

MICHAEL J. BUSEMAN
ATTORNEY AT LAW

132 E. BROADWAY
SUITE 501
EUGENE, OR 97401
(541) 344-0004
FAX (541) 344- 8443

July 3, 2019

If you are charged with a sex offense, can you call witnesses on your behalf to show that you are a sexually appropriate person? Yes! The following document explains how, and what the limitations in court are for this kind of evidence.

1 Michael J. Buseman
2 801 East Park
3 Eugene, OR 97401
4 (541) 344-0001

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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,)

12 v.)

13)
14)
15 Defendant.)

MEMORANDUM OF LAW IN SUPPORT
OF MOTION IN LIMINE TO ALLOW
EVIDENCE OF DEFENDANT'S SEXUAL
PROPRIETY

(HEARING REQUESTED)

16
17 I. Character Evidence of Sexual Propriety

18 Evidence of the defendant's sexual propriety is properly admissible in this case pursuant
19 to OEC 404(2)(a). OEC 404, which governs the admissibility of character evidence offered by a
20 criminally accused, states, in relevant part:
21

22 “(1) Evidence of a person's character or trait of character is admissible when it is
23 an essential element of a charge, claim or defense.

24 “(2) Evidence of a person's character is not admissible for the purpose of proving
25 that the person acted in conformity therewith on a particular occasion, except:
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1 “(a) Evidence of a pertinent trait of character offered by an accused, or by the
2 prosecution to rebut the same[.]”

3 The form of the evidence offered under OEC 404(2)(a) is governed by 405(1):

4 “In all cases in which evidence of character or a trait of character of a person is
5 admissible, proof may be made by testimony as to reputation or by testimony in
6 the form of an opinion. On cross-examination, inquiry is allowable into relevant
7 specific instances of conduct.”

8 Evidence of a person’s character with respect to sexual propriety evinces that person’s
9 propensity to act in a sexually proper manner. State v. Enakiev, 175 Or App 589 (2001)
10 (reversing trial court for excluding properly offered evidence under OEC 405 of sexual
11 propriety). *See also* State v. Basua, 280 Or App 339 (2016) (in a case involving a sexual crime,
12 opinion evidence regarding a defendant’s character for sexual propriety is admissible under
13 OEC 404(2)(a)).

14 II. Cross Examination

15 During cross examination of a character witness it is improper to bring up prior instances
16 of conduct of the defendant when they do not tend to impeach or undermine the testimony of the
17 character witness. *See* State v. Roller, 201 Or App 166 (2005) (in sex abuse trial, mother of
18 defendant testified that defendant was not sexually aggressive; trial court erred in allowing
19 prosecutor to cross-examine defendant’s mother regarding incident at a play fort in which
20 defendant exposed his penis and asked others to do so when he was nine years old; “[w]e
21 conclude that the fact that defendant’s mother knew about the fort episode - an episode that the
22 only expert to appear at trial called “normal” - had no bearing on whether she lacked credibility
23 when she asserted that, at age 16, defendant was not sexually aggressive”; because the evidence
24 was not relevant to her credibility it was error to admit).

1 Courts are likely to restrict questioning about specific instances of conduct that are too
2 remote in time. *See Kirkpatrick*, Oregon Evidence Sixth Edition page 272; State v. Williams, 44
3 Or App 387 (1980); 2 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence, ss
4 405.03 (Joseph M. McLaughlin, ed., Matthew Bender ed 1997).

5
6 Whenever prior specific instances of conduct are brought out upon cross-examination of a
7 character witness, the proponent of the witness is entitled to a limiting instruction under Rule 105
8 that such inquiries are to be considered only as bearing on the credibility of the character witness,
9 not as evidence that such conduct actually occurred. *Kirkpatrick* at 273.

10 Questions regarding specific instances of conduct regarding a person's reputation should
11 be prefaced with "have you heard". *Id.* Questions regarding specific instances of conduct
12 regarding opinion should be prefaced with "do you know". *Id.*

14 The cross examiner is required to accept the witness' answer to a question regarding
15 specific instances of conduct. *Id.* Extrinsic evidence to impeach an answer given upon cross -
16 examination is not allowed. *Id. citing United States v. Ling*, 581 F2d 1118, 1121 (4th Cir 1978).

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20 MOVED this ____ day of February, 2019.

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23 _____
24 Michael J. Buseman, OSB# 971196
25 Attorney for Defendant
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