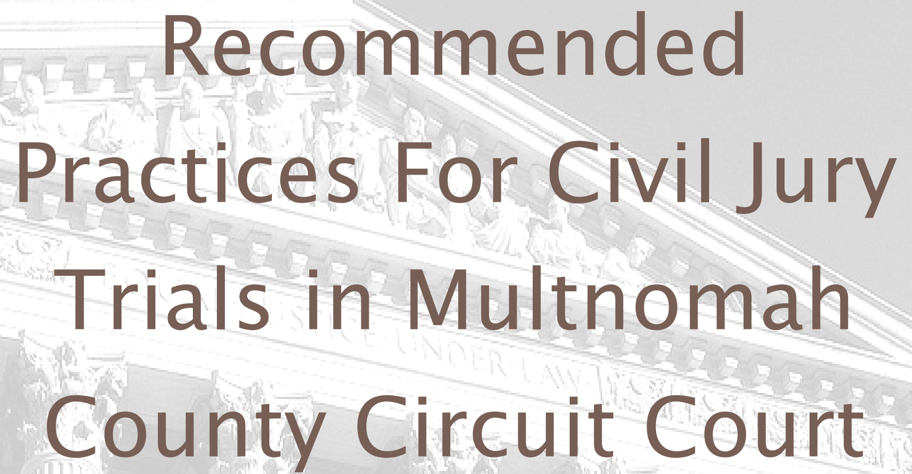
Recommended Practices For Civil Jury Trials in Multnomah County Circuit Court



2008

Multnomah County Presiding Court
Task Force on Civil Jury Trial Practices

RECOMMENDED PRACTICES FOR CIVIL JURY TRIALS IN MULTNOMAH COUNTY CIRCUIT COURT

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MULTNOMAH COUNTY PRESIDING COURT TASK FORCE ON CIVIL JURY TRIAL PRACTICES

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EXECUTIVE SUMMARY

Background of Project

Purpose Identify practices for civil jury trials likely to increase juror comprehension and satisfaction and improve trial efficiencies.

Criteria Implementation will not require any changes in rules or precedent; unanimously recognized by a committee of trial judges and experienced practitioners as a "best practice" that should be recommended; gives no advantage to either side.

History Research, study, discussion, drafting, and review took place 2006-2008 following ABA's publication of "Principles for Juries and Jury Trials."

Highlights of Recommended Practices

Scheduling If counsel believes that an unassigned case presents issues likely to require significant judicial time for pre-trial rulings, counsel should request a Wednesday call date for a pre-trial conference on Thursday with jury selection the following Monday.

Trial Exhibits & Depo. Excerpts Before trial, counsel should exchange exhibit lists, trial exhibits, deposition excerpts and exhibits and deposition objections; reduce duplication of exhibits.

Neutral Statement Of the Case Before trial, counsel should prepare a joint proposed neutral statement of the case and, if necessary, separately state any objections.

Depositions A tightly edited video (preferably under 30 minutes) with a synchronized transcript and stipulated summaries of witnesses' background are encouraged. The court or counsel should explain what a deposition is to the jury.

Pre-Trial Conference Do not call a jury until the judge has resolved the neutral statement, admitted stipulated exhibits, considered objections to exhibits and deposition excerpts, and held a preliminary instruction conference.

Jury Selection Judges should avoid extensive efforts to "rehabilitate" a juror; if a judge denies a motion to excuse for cause, it should be done outside the presence of the jury; the word "alternate" should not be used with the jury; the judge should not disclose the identity of the alternate jurors.

Trial Disruptions Judges should make every effort to schedule matters other than the trial in a way to minimize disruption of the trial schedule.

Preliminary Instructions The judge should present preliminary instructions to the jury after voir dire and before the evidence begins to aid the jury in understanding what the case is about and what they will need to decide.

Final Instructions The judge should instruct the jury before closing arguments.

INTRODUCTION

Both the Oregon Constitution and the Constitution of the United States guarantee the right to jury trial in civil cases. For those guarantees to remain meaningful and vital, the bench and bar must continually look for ways to improve the way jury trials are conducted.

Following the 2004 Jury Summit in Multnomah County, convened at the visit of then-ABA President Robert Grey, a committee of judges and lawyers was formed to study the ABA's newly-released Principles for Juries and Jury Trials. Using these Principles as a template to evaluate jury practices in Multnomah County, work groups were formed to consider improvements to different aspects of jury service in Multnomah County, from information for jurors on the court's website to more understandable jury instructions. As the evaluation process continued, a task force evolved to focus exclusively on civil trials. The following Recommended Practices for Civil Jury Trials is the product of that process.

The task force was comprised of trial judges and experienced plaintiff and defense counsel from the civil practice bar. The group considered its collective trial experiences, studied research and proposals from jury reform efforts in other states and met from 2006 until early 2008 in crafting these recommendations.

The task force sought to identify practices that would be likely to:

- Increase juror comprehension and understanding;
- Increase juror satisfaction; and
- Result in greater trial efficiency and less waste of jurors' time.

No practice was adopted as a recommendation unless it was:

- Capable of implementation without any change in court rules or legal precedent;
- Unanimously recognized by the judges and practitioners on the task force as a "best practice" that should be recommended for widespread adoption; and
- Neutral, i.e., it would not result in an advantage to either side in a civil trial.

It is our sincere hope that judges and lawyers will try the practices recommended here. We look forward to hearing from the bench and bar about your experiences using these Recommended Practices in the courtroom.

RECOMMENDED PRACTICES

I. Trial Scheduling

A. The current case management procedure used by the Presiding Court should be retained as a best practice for cases that are expected to take 5 days or more to try:

1. If the case has not already been designated complex or assigned to a specific judge for all matters, and if the trial is expected to last 5 days or longer, then the parties may send a letter to the Presiding Court requesting pre-assignment to a judge for trial. The letter must be received no later than 30 days before the scheduled call date. Not all requests can be accommodated.

2. If the case is expected to last 2 weeks or longer, the request for pre-assignment must occur at least 45 days before the call date for trial so that additional jurors can be summoned.

3. If a case is pre-assigned for trial, the trial judge may schedule a pre-trial conference before the designated trial date or counsel may request a pre-trial hearing with the assigned judge if they believe the case would benefit from pre-trial rulings on motions in limine, the admissibility of evidence or outstanding discovery issues.

B. For cases on the regular call docket, counsel who believe their case will require significant judicial time for pre-trial rulings should ask for a Wednesday call date, and at call request that pre-trial matters

be handled on Thursday and jury selection begin the following Monday.

II. Exhibits

A. Prior to commencement of trial, counsel should agree upon a date for exchange of an exhibit list and exhibits. Plaintiff's counsel should initiate a conference to set an exchange date. In the absence of agreement, the exchange should occur no later than noon on the court day prior to trial.

B. Counsel for all parties should deliver an exhibit list together with one copy of each exhibit required to be marked under UTCR 6.080 to opposing counsel and to the trial judge prior to the start of trial. If an exhibit cannot be copied, it should be made available to opposing counsel to inspect prior to the start of trial.

C. Counsel should identify those exhibits to which there are no objections. If there are objections, counsel should inform opposing counsel of the basis for each objection. To the extent there have been stipulations regarding exhibits (e.g., stipulations as to authenticity or relevancy), counsel should clearly identify those stipulations for the judge prior to the commencement of trial.

D. Counsel should eliminate unnecessary duplication of exhibits and attempt to consecutively number exhibits for trial, except as necessary to maintain exhibit numbers used in depositions. If possible, each exhibit should bear only one exhibit number.

E. At the commencement of trial, counsel should deliver to the courtroom clerk those exhibits to which there are no objections,

and, separately identified, those exhibits that may be offered to which there are objections.

III. Neutral Statement of the Case

A. Not later than 5 business days before trial call, counsel should exchange and confer on a proposed neutral statement of the case to be read to the jury panel before voir dire.

B. At the time required for the submission of trial memoranda, counsel should submit to the judge a jointly proposed neutral statement of the case and indicate which portions are agreed upon and, if applicable, where there is a dispute. If there is a dispute, counsel shall submit their own proposed language and may, but need not, also submit written argument.

C. The neutral statement of the case should identify for the jury the parties and the nature of the claims and defenses. The neutral statement should not be a detailed recitation of the evidence and should not be lengthy. Ideally, the neutral statement should be a few paragraphs in length.

IV. Deposition Testimony and Objections

A. Prior to commencement of trial, counsel should agree upon a date for exchange of deposition excerpts to be used at trial.

B. Plaintiff's counsel should initiate a conference to set an exchange date. In the absence of agreement, the exchange should occur no later than noon on the court day prior to trial (see §VII.E.5.d).

V. Pre-Trial Conferences

A. In pre-assigned cases, counsel should contact the pre-assigned judge and schedule a pre-trial conference. The pre-trial conference should take place before the day set for trial.

B. For cases on the regular call docket, please see §I.A, above. For cases on the regular call docket that do not have pre-trial conferences scheduled per §I.A, the pre-trial conference shall take place before the jury is summoned to the courtroom.

C. The jury should not be called to the courtroom until the judge has: (1) determined the final form of the neutral statement of the case; (2) admitted uncontested exhibits into evidence; (3) considered objections to exhibits; and (4) held a preliminary jury instruction conference to discuss those instructions to be given to the jury at the beginning of the trial after the jury is selected (see §VII.B).

D. Where a party requests that a particular claim not be discussed in the neutral statement of the case or the preliminary instructions at the beginning of trial, the judge should afford all parties an opportunity to be heard on that question before deciding whether to include a particular instruction.

E. In longer trials, the judge should consider modifying the trial schedule so that the judge and counsel can address matters that do not require the jury to be present without making jurors wait. These matters might include trial scheduling issues, evidentiary hearings, trial motions and arguments regarding jury instructions, etc.

VI. Jury Selection

A. The judge should avoid extensive efforts to "rehabilitate" a juror or to reject reasons given implicitly or explicitly by the juror for not serving. Judges should ask open-ended follow-up questions sufficient to probe and assess the ability of the individual to fairly judge the case. Judges should also pay attention to clues such as the juror's demeanor in assessing the credibility of the prospective juror's statements.

1. Where a juror has expressed an opinion or disclosed a prior experience or relationship that raises reasonable concerns about the juror's ability to be fair and impartial, but then also makes statements such as "but I think I could be fair," a judge should not merely ask whether, notwithstanding the prospective juror's earlier statement, he or she could be fair and impartial. Rather, the judge should diligently probe the reason for concern about the juror's ability to be fair.

2. If the judge believes that excusing a potential juror may provide a "blueprint" for other potential jurors seeking a way to avoid service, the judge may keep the potential juror seated until the end of jury selection, but shall advise counsel outside the presence of the jurors and before the exercise of peremptory challenges that the juror will be excused for cause.

3. If the judge denies a motion to excuse a juror for cause, the judge should make explicit findings on the record, outside the presence of the jury, supporting that decision.

B. The term “alternate” should – if possible – not be used in the presence of the jury, so that “alternate jurors” are not stigmatized or their role minimized.

1. The judge and counsel should not disclose to the jury which jurors are alternates. If a juror asks about the role or identity of alternate jurors, the judge should explain the role and purpose of alternate jurors and that the identity of alternate jurors will be disclosed at the end of the trial.

2. At the conclusion of the case, the judge should thank the excused jurors and explain their role, including the fact that their presence throughout the trial made it possible for the case to proceed to verdict – whether or not an alternate juror replaced one of the original 12.

VII. Trial Procedures

A. Judges should make every effort to realistically schedule matters other than the trial in such a way as to minimize disruption of the trial schedule. Judges should also educate and train staff in this regard. At a minimum, consideration should be given as to whether the non-trial matter has the potential to significantly interfere with the schedule of trial witnesses and jurors and, if so, whether the non-trial matter can be rescheduled for a later date or time. Staff should also be instructed to determine the actual time needed for non-trial matters. For example, when sentencing and probation violation hearings are scheduled during a civil jury trial, the number of witnesses and the length of time necessary for arguments should be determined.

B. The judge should present to the jury, after voir dire and before evidence begins, preliminary instructions. The purpose of these instructions is to provide assistance to the jury in understanding what the case is about.

1. The instructions should typically include the trial procedures, including note-taking and questioning by jurors, the nature of evidence and its evaluation, the issues to be addressed, and the basic relevant legal principles. These principles should include the elements of the claims and defenses, and definitions of unfamiliar legal terms.

2. The preliminary instructions should not be as specific as the pleadings or the final instructions.

3. If a claim or defense is presented to the jury in the preliminary instructions that is later withdrawn by a party or by the judge, the judge should give an appropriate curative instruction with the final instructions at the conclusion of the trial.

C. At the commencement of trial, the judge should state on the record that the uncontested exhibits have been received into evidence.

D. The judge should permit the jury to ask written questions directed to a witness after the witness' testimony is completed and before the witness leaves the witness stand. The judge should advise the jurors of this opportunity before the first witness is called. See ORCP 58 B(9).

E. The use of video depositions as a means for presenting deposition testimony is strongly encouraged.

1. With respect to the use of video depositions at trial, the preferred method is to have the video deposition synchronized with a written transcript of the deposition so that jurors are able to read along while they watch the video deposition.

2. Depositions used at trial should be tightly edited.

   a. For all depositions, whether presented by video or reading, counsel should edit depositions down to essential testimony for presentation to the jury. "Essential" means only those portions important to the merits of the case and not duplicative of other testimony. All objections and attorney colloquy should be removed, unless the attorney's conduct is important for the jury to consider.

   b. To encourage sustained jury attention, every effort should be made to reduce the presentation time of a deposition at trial to no more than 30 minutes.

3. Counsel should agree to a short summary of the witness' background as well as any other appropriate information in advance of the showing of the video deposition or the reading of deposition testimony. This information should include a brief introduction related to the witness' background and relationship to the case so that the only testimony of the

witness to be provided to the jury is what is essential to the merits of the case.

4. Either the judge (see §VII.E.6) or counsel offering the deposition testimony should provide a brief explanation to the jury prior to the presentation of the deposition testimony, explaining when the deposition was taken, who was asking questions at the deposition and whether the witness was unavailable to testify at trial or the parties agreed to the presentation of the testimony by deposition.

5. The following is the preferred method for dealing with objections to the use of deposition testimony:

   a. Counsel offering the deposition testimony should mark by brackets in blue the testimony from the deposition transcript it seeks to present to the jury by video or read to the jury from the transcript.

   b. After receiving this transcript from the offering counsel, the responding counsel should note in red on the transcript any objections to the offered testimony and then bracket in red any additional testimony offered.

   c. Upon receipt, offering counsel should note in blue on the transcript any objections to the testimony offered by the responding counsel.

   d. In order to ensure efficient presentation of deposition testimony to the jury, all objections to deposition testimony should be ruled upon prior to the

presentation of the deposition testimony to the jury. Deposition transcripts, with objections marked, should be submitted to the judge when exhibits are submitted. The judge, after providing a hearing, should rule in a timely fashion so as to allow the presenting counsel to do all necessary deposition editing.

6. Prior to the first time deposition testimony is presented to the jury, the judge should instruct the jury that deposition testimony is about to be offered by a party and that jurors should consider this testimony in the same way as if the witness was present to testify in person.

   a. The judge should instruct the jury as follows: "A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath to tell the truth and lawyers for each party may ask questions. You are about to have certain testimony [read to you] [shown by video] from depositions. Deposition testimony is entitled to the same consideration and is to be judged, insofar as possible, in the same way as if the witness had been present in court to testify."

   b. When counsel intend to present deposition testimony to jurors without the use of a video deposition, the preferred method of presentation is to use a reader who will read aloud all deposition answers. The reader should be instructed to read the deposition answers from the transcript in a neutral way, understanding that

the goal is to provide a fair presentation of the deposition testimony to the jury irrespective of which party obtained the services of the reader. The identity of the reader of the deposition testimony should not be disclosed to the jury.

F. The judge should instruct the jury before closing arguments are made.