

UCJI 5.00

INTRODUCTION

(To be given to venire before jury is selected.)

Today we select a jury for the case of: *[insert case title]*. I am *[insert judge's name]*, and I will keep order, rule on questions of law, and instruct you on the law. This is *[insert judicial clerk's name]*, who will swear witnesses, help with exhibits, and make sure everything that's said is recorded. The clerk is your contact during this trial. The jury will decide the facts and apply the facts to the law I provide.

[Optional: This is a civil case, not a criminal case. You may have seen criminal cases on TV or in the movies and know that a prosecutor must prove the defendant guilty beyond a reasonable doubt. Civil cases are different. In a civil case, like this one, the party who has to prove something only has to prove that it is more likely true than not true. [Insert alternative standard if appropriate.]]

This case was filed by: *[insert name]*, who we call the plaintiff. The plaintiff's attorney is: *[insert attorney's name]*. This case was filed against: *[insert name]*, who we call the defendant. The defendant's attorney is: *[insert attorney's name]*.

[Optional for multi-party cases: This case was filed by: [insert name] who we call a plaintiff. The case was also filed by [insert name] who is also a plaintiff. [Insert name of plaintiff #1]'s attorney is [insert attorney's name]. [Insert name of plaintiff #2]'s attorney is [insert attorney's name]. This case was filed against [insert name] who we call a defendant, [insert name] who is also a defendant, and [insert name] who is also a defendant. [Insert name of defendant #1]'s attorney is [insert attorney's name]. [Insert name of defendant #2]'s attorney is [insert attorney's name]. [Insert name of defendant #3]'s attorney is [insert attorney's name].]

[Insert pleading summary or parties' neutral statement of the case.]

You must be able to judge this case fairly and objectively, or you should not serve on this particular jury. I will begin with three questions:

First, do any of you know the plaintiff[s], defendant[s], or any of the attorneys? If so, please raise your hand.

Second, the following people may be called as witnesses in this case. If any of these names are familiar to you, or if you know any of these people, please raise your hand. *[List witness names.]*

Third, based on what you know from the case summary given a few moments ago, do any of you feel that your personal views concerning this type of case, **or any biases you may have**, might affect your ability to be fair and impartial about this trial? If so, please raise your hand.

Soon, the attorneys will ask you questions. The purpose of their questions is not to argue the case or embarrass you, but to determine who will serve on this particular jury. Please respond to the attorneys' questions openly, honestly, sincerely, and completely. If you do not understand a question, please ask that it be repeated for you.

Since you are in an unfamiliar setting among strangers, it may be uncomfortable for you to be open, honest, and complete in your answers to the attorneys' questions. This process requires you to overcome your discomfort and do your best to be open, honest, and complete when you answer. It is extremely important, and the fairness of this trial depends on it. If you are asked a question that involves something you consider very sensitive or private, tell us so. We can arrange to receive your answer outside the presence of other jurors.

When the attorneys finish their questions you will be excused briefly, then we will bring you back and release those of you who will not be on the jury. If you are not selected for this jury, please

do not feel that your attendance was without value. The court needs a substantial group of available jurors so an impartial jury can be selected. All of you here today provide an important contribution to the process because your presence assures fairness.

COMMENT: Some judges prefer to have each attorney give a mini-opening statement (2–5 minutes) rather than summarizing the pleadings from the bench. Some judges prefer to take peremptory challenges in writing, on the record, with the jury venire present.

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UCJI 5.01

PRECAUTIONARY INSTRUCTIONS (To be given after the jury is selected.)

Members of the jury, these instructions contain part of the law that applies to this case. After you hear the evidence and [before] the arguments of the attorneys, I will give you further instructions regarding the legal rules you must follow in deciding this case.

You are here to decide the facts of this case from the evidence and to apply those facts to the law that I will give you. That is how you will reach your verdict. In doing so, you must follow the law whether you agree with it or not. Do not allow any sympathy, prejudice or bias—whether conscious or unconscious—to influence your decision making. You must not be biased in favor of or against any party, witness, or attorney because of the persons’ disability, gender, gender identity, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status[, or *insert any other impermissible form of bias against a group or status that is not a protected class, e.g., a person’s profession*].

[As part of your orientation, you were shown a video on unconscious bias.] *Unconscious bias* is a term used by social scientists to describe the reality that everyone[, including me,] has feelings, assumptions, perceptions, fears, and stereotypes, that is, “unconscious biases,” that we may not be aware of. These hidden thoughts can affect what we see and hear, how we remember what we see and hear, how we interact with others, and how we make important decisions. Our biases can affect how we act, favorably or unfavorably, toward someone. You should make every effort to be aware of your unconscious biases and what effect those may have on your decision making.

The evidence you are to consider in this case consists of witness testimony and exhibits received in evidence. Exhibits are physical things such as letters, photographs, charts, or other objects. You will be able to examine the exhibits received in evidence while you deliberate. You must decide how believable the evidence is and what weight or value you will give to that evidence. You may draw any reasonable inferences from the evidence, but you must not guess or speculate.

If an attorney objects to evidence, I will decide if it is proper under the law for you to consider such evidence. Do not speculate about why the attorney objected or why I ruled as I did. If I overrule an objection, the question may be answered, or the exhibit received. If I sustain an objection, the question cannot be answered or the exhibit cannot be received. Whenever I sustain an objection to a question, ignore the question and do not guess what the answer would have been. Sometimes I may order that evidence be stricken from the record and that you disregard or ignore the evidence. When you are deciding the case, you must not consider the evidence that I told you to disregard.

During this trial, you may be allowed to ask questions of witnesses. If you have any questions of witnesses, you will submit them in writing. The procedure for submitting questions is as follows. You must wait until the attorneys finish asking all their questions before it is your turn. If you still have an unanswered question when the attorneys are finished, you may write it down, fold the paper, and hold it up to get my attention, or raise your hand to let me know you need time to write out your question if you haven’t already done so.

Your questions are subject to the rules of evidence, just as the attorneys’ questions are. I will review your questions with the attorneys and will rule on whether the question may be asked. I will ask the question if I decide it is proper under the law. I may not ask the question or may modify the question. I may or may not advise you of the reason for my decision depending on the circumstances and applicable law. If the question is not asked, you should not draw any inferences about my ruling or speculate as to what the answer to the question might have been. Do not weigh answers to a juror question more heavily or lightly than any other answer simply because the answer was given in

response to a juror question. After any juror questions are asked, the attorneys are allowed to ask follow-up questions.

The attorneys' opening statements and closing arguments are not part of the evidence, but are intended to help you understand the evidence and apply the law. You must not interpret any statement, ruling, or remark I make during this trial as any indication that I have formed any opinion about the facts or outcome of this case. You, and you alone, are to decide the facts.

You must decide this case based only on the evidence received here in this courtroom. You are not allowed to do any independent research on any idea, location, or person connected to this case. The law forbids you from seeking information from any source outside this courtroom.

Until you retire to deliberate, you may not discuss this case with anyone, including each other, friends, or family members. When you deliberate, you may discuss the case with each other, but you may not discuss the case with anyone else until after you are discharged at the end of the case.

Although many of you use cell phones, the Internet, and other tools of technology, communicating with others about the case before it ends is strictly prohibited. You may not communicate by cell phone, smartphone, email, Blackberry, iPhone, text messaging, on Twitter, through any blog or Web site, Internet chat room, or by way of any other social networking Web sites, including Facebook, LinkedIn, and YouTube.

The court recognizes that these rules may require you to refrain from activities that may be very common and important in your daily lives. However, the law requires these restrictions to ensure the parties have a fair trial based on evidence that each party has had an opportunity to address. If one or more of you were to get additional information from an outside source, that information might be inaccurate or incomplete, or it may not apply to this case, and the parties would not have a chance to explain or contradict that information because they wouldn't know about it. That's why it is so important that you base your verdict only on information you receive in this courtroom.

Any juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire trial process to start over. As you can imagine, a mistrial is a tremendous expense and inconvenience to the parties, the court, and the taxpayers. If any juror is exposed to any outside information, or has any difficulty whatsoever in following these instructions, please notify the court immediately. If any juror becomes aware that one of your fellow jurors has done something that violates these instructions, you are obligated to report that to the court. If anyone tries to contact you about the case, either directly or indirectly, or sends you any information about the case, please report this promptly as well.

These restrictions remain in effect throughout this trial. Once the trial is over, you will be free to read or research anything you wish, and you will be free to talk to anyone, or write, or post, or tweet about the case if you choose to do so. The only limitation is that you must wait until after the verdict, when you have been discharged from your jury service.

Please understand why the law limits such communication. The attorneys and parties have selected you, and only you, as the people they want to make this very important decision for them. The attorneys did not choose anyone else in your family or social circle, or anyone in the virtual world of the Internet. They chose you. It is not fair to the parties to have people they never met, with backgrounds they do not know, influencing the decision in this case. That is why the law does not allow it.

At the end of the trial, you will have to make your decision based on what you recall of the evidence. You will not have a written transcript to consult, and it is so difficult to play back recorded

testimony that it is not typically done even when requested. I urge you to pay close attention to the testimony as it is given.

You may take notes, if you wish, during the trial. If you take notes, don't let your note-taking interfere with your ability to observe the witnesses and evaluate their testimony. Don't feel obligated to take notes just because we have notepads. Taking notes helps some people listen and remember, but for others it gets in the way and they remember better if they don't try to take notes. Do whatever works for you. Whenever you leave the courtroom, you may leave your notes on your chair in the jury box or take them to the jury room. Do not take them out of the courthouse. During deliberations each juror needs to make up his or her own mind about the facts. Don't rely on someone else's notes, especially if they conflict with your own memory.

We will now hear the opening statements, in which the attorneys will outline the evidence as they expect it to be. After the opening statements, the evidence will be presented. At the conclusion of the evidence, you will hear the attorneys' closing arguments and instructions about the law that applies to this case before you begin your deliberations.

COMMENT: ORCP 58 B(9) gives the court sole discretion to invite written questions from jurors to a witness or the court, but the parties must be provided an opportunity to object to such questions outside the presence of the jury.

The technological tools referenced in this instruction may be adjusted to delete obsolete technological tools and add newly popularized tools as public usage preferences evolve.

The instruction provides that testimony is not typically played back for the jury. This language emphasizes to the jury the importance of their paying attention to the testimony as they hear it. A trial court has discretion to play back testimony. *State v. Vaughn*, 200 Or 275, 278, 265 P2d 249 (1954). However, what testimony can be played back will usually be a source of contention between the parties.

COMMENT: The bracketed sentence about the unconscious-bias video should be deleted if the court chooses not to show the video.

COMMENT: The court can omit the bracketed reference to "including me".

FUNCTIONS OF THE COURT AND JURY

It is solely your responsibility to make all the decisions about the facts in this case. You must evaluate the evidence to determine how reliable or how believable that evidence is. When you make your decision about the facts, you must then apply the legal rules to those facts and reach your verdict.

Remember, however, that your power to reach a verdict is not arbitrary. When the court tells you what the law is on a particular subject or tells you how to evaluate certain evidence, you must follow these instructions.

Do not allow anything that the court has said or done, or the fact that the court gives any particular instruction, to suggest that the court has formed any opinion about this case. When the court has sustained objections to evidence, or ordered that evidence be stricken or excluded from your consideration, you must follow the court's rulings. Do not consider such matters during your deliberations. Base your verdict on the evidence and these instructions. The attorneys' statements and arguments are not evidence. If your recollection of the evidence is different from the attorney's recollection, you must rely on your own memory.

In deciding this case, you are to consider all the evidence that you find worthy of belief. It is your duty to weigh the evidence calmly and dispassionately and to decide this case on its merits. Do not decide this case on guesswork, conjecture, or speculation.

You should make every effort to be aware of your biases, including unconscious biases, and what effect those may have on your decision making. In your deliberations, you must not be biased in favor of or against any party, witness, or attorney because of the person's disability, gender, gender identity, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status[, or *insert any other impermissible form of bias against a group or status that is not a protected class, e.g., a person's profession*]. We all have feelings, assumptions, perceptions, fears, and stereotypes about others. Some biases we are aware of, and others we may not be fully aware of. These hidden thoughts can affect what we see and hear, how we remember what we see and hear, how we interact with others, and how we make important decisions.

All parties are equal before the law, so do not allow any personal feelings, sympathy, prejudice, or bias – whether conscious or unconscious – to influence your decision making.

Generally, the testimony of any witness whom you believe is sufficient to prove any fact in dispute. You are not simply to count the witnesses, but you are to weigh the evidence.

Keep in mind that each party is entitled to the considered decision of each juror. Therefore, you should not give undue weight to another juror's notes if those notes conflict with your recollection of the evidence.

COMMENT: *See* ORS 10.095.

Under ORS 41.270, proof of usage requires two witnesses and therefore the next-to-last paragraph may not be applicable.

INTRODUCTION

[To be given before the jurors are questioned]

Before we begin, please make sure that all cell phones, laptops, and other electronic devices are turned off. They must remain off while court is in session.

Ladies and gentlemen, today we are selecting a trial jury for the criminal case of State of Oregon v. _____. The state is represented by _____, and the defendant is represented by _____.

A. The defendant is charged with the offense of _____, alleged as follows: [read the charge].

B. The offense is alleged to have involved the following additional facts: [read the offense-related enhancement allegations].

C. The defendant has previously been convicted of the offense of _____, by [read the charge]. In this proceeding, you will be asked to decide the following additional facts: [read the enhancement allegations].

D. To this offense, the defendant has entered a plea of not guilty. A plea of not guilty denies that the defendant is guilty of the offense. Under our system of justice, the defendant is innocent of any crime or wrongdoing unless and until the state proves the defendant's guilt beyond a reasonable doubt. Therefore, the burden is on the state to prove the defendant's guilt beyond a reasonable doubt.

E. The state has the burden of proof on these facts. Under our system of justice, these facts are deemed not to exist unless and until the state proves them beyond a reasonable doubt.

Some of you may have served as jurors in civil cases where lesser standards of proof apply—for example, proof by a preponderance of the evidence or proof by clear and convincing evidence. In criminal cases, however, the state's proof must be more convincing. It must be beyond a reasonable doubt.

Reasonable doubt is doubt based on common sense and reason. Reasonable doubt means an honest uncertainty as to the guilt of the defendant. As a juror, you must return a verdict of not guilty if, after careful and impartial consideration of all the evidence in the case, you are not convinced A/B that the defendant is guilty.

Each juror must be able to judge this case fairly and objectively. Therefore, if any juror knows of or has any association with any of the parties, lawyers, or witnesses, or if any juror has any knowledge of or has formed any opinion about this case, this should be brought to the court's attention.

Do any of you know the defendant or any of the lawyers? If so, please raise your hand.

The following persons may be called as witnesses in this case: [either the court or the lawyers read the names of the witnesses]. If any of you know any of these persons, please raise your hand.

As jurors you are being asked to make very important decisions in this case. You must not allow any personal feelings, sympathy, prejudice, or bias—whether conscious or unconscious—to influence your decision making. You must not be biased in favor of or against any party, witness, or lawyer because of the person's disability, gender, gender identity, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status[, or insert any other impermissible form of bias against a group or status that is not a protected class, e.g., a person's profession].

[As part of your orientation, you were shown a video on unconscious bias.] *Unconscious bias* is a term used by social scientists to describe the reality that everyone[, including me,] has feelings, assumptions, perceptions, fears, and stereotypes, that is, “unconscious biases,” that we may not be aware of. These hidden thoughts can affect what we see and hear, how we remember what we see and hear, how we interact with others, and how we make important decisions. Our biases can affect how we act, favorably or unfavorably, toward someone. You should make every effort to be aware of your unconscious biases and what effect those may have on your decision making.

Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by bias for or against any party or witness.

Do any of you feel that your personal views concerning this type of case or the parties involved might affect your ability to be fair and impartial in this case? If so, please raise your hand.

The lawyers will now ask each of you questions. The purpose of these questions is not to argue the case or to embarrass you, but rather to determine your qualifications to serve in this specific trial. Please respond to the lawyers’ questions honestly and sincerely. If you do not understand a question, please ask the lawyer to restate it for you.

[The following “juror privacy” instruction is discretionary.] Some of the questions may address matters that you consider sensitive or private. You may provide answers to such questions outside the presence of other jurors. If you do wish to answer any question that way, please raise your hand and let us know you have an answer but would prefer to address it outside the presence of other jurors.

Each side is also allowed to excuse a certain number of jurors. If you are excused, you should not feel that your attendance has been without value. The court needs a substantial group of available trial jurors so an impartial jury can be selected. All of you here today provide an important contribution to the process. Your presence assures fairness.

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- A beyond a reasonable doubt
B to a moral certainty¹

COMMENT: Or Const, Art I, §§ 11, 16; ORS 10.095(6); ORS 136.001(1); ORS 136.320; ORS 136.330(1); ORS 136.415; ORS 136.430; OEC 311; ORCP 58 B–C; ORCP 59 B–C, E.

This instruction is to be given before the jury is selected. The Committee suggests that the terms indictment and information not be used. The jury does not need to know whether the case was heard by the grand jury. The jury no longer receives a copy of the indictment.

Whether to read paragraphs A through E depends on whether the trial is for determination of guilt only, for determination of enhancement facts only, or both. If the trial involves a determination of enhancement facts, which paragraphs to read also depends on whether the enhancement facts are offense-specific, offender-specific, or both.

If the trial is for determination of guilt only, or if it is a bifurcated trial for determination of guilt and offender-specific enhancement facts, read paragraphs A and D.

If the trial is for determination of enhancement facts only, read paragraphs C and E.

If the trial is for determination of both guilt and enhancement facts including offense-specific enhancement facts, read paragraphs A, B, and D.

The instruction does not provide for discussing the possible existence of offender-specific enhancement facts before guilt is established, in light of the possible prejudice to the defendant of

such a discussion. See ORS 136.773 (providing for determination of offender-specific enhancement facts after guilt and offense-specific enhancement facts have been decided).

The 1995 version of this instruction added language concerning civil burdens of proof. This language was adopted from similar language in the instruction of the Federal Judicial Center, Pattern Criminal Jury Instructions 17–18 (1987) (instruction 21); also cited in *Victor v. Nebraska*, 511 US 1, 27, 114 S Ct 1239, 127 L Ed 2d 583 (1994) (opinion of Ginsburg, J., concurring). The 1995 version also included the 1995 changes to former UCrJI 1007 (1995) (Beyond a Reasonable Doubt).

Regarding the “juror privacy” instruction, see ABA Criminal Justice Section Standards, Part I, Standard 15-2.4(e) (1996): “Jurors should be examined outside the presence of other jurors on sensitive matters or prior exposure to potentially prejudicial material.” *See also* ABA Principles for Juries and Jury Trials, Principle 7(A) (2005):

5. Courts should consider juror privacy concerns when choosing the method of voir dire (open questioning in court, private questioning at the bench, or a jury questionnaire) to be used to inquire about sensitive matters.

6. Courts should inform jurors that they may provide answers to sensitive questions privately to the court, and to the parties.

7. Jurors should be examined outside the presence of other jurors with respect to questions of prior exposure to potentially prejudicial material.

Although jurors may be examined outside the presence of other jurors, all criminal trials are open to the public. ORS 1.040.

The admonition regarding electronic devices being turned off is placed here as a reminder only.

¹ As in UCrJI 1009 (Innocence of Defendant—Proof Beyond a Reasonable Doubt), the “moral certainty” language is optional. The court should not use the “moral certainty” language unless it intends to use that language in its instruction on reasonable doubt at the close of the case.

PRECAUTIONARY INSTRUCTIONS

[To be given after the jury is selected]

Members of the jury, I will now explain some of the rules that apply during a trial.

There are eight stages to most trials, and I will briefly explain each stage:

- (1) Jury selection. We just completed that part.
- (2) Explanation of the general rules. That is what I am doing now.
- (3) Opening statements. This is when the attorneys summarize what they expect the evidence to be.
- (4) Presentation of the evidence. This is when witnesses and exhibits are presented.
- (5) *Closing arguments. This is when the attorneys have the opportunity to persuade you how to decide the case.
- (6) Jury instructions. This is when the judge explains the law that applies to the particular charges in the case. This includes explaining what the state must prove beyond a reasonable doubt for a guilty verdict. You will receive a printed copy of the instructions.
- (7) Deliberations. This is when you go back into the jury room and decide whether the defendant is guilty or not guilty [of any particular charge].
- (8) Return of verdict. This is when you tell us your verdict[s].

I will explain in a moment what is and what is not evidence. It is extremely important that you consider only the evidence in deciding the facts.

Do not allow any personal feelings, sympathy, prejudice, or bias—whether conscious or unconscious—to influence your decision making. You must not be biased in favor of or against any party, witness, or lawyer because of the person’s disability, gender, gender identity, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status[, or *insert any other impermissible form of bias against a group or status that is not a protected class, e.g., a person’s profession*].

[As part of your orientation, you were shown a video on unconscious bias.] *Unconscious bias* is a term used by social scientists to describe the reality that everyone[, including me,] has feelings, assumptions, perceptions, fears, and stereotypes, that is, “unconscious biases,” that we may not be aware of. These hidden thoughts can affect what we see and hear, how we remember what we see and hear, how we interact with others, and how we make important decisions. Our biases can affect how we act, favorably or unfavorably, toward someone. You should make every effort to be aware of your unconscious biases and what effect those may have on your decision making.

As a judge, I am a gatekeeper regarding evidence. I determine what the law allows to be evidence. In effect, the law considers anything that is not evidence to be unreliable; that is why you may not consider nonevidence in deciding the facts. However, the law does not conclude that anything that is evidence is necessarily reliable. Determining the reliability or believability of evidence is ultimately your responsibility. You must decide what evidence is believable and how believable or persuasive any particular piece of evidence is. So, while you are not allowed to consider anything that is not evidence in deciding the facts, you are free to decide how believable or unbelievable, important or unimportant, any particular piece of evidence is in deciding the facts.

Evidence consists of testimony of witnesses and exhibits that are admitted into evidence. Testimony is what a witness, who has sworn or affirmed to answer questions truthfully, says while being examined as a witness. Exhibits are physical objects, such as photographs, charts, and letters.

You will be able to examine admitted exhibits during your deliberations. You may draw reasonable inferences from the evidence, but do not guess or speculate.

In understanding what is evidence, it is helpful to have some examples of what is not evidence.

The fact that a criminal charge has been filed against the defendant is not evidence. Any defendant is innocent of any crime unless and until the state proves the defendant's guilt beyond a reasonable doubt.

Questions from lawyers—and other nonwitnesses, for that matter—are not evidence. So, whenever I sustain an objection to a question, do not speculate about why the question was asked or what the answer would have been.

This is a subtle but important point. In our everyday lives, if a friend asks us if we have seen our mutual friend's new car [*the court should feel free to choose its own example*], we infer from the question that the mutual friend has a new car. However, it is not the same in a trial. The person asking the question is not a witness and is not subject to the safeguards that the law requires before you may consider the person's words as evidence. So, in court, you are not allowed to consider questions asked by attorneys or nonwitnesses in determining what the facts are. Those questions are not evidence.

Of course, when a witness answers a question, you may consider the answer in the context of the question. For example, if a lawyer asks, "Was the traffic light red or green?" and the witness answers, "Green," you may take the answer as stating that the traffic light was green. However, if the witness answers, "There was no traffic light," you may not take the question as evidence that there was a traffic light.

From time to time, a lawyer may object to something that is offered into evidence. I will decide whether the objected-to material will be admitted into evidence. If I overrule the objection, the material—for example, an exhibit or a witness's answer to a question—becomes evidence. If I sustain the objection, the exhibit is not admitted and is not evidence, or the witness is not allowed to answer the question. If the witness starts to answer a question before I sustain an objection to the question, you must disregard the witness's response because the response is not evidence.

Occasionally, I may decide that something that had been admitted into evidence should not have been. If that happens, I will instruct you to disregard the exhibit or testimony that should not have been admitted. This means that the material is no longer evidence. You must not consider it in any way. You must treat it as if the question had not been answered or the exhibit had not been received in the first place.

You must not interpret any statement, ruling, or remark I make during this trial as any indication that I have formed any opinion about the facts or outcome of this case. You, and you alone, are to decide the facts. You must decide how believable the evidence is and what weight or value you will give that evidence.

[During this trial, you may be allowed to ask questions of witnesses. If you have any questions of the witnesses, you will submit them in writing. The procedure for submitting questions is as follows: A/B (*Procedures are to be established by the judge; sample procedures are set forth below.*)

Your questions are subject to the rules of evidence, just as the lawyers' questions are. I will review the question with the lawyers and will rule on whether the question may be asked. I will be the person to ask the question of the witness if I decide it is proper. We do not expect jurors to know the fine points of asking questions pursuant to the rules of evidence. Accordingly, I may sometimes modify a question so that it conforms to the rules of evidence. If the question is not asked, jurors should not draw any inferences about my ruling or speculate as to what the answer to the question

might have been. Do not weigh answers to a juror question any differently than any other answer simply because the answer was given in response to a juror question. After any juror questions, the lawyers are allowed to ask follow-up questions.]

You may take notes, if you wish, during the trial. However, please keep in mind that each party is entitled to the considered decision of each juror. Therefore, during deliberation, you should not give undue weight to another juror's notes if those notes conflict with your notes or your recollection of the evidence. Do not allow your note-taking to interfere with your ability to observe and evaluate testimony. Your notes may be in only two places: the courtroom and the jury room. You may not take the notes with you on lunch or overnight breaks, for example. My staff will make sure that your notes are safe and that no one has access to them in your absence.

Do not discuss this case during the trial with anyone, including any of the lawyers, parties, witnesses, your friends, or members of your family. This includes not communicating with anyone by any other means, such as telephone, text messages, email, Internet chat, blogs, or social networking websites. Do not discuss this case with other jurors or look at other jurors' notes until you begin your deliberations at the end of the case, after you have heard all the evidence and the arguments of the lawyers and been instructed on the law that applies to the case. Each of you must keep an open mind throughout the trial and must not attempt to decide the case until you begin your deliberations.

Do not make any independent personal investigations into any facts or locations connected with this case. Do not look up any information from any source. Do not communicate any private or special knowledge about any of the facts of this particular case to your fellow jurors. Decide the case only on the evidence received here in court. Do not read any news stories, listen to any radio or television reports, or read or listen to anything on the Internet about this case or about anyone involved in this case.

In addition to conventional research, you also must not use any Internet search engine—such as Google—to look for any information about the case, the law that applies to the case, or the people involved in the case, including the defendant, the witnesses, the lawyers, or the judge. Do not use any map program or mapping system to attempt to view or locate any of the locations that may be discussed in this case.

In short, do not communicate with anyone by any means concerning what you see or hear in the courtroom, and do not try to find out more about this case, by any means, other than what you learn in the courtroom. Decide the case only on what happens here in open court, where both the state and the defense are aware of and have the opportunity to question the sources of the evidence and to address any legal issues that may arise. That is the only fair way to decide a case.

If you base your verdict on anything other than what you learn in this courtroom, that could be grounds for a mistrial—which means that all of the work that you, your fellow jurors, the parties, the lawyers, and the judge have done will have to be done all over again. That is why this is so important. [If you disobey any of my orders, you could be held in contempt of court.]

Ignore any attempted improper communication. If any person tries to communicate with you about this case, tell that person that you cannot discuss the case because you are a juror. If that person persists, simply walk away and report the incident to the court. You may not talk to anyone about this case—even the people closest to you—except to say that you are a juror on a criminal case and Judge _____ says you cannot talk about it.

After you have rendered your verdict, or have been otherwise discharged by me, you will be free to do any research you choose, or to share your experiences with anyone you choose either directly or through your favorite electronic means.

Remember that all phones, laptops, and other electronic devices must be turned off while you are in court and while you are in deliberations. [The bailiff will take all such devices from you during deliberations. We do this, in part, to prevent anyone from questioning whether jurors are engaging in improper communications during deliberations.]

We will now hear the opening statements in which the lawyers will outline the evidence as they expect it to be. After the opening statements, the evidence will be presented. *At the conclusion of the evidence, the lawyers will make their closing arguments to you. I will then instruct you about the law that applies to this case, and you will begin your deliberations.

At the end of the trial, you will have to make your decision based on what you recall of the evidence. You will not have a written transcript to consult[, and it is difficult to play back recorded testimony, so that is not typically done]. I urge you to pay close attention to the testimony as it is given. If at any time, you cannot hear a question or answer, let me know immediately by raising your hand. In performing your role, you must, of course, be fair and impartial. You must follow the law whether you agree with it completely or not, and you must not allow yourself to be influenced at all by personal feelings, sympathy for, or prejudice against anyone involved in this case.

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- A Please wait until the end of the witness testimony, because the question may be answered by the time the lawyers are through. You may write your question down, fold it, and hold the paper up to get my attention, or you may raise your hand and we will wait for you to write out your question if you have not already done so. The clerk will get the question from you.
- B When the lawyers are finished questioning the witness, you will retire to the jury room where you may write down your question or questions. Do not sign your name to the question. The clerk will retrieve the question, and we will review it before you are brought back to the courtroom.
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COMMENT: ORCP 58 B; ORS 136.330(1). This instruction should be given after the jury is impaneled and before opening statements. This is a preliminary instruction and is not intended to replace any instructions that would ordinarily be given after argument.

The decision to allow juror questions is at the discretion of the court. See §1.19 of the Users' Guide for discussion on the use of juror questions. If the court does allow questions, the court must afford the parties an opportunity to object to the questions outside the presence of the jury. ORCP 58 B(9).

The paragraphs concerning electronic communication and research were added following several incidents across the country in which jurors were blogging or doing Internet research during trials and deliberations.

The Committee removed the phrase “and it will not be possible for the court reporter to read back testimony” from the final paragraph of the instruction because it implied an incorrect statement of the law. Although most courts no longer use reporters, it is within the trial court’s discretion to refresh the jury’s recollection regarding testimony. Physical or electronic limitations of individual courtrooms may affect that ability, but there is no legal prohibition. *State v. Vaughn*, 200 Or 275, 278, 265 P2d 249 (1954) (“The better rule, however, seems to be that whether in a particular case certain portions of the testimony should be read to a jury rests in the discretion of the trial court, and this state conforms to this rule.”) (citation omitted); *State v. Jennings*, 131 Or 455, 475, 282 P 560 (1929); *State v. Miller*, 2 Or App 353, 355, 467 P2d 683 (1970) (“While such requests should not

be encouraged, when a jury requests that testimony be repeated the decision on that request lies within the discretion of the trial court.”).

The bracketed paragraph addressing mistrials and contempt may not be needed in most trials. In certain circumstances, though, such an instruction may be warranted.

*Judges who give jury instructions before closing arguments should modify this instruction accordingly.

FUNCTIONS OF THE COURT AND JURY

[To be given after closing arguments]

It is your sole responsibility to make all the decisions about the facts in this case. You must evaluate the evidence to determine how reliable or how believable that evidence is. When you make your decision about the facts, you must then apply the legal rules to those facts and reach your verdict.

Remember, however, that your power to reach a verdict is not arbitrary. When I tell you what the law is on a particular subject or tell you how to evaluate certain evidence, you must follow these instructions.

Do not allow anything I have said or done during the course of this trial to suggest that I have formed any opinion about this case.

Keep in mind that a judge is required by law to give certain instructions in every criminal case.

When I have sustained objections to evidence, or ordered that evidence be stricken or excluded from your consideration, you must follow these rulings. Do not consider such matters during your deliberations. Base your verdict on the evidence and these instructions. The lawyers' statements and arguments are not evidence. If your recollection of the evidence is different from the lawyers' recollection, you must rely on your own memory.

In deciding this case, you are to consider all the evidence you find worthy of belief. It is your duty to weigh the evidence calmly and dispassionately and to decide this case on its merits. Do not decide this case on guesswork, conjecture, or speculation.

You should make every effort to be aware of your biases, including unconscious biases, and what effect those may have on your decision making. In your deliberations, you must not be biased in favor of or against any party, witness, or lawyer because of the person's disability, gender, gender identity, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status[, or *insert any other impermissible form of bias against a group or status that is not a protected class, e.g., a person's profession*]. We all have feelings, assumptions, perceptions, fears, and stereotypes about others. Some biases we are aware of, and others we may not be fully aware of. These hidden thoughts can affect what we see and hear, how we remember what we see and hear, how we interact with others, and how we make important decisions.

Do not allow any personal feelings, sympathy, prejudice, or bias—whether conscious or unconscious—to influence your decision making.

Do not consider what sentence the court might impose if you find the defendant guilty.

Generally, the testimony of any witness whom you believe is sufficient to prove any fact in dispute. You are not simply to count the witnesses, but you are to weigh the evidence.

[During the course of this trial, the court allowed jurors to prepare questions to be asked of certain witnesses. Some of those questions were not asked or were changed. Do not speculate on the court's reasons for changing questions or not asking questions or speculate as to what the answer might have been to the original question.]

Keep in mind that each party is entitled to the considered decision of each juror. Therefore, you should not give undue weight to another juror's notes or memory if they conflict with your recollection of the evidence.

The court has provided written instructions for your use. When you use these instructions, do not place undue emphasis on any particular instruction, but rather view the instructions as a whole.

COMMENT: ORS 10.095(2); ORS 136.310; 136.320; ORS 136.330(1); ORCP 59 B.
This instruction is to be given at the conclusion of arguments.

The sentence “Do not consider what sentence the court might impose if you find the defendant guilty” should not be given when the defense of insanity is raised. *See* UCrJI 1121.

With regard to the eighth paragraph, the “number of witnesses” instruction derived from ORS 10.095(2) is included in this instruction because the “number of witnesses” instruction is usually given in every case. The Committee changed the words in the original version of that instruction from “not simply to count the witnesses on each side” to read “not simply to count the witnesses.” The words *on each side* would not be appropriate in a case in which the defendant has not called any witnesses. If the defendant in an appropriate case wishes a more specific instruction under ORS 10.095(2), it should be submitted as a requested special instruction.

Under ORS 41.270, proof of usage requires two witnesses and therefore the eighth paragraph may not apply.

The court must provide written instructions for the jury’s use. ORCP 59 B; ORS 136.330(1). See Users’ Guide §1.18 regarding providing instructions to the jury.