of proof can be made in one of three ways, all outside the hearing of the jury. The offer of proof may be made through a statement by the lawyer, questioning of the witness, or a written statement of what the witness's testimony would have been. The offer must be made at the time of the sustaining of an objection or it will be waived. The theory behind this rule is to provide the trial judge with the most informed opportunity to make the proper ruling. *See State v. Rodriguez*, 115 Or App 281, 840 P2d 711 (1992).

Forms of the Offer of Proof

Immediately after the court sustains the objection, the lawyer must request permission to make an offer of proof. Outside the hearing of the jury, the offer of proof is made in one of the following ways:

- (Statement by counsel) If the witness was allowed to testify, he or she would state (*give the nature of the testimony excluded by the court's adverse ruling*).
- (Questions of witness) Question the witness regarding those matters which were excluded by the court's adverse ruling.
- (Written statement) Submit a written statement of the witness's testimony which would have been given but for the court's adverse ruling.

C. MOTION FOR MISTRIAL

Sometimes objecting to evidence is not enough to protect a party's rights. A motion for mistrial is appropriate if, during trial, an event occurs that is prejudicial to either party. If the motion is granted, the trial is terminated. Either party may move for a mistrial. The test for a mistrial is uninvited prejudice. Prejudice means the reasonable possibility that the trier of fact was influenced by the irregular event. *See* 2 OREGON CIVIL PLEADING AND PRACTICE §38.41 (Oregon CLE 2006); 2 CRIMINAL LAW §§20.40–20.42 (Oregon CLE 2005 & Supp 2006).

A motion for a mistrial must be timely to preserve error. Generally the motion must be contemporaneous with the objectionable event. In other words, it must be made at a time when the court will be able to assess the possible curative action. *See State v. Walton*, 311 Or 223, 248, 809 P2d 81 (1991); *State v. Montez*, 309 Or 564, 601, 789 P2d 1352 (1990).

The granting of a motion for mistrial is within the discretion of the trial court. If a curative instruction can adequately remedy the error, a mistrial is not necessary. *See also* Or Const art VII, §3.

D. PRESUMPTIONS

A presumption is a fact which is automatically proved by the proof of some other fact. In civil actions and proceedings, a presumption shifts the burden of persuasion on the presumed issue. The amount of evidence necessary to rebut a presumption is governed by common law. *See* OEC 308–311. One common example of a presumption is of delivery and receipt of information, once a party proves it was put in the U.S. mail, with proper address, postage, and return address. The opponent has the ability to offer evidence to rebut the presumption of delivery and receipt.

Rule 308 governs the effect of presumptions in civil proceedings. Once a party establishes basic facts giving rise to a presumption, the burden of establishing the nonexistence of the presumed fact shifts to the opposing party.

Rule 309 governs the effect of *presumptions* in criminal proceedings. The jury should be told that it must find the facts giving rise to the inference beyond a reasonable doubt before it may find the inferred fact, and should be specifically informed that they are not required to find any inferred fact. In criminal cases, the presumption should be submitted to the jury as an inference, with a “may” instruction, not a “must” instruction. In this regard OEC 309 is similar to OEC 201(g)(2) concerning judicial notice against the defendant in criminal cases. Rule 309 only applies to presumptions against a defendant in a criminal case. The Oregon Evidence Code is silent on the issue of presumptions in favor of a defendant. *See generally* UNIFORM CRIMINAL JURY INSTRUCTIONS Users’ Guide (Oregon CLE 2002 & Supp 2003–2008).

The commentary and case law emphasize that the word *presumption* should never be used in jury instructions under Rules 308 and 309. In *State v. Rainey*, 298 Or 459, 693 P2d 635 (1985), the Oregon Supreme Court held that an inference instruction should be avoided whenever it could be construed as an improper comment on the evidence under ORCP 59E.

Rule 310 directs that in the unusual case in which two or more presumptions conflict, the judge should give effect to the one which is founded on weightier considerations of policy and logic. Rule 310 further provides that when presumptions are of equal weight, neither applies.

Rule 311 contains a partial list of 26 statutory presumptions. This list is useful because it collects presumptions that were formerly scattered throughout the Oregon laws into one central place, but it is possibly misleading because it is not exhaustive.

AMBIGUOUS QUESTIONS

NOTES

OBJECTION

- I object on the grounds that the question is [**ambiguous / vague / unintelligible**].

RESPONSE

In most circumstances, it is better to rephrase the question unless counsel is certain of the question's clarity.

EXPLANATION

There is no Oregon Rule specifically covering forms of questions. The court has discretion to sustain the objection pursuant to Rule 611(1). An ambiguous question is one that is susceptible to at least two interpretations, or that is so vague or unintelligible as to make it likely to confuse the jury or witness.

For additional research, see LAIRD C. KIRKPATRICK, OREGON EVIDENCE §611.03 (5th ed 2007) (supplemented periodically).

Rule 611. Mode and order of interrogation and presentation.

- (1) The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to make the interrogation and presentation effective for the ascertainment of the truth, avoid needless consumption of time and protect witnesses from harassment or undue embarrassment.

600

