



**HORROR STORIES
FROM THE CONFERENCE ROOM
"DEPOSITIONS GONE WRONG"**

Double Feature:

**"THE DOCUMENTS THAT
WOULDN'T BE PRODUCED"**

Team Sutton
Willamette Valley
Inns of Court
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Discovery Challenges

❖ Depositions:

- **Difficult Counsel**
- **Uncooperative witnesses**
- **Fixing errors by your witness**
- **Entity depositions**
- **Perpetuation depositions**
- **When to call the judge**

❖ Documents

- **Evasive Discovery**
- **Non-Responsive Discovery**
- **Protective Orders**
- **Discovery Sanctions**
- **Privilege**

SCOPE OF DISCOVERY:

❖ ORCP 36 B(1) & FRCP 26(b)(1):

The parties may inquire regarding any matter, not privileged, which is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . .

Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

SCOPE OF DISCOVERY

❖ [T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of ‘fishing expedition’ serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.

❖ *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S. Ct. 385, 392, 91 L. Ed. 451 (1947)



INTERFERENCE BY COUNSEL

- **What would you/should you do with this guy?**
 - “Unfair Question”
 - “Absolutely speculative with no foundation”
 - “It is a B.S. Question”
 - “You’re trying to get him to say things that are simply untrue”
- Does he have a point?
 - Oregon RPC 4.1 - In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person . . .

OBJECTIONS

❖ **ORCP 41 describes when deposition objections must be made to protect the record or preserve an issue for later resolution**

- Objections related to competency, relevancy, or materiality of testimony are generally not waived by failure to make them at the time of the deposition
 - ORCP 41C(1) and FRCP 32(d)(3)(A)
- Objections related to the manner of taking the deposition, the form of the questions or answer, the oath affirmation, the conduct of the parties, including errors of any kind which may be corrected are generally waived if not made at the time of the deposition.
 - ORCP 41 C(2) and FRCP 32(d)(3)(B)-

SPEAKING OBJECTIONS

❖ A party or deponent shall state objections concisely and in a non-argumentative and non-suggestive manner.

- ORCP 39D(3) & FRCP 30(d)(3)

- **Multnomah County Deposition Guide**- “Attorneys should not state anything more than the legal grounds for the objection to preserve the record, and objection should be made without comment * * *.”

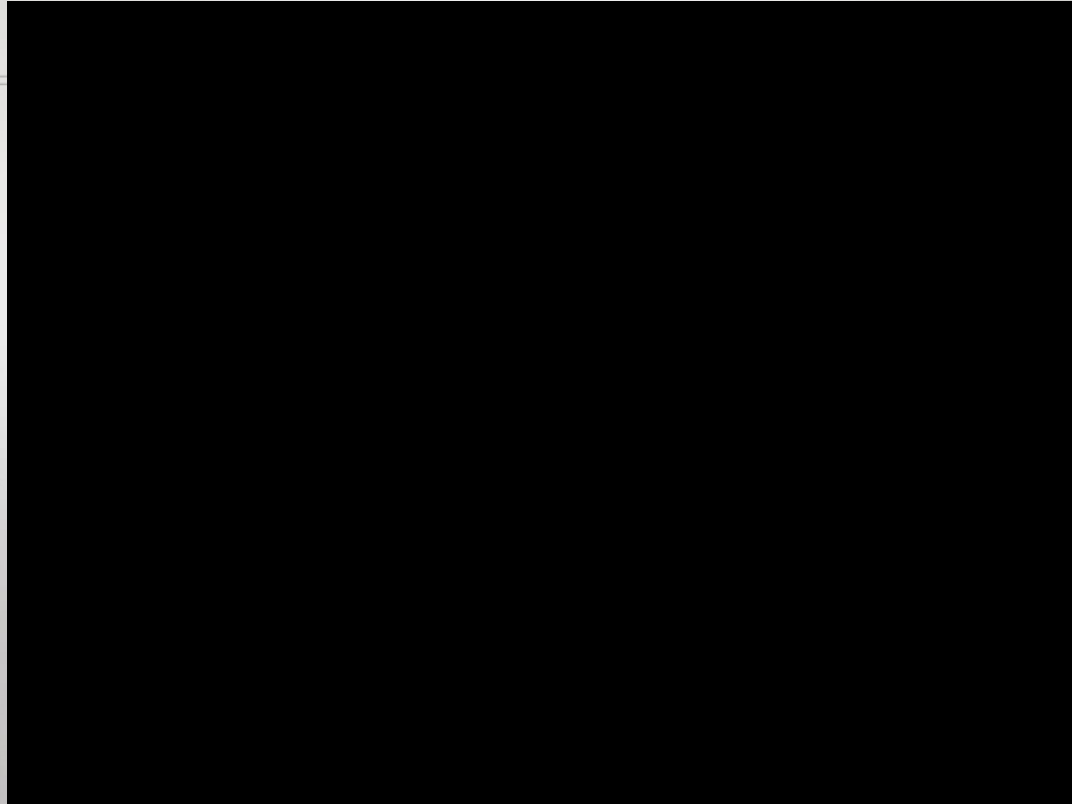
- <https://mbabar.org/assets/depoguide2012.pdf>

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ARE THESE NECESSARY OR APPROPRIATE OBJECTIONS?

- “Form” / “Foundation”
- “Asked & Answered”
- “Irrelevant”
- “Hearsay”
- “Mischaracterizes prior testimony”
- “Calls for speculation”
- “Compound question”
- “Assumes facts not in evidence”
- “Calls for a legal conclusion”

INSTRUCTIONS NOT TO ANSWER



INSTRUCTION NOT TO ANSWER

❖ **ORCP 39D(3) – Instructions Not to Answer:**

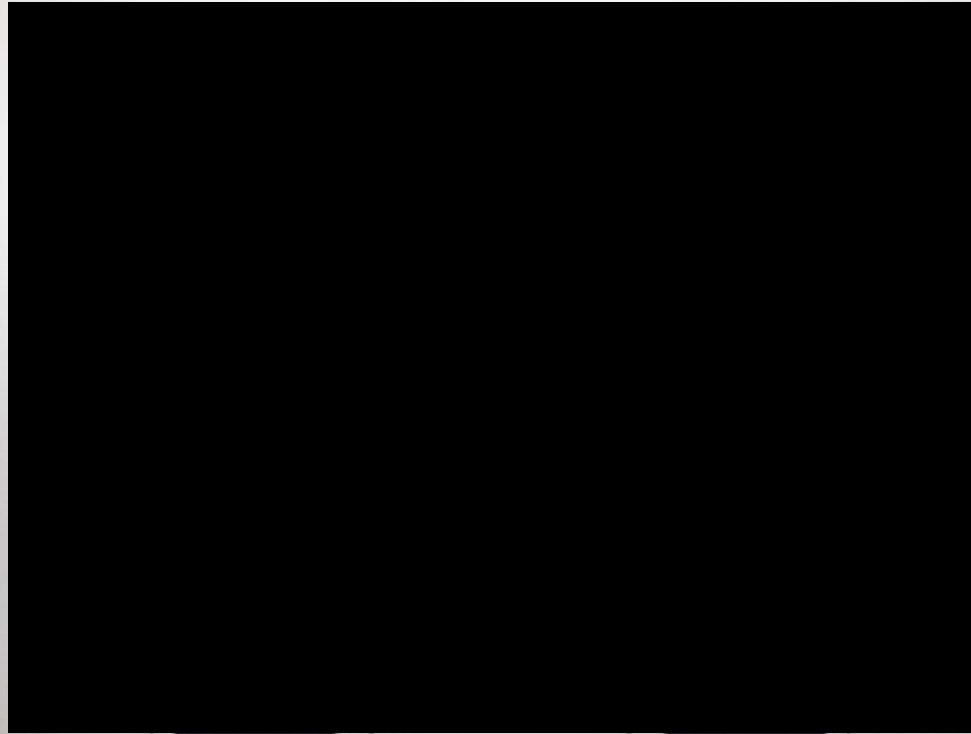
- To preserve a privilege, constitutional or statutory right.
- To enforce a limitation on examination ordered by the court;

❖ Question:

- What are the best practices in response to wrongful instruction not to answer?
- When should the judge be called?
- What record should be made?



MAKING THE RECORD



MAKING A RECORD

- ❖ Did counsel handle this properly?
- ❖ Anything else that counsel should have done?
- ❖ When do you take a stand?
- ❖ Is it best to make a record and terminate the deposition?
- ❖ Should the court be contacted mid-deposition?

REQUESTING ASSISTANCE

❖ **ORCP 39 E(1)-Motion for Court Assistance**

- At any time during the taking of a deposition, upon motion and a showing by a party or a deponent that the deposition is being conducted or hindered in bad faith, or in a manner not consistent with these rules, or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope or manner of the taking of the deposition as provided in section C of Rule 36.

REQUESTING ASSISTANCE

❖ **FRCPP 30(d)(2) – Motion for Sanctions**

- The court may impose an appropriate sanction--including the reasonable expenses and attorney's fees incurred by any party--on a person who impedes, delays, or frustrates the fair examination of the deponent.

PROCEDURAL MATTERS

❖ Going off the Record:

- When is it appropriate?
- Who decides?
- What if there is a disagreement?

❖ Who may Object?

- If multiple parties attending deposition, are objections limited to the defending lawyer?

DEALING WITH DIFFICULT WITNESSES



"Perhaps you would like to rephrase your last answer."



EVASIVE DEPONENTS

- ❖ “I don’t recall”
 - ❖ “It’s possible”
 - ❖ Witness wants to debate you
 - ❖ Witness asks you questions
 - ❖ Answers are long-winded & rambling
 - ❖ Witness needs to check records before answers
 - ❖ Witness needs to talk to attorney before answers
- ❖ Best Practices? How do you handle an evasive witness?**

FIXING ERRORS

❖ Suppose your own witness makes an error in testimony?



- Should you question your own witness at deposition to correct the record?
- Is it better to correct/clarify by subsequent affidavit or trial testimony?
- Can the error be fixed in the “read & sign” process?

CORRECTING / CLARIFYING TESTIMONY

❖ **MSJ “Sham Affidavit”** – When a party seeks to create an issue of fact by subsequent affidavit contradicting the party’s deposition testimony, no genuine issue of fact is raised.

- *Henderson-Rubio v. May Dep’t Stones Co.*, 53 Or App 575 (1981);
- *Oliver v. Keller*, 289 F3d 623, 629 (9th Cir 2002)

CORRECTING / CLARIFYING TESTIMONY

❖ **Read & Sign** – FRCP 30(e) & ORCP 39F -

- Must be requested prior to conclusion of deposition
- Corrections don't replace original answers → inconsistent statement
- Can deposition be reopened to address changed answers?
- If read & sign requested, does failure to make changes limit ability to clarify testimony at trial?

ORGANIZATIONAL DEPOSITIONS

- ❖ **ORCP 39 C(6) & FRCP 30(b)(6)**: allows the party taking the deposition to notice a deposition by describing the matter on which examination is requested; the entity must then designate one or more officers, directors, etc. with personal knowledge to testify.
- ❖ Topics of deposition must be described “with reasonable particularity”
- ❖ Testimony treated as party admission

ORGANIZATIONAL DEPOSITIONS

- ❖ Can two depositions be taken of the same witness?
- ❖ Simultaneous or consecutive depositions?
- ❖ Are there limitations on a corporate deposition if the witness has already been extensively deposed as a fact witness? Use of stipulations?
- ❖ What if the organizational witness “can’t recall” or doesn’t know the answer?
- ❖ Limits of “person most knowledgeable”? What if many “persons most knowledgeable”?

UNAVAILABLE WITNESSES

- Depositions taken when a witness will be unavailable at trial, when all objections are made at the time of deposition, and when direct examination is made by non-leading questions. *State ex rel Grimm v. Ashmanskas*, 298 Or 206, 211–212, 690 P2d 1063 (1984);
- **ORCP 39 I and FRCP 32(a)(4)-(5) Requirements**
 - At least 14 day's notice. At least 7 days before trial.
 - Notice with a brief description of the subject areas of testimony and manner of recording the deposition
 - Opposing party has ability to object by filing motion for protective order; the party seeking perpetuation has the burden of showing the witness is unavailable under OEC 804(1)(d)-(e), an undue hardship, or good cause to allow perpetuation.

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PERPETUATION DEPOSITION ISSUES

- ❖ When should discovery deposition also be taken, if allowed?
- ❖ Timing of perpetuation deposition in relation to discovery deposition?
- ❖ Making & responding to objections
- ❖ What if the witness later becomes available for trial?



DOCUMENT DISCOVERY CHALLENGES

BOILERPLATE OBJECTIONS

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RESPONSE

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1. All financial statements, statements of net worth and credit card and loan applications prepared by or for you and/or the Respondent during the last two (2) calendar years.

11

12

RESPONSE: *Objection. Request is vague, overly broad, unduly burdensome,*

13

and not reasonably calculated to lead to admissible evidence.

NON-RESPONSIVE

WILLIAM
1011
SA
TELEPHONE (6

14

2. All records showing any income earned or received by you and/or the Respondent

15

for the current calendar year.

16

RESPONSE: Respondent is well aware of Petitioner's income.

NON-RESPONSIVE

1 8. All documents which reflect the amount and location of any checking accounts,
2 savings accounts, money market accounts, credit union, other thrift accounts, on which your name
3 appears or has appeared, on which you are or were an authorized signer, or in which you have or
4 had funds on deposit, including monthly statements, canceled checks, check registers and/or stubs,
5 deposit records, passbooks, and certificates of deposit from January 1, 2008 to present.

6 **RESPONSE:** *Respondent is well aware that these records were in the basement*
7 *and most of them were ruined when the basement flooded.*

EXCESSIVE REDACTION

Finally, a new provision

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

HOW DO YOU RESPOND?

- ❖ Boilerplate objections (“vague, overbroad, undue burden, harassing”)
 - – unless they are true?
- ❖ Non-responsive to requests
- ❖ No apparent inquiry of client, or superficial inquiry
- ❖ Heavy redaction
- ❖ Production disorganized, not sorted by request, a document dump
- ❖ Spoliation
 - What if your own client has destroyed or failed to produce documents ?

PROTECTIVE ORDERS

- ❖ Useful in overcoming privacy, trade secret and confidentiality objections
- ❖ One Tier Protective Order
 - Allows parties and other authorized persons access to protected documents
- ❖ Two Tier Protective Order
 - Creates two tiers of protection
 - “Confidential” and “Attorney Eyes Only”
 - Does “Attorney Eyes Only” allow you to discuss with client?
 - Does this tie hands for use in case?
- ❖ Federal Template for Stipulated Protective Orders:
 - www.ord.uscourts.gov

MOTIONS TO COMPEL

- ❖ **Meaningful conferral required first (UTCRC 5.010, LR 7-1)**
 - Find out the reason for the objection, offer a compromise such as entry of a protective order or modify request
- ❖ **Motions To Compel and Sanctions - Two Step Process:**
 1. ORCP 46A or FRCP 37(a) motion for order compelling discovery (prevailing party fees and costs allowed in FRCP 37(a) only);
 2. If a party fails to obey the court order, a motion for sanctions may be filed. ORCP 46B; FRCP 37(b)(2)(A); *Western Ridge Land Co. v. Zimmerlee*, 127 Or App 705, 709, 873 P2d 1099 (1994).

PRIVILEGE ISSUES

- Discovery is allowed of “any matter, not privileged, which is relevant to the claim or defense of the party..”
- Privileges applicable in discovery include the privileges in Oregon Evidence Code 503 to 514, *and* all existing constitutional, statutory, and judicially developed privileges (e.g. 5th Amendment). *See Kahn v. Pony Express Courier Corp.*, 173 Or App 127, 135–136, 20 P3d 837 (2001) (citing OEC 514).
- Most commonly used: Attorney Client Privilege/Work Product/ORCP 36B(3) trial preparation materials.



**QUESTIONS ...
COMMENTS ...
STORIES?**