



Multnomah Bar | Young Lawyers
Association | Section

Pre-Trial Motions and Jury Instructions

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Trial Motions

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Trial Motions

- Motion practice at trial can make or break your case
- This presentation will help attorneys prepare and use motions in civil trials to achieve favorable outcomes for their clients
- This CLE will present on and share best practices for:
 - Evidentiary motions such as motions *in limine* and motions to exclude witnesses;
 - Moving for and defending against a motion for directed verdict; and
 - Limiting instructions, motions for a mistrial, and other special circumstances.

Evidentiary Motions

Motion to Limit Evidence (Motion *in Limine*)

- Motion is used to try to exclude evidence that the moving party anticipates the opponent will seek to offer at trial
 - Alerts the court to potential areas of dispute
 - Rulings help lawyers plan their voir dire, opening statements, and questions for witnesses
- Trial judge has discretion to rule immediately or during trial when and if the issue arises
- If granted, proponent of the excluded evidence should consider making an offer of proof
- Denial of the motion does not, on its own, provide grounds for reversal

Motion to Exclude Witnesses

- A party may move to exclude nonparty witnesses from the courtroom (OEC 615; ORS 40.385)
 - Should be made before the start of trial—but can be made after
 - Purpose is to prevent witnesses from being influenced, consciously or unconsciously, by the testimony of other witnesses
- Decision to exclude nonparty witnesses is generally within the trial court’s discretion
- The following persons may NOT be excluded:
 1. A party who is a natural person;
 2. An officer or employee of a party which is not a natural person designated as its representative by its attorney;
 3. A person whose presence is shown by a party to be essential to the presentation of the party’s cause; or
 4. Victims in a criminal case

OEC 104 Motion: Preliminary Questions

“Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege or the admissibility of evidence shall be determined by the court” (OEC 104(1); ORS 40.030(1))

- Hearings on OEC 104 motions:
 - Parties may present evidence on the OEC 104 issue to the judge
 - Outside of the presence of the jury
 - The trial court is not bound by the rules of evidence (except for the rules on privilege)
 - Judges use the preponderance standard and determine weight and credibility of evidence

Motion for Production of Documents

- Court can order parties or witnesses at trial to produce documents
- Motion is not necessarily subject to limitations on pretrial discovery
 - For example, the work-product doctrine “disappears” when an expert witness takes the stand
 - A court will often grant a party’s request for production of the opponent’s expert witness’ file at trial, given the typical inability to conduct expert discovery prior to trial

Motion to Strike

- Must state grounds for motion and identify the specific part of the testimony that is improper
- Motion must generally be made as soon as the objectionable testimony is given and the basis becomes apparent, or objection is waived
 - May file a motion to strike; but must do so as soon as the ground for such a motion is disclosed
- May at the same time request the court to instruct the jury not to consider the stricken evidence
- May move to strike improper closing argument
 - Consider doing so if the closing argument refers to facts that were not in the record or law that is inconsistent with the jury instructions

Motion for Directed Verdict

Motion for Directed Verdict (Jury Cases)

- A party may move for a directed verdict at the close of opponent’s evidence or at the close of all evidence
 - A party who moves at the close of the opponent’s evidence need not reserve the right to introduce evidence if the motion is denied (ORCP 60)
 - Court may dismiss a complaint without prejudice under ORCP 54 instead of directing a verdict if moved by defendant
- May be made against or for one or more of the claims or defenses; but must be specific
- Moving party is entitled to judgment on a claim or defense as a matter of law if evidence is insufficient to sustain the claim or defense
 - Motion will be denied if evidence exists to support any of the claims or the defenses moved against

Motion for Directed Verdict (Jury Cases) CONTINUED. . .

- Party must first move for a directed verdict to preserve the right to move for a judgment notwithstanding the verdict (ORCP 63 A)
 - Court may render a judgment n.o.v. only if a motion for a directed verdict was made “at the close of all the evidence” (ORCP 63 A)
- Party must move for a directed verdict during trial to preserve the right to raise on appeal the sufficiency of the evidence supporting the verdict

Motions Related to a Directed Verdict

- **Motion to Prevail on Certain Elements of a Claim or Defense**
 - Whether a party is entitled to prevail as a matter of law on one or more elements of a claim or defense should be raised by a request for a peremptory instruction, not by a motion for a partial directed verdict
- **Motion to Withdraw Issues**
 - A party may move to withdraw issues from the jury’s consideration
 - The party can reach the same result by moving for a partial directed verdict or by requesting an instruction directing the jury not to consider certain issues
- **Motion to Dismiss or Strike a Claim (discussed next)**

Motion to Dismiss or Strike a Claim, Motion for Mistrial, and Other Motions

Motion to Dismiss or Strike a Claim

- Certain grounds for dismissing a claim are waived if the defendant does not raise them pretrial
 - ORCP 21 G specifies four grounds that may be raised at trial:
 - (1) “failure to state ultimate facts constituting a claim”;
 - (2) failure to join an indispensable party;
 - (3) “failure to state a legal defense to a claim or insufficiency of new matter in a reply to avoid a defense”; and
 - (4) lack of subject-matter jurisdiction.
- A party can and should renew a pretrial motion to dismiss or to strike if the motion was previously denied by a different judge

Motion for Mistrial

- A party may move for a mistrial at any time during a trial when misconduct or an irregularity occurs
 - Failure to move at the first opportunity may result in a waiver of the right to a mistrial
 - Motion must be timely to preserve error
- The decision regarding whether or not to grant a motion for a mistrial normally lies within the trial court's discretion
 - But when misconduct involves intentionally injecting insurance into the case, the trial court must normally grant the motion for mistrial
 - For intentional acts other than injecting insurance into the case, the trial court's failure to grant a mistrial is not automatically reversible error

Other Motions

Motion for Jury View

- A party may move for a jury view of the premises, or the court may order a view on its own motion (ORS 10.100)

Motion for Jury Poll

- A party may request that the jury be polled after the verdict is given and before it is filed

Motion to Correct Verdict

- a party may move the trial court to instruct the jury to correct a verdict that is informal or insufficient (ORCP 59 G(4))

Motion for Judgment of Dismissal

- A trial court may grant a motion for judgment of dismissal with or without prejudice and the dismissal may be voluntary or involuntary (ORCP 54)

Motion to Reopen the Case-in-Chief

- A trial court may allow a party who has rested to reopen its case and present further evidence

Presenters

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