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If you are charged with a crime, how much of your past can the government use to try to convict you? An excellent question, and not always easy to answer. The following document can be used in a pre trial hearing to keep evidence of your past from being used.

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6 IN THE CIRCUIT COURT OF THE STATE OF OREGON
7
8 FOR THE COUNTY OF LANE

9 STATE OF OREGON,)

10)
11 Plaintiff,)

Case No. [REDACTED]

12 v.)

13) MOTION *IN LIMINE* TO EXCLUDE ANY
14) AND ALL OTHER ACTS EVIDENCE
15) AND MEMORANDUM OF LAW IN
16) SUPPORT OF THIS MOTION

17 [REDACTED])
18 Defendant.)

(HEARING REQUESTED)

19 Pursuant to OEC 104(1), 401, 402, 403, and 404, the defendant hereby moves to exclude
20 any and all “other acts evidence” that the state intends to offer at trial. Pursuant to OEC 104(1)
21 and UTCR 4.050, defendant requests a preliminary hearing where the state must prove to this
22 court, by a preponderance of evidence, that any other acts evidence it intends to offer actually
23 occurred and that the defendant is the person who committed the other acts. Rugmer v. Rhea,
24 153 Or App 400, 408-09 (1998). The phrase “other acts evidence” refers to evidence offered
25 under either OEC 404(4) to “prove a defendant’s propensity to commit charged crimes” and
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1 evidence offered under OEC 404(3) for a “non-propensity purpose.” State v. Baughman, 361 Or
2 386, 388 (2017). The state, as the proponent of any such evidence, is in the best position to
3 estimate how much time it will need to satisfy its burden of proof at the preliminary hearing.

4 Defendant objects to any other acts evidence offered by the state on the basis that any
5 offered evidence: (1) is not relevant to any fact in dispute (OEC 401) and therefore is
6 inadmissible under OEC 402; and (2) is not admissible for a non-propensity purpose under OEC
7 404(3). Further, even if this court concludes that the proffered evidence is relevant and that it is
8 admissible for some non-propensity purpose under OEC 404(3) or if it is admissible for a
9 propensity purpose under OEC 404(4) - then the defendant objects to the admission of the
10 proffered evidence on the basis that it should be excluded because “its probative value is
11 substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading
12 the jury, or by considerations of undue delay or needless presentation of cumulative evidence.”
13 OEC 403; Baughman at 388 (When “a defendant objects to the admission of ‘other acts
14 evidence, the trial court must conduct balancing under OEC 403, according to its terms, to
15 determine whether the probative value of the challenged evidence is substantially outweighed by
16 the danger of unfair prejudice.”).

17 Pursuant to OEC 401, relevant evidence “means evidence having any tendency to make the
18 existence of any fact that is of consequence to the determination of the action more probable or
19 less probable than it would be without the evidence.” Relevant evidence “is admissible, except as
20 otherwise provided by the Oregon Evidence Code, by the Constitution of the United States and
21 Oregon, or by Oregon statutory and decisional law. Evidence which is not relevant is not
22 admissible.” OEC 402.
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1 OEC 403 and 404(3) are limitations on the admissibility of relevant evidence. *State v.*
2 *Tena*, 362 Or 514, 519 (2018). OEC 403 provides,

3 “Although relevant, evidence may be excluded if its probative value is
4 substantially outweighed by the danger of unfair prejudice, confusion of the issues, or
5 misleading the jury, or by considerations of undue delay or needless presentation of
cumulative evidence.”

6 OEC 404(3) provides,

7 “Evidence of other crimes, wrongs or acts is not admissible to prove the
8 character of a person in order to show that the person acted in conformity therewith. It
9 may, however, be admissible for other purposes, such as proof of motive, opportunity,
intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

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11 As the *Tena* court recently observed,

12 OEC 404(4), however, provides that, in criminal actions, ‘evidence of other
13 crimes, wrongs or acts by the defendant is admissible if relevant, ‘except as otherwise
14 provided by specific statutory provisions to the contrary and by the state and federal
15 constitutions. Under that rule, other-acts evidence is generally admissible, regardless of
16 the purpose for which it is offered, though it may still be inadmissible under, among other
17 things, the state or federal constitutions. On its face, the rule appears to conflict with
OEC 404(3), at least in part; specifically, it appears to conflict with the part of
OEC 404(3) that states that other acts evidence is not admissible to prove fa defendant’s
character in a criminal action.”

18 *Tena* at 519. The court continued by explaining that in *State v. Williams*, 357 Or 1 (2015), it
19 concluded that:

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21 “OEC 404(4) has the effect of superceding that part of OEC 404(3) that
22 declares inadmissible other-acts evidence offered to prove character; under OEC 404(4),
23 other-acts evidence - even to prove the character of a criminal defendant - is admissible,
24 at least unless otherwise provided by, among other things, the state or federal
25 constitutions. The [*Williams*] court noted that OEC 404(4) did not have the effect of
superceding the part of OEC 404(3) stating that ‘other acts’ evidence is admissible when
offered for a non-character purpose.”

26 *Tena* at 362 (citing *Williams*, 357 Or at 15). The *Williams* court further concluded that such
27 evidence may be inadmissible because its admission would be so unfair that it would violate the

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2 state or federal constitutions. Williams at 18. The *Williams* court concluded that, under the Due
3 Process Clause of the Fourteenth Amendment to the United States Constitution, such evidence
4 may be inadmissible because its probative value is substantially outweighed by its prejudicial
5 effect.
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7 In Baughman, 361 Or at 402, the court concluded that the legislature, by referring in OEC
8 404(4) to whether the state or federal constitution requires the exclusion of otherwise admissible
9 other acts evidence offered to prove a criminal defendant's character, intended the balancing
10 described in OEC 403 to apply. The Baughman court explained that, as a result, the admissibility
11 of evidence of other acts is determined by means of a two-part test:
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13 “When a party objects to the admission of other acts evidence, a trial court
14 first should determine whether the proffered evidence is relevant for one or more
15 nonpropensity purposes, under OEC 404(3). If it is, then the court should determine, at
16 step two, whether the probative value of that evidence is substantially outweighed by the
17 danger of unfair prejudice under OEC 403. If the trial court determines that the evidence
18 is relevant for a nonpropensity purpose under 404(3) and admissible under OEC 403,
19 then it need not determine whether the evidence is also admissible under OEC 404(4)
20 and OEC 403. However, if the trial court determines that the proffered evidence is not
21 relevant for a nonpropensity purpose, then it must determine whether that evidence
22 nevertheless is otherwise relevant under OEC 404(4) and, at step two, whether the
23 probative value of the evidence is substantially outweighed by the danger of unfair
24 prejudice, under OEC 403.”

21 Id. at 404-405.

22 Importantly, the Baughman court explained why a trial court's decision with regard to the
23 first step in its analysis is critical to the balancing test that it must employ under step two:
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26 “A trial court's decision, at step one, about whether other acts evidence is
27 relevant for a nonpropensity purpose, will have a significant effect on whether the trial
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1 court admits that evidence at step two. At one end of the spectrum, other acts evidence
2 that is relevant for a nonpropensity purpose under OEC 404(3) generally will be
3 admissible under OEC 403 as long as the particular facts of the case do not demonstrate a
4 risk of unfair prejudice that substantially outweighs the probative value of the evidence.
5 *Williams*, 357 Or at 19. At the other end of the spectrum, when evidence is relevant only
6 to prove a defendant’s character, more significant due process concerns are implicated,
and, generally, the danger of unfair prejudice will substantially outweigh the probative
value of the evidence. *Id.* at 20.”

7 Baughman at 405.

8 In sum, the state, as the proponent of the “other acts” evidence, has the burden to prove
9 that the evidence is relevant and, therefore, admissible. As part of its burden, the state must
10 identify why the evidence is relevant to any fact in dispute, whether it is seeking admission under
11 OEC 404(3) or 404(4) and if it is seeking admission under OEC 404(3), the non-propensity
12 theory of admissibility. It is only after the state has met its burden as the proponent of the other
13 acts evidence that this court can conduct the balancing required in Baughman.

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15 Further, OEC 104(1) requires that the state prove to this court at a preliminary hearing,
16 by a preponderance of the evidence, that any other acts evidence it intends to offer actually
17 occurred and that the defendant was the person who committed the acts. Rugemer, at 408-09.

18 In *Rugemer* the court explained,

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21 “There are important reasons for requiring the proponent of other act evidence to
22 meet the higher OEC 104(1) standard of preponderance of the evidence before it is sent
23 to the jury. In the criminal context, the Supreme Court, in *State v. Pinnell*, 311 Or 98,
24 106, 806 P2d 110 (1991), warned of the dangers of other bad acts evidence, including
25 ‘the risk that the jury will convict for crimes other than those charged, or because the
26 accused deserves punishment for his past misdeeds,’ and that ‘the jury will give more
weight to the evidence than it deserves in assessing guilt of the crime charged,’ In a
footnote, the court added:

