



YLS Winter Series: Courtroom Nuts and Bolts

Hon. David Rees

Multnomah County Circuit Court

Hon. Eric Dahlin

Multnomah County Circuit Court

Multnomah Bar Association
Continuing Legal Education Seminar

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**MBA Young Lawyers Section
Courtroom Nuts & Bolts Outline
Judge David Rees and Judge Eric L. Dahlin**

I. Introductory comments:

- A. Please read the written materials. Won't be discussing all of them in the CLE.
- B. If you have questions as we go along, please put them in the chat or question bar.
- C. This CLE is essentially a survey course that touches on in basic detail many topics but will not be in depth on any of them.

II. The Fundamentals to Becoming a Great Courtroom Lawyer (In no particular order of importance).

A. Be strategic.

- 1) Think carefully about your case. Every case has opportunities and pitfalls that should be identified. This process should continue throughout your representation. Talk things over with others in the office regularly.
- 2) Careful case planning is essential. Identify which actions should be taken in the case and set priorities. Keep things moving forward.
- 3) **LISTEN** and observe carefully while in court. Read the room. Hearings, depositions and jury selection rarely go as planned. New lawyers can be overwhelmed by the surroundings and seem to focus only on their outlines and notes. The focus should always be on what is happening in the room. Then adjust as circumstances change.

B. Be professional.

Acting professionally is not only the ethically right way to practice, it is strategically the best approach. This can be challenging when it feels as if opposing counsel is being discourteous and rude. Try to find something to like about opposing counsel. Portland is a small town, and if you become known as a professional and ethical lawyer, you will feel better about yourself, get better results in your cases and build a reputation that will pay off in any number of ways.

The most difficult thing to do at times is turn over discovery or disclose negative case law. The easiest thing to do at times is find rationalizations for holding back on both. If you find yourself rationalizing, it probably means you should disclose. Opposing counsel and judges will respect and trust you which will pay off big time. Portland is a small town where both good and bad legal reputations tend to spread and stick.

C. Become skilled and effective.

Becoming skilled and effective in court involves gaining experience, preparing the heck out of your cases, and learning writing and trial skills.

D. Be zealous and client centered.

Work hard on behalf of clients. Maintain confidences, i.e. don't talk about your clients to others outside your firm even if you withhold client names.

III. Read the rules. There are three main things to say about the rules (ORCPs, UTCRs, SLRs): read the rules, read the rules, read the rules. Whether you are a first-year lawyer, a 30+ year lawyer or even a judge, it's always a good idea to read the rules to see if there is a rule that addresses a particular concern you might have, as opposed to just going off memory or belief.

IV. Learn motion skills.

- Become a case law nerd.
- Be concise in written and oral advocacy and avoid unnecessary motions.
- Have others review your work.
- Cite case law accurately.
- Disclose negative law.
- Be even more concise in your reply, perhaps the most important and potentially persuasive pleading.
- Be respectful when addressing opposing arguments. Petty put downs might feel good to you but not to me.
- Deliver a judge's hard copy of pleadings to your motion judge.

V. Learn trial skills

- A.** Watch great trial lawyers as often as possible but be yourself when it's your turn. Not everyone can try a case like Edward Bennett Williams or Gerry Spence.
- B.** Develop a theme for your trial that connects to universal human emotions and experiences.
 - i.** Plaintiff's counsel: "This is a case about how the irresponsible behavior of one can result in years of pain and suffering to others."
 - ii.** Defense counsel: "This is a case about how people who don't know all the facts, jump to conclusions in their desire to blame others and to find fault."
- C.** Confer on motions in limine well before the first day of trial.
- D.** Prepare an exhibit notebook for the court and confer on preadmission of exhibits.

- E. Confer on slides used in PowerPoint for opening statements.
- F. Prepare jury instructions as soon as you get the case – this is very helpful in honing your arguments and seeing weak spots. For non-uniform instructions, submit proposed instructions electronically in MS Word format and include authority in a footer. Confer with opposing counsel to come up with an agreed upon neutral statement of the case and confer on all disputed instructions to at least narrow what is in dispute. That simple act will make your trial judge very happy.
- G. **Trial memos.** Use your trial memorandum to (1) establish the framework for jury instructions; (2) set the stage for an anticipated motion for a directed verdict; and (3) educate the judge on any significant evidentiary issues that are expected to arise during trial. There is no need to include your jury argument in the trial memorandum as you are not going to win any factual arguments based on your trial memo. Trial memo should be short.
- H. **Voir Dire:**
 - i. Voir dire is one of the most important parts of trial and also may be the most difficult part of trial because it is so different than everything else a lawyer does, and because most lawyers haven't had much practice with it. So plan on spending a substantial amount of time preparing by developing a strategy and questions (including reading about it), by practicing, and by watching others.
 - ii. Voir dire is jury de-selection, not jury selection. You want to identify people who might be bad for your case so you can strike them; you won't have the ability to pick jurors who are perfect for your side..
 - iii. Listen, listen, listen.
 - iv. Virtually every word out of the lawyer's mouth should be part of a question. Limit the amount of "setting up the question" and cut out altogether attempts to explain various processes to jurors.
 - v. Have a plan and a goal. Don't just ask questions you've heard other lawyers ask. Figure out what is important for your case and ask questions that are tailored to your plan and goal.
 - vi. Don't use conditioning in jury selection. It's improper, confuses jurors, and makes them feel uncomfortable.
 - vii. Get the jury talking to you and to each other by asking interesting questions about their life experiences and attitudes.
 - 1. "Show of hands, how many people have been involved in an automobile accident or fender bender that might have been at least partially your fault?"
 - 2. How many had the immediate reaction of wanting to blame someone else or minimize your fault when retelling the story?

3. Do you agree that minimizing fault is a common human response when feeling embarrassed or ashamed?
 4. Who agrees with juror #1? Who disagrees with juror #1?" Tell me about that.
- viii. Make sure to get everyone talking. It is surprising how many people end up sitting on the jury who did not talk at all after answering the initial questions posed by the judge.

I. Opening statement.

- i. Tell a story in opening statements (argument in opening is not allowed and not effective). Jurors really do want to hear the facts before they hear argument. They just want the facts told in an interesting way.
- ii. Your theme should come out during opening statement, though not in an argumentative way.
- iii. There is no magic formula for an opening statement, it is just priming the jury for your theme of the case. Don't try to copy someone else's opening that you thought was really good because what is good in one case is not necessarily good in all cases.
- iv. Don't just recite what the witnesses will say in order of appearance.
- v. Don't try to include every fact, just set the stage; trial is for filling in the blanks.
- vi. Don't oversell in opening. The jury will notice if you promise something in opening that is not borne out by the evidence. The bigger the issue the more of a problem it is when it does not come out later.
- vii. VERY important to practice this out loud so you can feel comfortable with it and so you can make it tighter. Helpful to do this in front of others who know nothing about your case – preferably non-lawyers – to get their feedback. If you can't find others to watch you, at least video yourself to get a better feel for how it is being delivered.

J. Direct exam. Tell a story. Don't lead on direct. It's not effective. It is way more compelling for jurors to hear the story from your witnesses rather than from you. Set up your direct in subject matter blocks and guide the jury and witness from block to block. ("now I'd like to ask you some questions about"). Prepare your witnesses for testimony and use mock examination for your client.

K. Cross exam.

- i. Only lead on cross and only ask questions to which you know the answer. Short declarative sentences can be as effective as actual questions.
 1. Exceptions.
 - a. For especially damning admissions, have the witness supply the damning words, not the lawyer.

- b. It is ok to ask questions to which you do not know the answer if either answer is not going to hurt you. But don't do this too often because could get you off track.
- ii. Don't try to do too much. Don't go over the witness's testimony on direct in excruciating detail in the hopes that he will get tripped up on the details. Figure out what points you expect to make with the witness, make those points, and then stop.
- iii. Typical points to address on cross: perception; memory; interest in the litigation or other bias; qualifications to offer expert opinions.

L. Exhibits/technology.

- i. Use technology to enhance your opening, closing, and examinations. Jurors can absorb information better if they get it in audio and visual forms. The new courthouse has great technology that is very easy to use.
- ii. Lawyers can't expect the jurors to be engaged and to follow the evidence if the lawyer is talking to a witness about an exhibit but does not also show the exhibit to the jury, at least the key parts.
- iii. BUT be sure to test your technology to make sure it is working and that you know how to connect to the court's system. Jurors will expect you to be an expert on technology, so no bonus points for being an expert, but you will lose points and credibility if you seem to have issues with technology.
- iv. Confer on all exhibits well in advance of trial, and for those that are in dispute ask for pretrial rulings. Trial goes much smoother for all involved if all, or at least most, exhibits are preadmitted.

M. Closing argument – prepare your closing in outline form many weeks before trial, but deliver a closing that makes sense after the evidence comes in. Use the entire courtroom and modulate your voice to express appropriate emotion, somber topics, sincerity. You must believe in your case to be effective in closing arguments. Use video and PowerPoint but only to highlight, spotlight, and summarize points. Do not read your closing from a PowerPoint or the jury will be looking at the screen and not you.

N. Feedback – If it is one of your first trials, ask the judge for feedback at a point when appeals and post-verdict motions are over. Ask the judge to seek feedback from the jury. Ask someone you admire to watch portions of the trial for feedback.

VI. Other hints

A. Become a neutral. A great way to learn to be a good advocate is to become a neutral. One of the best things a trial lawyer can do to become a better lawyer is to spend some time as a pro tem judge, a volunteer mediator with the court's Small Claims docket, or an arbitrator; or any other situation where you need to be a neutral. Serving as a neutral will help any lawyer get a better feeling

about what is persuasive for decision makers, and what type of things are counterproductive.

- B. **Know your judge; every judge is different.** There are many things that the judges uniformly agree on, but there are many things that we have different views about. The more procedural a matter is, the more likely the judges have different preferences about how they handle things. So it is very important to know your judge. You can learn about the judge by looking at the court's website and also asking around.
- C. **Beware of the Curse of Knowledge.** Just because the judge wears a robe doesn't mean that the judge knows everything, especially with respect to the facts of your case. Keep a list of the things you struggled with at the outset of the case before gaining particularized knowledge and consider whether the judge or jury will also struggle with those items so you can be prepared to teach those better.

Decorum isn't Dead:

Courtroom Etiquette 101 – Top 10 Tips from The Bench

The Honorable Adrian Lee Brown, Multnomah County Circuit Court

The Honorable Rebecca Guptill, Washington County Circuit Court

2022

1. **Be on Time (*and communicate if you are running behind*)**. If you aren't early, you will probably be late. Be early (there is always something you can do to improve your case – e.g. practicing your argument, witness prep, introduce yourself and/or confer with opposing counsel, etc. -- while waiting. Remember, depending on the courthouse, you may need extra time to find parking; time to walk several blocks to court; wait in line to get through security; and maybe even search for your client (or agent and/or witness(s)). Oh, and that restroom stop!
 - a. If you are running late (life happens), you can still be professional about it by communicating to the court as soon as you know. The key is to *communicate* – whether with court staff (ideally directly through a call or email); or through your co-counsel, a fellow attorney or assistant from your office. If you are in the same courthouse and just in another courtroom, let that court staff or judge know so that they can alert the other courtroom.
 - b. If you aren't on time, be humble and apologetic. Do not make excuses or blame others, although a matter-of-fact explanation is fine (e.g. my infant twins both had diaper blowouts as I was getting them in the car for daycare (*actual statement from counsel to court staff*)).
 - c. Being late to a court hearing should be an extremely rare circumstance. You don't want to develop a reputation for lateness – you want judges and staff to find that running late is unusual and out

of character for you, preferably to the point where they are concerned for the worst; happy to hear that you are okay; and relieved to see you when you walk in the courtroom.

- d. If you do find yourself having trouble getting to court on time *regularly*, there is likely a professional practice or personal mental health issue you need to address. You are not alone, and there is help for lawyers struggling to keep up with the pace of the legal profession. The practice of law can be overwhelming. Please reach out to the Oregon Attorney Assistance Program (OAAP), for confidential, career-saving assistance on a range of issues. There is no shame in asking for help, and the court wants you to succeed in being the best professional you can be, for the bar, for your clients, and for the public. Take a look at what OAAP can offer at their website, <https://oaap.org/>. You can reach a counselor anytime by calling 503-226-1057, including after-hours for urgent matters.
2. **Dress to Impress (sorry soft pants).** When appearing in court, appropriate *and professional* attire is required. See UTCR 3.010. While some judicial districts may be more relaxed than others, always error on the side of formality. Yes, this means wear a suit or equivalent (blazer and tie, appropriate dress or pant suit, and professional accessories). Attorneys who dress professionally are noticed – in a positive way. How you dress is the beginning of your reputation – with the court, with opposing counsel, and with the jury. You will never be chastised for dressing professionally.
- a. Remind your clients and witnesses to dress appropriately for court -- no jeans, no sleeveless tops or sleeveless dresses; no shorts or mini-skirts; no chewing gum; and no hats (in courtroom).
 - b. If your client is in custody, you need to make sure they have appropriate court clothes to wear for a jury trial. Some counties have clothing banks to borrow from; and some clients may have family who are able to provide clothes. Plan ahead and make sure your

client has appropriate clothing for court and know the process with the jail and the court to ensure you have the appropriate permission for delivering the clothes.

3. **All Rise! (*Toto, we're not in Zoom court anymore*)**. Stand up when the judge enters the courtroom. See UTCR 3.050. Prepare your clients to do the same. Out of respect for those serving as a juror, stand during entry and exit of the jury from the courtroom, and during the reading of the jury verdict. Even if "All Rise," is not called when the judge leaves the bench, it is still best practice to stand.
 - a. Always stand when addressing the judge (or jury) and have your clients do so as well.
 - b. It is generally acceptable to sit while asking questions of a witness, but it is always safest to ask the judge if you may remain seated for questioning.
 - c. Judges generally will allow attorneys some freedom of movement around the courtroom. Always ask if you may approach a witness, the bench, or to otherwise have that freedom. Play it safe and ask, "may I...?" before approaching witness or bench.
 - d. Remember that these are courts of public record – the mics around the courtroom are there to record the proceedings. You need to be close enough to a mic when talking for the record to be clear. Be mindful of mic locations when you are up and about so that you speak in proximity to one of them. You do NOT need to "eat the mic". If you are near a mic, remember it will pick up your conversation with your client. Press (and hold) the button on the base of your mic to mute your mic.
4. **Check in with court staff when you arrive to court**, especially if you have not appeared in a particular courtroom before. Identify yourself, who you are representing, and what matter you are appearing on and its status. This

is helpful so that the staff and judge know when matters are ready to be heard and what order they should be heard in.

- a. Make sure you file your notice of representation on cases so that everyone knows you are on the case and to make sure you receive court notices properly.
 - b. Unless a judge or another attorney has announced your name on the record when calling the case, state your name and bar number for the record when you go to speak. Always best to make sure the record is clear and that all of the people involved – including the judge – know who you are and there is no confusion.
5. **Pronouns Matter!** Every judge and court likely has a different procedure to address pronoun usage. The judge and court staff will always appreciate being informed of preferred pronouns, names, titles, and honorifics. None of us want to be rude or confused. Every person deserves to be called by their preferred name and pronouns. Help us get it right! This is particularly important if there could be any confusion by the judge. Learn more at the following website: <https://pronouns.org/what-and-why>.
6. **Be ready (Bring your “A” game!).** Be prepared when you get to court – each time; every time.
 - a. Have your calendar ready in case additional hearing dates are scheduled. And even if they aren’t set by the judge at the time of your hearing, post-hearing you should seize any opportunity to confer with opposing counsel on future dates.
 - b. If you think you have a conflict with a date being proposed – double check, other client meetings and personal appointments can generally be rescheduled -- trials and other court appearances take precedent. A trial or hearing in another courtroom, pre-planned vacation, medical procedure, etc, are actual conflicts. Another trial the same week, a consult, an office conference, etc. are not. Also,

being ready means having paid your trial fees, if applicable, *before* your trial starts and remember to leave enough time to do so!

7. Stay Hydrated and Nourished-- Bring a *filled* water bottle and snacks (for short breaks) to court and advise your clients do so as well. While most courtrooms will have pitchers of water and paper cup, don't count on it. Come prepared.

- a. Don't plan to drink your coffee in a courtroom unless you are certain it is allowed in that courtroom. When in doubt, just ask the courtroom clerk.
- b. Do not eat in a courtroom or chew gum, but have those snacks ready in case you have to work through lunch, or don't have enough time to leave courthouse.
- c. Phones and electronic devices should be turned *off* – you don't want that unexpected alert or notification that comes through even if your phone is on silent.
- d. If a phone needs to be turned on in order to check calendars, it is always safest to let the judge know and ask permission. If you have a laptop that you are using at counsel table, make sure it is in silent (not just on vibrate).
- e. Make sure to inform clients and witnesses of these rules – they apply to them as well.

8. Requests for Accommodations. Ask for accommodations in advance.

- a. Make sure that the court staff knows well in advance if any interpreter is needed for your client or a witness so that it can be arranged. Never plan to bring your own interpreter -- court certified or qualified interpreters are the only interpreters allowed for court matters.

- b. Let the court clerk know if you, your client or a witness needs an assistive listening device, or needs other accommodations (breaks for pumping breast milk, or to take medication). The court and judges want to provide accommodations, and we need to know that you need them.
 - c. In general, let the court know if you are in need of a comfort break. Do so at an appropriate time and in an appropriately deferential manner. The judge could probably use a break too. (Extra professionalism points if you let us know that a self-represented litigant on the other side of your matter needs an interpreter or accommodation.)
 - d. Please alert court staff if there are any security concerns in a case, particularly if you are in a county that doesn't have security for the building.
9. **Communicate, communicate, communicate** (politely and professionally). Every judge's staff may have a preferred communication method. Most prefer email as they are often in court and unable to communicate via phone.
- a. Email is generally the safest and most preferable method for communicating to court staff. It is the safest way to avoid any *ex parte* communications. Always make sure to cc opposing counsel.
 - b. Do not have ex parte contact on a matter with a judge. Never email a judge directly on a matter (unless in a rare instance they have emailed you; and even then be sure to cc judicial staff and opposing counsel in your response).
 - c. Don't email staff a request that is actually a motion. When in doubt, check the UTCRs and SLRs, and confer with opposing counsel, before you reach out to judicial staff.

- d. Avoid asking for special favors of court staff – it puts them in an awkward position.
 - e. Be polite to court staff at all times. They are underpaid, overworked, and doing their best. This goes for staff at filing counters, accounting, and other departments. Word gets around the courthouse if you are a rude or unpleasant person to work with. Kindness costs nothing.
10. **Know your Audience and Stay Curious.** It doesn't take much these days to learn about your judges—both background and their judicial practices.
- a. Before appearing before a judge see if the court's website provides any information about judges – Multnomah County judges have a public webpage for each judge on the court's website.
 - b. Read the Uniform Trial Court Rules; the Supplemental Local Rules; and Consensus Statements; and any other practice guides available on the court's website.
 - c. For court filings, know the general standard practices of that court, and any individualized practices the judge you are appearing before may have (e.g. a paper copy of filings over 10 pages must be delivered to chambers; or do not submit any paper copies to judges). Remember, judges are people too (and each independently elected public officials) and we each have our own style. Instead of being frustrated by these differences, embrace them and go with the flow of the judge you are appearing before.

TRIAL PRACTIC TIPS—CRIMINAL CASES

Judge Stephen K. Bushong
Multnomah County Circuit Court
October 28, 2021

I. Pre-Trial Preparation

- A. Trial Schedule.** Be realistic on how much time you will need for trial. It is better to overestimate than underestimate. Contact opposing counsel before requesting a trial date; attempt to agree on dates, or at least inform the other side that you will be requesting a trial date. Be sure your witnesses and experts are available before committing to a “Date Certain” trial date.
- B. Motions to Suppress & Other Dispositive Motions.** File your motions ahead of time; discuss them with opposing counsel. Consider whether truly dispositive motions can be decided in advance of trial. Consider a stipulated facts trial.
- C. Motions in Limine.** Use motions in limine to get pretrial rulings excluding (or admitting) evidence that is in dispute. Do not submit “boilerplate” motions. Emphasize quality, not quantity.
- D. Jury Instructions.** Use the Uniform Criminal Jury Instructions whenever possible. Don’t forget to fill in the blanks, or choose from suggested alternatives. Special instructions should be stated in neutral terms, with appropriate citations (including jump cites). When necessary, summarize complex statutory or regulatory schemes to make them understandable. Consider whether a “lesser included” instruction should be given.
- E. Verdict Form.** Your verdict form should logically follow from your jury instructions. Use the same terminology. Make sure you have a good understanding of the questions the jury will be expected to answer before you start the trial.
- F. Best Practices**
 - Use an elements checklist
 - Prepare your jury instructions and verdict form before trial

- Practice your opening statement in front of a colleague or mirror
- Consider demonstrative exhibits to assist jurors' understanding of the evidence
- Confer with opposing counsel regarding exhibits, other issues that may or may not be in dispute
- Stipulate in advance of trial to the admissibility of exhibits
- Test technology in the courtroom beforehand; edit video testimony to minimize juror boredom

G. Common Mistakes

- Failing to organize/edit trial exhibits
- Failing to edit videotaped evidence in advance
- Failing to talk to opposing counsel before trial about trial exhibits and other issues

II. Jury Selection

Ask potential jurors about relevant life experiences, opinions and attitudes. Use short, open-ended questions. Don't make a speech or talk too much. Do not use "conditioning" questions that attempt to "plant the seed" for a favorable verdict. Don't be afraid to challenge a juror for cause.

A. Best Practices

- Ask open-ended questions; learn about their life experiences and get them to tell you their stories.
- Remember that you are trying to figure out which jurors you will excuse, either for cause or with a peremptory challenge; you will not win your case in voir dire.
- Use favorable jurors to educate others and establish themes, even though the other side will likely bump them.

- Screen questions with your trial judge in advance if you think the other side might object.
- Orient jurors by explaining their task is to speak honestly and to share their experiences and attitudes – one way is to say the parties are looking for the “best fit.”
- Listen to jurors’ answers to your questions; follow up where appropriate, but don’t argue or correct them.
- Ask jurors about their attitudes and experiences with the critical issues in your case, but don’t attempt to condition them.
- Manage juror personalities; don’t let an outgoing juror dominate or ignore shy jurors.

B. Common Mistakes

- Attempting to argue your case or “condition” the jurors to rule in your favor.
- Talking too much; not listening.
- Arguing with prospective jurors who express views that are contrary to yours or harmful to your case.
- Failing to ask questions that matter – about prior experiences and attitudes.
- Asking questions designed to use a juror as an “expert” witness for your case.
- Attempting to condition or manipulate jurors; jurors understand and resent you for trying this.
- Taking too long; there may not be a time limit, but jurors resent it when they think you’re wasting their time

III. Opening Statement

Tell the story from a key player's perspective. Make it interesting; don't just summarize the testimony you expect to elicit from each witness. Set the scene; paint a picture with your words. Establish (and use) a theme for the trial. Define complex or technical words/phrases. Identify the cast of characters. Use visuals. Use a timeline where appropriate.

A. Best Practices

- Tell a story; pick your client's or a key witness's perspective and let the jury re-live the experience
- Use active and descriptive words; make the jury "see" and "feel" what happened
- Use demonstrative exhibits
- Define key terms; introduce the cast of characters; use a timeline
- Make it interesting; jurors are used to seeing the whole story unfold in an hour, as on "Law and Order"
- Pick a theme and stick to it
- Keep it short; you can fill in some of the details later
- Introduce your client; tell your client's story

B. Common Mistakes

- Reciting what each witness will say in order of appearance
- Telling the jury that the opening statement is not evidence
- Relying too much on technology
- Arguing and drawing conclusions for the jury; let them draw the conclusions

- Waiving or deferring opening statement

IV. Presenting the Evidence

A. Direct Examination

Focus the jury's attention on the witness. Get the testimony out in bite-sized pieces instead of a lengthy narrative. Stop the witness and ask a "why" question when appropriate. Use part of the answer in the next question to emphasize important points ("looping"). Use short, open-ended questions, but use leading questions to get through non-essential information more quickly or to avoid a misstep in a problem area. Use your experts to "teach" the jury about complex, technical issues. Use graphics, demonstrative exhibits, and other visuals to reinforce and explain the testimony. Avoid using lengthy videotaped evidence.

B. Cross Examination

Don't try to do too much. Don't go over the witness's testimony on direct in excruciating detail in the hopes that he will get tripped up on the details. Figure out what points you expect to make with the witness, make those points, and then stop. Typical points: perception; memory; interest in the litigation or other bias; qualifications to offer expert opinions. Control the witness. Use leading statements to make your points and ask the witness to confirm them. Use the other side's expert to get testimony that helps your case, when possible.

C. Redirect Examination

Use redirect to give your witness a chance to explain any troublesome or confusing answers. Do not "save" key testimony for redirect; that will typically open the door for re-cross.

D. Effective Use of Exhibits and Technology

If you use documents or other exhibits, make sure the jury can or will be able to see the exhibit. Publish the exhibit to the jury after it is accepted into evidence. Make a clear record by referring to documents by exhibit number. Power point presentations can be effective, but don't rely too heavily on them and be sure to clear it with the judge first.

E. Objections

Make short, one-word objections (relevance, hearsay) in front of the jury. Ask to be heard outside the presence of the jury if you want to argue the point. Don't be afraid to object (jurors expect lawyers to object on occasion), but don't overdo it. Use your judgment; don't object on minor points that don't make a difference.

F. Best Practices

- Make sure an exhibit has been received before showing it to the jury
- Let your witnesses tell the story on direct examination; don't lead your own witnesses
- Make your points on cross-examination and stop; don't try to do too much
- Object when necessary; jurors expect lawyers to object occasionally. Remember, you're making a record for possible appeal
- Don't object just because you can; jurors don't like lawyers who object too much and make it appear that they have something to hide (or want to make life difficult for opposing counsel)
- Make specific objections based on the rules of evidence
- Use Rule 104 hearings appropriately (to challenge an expert's qualifications or the basis for an expert's opinion)
- Use your experts to teach the jurors

G. Common Mistakes

- Offering exhibits that include objectionable material; better to redact objectionable material and have the exhibit received than to have it excluded

- Showing illustrative or other exhibits to the jury without the judge's approval; can be embarrassing in front of the jury if objection is sustained
- Failing to object when necessary, or failing to make specific objections based on the rules of evidence
- Making "speaking" objections in front of the jury
- Trying to do too much on cross; don't lose control, and don't let the other side's witness repeat (and reinforce) testimony on direct

V. Closing Argument

Trust the jury; by the end of the trial, they understand. Do not summarize evidence the jury has already heard several times. Argue the circumstances, the credibility of the witnesses, or other critical issues. Use analogies and examples. Explain why your version of the facts makes more sense. Use the jury instructions and verdict form; tell the jury how you want them to answer the questions and why. Ask questions; answer some of them. Focus on the key issues, and give the jury some direction. Tell them the exhibit numbers of the exhibits you want them to look at during deliberations. Don't bluster or overstate the facts of the case. Pay attention to the time; don't be afraid to stop.

A. Best Practices

- Use the jury instructions and verdict form
- Argue and persuade; don't just summarize the evidence
- Use demonstratives and visuals
- Trust the jury; by the end of the trial, they understand and want to decide the case
- Focus on the key points in dispute; don't try to argue everything
- Juries want to do the right thing; explain why ruling in your favor is the right thing to do

- Address any weakness or “elephants in the room”
- Ask jurors to look at specific exhibits (by number), but don’t overdo it
- Keep it short, and end on a strong point

B. Common Mistakes

- Torturing the jury by making them sit through lengthy, unnecessary recitation of all the evidence
- Referring to facts that are not in evidence
- Attacking opposing counsel; do not make it personal
- Ignoring the jurors’ body language

VI. Verdict

If you lose, ask the judge to poll the jury on the record. Confirm the results on the record.

VII. PERSONAL CONDUCT

A. The Judge’s Perspective

- Be professional and respectful at all times. Lawyers must behave with courtesy towards everyone in/outside the courtroom. You are never offstage if you are within sight or hearing distance of any juror or member of the court staff.
- If you know a matter for the court is going to take more than a few minutes, let the judge know in advance so it can be arranged to coincide with a jury break.

- Speaking objections are never appropriate during a jury trial. If you need to make a record, ask to be heard outside the presence of the jury.
- Judges do not like surprises – keep your judge apprised of the order of witnesses, which exhibits you intend to offer and legal issues that are critical to your case.
- Be realistic in your estimates about how long the matter will take. Don't tell the judge that you can try the case in 2 days and then take 4. Make a schedule and stick to it.

B. The Jury's Perspective

- Jurors do not appreciate lawyers who are disorganized and seemingly unprepared. If you are using a video, PowerPoint, or other "high tech" device, make sure the equipment works and you know how to operate it. Cue the equipment to begin at the correct place. Be prepared with your exhibits.
- Jurors do not like it when lawyers seem to be wasting their time with cumulative evidence, repetitive arguments, or numerous "matters for the court" during trial.
- Jurors do not like lawyers being rude to each other, to their support staff, to court staff, or anyone else. They're always watching.
- Jurors do not like to be manipulated. Persuade jurors to come to a just decision; manipulation rarely works.

JUDGE MAURER'S DOS AND DON'TS

I. PROFESSIONALISM

- Be courteous.
- Be brief.
- Be timely.
- Confer and follow through on your commitments.
- Empathize with the position of opposing counsel, the court and other players in system.
- Introduce yourself to the court staff and treat them with the utmost respect.
 - Courtroom clerk
 - Judicial Assistant
 - (These folks are like members of our family.)
 - Corrections deputies
- Advise court if you have resolved your case and will not need the hearing.
- Strike from your written and oral arguments all disparaging remarks.
- Never interrupt. Stand up instead. Make your arguments to the judge, never to opposing counsel. Make all of your arguments before the judge rules, not afterward. (Do not make comments “for the record” after the judge rules.
- Be aware that the microphones feed into the judge's chambers.

II. PREPAREDNESS

- Serve your opponent and the judge with copies of all court documents.
- Have a notebook or something else that will keep you organized.
- Bring your calendar with you to court.
- Cite to best case, no suing cites. Use Oregon cases if possible.
- Have your witnesses ready to go. Go over their testimony beforehand.
- Have a notebook with your exhibits marked and ready to go and give a copy to the judge.
 - Confer with opposing counsel and stipulate to as many exhibits as possible.
- Work Backward: Pull out the jury verdict and jury instructions early in case. Fit your evidence and arguments into the verdict and instructions.

III. PRESENTATION

- Speak slowly, loudly, clearly. Courtrooms have terrible acoustics.
- Stand up, sit up. Be mindful of your facial expressions.
- State your name for the record every time.
- Tell the judge what you want before you give background of your case.
- Learn the stages of a trial:
 - Jury selection. Do not use it to condition the jury. Know what jurors you want.
 - Opening Statement: Roadmap, not argument.
 - Witness presentation: Get to the point. Do not interrupt your witness.
 - Use cross sparingly unless you are very skilled. No “why” questions.
 - (DV case; you are defending and want to establish that the witness is exaggerating injury. No “well, if injuries so bad, why didn't call police?”

Pointers For Your Witnesses

1. **Tell the truth** – in a trial, as in all other matters, honesty is the best policy. Truthful testimony is an absolute insulation against the most intense cross-examination. Discourage the friendly witness from attempting to be too helpful—that's when they get into trouble.
2. **Don't guess**—Tell them if they don't know an answer, to say so, but remind them that they are permitted to estimate.
3. **Understand the question before answering.** Discourage asking the lawyer to repeat the question unless they are truly confused.
4. **Take your time** — Do not give a snap answer. But overly-long pauses can create the impression that the witness is making up an answer.
5. **Answer the question that is asked and then stop and wait for the next question.** Stick to the point and don't wander.
6. **Talk loud enough so everyone can hear you.** Very important!
7. **Give an audible answer rather than nodding your head yes or no.**
8. **Don't look at your lawyer for help when you are on the stand.**
9. **Beware of questions involving distance and time**—If you make an estimate, make sure that everyone understands that you are estimating.
10. **Speak to the jury**—Project your voice to the jurors.
11. **Avoid hostility or aggressiveness**—Be candid and cooperative. Don't get angry.
12. **Don't be a comic**—A pleasant smile is nice but no wisecracks.
13. **Don't argue or engage in a duel of wits with the attorney.**
14. **Don't make personal remarks.**
15. **Ignore the microphone**—Don't bob your head up and down towards the mike as you talk.
16. **Make eye contact with jurors as you talk**

JURY TRIAL CHECKLIST

- _____ COURTROOM ETIQUETTE
- _____ PRE-TRIAL MOTIONS
- _____ SEND FOR JURY PANEL¹
- _____ CLERK SWEARS JURY PANEL (Give juror oath #1)
- _____ READ INTRODUCTION INSTRUCTION
- _____ EACH JUROR ANSWERS STANDARD VOIR DIRE QUESTIONS
- _____ FORMAL VOIR DIRE QUESTIONS²
- _____ JURY SELECTION (Out of presence of the jury)
- _____ CLERK SWEARS JURY (Give juror oath #2)
- _____ READ PRECAUTIONARY INSTRUCTION
- _____ OPENING BY STATE/PLAINTIFF
- _____ OPENING BY DEFENSE/RESPONDENT
- _____ STATE/PLAINTIFF CASE³
- _____ DEFENDANT/RESPONDENT CASE
- _____ STATE/PLAINTIFF REBUTTAL CASE
- _____ MOTION FOR JUDGMENT OF ACQUITTAL (CRIMINAL)/MOTION FOR DIRECTED VERDICT (CIVIL)
- _____ STATE/PLAINTIFF CLOSING ARGUMENT
- _____ DEFENDANT/RESPONDENT CLOSING ARGUMENT
- _____ STATE/PLAINTIFF REBUTTAL ARGUMENT
- _____ INSTRUCT THE JURY (Some judges do this before closing, some do this after)
- _____ RELEASE THE ALTERNATE(S), IF ANY
- _____ SWEAR THE CLERK - THEN CHARGE THEM WITH THE JURY

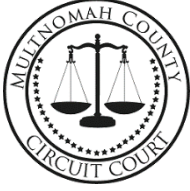
_____ JURY DELIBERATES ^{4,5}

_____ TAKE EXCEPTIONS/OMISSIONS TO THE JURY INSTRUCTIONS

_____ RECEIVE VERDICT (I ALWAYS MAKE IT A POINT TO POLL THE JURY TO ENSURE A LAWFUL VERDICT)

_____ MAKE SURE THE CLERK RECEIVES THE VERDICT FORM AS WELL AS ANY WRITTEN QUESTIONS AND ANSWERS THAT WERE ADDRESSED DURING DELIBERATIONS.

1. I typically call 30 jurors for felonies, 18 for misdemeanors, and 24 for civil.
2. In criminal trials, Defense goes first; In civil trials, Plaintiff goes first.
3. I find time during the trial to finalize the jury instructions and verdict form.
4. I give one set of written jury instructions per side and one set to the interpreter, if there is one.
5. Make sure the jurors have all admitted exhibits, a verdict form and at least 2 copies of the written jury instructions.



BEST PRACTICES IN THE COURTHOUSE AS OF JANUARY 1, 2023

The staffing shortages have created a need for everyone to examine how their work is completed. The Courthouse is experiencing the same difficulties as most office environments. We are also working to reinstate the Time to Disposition Standards for Oregon Circuit Courts recommended by the OJD Court Reengineering & Efficiencies Workgroup and adopted as OJD policy by Chief Justice Martha Walters. To streamline our work, adhere to time guidelines, and avoid a great deal of duplicative work, the court has developed the following best practices for the Presiding Judge Dockets.

Daily Trial Call Docket 9:00 am in Presiding

1. All attorneys must report in person. If you are unable to appear, have another attorney report for you.
2. If you are reporting ready for your hearing or trial, you may report in advance to Presiding per SLR 7.055(8)(b).
3. Defendants in criminal cases may appear in person, remotely, or through counsel after signing a Consent to Appear Through Counsel form as specified in PJO 2201-00006.
4. If the Defendant in a criminal case fails to appear at Call for Trial assignment and there is no Consent to Appear Through Counsel form, a bench warrant will issue regardless of whether the attorney says they are in good contact. The Presiding Judge or designee has discretion whether or not to require a defendant to appear in person, remotely, or to file a Consent to Appear Through Counsel form at a setting prior to the Call for Trial date.
5. In order to move toward adherence with the Time to Disposition Standards following the pandemic-caused delays, the court is adopting the following timeline for criminal trials on the Presiding Call docket:
 - a) Cases issued in 2019 must be resolved or tried by December 31, 2022, or if good cause is shown, have a date certain trial date prior to February 28, 2023.
 - b) Cases issued in 2020 must be resolved or tried by February 28, 2023, or if good cause is shown, have a date certain trial date prior to April 30, 2023.
 - c) Cases issued in 2021 must be resolved or tried by June 30, 2023, or if good cause is shown, have a date certain trial date prior to August 31, 2023.
 - d) Cases issued in 2022 must be resolved or tried by September 30, 2023, or if good cause is shown, have a date certain trial date prior to November 30, 2023. Parties may request a scheduling conference with the Presiding Court to request an extension beyond that date.

e) Cases issued on or after January 1, 2023 will follow the Time to Disposition Standards. Cases must be resolved or tried within 180 days of arraignment on the indictment. Parties may request a scheduling conference with the Presiding Court to request an extension beyond that date.¹

f) The above timeline does not apply to cases specially assigned to an individual judge. The court will take into consideration time during which the defendant did not have access to an attorney, was in warrant status, or was unfit to proceed. The timelines apply whether the person is in or out of custody, though custody defendants have priority for purposes of scheduling trials.

6. Cases on the 9 a.m. Call for Trial docket will be sent out for trial unless it is the first trial setting as assigned at arraignment. If you are on the Call for Trial docket and believe you are not ready for trial, do not wait until the call docket to announce you need a postponement. Use ex parte to select new dates.
7. When using the ex parte process, it is best not to move the case ex parte to a future further proceeding to pick dates, just pick the dates when you appear at to avoid multiple appearances.
8. If you are sent out for trial and any party requests a setover, the attorneys must return to Presiding court.

Daily Short Matters Docket at 9:15 in Presiding

1. Do not sign up for a plea unless an offer has been made and accepted.
2. If the Defendant does not appear and the attorney cannot state they are in good contact, an appearance or bench warrant will be scheduled for one week.
3. Matters will only be carried a day for good reason.
4. Attorneys should confer regarding availability prior to placing a case on the docket.
5. If the short matter is assigned out and does not occur the matter needs to be placed back on the Short Matters docket and not rescheduled on the individual judge's docket.

Daily Preventative Detention Docket at 9:20 in Presiding

1. These hearings are scheduled 1-2 days prior by the Justice Center.
2. An Oral Waiver of the defendant's right to a hearing within 5-days will be accepted to set the hearing over for up to 34 days.
3. A written waiver must be filed by the defense to postpone the Preventative Detention hearing beyond 35 days.
4. Unless Defense can stipulate the 60-Days either does not apply, is not running due to tolling for A&A concerns, that the defendant is serving a sentence or if a 60-Day Waiver

¹ The shorter timeline for newer cases reflects that the parties in cases issued in 2022 or earlier did not have notice of the reinstated time to resolution standards. National agencies including Justice Management Institute and Center for Court Innovation recommend distinct time frames for cases issued during the pandemic

has been filed, the Preventative Detention hearing must be sent out to be heard by a judge.

ExParte at 10:30 and 1:30 (Criminal and Civil)

1. Attorneys should make sure they appear with the paperwork or, if they plan to appear remote, have emailed their documents to Mul.Presiding@ojd.state.or.us at least **24 hours** before they intend to appear.
2. Civil attorneys may prefer to attend 1:30 ex parte as the morning ex parte may be delayed due to lengthy morning dockets.
3. If you have a disputed matter, please wait until the end of ex parte.
4. If your matter involves a great deal of material (i.e. TROs), please make sure it is sent in advance to Presiding court. If materials are not sent in advance, the matter may have to be postponed allowing the judge time to read the material.
5. Motions for a Sitting Judge to hear a motion for Summary Judgment will be heard at ex parte, and if granted, the parties will be asked to contact Judge Marshall for assignment.
6. Assuming a case is at issue, once a motion is filed, the civil department will assign a motion judge within 10 days. If the case is not at issue and a motion judge is needed the parties may seek appointment of a motions judge at ex parte.
7. Criminal set over requests must be presented at least 2-days prior to the Call setting. Set overs of cases set within 2-days will need to be addressed at Call.

Civil Scheduling Conferences

1. Scheduling Conferences are set with the Presiding Judge on Wednesday afternoons between 2:00-4:00 pm and are set in 10-minute increments.
2. Scheduling Conferences will address requests for Complex designation or contested set trial set over requests. Requests for contested Abatements may also be set for a Scheduling Conference so long as the parties can make their arguments in 10 minutes or less. If a longer period is needed, parties need to contact their Motions Judge to set a hearing.
3. To set a conference, parties must contact Presiding to get available dates and times. Parties must then confer with all sides on an agreeable date and time and return Presiding to schedule.
4. Complex Case Assignments need to be requested as soon as the case becomes at issue.
5. If a postponement of a trial is requested, parties must keep in mind, cases filed before 2020 will need to given trial dates as soon as possible. Civil cases filed in 2021 need to be given trial dates before the end of 2023. These are guidelines.

Civil Trial Dates

1. Beginning in September 2022, all civil cases at issue will receive a form and instructions from the court advising them to talk with opposing counsel and find a trial date within certain parameters.

2. The form must be filed out and submitted to the court within 35 days. If a date cannot be agreed upon, counsel is to contact Presiding court (MUL.Presiding@ojd.state.or.us or 971-274-0660) to request a scheduling conference.
3. If the trial date submitted is denied the case will be placed on a Trial Scheduling Docket. These dockets are held on Tuesday and Thursday at 2:00 PM.
4. If no action is taken, a 30 notice of dismissal will be sent.

Medical Malpractice Docket

1. The medical malpractice docket has been moved to Judge Angela Lucero, as a result of Judge Hodson's retirement. She will continue the same practices. Most matters may continue to be forwarded to Judge Lucero. However, if a case has been given a trial date and because of the length of the trial, a request has been made to Cheri Coe for a specially assigned trial judge at least 45 days before trial and she is in the process of assigning a judge, all requests for postponement must come to a Scheduling Conference.

Rules, Procedures and Guidelines Courtroom Litigators (Civil & Criminal) Live By

(most recent versions available on weblinks)

Oregon Rules of Professional Conduct ([ORPC](#)) Trial Conduct Rules 3.1, 3.3, 3.4, and 3.5

Uniform Trial Court Rules ([UTC](#)R) and Supplemental Local Rules ([SLR](#))

Practice tip: the Court's [form page](#) has many commonly used forms for a range of matters and proceedings

[OSB](#) and [MBA](#) Statements of Professionalism

MBA [Deposition Guidelines](#) and Judges [Motion Consensus Statement](#)