# Construction Law Newsletter

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## OREGON EVIDENCE RULE 408: ITS PURPOSE AND ITS BOUNDARIES

*Alix Town*
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"Communication Subject to OER 408" – a phrase so often included in written correspondence that it becomes almost overlooked boilerplate. It is used and abused or alternately unused where appropriate. The rule states:

> (1)(a) Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.
>
> (b) Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

What does this practically mean? If Sam claims Joe owes him $50 and Joe says "I'll pay you $25 to settle this dispute," Joe's statement is not *admissible as evidence* as to if Joe owes Sam money or how much money Joe might owe Sam. The key language here is that this restriction applies only as to admissibility and not as to *discovery*. If Sam's attorney issues a document request for offers Joe made during settlement discussions with Sam, citing to OER 408 is not a sufficient basis for withholding the document.


Alix Towns

Further, it does not prevent the parties from discussing offers made during settlement discussions outside of those settlement

discussions. The public policy purpose of OER 408 is to encourage settlement and free and open discussions between the parties to resolve the dispute without the need of a judge or an arbitrator. It does not restrain the parties from referring to such discussions in later project correspondence or require them to keep such information confidential. It simply states that such offers to compromise or accept a compromise are not allowed as evidence before a judge or arbitrator to determine the entitlement or quantum of a dispute. Thus, if there is information that a client seeks to keep confidential that is exchanged during settlement communications, a separate confidentiality agreement is required.

OER 408 also does not cloak facts exchanged during settlement discussions or normal project activities. Going back to the hypothetical, if Sam gave Joe shoes worth $35, but there was a contract that said Joe would pay Sam $50 for the shoes, neither one of those facts would be inadmissible simply because those facts were exchanged during settlement negotiations. There must be an offer to *compromise* a *dispute*. These facts are elements of the dispute but not offers to resolve the dispute itself or acts undertaken during compromise negotiations.

An offer to compromise also need not state that it is subject to OER 408 in order to be protected. While certainly it is a best practice to identify communications that a party wants to be protected, the rule does not prohibit OER 408 from extending to offers to compromise that do not include an OER 408 statement. The rule focuses on the substance and circumstances of the communication and not the procedure around the statement. Thus, an offer made to compromise a claim that does not say "subject to OER 408" may still be protected from admissibility as evidence.

So when can OER 408 be used? It is properly used to protect compromise discussions to enable parties to speak freely and honestly without fear of their communications being used against them at a later time. This includes a literal offer to compromise a claim but also extends to mediation statements or other documents prepared solely for the purposes of settlement discussions that are exchanged between the parties.

OER 408 is a powerful tool that can help encourage settlement and allow for expedient resolution of disputes between parties. However, it is important to remember the boundaries of OER 408 so that clients are not later surprised about what disclosures are or are not protected.

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**2024 LEGISLATIVE SESSION UPDATE**

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In the 2024 short Legislative Session, the Oregon Legislature focused the majority of its efforts on Ballot measure 110 and access to affordable housing. The legislature recriminalized possession of small about of certain drugs, and, as prioritized by Governor Kotek, passes SB 1573, 1530, and HB 4134 to provide $376 million in investment in infrastructure, home building, and homeless shelter and rent assistance. Those bills have been widely discussed in the news, and readers may find helpful discussions of those bills from the Capital Insider published by the Bar.

As it relates to the construction industry, six bills from the short session (five of which are or soon will be enacted) are worth the attention of construction law practitioners, especially when advising clients on bonds for public projects, offshore wind development, transportation taxation, and when representing design professionals in state public works matters.

***HB 4006 (Retainage Bill)***

This bill makes a "fix" to the 2019 interest-bearing escrow account requirement passed by the legislature in 2019. After much discussion, Stakeholder were able to agree on legislation that requires owners and agencies to accept surety bonds in lieu of retainage for large commercial or public improvement contracts akin to Washington law. The bill includes a "good cause" exception to the general rule, but the owner or agency must make written findings that ae "based on "unique project circumstances," rather than general preferences for escrow accounts. This bill further extends to subcontractors and suppliers who submit surety bonds in lieu of retainage to any prime contractor already approved to deposit surety bonds in lieu of retainage. Finally, the bill also repeals the requirement that a public or private contracting party place retainage in an interest-bearing escrow account when the contract price exceeds $500,000, but rather maintains the option for contractors who do not deposit a surety bond in lieu of retainage to request that cash retainage be deposited into an interest-bearing account or accumulate interest at the specified rate of 2.5%.

***HB 4080 (Offshore Wind Labor Standards)***

Effective on March 27, 2024, this new law defines imposes higher labor standards on wind development projects in Oregon, while offering a collaborative framework for local participation in the federal approval processing for wind projects. The law directs the Department of Land Conservation and Development to create a roadmap that defines a uniform standard for wind energy development processes in conformity with the state's policies and industry labor and supply chain standards. The new standards require that contractors either be an Oregon Bureau of Labor & Industries (BOLI) registered training agent, in addition to other specific requirements, or sign a project labor agreement and labor peace agreement. Proponents of this law appreciate heightened emphasis on strong labor standards and an inclusive, community-driven development that promotes economic diversification. Opponents, on the other hand, largely fear the associated installation and maintenance costs, as well as the unknown effects on ocean life and the environment.

Bob O'Halloran, Jr.

***HB 4165 and SB 1519***
***(Collectively Study Bills for Transportation)***

In effort to rebalance the responsibilities of highway maintenance and funding more equitably across vehicle classes, HB 4165 requires ODOT to identify and prepare a report of statutory changes necessary to more proportionately allocate tax liability among heavy and lightweight vehicles. The bill garnered significant support from across various industries and cities, with no written public testimony in opposition. SB 1519 is a pragmatic complement to HB 4165 in that, in effort to better balance tax responsibilities among vehicle classes, the act decreases weight-mile taxes and directs ODOT to retroactive refund taxpayers who have recently overpaid in weight-mile taxes. Proponents of SB 1519 believe that every user of Oregon's roads will benefit from this act. Opponents to the act worry about the efficacy

of the act's study in assessing the true costs of various vehicle types on Oregon's transportation system. As with most study bills, many expect continued debate and advocacy on this issue in future legislative sessions.


Camille Sakamoto

***SB 1573 (Wage Theft)***

Introduced previously in 2023 as HB 2057, this bill also did not pass in the 2024 short session. SB 1573 would have held general contractors joint and severally liable in civil or administrative actions for unpaid wages of a subcontractor at any tier. The bill also would have provided a six-year statute of limitations for actions to recover unpaid wages, and a two-year statute of limitation for actions to recover unpaid overtime wages. While the bill did not receive a hearing, stakeholders expected this bill to return in some form in the 2025 long session.

***SB 1575***
***(Duty to Defend for Design Professionals)***

Following long term negotiations between design professionals, local governments, and construction industry groups over multiple legislative sessions, stakeholder reached a compromise for limiting the "duty-to defend" for design professionals on construction projects. Limited only to state public works projects where the design professional is in privity with the public agency, the act removes the contractual risk of design firms from being required to defend against third-party claims unless the liability or fault of the designer is first established. Public bodies are now proscribed from contractually requiring that a person or entity providing architectural, engineering, photogrammetric mapping, transportation planning, land surveying services or related services defend the public body against a claim for professional negligence and relating to the professional services provided by the design professional. The act does not apply, though, to federal or private projects.

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## LIEN FORECLOSURE TIMELINE ON PROJECTS WITH MULTIPLE LIENS

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It not infrequently happens that a construction project will have multiple liens recorded against it. This article focuses on the foreclosure mechanics on a project with multiple liens, specifically must each lien claimant foreclose their respective liens separately in separate lawsuits? Not necessarily, although the 120 day time must be strictly followed, a foreclosure suit may be brought in an answer or crossclaim, not just in a stand-alone foreclosure suit.

Like any analysis of a lien issue, the starting point is the statute, specifically ORS 87.055. ORS 87.055 is a statute of duration which states construction liens must be foreclosed within 120 days from recording: "No lien created under ORS 87.010 shall bind any improvement for a longer period than 120 days after the claim of lien is filed unless suit is brought in a proper court within that time to enforce the lien * * *." After the time to foreclose passes, the lien expires. *Fleshman v. Whiteside*, 148 Or 73, 80, 34 P2d 648 (1934).

("When the limit fixed by the statute for the duration of a lien has passed, *no lien exists*, any more than if it had never been created. The statute gives jurisdiction to the court to foreclose a lien on certain conditions...If these things are not done, *no jurisdiction exists in the court to foreclose the lien*.") (emphasis added).


Jacob Zahniser

Once the lien expires, the improvement is free from the lien and no foreclosure may be brought: "The remedy forms a part of the right and must be pursued within the time prescribed, or else both are lost. If an action is not brought within the time limited, the court is without jurisdiction to decree a foreclosure, though it is not deprived of power to render a valid personal judgment." *Id.* at 78. As explained by the *Fleshman* Court,

> The statute creates and limits the duration of the lien. When the limit fixed by the statute for the duration of the lien is passed, no lien exists, any more than if it had never been created. The statute gives jurisdiction to the court to foreclose a lien on certain conditions,-the filing of a lien notice, and the commencement of the action within eight months after such notice is filed. If these things are not done, no jurisdiction exists in the court to foreclose the lien. * * * In suits to foreclose mechanics' liens the jurisdiction does depend upon the time in which the action is brought.

*Id.* at 80.

Does this mean where a project has multiple liens, each lien claimant forecloses their respective liens separately in separate lawsuits? Not necessarily; while the claimant must foreclose the lien, the foreclosure action may be alleged as part of an Answer or Cross-Claim in another claimant's foreclosure action.

This issue of whether a lien claimant must foreclose their respective liens separately in separate lawsuits first arose in *Coggan v. Reeves* 3 Or 275 (1871). In *Coggan,* lien-holders were named as defendants in a suit to foreclose a mortgage. The fact that the lien holders were made defendants in another's foreclosure action did not release the lien claimant from their separate obligation of strictly pursuing its statutory remedy by commencing an action to foreclose their respective liens. In *Coggan,* filing an answer asserting some interest in the property was insufficient for the purpose of foreclosing the liens: "[t]heir answer simply advised the court of the fact that they had some interest in the mortgaged premises, which required the interposition of a court of equity to secure or preserve. * * *[B]ut when they saw the time limited to them by statute rapidly passing away without any probability of a final decree being entered in the original foreclosure suit, it was their duty to have *commenced* their suit to foreclose the liens in the manner and form provided by the statute." 3 Or at 276–77.

Later, however, in *Title Guarantee & T. Co. v. Wrenn* 35 Or 62 (1899) the Court held that the lien claimant's answer, "setting up their alleged liens" was as much a compliance with the lien statute as the commencement of an original suit, irrespective of when those answers were served: "the defendant lien claimants *filed answers setting up their respective liens*, but no process was issued thereon, nor did they make service thereof on the owners of the property within six months after the filing of their respective liens." 35 Or at 64 (emphasis added).

> [A] suit to enforce a particular mechanic's lien is, in effect, a proceeding to enforce the liens of all lien claimants, parties to the record, and the filing of an answer by a defendant in such proceeding is as much a compliance with the statute as the beginning of the original suit.

35 Or at 69

*Wrenn* was followed in *Byrd v. Cooper*, 69 Or 406 (1914) where the Court noted that "the filing of an answer by the holder of a mechanic's lien in a suit to foreclose another lien was as effectual to save the lien from the bar of the statute of limitations as the bringing of a separate suit to foreclose, regardless of the facts that such answer was not served upon the owner of the property." 69 Or at 411-412 (citing *Wrenn*).

Next, in *Brown v. Farrell*, 258 Or 348 (1971), a subcontractor sought to foreclose its lien in an answer and crossclaim. The crossclaim was filed the day before the deadline to foreclose, but not served until after the deadline to foreclose. The Court held the lien foreclosure was a statutory process, not subject to ORS Chapter 12, so the filing of the cross-complaint within the time required was the commencement date, not service of the summons.

Interestingly, the Oregon legislature revised ORS 87.055 to address the ruling in *Brown* by adding the following:

> * * * For purposes of this section:
> (1) Subject to subsection (2) of this section, a suit to enforce the lien shall be deemed commenced as provided in ORS 12.020.
>
> (2) With regard to other parties who are construction lien claimants under ORS 87.035, a suit to enforce the lien shall be deemed to commence when the complaint is filed, whether or not summons or service with regard to such defendants is completed within the time required by ORS 12.020.

1985 Or Law ch 341. The phrase "other parties" was changed in "defendants" in 1987. 1987 Or Laws ch 662.

Finally, ORS 87.060(7) requires other lien claimants to be "made parties" to "[a]ll suits to enforce any lien." Thus, each lien claimant must be named as a defendant in each lien claimant's foreclosure action. *Coggan, Wrenn, Byrd,* and *Brown* stand for the proposition that merely being named as a defendant is insufficient to foreclose an individual defendant's lien (*Coggan*), but filing an answer and setting up a lien foreclosure crossclaim or counterclaim is sufficient to commence the foreclosure of an individual defendant's lien (*Wrenn, Byrd,* and *Brown*). In other words, a lien claimant need not file a separate action; an answer containing a foreclosure counterclaim or crossclaim filed within the required time should suffice.

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