DEPOSITIONS: A LAWYER'S ART

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The written rules for depositions in Oregon are short and clear. They are set forth in ORCP 39. They address the basic issues of when the deposition may be taken, the rule for notice of a deposition and the requirements for an oath, a record and limited objections. ORCP 39A-D. Otherwise, the rule is wide open in that "[e]xamination and cross-examination of deponents may proceed as permitted at trial." With the exception, of course, that deponents must answer deposition questions, barring privilege issues or court-imposed limitations, even if there is an objection. ORCP 39D(1), (3). Therefore, like a trial, a deposition is more art and sport than science and rule.

The art and sport, the unstated part, is far more interesting than the written rules. From defending depositions to taking them, there are things to do and to watch out for.

Preparing clients

Early in your practice, it seemed that taking a good deposition was more nerve-wracking than defending one because there didn't appear to be any boundaries or set rules for how to take a deposition. Later in your practice, you realized that defending a deposition can be far more nerve-wracking because you have almost no control over what is said and your client always seems one sentence away from possibly losing the case. Of course, there are a number of ways to prepare your client and reduce your tension that don't involve illegal coaching or testifying for them.

Don't get tripped up

For a client who has never been deposed, the process is intimidating and unnatural. Your client is used to answering questions in a conversational tone, elaborating at times and filling in awkward pauses with words. None of these are helpful qualities in a deposition and it takes some practice to understand that.

It is nearly impossible for a client to be prepared on the morning or day of a deposition. If the deposition is likely to involve a lot of documents, the preparation should likely be the week before the deposition with a short refresher before the deposition.

Regardless of how many times you have asked your client for all of the relevant documents at the initial interview, as you work on the complaint or work up the case, the client will often realize he or she has some additional documents when it comes time for the deposition. This may be the first time the client has thought hard about all of the relevant information in light of the risks and questions that may come up. The client may have only focused on the upsides of the case until the threat of answering to an opposing attorney shifts the focus to the risks and universe of information. It is better to discover any additional documents or electronic information with plenty of time for you to produce the material and make adjustments. Even if the deposition is not document intensive, it is best to have the initial deposition preparation at least a day in advance to address anything unexpected and give your client a chance to get comfortable.

I find most clients, even sophisticated business people, are only able to retain a few pieces of advice when coming into a deposition. You may need to tailor your advice based on your client's personality and risks, but here are the most important tips to tell clients in all cases:

- If there is only one thing to remember for your deposition, it is to always tell

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the truth. I can help you survive some bad facts. It will be impossible to prevail if a jury believes you are lying.

- We are going to go over the key facts, but if you are asked something at your deposition and you are not certain or do not know, you should say so and do not guess. If you guess wrong on something important, a jury may think you are not telling the truth even though you were trying to.
- Answer each question briefly so that you provide just enough information to respond accurately and answer in your own words, not the words of the other attorney.

It is also helpful to go over your role, where everyone will sit, the process, the recording method, advice on providing clear and audible answers (no uh-huhs), and instructions on pausing to allow for your objections and for the client to consider the question. All of these things will allow the client to be more confident and prepared, but if your client can keep only three things in mind, he or she should focus on the bullet points above.

In large cases where there will be video depositions, it is not unheard of for attorneys to hire a trial consultant to help prepare a difficult client. The client's video deposition may be as much a part of the trial as the client, so it makes just as much sense to use a trial consultant at the deposition stage if you plan to use one at trial and the case justifies it. Even if your client is sophisticated, go over the basic dress code so he or she appears neither too disheveled nor too ostentatious. Whether or not there is a video, you will want your client to make a strong impression.

There is always a tension between getting your client relaxed enough about the process to feel assured and comfortable, but on edge enough to understand the need to be very careful to listen closely and answer precisely and without unnecessary elaboration.

Protecting your client

The written rules are again short and clear. You may object to the form of the question "concisely and in a non-argumentative and non-suggestive manner." ORCP 39D(3). Evidence may be taken over those objections except on issues of "privilege or constitutional or statutory right" to enforce a court order or limitation, or in order to present an immediate motion to the court to terminate or limit a deposition. *Id.* Clearly, some attorneys still take liberty with those rules and provide more than concise, non-suggestive objections. It is better to expose those attorneys (see below) and limit your exposure by keeping things simple. If the case goes to trial, your client is going to look far worse if it appears that you coached your client on the key answers and didn't trust him or her enough to respond.

You still want to be vigilant and object whenever appropriate. Depositions are tiring. Listening very closely to the other attorney and your client for hours on end is exhausting. You want to sit up at the edge of the seat and be vigilant and focused and take breaks for your and your client's sake whenever needed, except when a question is posed. If you are sitting upright and vigilant, your client will often unconsciously mimic your behavior.

Always assert a client's right to read and sign the deposition before concluding so the client may review and provide any important written changes. ORCP 39(F)(1).

Finally, many older attorneys will ask a younger attorney to agree to the "usual stipulations." There really is no such formal thing and no need to agree unless spelled out. Often the lawyer is asking you to agree that attorneys only need to object to the form of the question and not to evidence as if at trial, which is generally the case anyway except for

perpetuation depositions or out-of-state deponents.

Taking a good deposition

As noted, there are few formal rules, but a lot of informal rules from experience. Even if you are inexperienced, it is usually best only to outline your topics of interest and not script out every question or you will not be flexible enough to follow up when you hear something significant that may lead to questions you had never considered. Taking a deposition is as much a listening skill, staying focused on what is said, as a questioning skill. It is hard to listen and be flexible if you are tied down to particularly worded questions.

Depositions can serve different functions, including seeking discovery, preserving testimony for trial and authenticating documents (to the extent you cannot stipulate to them with opposing counsel). A single deposition may include aspects of all three. Those functions call for different types of questions and skills. For discovery depositions, you generally want broad questions that often have follow-up questions to ensure you have unearthed all of the possible places or people with relevant information. For the portion of the deposition that attempts to preserve testimony for trial or cement a witness into a particular story, you still may want to start with broad questions that pull out the story. If your goal is to confirm a particular fact (e.g., confirm deponent made representation to client), you may need to move to a very specific or leading question that confirms your goal. If you obtain that goal or get the answer you want, stop with that line of questioning and move on to something else quickly. Do not ask why or get elaborations if you have already met a goal. Elaboration will only provide the witness an opportunity to change the testimony in a way that undercuts your goal.

Some other general rules for questions:

- When presenting documents, make sure to identify the exhibit and ask a complete question using the exhibit number and description ("Mr. Smith's letter of X date") rather than asking about "this document." You are making a record and the record will be meaningless later, even if it seemed clear at the time in context. If the deposition exhibit number is not also going to be the trial exhibit number, be clear in describing the document as well.
- Break questions into simple parts to avoid objections and obtain clear and direct answers.
- Go through general recollections without presenting documents first. Often witnesses will tie themselves to documents presented and claim that is the entire source of their knowledge when that is not the case.
- Do not let a witness evade a specific question by providing a general answer. Continue to probe with more specific questions or questions that require yes or no answers.
- Do not be rushed and make sure you have checked off each point in your outline before you conclude. Take a break when you believe you are done just to go back through your outline to ensure you are done, before you close the deposition.
- Change up your order or line of questioning and do not always follow chronological order when dealing with a hostile witness.

Take it easy

If the opposing attorney is continually being argumentative, objecting by leading the witness, or engaging in other inappropriate behavior, calmly state your issue on the record and suggest that you will get the court involved if the behavior continues. If you do that, however, you need to follow up and call the court to resolve a dispute if the conduct does continue. ORCP 39E (Motion for court assistance).

It's better if you can keep things calm and cool as you go. Take lots of breaks and it will help both you and your client stay focused. The main thing is to set a record that will help your case move forward and produce a positive outcome for your client.

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