Oregon State Bar

Litigation Journal

SPRING 2018 VOLUME 37 NUMBER 1

In This Issue...

www.osblitigation.com

Direct Examination: Maximizing Connections

By Charese Rohny

Charese Rohny

Every case depends on a successful direct examination. We imagine examination of our witnesses unfolding like finely engineered banker boxes packed with facts and legal elements. What happens more often, though, is the witness is nervous, has forgotten the big picture, and is trying to "help" with out-of-sequence information that makes no sense or seems irrelevant to the jurors. We sometimes read our prepared questions and miss listening and following the witness. Or we follow our witness, don't use our prepared outline enough, and improvise in a manner that veers completely off track. We have all had moments of ending up with a pile of messy, unconnected cardboard pieces.

Every question asked should elicit an interesting and important response. Direct examination at trial is not a deposition.

Direct examination is the time for the trier of fact to observe the witness and hear their story. It sets the stage for our theory of the case. It allows the trier of fact to connect with our client and our story of the facts. In order to do that effectively, we need to be organized and to keep it interesting and persuasive.

We hear all the time regarding direct examination "Prepare, prepare, prepare" or "Simplify, simplify, simplify" or "Just the facts, Ma'am" or "Control your witness." All that is absolutely true; but the most basic thing to keep in mind is that a trial is not just a battle of facts or logic; instead, a trial is a battle of impressions.

Big questions for direct examination derive from how best to make a winning impression. We want to be the credible source of the good, the bad, and the ugly. We strive to convey that *our* case is the source of the truth and our witnesses are not hiding anything. For each witness, ask yourself:

- What is the impression I want to make?
- What themes make that impression?
- Are my questions important to my theme? and
- How can I make the examination most interesting?

Most of us remember the key facts we need to elicit to prove the legal elements. Where we often fail is in avoiding dull moments. Ask only what is *important* and *interesting*.

1. Preparation.

Preparing for direct examination comes in many forms. Get the facts. All of the facts. Only then will you have the interesting ones, and not just those that are wooden elements. Be prepared for what could happen on cross-

examination, and craft the story you want the jury to hear. Prepare a detailed timeline and update it throughout your case. Determine the important facts, and then use your questioning on direct examination to structure your presentation of the order of proof, so the jurors can easily connect the dots, well before you do it in closing argument.

The devil is in the details, especially with preparation of foundational questions. Those should always be prepared ahead of time.[i] Utilizing methods to streamline admissibility issues so you can seamlessly tell your story is the key goal of preparation.

Preparation produces epiphanies of insight, big and small. A less direct, but still effective, product of preparation is identifying what we have in common with our witnesses. From moments like those, we can build an organic, natural, and connecting story.

2. Don't bore your jury.

Our job is to help the witness be interesting and to help them connect to the jury. As in day to day life, first impressions are critical. Capture the interest of the jury in the first few minutes, right out of the gate. Perhaps we are at a point in history where attention spans may have shrunk to shorter than that of a goldfish.[ii] Or perhaps those studies are fishy and attention spans are the same as ever, but humans simply crave more relevance. Whether the human attention span is shorter than ever or not, in order to hold the attention of a juror's brain, we must manage stimuli and re-engage it. We must move the jurors' brains from whatever else the juror is focusing on instead to being alert in listening to our evidence, and the story we are telling.

Keep your witnesses interesting and focused on important facts. Keep your questions short, and make sure your witness does the same for their answers.

3. Tell the jury why each witness is important, establish their credibility, and highlight the great facts.

Begin with a key question that creates interest. Examples:

TO LAY WITNESS: "Mr. Sandman, you were an eyewitness to the two people fighting. At the end of your examination, you will be able to tell us who swung the first punch. Now, before we get to that, let me ask you…."

TO EXPERT WITNESS: "Dr. Spearhead, at the end of your examination, you will be able to tell us your opinion as to the cause of death of Veronica Jones. But before we get to that, let's discuss some of your background and training…."

Establish the witness' credibility. Examples of how to do that:

- How do we know that the witness knows what they say they know?
- Is there any history between the witness and the defendant/plaintiff?
- Does the witness have any interest in the outcome of the trial?
- If this was the only testimony the jury heard from that witness, what questions might the jury have about the testimony?

We don't want to be redundant, but we do want to help that juror whose mind was wandering. So, be persuasive through repetition for your great facts selectively**:**

Q: As he approached you, did you notice anything unusual?

A: Yes, he had a gun.

Q: What was he doing with the gun?

A: Pointing it at me.

Q: As he was pointing the gun at you, was he saying anything?

An objection by opposing counsel on this will only serve to highlight it further.

Highlight your critical evidence with repetition, an old fashioned foam board, a modern technological visual aid, a pause in a manner that draws attention, or another effective way that makes it memorable for the jury.

4. Control your witness.

Control sounds a bit mechanical; we want to help guide the testimony and the narrative in a conversational manner to share the intended story. A way to do this is the use of headlines. The basics to any story as we know are:

- What happened?
- Why did it happen?
- How did it affect your client?
- Why does that mean your client should win?[iii]

One goal is to present the trier of fact with the legal elements, but more importantly to present your theme, which is the moral persuader of your case.[iv] You know not to lead on direct examination, in part because it is inappropriate but also because it shifts the focus back to you and not your witness. Guide the witness in a natural, organized and persuasive manner.

5. Telling the story.

Do not script your witness, but do thoroughly prepare them on the topics needed for your story. Capture and ask about the basics for your case.

As a plaintiff, it is essential to tell the liability story as it builds for damage. For example in an employment race discrimination case the topics for the liability story may include having the witness share:

- The day you heard the words you were hired.
- How you enjoyed your job.
- What was it like the first day you were called the "N-word" in the workplace at Bad Corp.
- The day you heard the words "You are fired."

Presenting evidence on damages after this flows more easily. The specifics would serve for another article. The key points here: keep your non-economic damages witnesses brief, and the testimony for your economic damages witness simple.

6. Bringing your witness to life through inoculation.

As with characters in a story, our witnesses have flaws. However, some flaws bring characters to life. Portrayal of the human experience tells us something significant about ourselves.[v] It is the struggle of human experience to know oneself which forms our journey. Writers touch a part of this level of self-reflection and connect with their readers. So too do trial lawyers on direct examination – we create connection between the witnesses and the jurors. Face the weaknesses of your case on direct. At the same time, throughout trial highlight each way in which our facts and witnesses are more reliable than the opponent's facts.

One strategic opportunity to do this is through inoculating the jury on direct to what our weaknesses are. Minimize the sting before cross-examination occurs. Consider doing a mini-cross during your direct – be candid. Whatever method we choose to present those weaknesses, we should not ignore them.

Capturing the true essence of our witness during direct makes them real. It underscores their humanness, their credibility despite their flaws, and hopefully guts cross-examination.

7. Simplify.

The length of our questions and words we choose should be short. Many cases are indeed complex. Think of your evidence in terms of buckets of topics.[vi] This guides preparation and helps eliminate certain questions from each bucket, so as to not present the testimony in a complicated or redundant manner. We know how to simplify. Often, it is what requires the most preparation.

8. Be spontaneous.

Effective direct examination stories are those with moments of opportunistic spontaneity. When you are prepared with all the facts, know where briar patches lie, and feel confident in your examination, you can seize a moment when something unexpected, human, and connecting happens. Don't miss an opportunity to take a risk and be spontaneous. The better you know your witnesses, the more likely it will happen and work to your advantage.

9. Know yourself.

We each have strengths and weaknesses in how we communicate. Be aware of both as you consider how the interaction with your witness will go. It is as important to knowing your story as it is to knowing yourself.

> *If you know the enemy and know yourself,*
> *You need not fear the result of a hundred battles.*
> *If you know yourself but not the enemy,*
> *for every victory gained you will also suffer a defeat.*
> *If you know neither the enemy nor yourself,*
> *you will succumb in every battle….*[vii]

There is a primary element that sets up the internal value system of the themes of each case. These themes are expressed through direct testimony, circumstantial evidence, and struggles we hope a jury will resolve in favor of our clients. To get to those core values and to evoke meaning from witness testimony, we need to understand where there is commonality with jurors between our own witnesses and that of our opponents. Be willing to go inwards, to experience that journey, and then share it so as to make those important connections with the jurors.

A natural story structure is one that reflects the true nature of the human experience.[viii] If we refuse to look inward to know either ourselves or our story, we risk that nothing of any value will come of our efforts.[ix] Through careful preparation and an understanding of your witness, yourself and the jurors, your direct examination can make the impression you want to make, connect with the jury and persuade them that your story is the true one.

Endnotes

i "Direct Examination – Plaintiff's Perspective" Presented by Gregory B. Breedlove, Jere F. White., Jr. Trial Advocacy Institute (November 30, 2012), http://www.cunninghambounds.com/docs/default-source/publications/11-30-2012_direct-examination---plaintiffs-perspective_gregorybreedlove

ii "Busting the Attention Span Myth," Simon Maybin, BBC News, March 10, 2017, http://www.bbc.com/news/health-38896790 (Some statistics say that the average attention span is down from 12 seconds in the year 2000 to eight seconds now. That is less than the nine-second attention span of an average goldfish. This is disputed and the science disputable.)

iii "Persuasive Storytelling Using Direct Examination," http://www.srglegal.com/articles/storytelling.htm

iv Id.

v Inside Story: The Power of Transformational Arc, The Secret to Crafting Extraordinary Screenplays, Dara Marks (2007) at p. 101

vi Id.

vii Inside Story: The Power of Transformational Arc, The Secret to Crafting Extraordinary Screenplays, at p. 4 (citing "The Art of War" by Chinese general Sun Tzu who wrote a collection of essays on military strategy 2500 years ago)

viii Inside Story: The Power of Transformational Arc, The Secret to Crafting Extraordinary Screenplays, at p. 4-5.

ix Inside Story: The Power of Transformational Arc, The Secret to Crafting Extraordinary Screenplays, at p. 4-5.

COMMENTS FROM THE EDITOR

Direct Examination: An Alternative Approach

By: Dennis P. Rawlinson
Miller Nash Graham & Dunn LLP


Dennis P. Rawlinson

Traditionally, the techniques employed in direct examination and cross-examination are directly opposite.

For instance, in direct examination, the examiner attempts to place the attention of the fact-finder on the witness. The witness is given free rein and encouraged to tell his or her story in a narrative manner with limited guidance from the examiner.

In contrast, on cross-examination, the attention should be on the cross-examiner. The cross-examiner argues his or her themes or theories by asking questions, the answers to which are often irrelevant. The cross-examiner is really arguing his or her case through the "window" of the adverse witness. The emphasis is on controlling the witness and, by raising impeaching, contrasting, and contradictory points, exposing weaknesses in the recently conducted direct examination of the witness. (*See Direct Versus Cross-Examination: A Study in Contrast*, Lit J, Mar. 1998, at 3.)

A number of respected trial practitioners and trial-technique teachers are challenging this traditional approach. They contend that the direct examination should be tightly controlled by the examiner, that the direct-examination witness should be given little or no leeway, and that the attention of the fact-finder during direct examination should be on the examiner, not the witness. They believe that like cross-examination, direct examination is an opportunity for the examiner to argue his or her case through the window of the witness.

Set forth below are some of the reasons why this alternative approach to direct examination is gaining favor.

1. Lets Examiner Take Control.

Under this alternative approach, the witness on direct examination is never allowed to answer with any more than a sentence. This allows the examiner to do the work and control the examination. It limits the amount of each "bite" of information that is given to the fact-finder, improving the possibility of understanding. Moreover, it allows the examiner to take advantage of the additional benefits discussed below.

2. Removes Pressure From the Witness.

Under traditional direct-examination techniques, the witness is placed under a tremendous amount of pressure. He is told that he will be asked, "What happened?" The witness is then expected to tell his story in the way that is most persuasive, articulate, and memorable. The witness is told to "be sure to cover this, be sure to cover that, and don't forget to say this . . . and by the way, you cannot use any notes."

Is it really fair to place all this burden on the witness? Is this really the most effective approach to direct examination? Shouldn't a lawyer be doing the "rowing" (work)?

In contrast, under the alternative approach, the lawyer takes control and does the work. The witness is asked a series of short questions to each of which he gives an answer of only a word or two and in no event any longer than a sentence. The lawyer then leads the witness to the next point. The witness can now relax.

3. Employs the Techniques of Persuasion.

If the lawyer does the work and coaches the witness to give short answers, the lawyer has a full array of persuasive techniques available. First is repetition of the most important and damaging points; the direct examiner can repeat a point several times by rephrasing the question to ensure that it is remembered by the fact-finder.

Second, the lawyer can remove from the direct-examination testimony tangential, irrelevant, and side points that clutter up the information that the fact-finder needs to receive. Third, the lawyer can, by controlling the witness, make the arguments to the jury that are available through the direct-examination witness. Similar to cross-examination, the examiner can argue the case through the window of the direct-examination witness.

These techniques are demonstrated in Section 5 below.

4. Allows the Examiner, Not the Witness, to Be the Salesperson.

In traditional direct examination, it was up to the witness (whether a fact or an expert witness) to be persuasive—to be the salesperson. At least in my experience, most fact-finders are suspicious of fact or expert witnesses who appear to be selling something.

In contrast, the fact-finder expects the lawyer examiner to be a salesperson. If the lawyer argues through the direct-examination witness and the witness simply provides short, accurate, and thoughtful answers, the resulting argument is that of the lawyer. The witness's credibility is not undercut or tainted by the witness's active effort to sell the point.

5. A Sample Examination for Your Consideration.

Two proponents of this alternative approach to direct examination are Judge Herbert Stern and Judge Ralph Adam Fine. One of Judge Fine's examples of the effectiveness of this technique is taken from the novel *Runaway Jury*, by John Grisham.

In the novel, a turncoat former employee of a tobacco company is testifying about a memorandum that went to the president of the company, which has since been destroyed by the tobacco company (thereby overcoming the best evidence rule problem). The examination follows the traditional method of having the witness do the work.

Q: What was in the memorandum?

A: I suggested to the president that the company take a serious look at increasing the nicotine levels in its cigarettes. More nicotine would mean more smokers, which would mean more sales and more profits.

The question and answer are powerful. But not as powerful as they could be if the lawyer were doing the work. With a single question and answer, there is always the risk that the fact-finder will be distracted for the moment and miss or misunderstand the answer.

Now, here's a sample of the same direct examination in which the examiner does the work, limits the witness's answer, and argues the important points to the fact-finder through the window of the direct-examination witness.

Q: Did you read the third paragraph of the memorandum?

A: Yes.

Q: What was the subject of the third paragraph?

A: Nicotine.

Q: What about nicotine was discussed?

A: The nicotine levels in cigarettes.

Q: Did the paragraph suggest that the nicotine levels should be increased or decreased?

A: Increased.

Q: If the nicotine levels were increased, would that have any effect on anything?

A: Yes.

Q: What?

A: The number of smokers.

Q: Would increasing nicotine mean more smokers or fewer smokers?

A: More smokers.

Q: More smokers than if the nicotine levels were not increased?

A: Yes.

Q: Would this mean more or fewer sales?

A: More.

Q: Would this mean more or less profit for the company?

A: More.

Q: Would the increased profits be substantial or insubstantial?

A: Very substantial.

Under the second example, with a lawyer doing the work, it would be hard for a fact-finder to miss the answer or the point. In fact, after the first couple of questions, the fact-finder knows the answer to the next question before it's even answered. Why? Because the answer is compelled by common sense.

One of the advantages of arguing the case through a witness not only on cross-examination but on direct examination is that the fact-finder knows the answer before it is given. An answer that the fact-finder arrives at on his or her own regardless of the witness's response is an answer that will not be subject to impeachment by your adversary.

The Litigation Journal is published three times a year by the Litigation Section of the Oregon State Bar (offices located at: 16037 S.W. Upper Boones Ferry Road, Tigard, Oregon 97224; mailing address: P.O. Box 231935, Tigard, Oregon 97281-1935; phone: 503-620-0222).

The Litigation Journal welcomes timely, practical, and informational articles from Oregon attorneys. If you or someone else in your law firm has produced a written piece that would be of interest to the 1,200-member Litigation Section, please consider publishing it in the Litigation Journal. We welcome new articles and articles that have been previously prepared for or published in a firm newsletter or other publication.

6. Summary.

We all have plenty to do and think about at trial. Perhaps that is why allowing the witness to do the work on direct examination is so attractive. In any event, next time you conduct a direct examination at trial, you may want to consider this alternative approach. You may find that the rewards gained from this technique far outweigh the detriment of the extra work.

A Seasoned Litigator's Tried and True Suggestions

By Stephen F. English, Perkins Coie LLP


Stephen F. English

This article will set out tactics and strategies that will absolutely create a reputation for you. This is not a work of fiction, but rather based on real events, repeatedly observed.

1. In discovery disputes, stake out your position and hold to it without exception. Don't worry about the so-called obligation to meet and confer in good faith. That's just a short weigh station until you get to destroy the other side with ad hominem attacks and spicy, sarcastic references in your filings. Judges love to parachute into disputes like this because they live for pre-trial discovery fights.[1]

2. When taking depositions, conduct your depositions as though this is a real trial. Granted, your opponent may make objections but, whatever you do, don't pay attention to them or use them as guidance for reframing your question. Rather, stick to your guns and force the witness to answer the question you asked. Make sure your questions are long and front-loaded with preamble. Remember, the goal here is to trick or trap the deponent. Don't bother about holding things back for trial. Letting your opponent know your theory of the case through clever questioning simply shows how confident you are.

3. When defending depositions object frequently and make sure your objections are long enough so that your witness has a chance to figure out what you want him or her to say. Arguments with opposing counsel also help energize an otherwise boring question and answer period over several hours.

4. Spend at least the first two to three hours of your deposition going over the background of the deponent in minute detail focusing on grade school and high school, friends and activities, initial employment, and previous addresses. This is particularly useful if you already have most if not all of this in documents sitting in front of you because then you can test the memory of the witness and later impeach the witness with these highly relevant background issues.

5. In getting ready for the actual trial, try not to get realistic estimates of the amount of time your witnesses will be on the stand. That way you don't have to worry about lining up witnesses precisely so that they follow one another efficiently to fill the full day. Don't worry about these half hour to an hour gaps, though, jurors like frequent breaks and lots of down time. They're getting paid plenty by the state to serve as jurors, so they have no room to complain.[2]

6. Try to think of as many motions in limine as possible and file them as close to the actual beginning of trial as possible. After all, this is a "trial by ambush" state. If at all possible, save some of your case law authority so that during the argument of the motions in limine you can surprise your opponent with another case that helps your position and at the same time not give your opponent an opportunity to research and create arguments to oppose that case. Judges really appreciate the thrill these surprises create as well.

7. Try not to work with the other side or your co-plaintiff or co-defendant with exhibits in advance. Jurors love two to three exhibit numbers for the same document. The confusion of these multiple exhibit numbers really heightens the dramatic tension.

8. Jury selection is a time when the jury gets to see how smart you are and how well you know the law. Do your best to sell your case to the jury by asking them to commit in advance to your theory of the case. Don't take no for an answer, particularly with prospective jurors who appear to be shy. Ask prospective jurors questions about burdens of proof, concepts of negligence, and other legal definitions that we spent three years studying in law school, basically anything that will allow you to dominate center stage in the process. Talk at them, not to them, because it makes you look smarter to jurors. After all, who has the J.D.?

9. When you get to the opening, keep in mind this case is really all about you. The jury wants to hear from you. Don't give them any sense of how long you'll talk or the organization of your opening. Let them figure that out. Follow the rule that any opening that is not at least two hours long doesn't do enough to set the stage for testimony. Constantly remind the jury that what you're saying is not evidence, in case they're accepting what you're saying.

10. During the trial itself, bicker with the other side at every opportunity. A constant running visible antagonism between you and opposing counsel provides a welcome subplot for the jury to follow.

11. Don't give up on objections even after the court seems to have ruled against you. Keep fighting and pushing back. Judges love this kind of challenge.

12. Object frequently. Jurors love the break in the tedium of hearing a witness testify to the actual facts of the case.

13. Better yet, frequently inform the judge that you have a matter for the court. Jurors love getting up and walking out of the courtroom over and over.

1 With due deference to the late Judge Donald Ashmanskas, who styled his guidance for lawyers in brief writing in a similar manner.

2 Granted, judges such as retired federal judge Malcolm Marsh would require that you have a witness sitting outside the courtroom to immediately take the stand upon the conclusion of your current witness on the stand. If you didn't, he would consider that you had rested. But that is a story for another day.

14. Whether you're examining or cross-examining, when you make a good point, be sure to pause and look at the jury so that they recognize the significance of your deft examination and are able to acknowledge how good you are.

15. To the extent possible, carry on an ongoing whispering communication with your client and your co-counsel loud enough so that the jury can catch it, or at least snatches of it. Whispers regarding the credibility of witnesses on the stand are particularly useful to assist the jury in understanding what they should and shouldn't believe. Smile a lot, because it shows the jury that you have an inside joke that must mean your side is winning.

16. When your opponent is examining a witness, react frequently with facial gestures. It helps guide the jury into understanding what is helpful to you and what is not, as well as what you believe and what you don't believe. Eye-rolling helps as well.

17. When making objections, make sure that you vigorously object to any evidence that is hurting you so that the jury wakes up and pays close attention to the testimony in the event the jury was zoning out about it.

18. When making objections, make sure the jury understands that you know the evidence better than the judge does. Even in the event that the jury is excused while you are arguing these objections, make sure the judge understands the superior knowledge of evidence you have. Judges really enjoy being lectured to in this manner.

19. When examining witnesses and making a point, follow the rule that if some is good, more is better. Don't just get the information, belabor it. Jurors love to hear the same thing said over and over and over again, because they can't be trusted to get it the first or second time.

20. When cross-examining witnesses, be aggressive. Jurors delight in seeing witnesses attacked by lawyers; after all, they've seen it on Law and Order.

21. When examining a witness and putting a document on the overhead display, particularly if it's a document the witness created at some point, have the jury get the benefit of having the witness read the entire document. In this regard assume the jury's reading skill sets aren't at the same level as yours and the witness.

22. Use impeachment frequently and liberally, especially with respect to minor details. Impeachment is particularly useful when an adverse witness actually says something on the stand that is helpful to you. When that occurs, impeach the witness with the information from their deposition that is harmful to you. Remember the goal here is impeachment, regardless of the facts.

23. In closing, try to make the opposing attorney the focus of the argument. Things he/she did during trial, purported misconduct, all of this needs to be pointed out to the jury. Facts developed and proven in trial should be secondary to this ad hominem approach.

24. In order to deliver a closing that is sufficiently long and allows the jury to be sufficiently impressed with your skills at oratory, plan to go over all of the evidence, including all the exhibits, in minute detail. Assume the jury hasn't been sitting in the courtroom watching you and listening to the evidence for the last two weeks. Assume that the jury simply isn't as smart as you and therefore is not capable of grasping the information to the same level you have. Imply or even state that you're going to help them understand the evidence because without your guidance they simply don't have the requisite intellectual ability to understand what has been happening.

25. Remember this is "summation," that means you're obliged to review and summarize all the evidence. Don't let anyone convince you this is (closing) argument where you argue the reasonable inferences that flow from key evidence.

If you pay attention to the above rules and do just the opposite you actually will have a chance of being an excellent trial lawyer.

DEPOSITION DISPUTES – WHEN AND HOW TO ASK FOR COURT INTERVENTION

By David B. Markowitz, Markowitz Herbold PC, and Joseph L. Franco, Holland & Knight LLP

David B. Markowitz

Joseph L. Franco

Most trial lawyers have struggled with questions about when and how to seek judicial intervention to address serious deposition misconduct. There is no one-size-fits-all approach to resolving such disputes. The right approach will depend upon factors such as the nature and pervasiveness of the misconduct, whether the misconduct is by the questioning or defending lawyer and how clear the misconduct is on the record. The lawyer must also consider whether the misconduct is of a type that is best resolved by immediate judicial intervention during the deposition, or would be better addressed by a formal written motion.

This article identifies common types of deposition disputes, addresses how to deal with those disputes during the deposition, discusses the types of judicial intervention that may be available, and offers some best practices for presenting disputes to the court.

I. Examples of Improper Deposition Conduct.

While most depositions occur with little acrimony and no serious problems, it is important to recognize deposition misconduct as soon as it presents itself so that the lawyer can preserve her objections should judicial intervention become necessary. Because of the importance of promptly recognizing misconduct, this article summarizes some of the most clear cut types of mis-

conduct depending on whether it is the questioning lawyer or defending lawyer who is acting improperly. For a more complete discussion of deposition misconduct and the remedies available to discourage it, the authors recommend a review of their previous articles on these subjects. *See Sanctions for Deposition Misconduct*, OREGON STATE BAR LIT. J., Vol. 33, No. 1 (Spring, 2014); *Sanctions for Deposition Misconduct - Revisited*, OREGON STATE BAR LIT. J., Vol. 33, No. 3 (Fall, 2014).

A. Misconduct by the Lawyer Taking the Deposition.

Misconduct by the lawyer taking a deposition typically involves an effort to intimidate or rattle the witness by raising one's voice, asking rude questions or questions that are irrelevant and designed primarily to anger or embarrass the witness. Although some lawyers feel this gives them a tactical advantage, the authors have found this type of behavior is counterproductive and results in a non-compliant witness from whom less useful facts and fewer key admissions are achieved. Fortunately, the Oregon and Federal rules provide tools for the defending lawyer to protect her witness. *See* ORCP 39 E(1) (Providing that if a 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."); *See also* Fed. R. Civ. P. 30(d)(3)(A). The manner in which the defending lawyer should seek this protection is discussed in Sections III and IV, *infra*.

B. Misconduct by the Lawyer Defending the Deposition.

Misconduct by the lawyer defending a deposition typically involves an effort to obstruct the deposition in some fashion. This can involve attempts to influence the deponent's testimony through speaking objections, objections that blatantly suggest the desired answer or excessive breaks to coach the witness. It can also involve an instruction not to answer a question without a legitimate basis. Another common form of misconduct is designed to upset the questioning lawyer through excessive objections – including excessive objections to "form" – as well as by objections designed to bait the questioning lawyer into argument on the record.

These forms of obstruction by the lawyer defending the deposition are improper and can subject the deponent and its attorney to sanctions. *Craig v. St. Anthony's Medical Center*, 384 F. App'x. 531, 533 (8th Cir. 2010) (Indicating sanctions may be imposed for "argumentative objections, suggestive objections, and directions to a deponent not to answer…"). An excessive number of objections may also "constitute actionable conduct, though the objections be not argumentative or suggestive." *Id.* We discuss in Sections III and IV below what the lawyer should consider in seeking judicial intervention to halt obstructive conduct.

II. Options for Dealing with Improper Deposition Conduct.

There are three primary ways to respond to deposition misconduct by an opposing lawyer or witness: 1) do nothing; 2) engage in reciprocal misconduct; or 3) preserve the record with appropriate objections so the issue can be resolved by the court. The first two approaches are not viable.

Doing nothing is a bad idea because an objection to improper questioning or other conduct that could have been fixed during the deposition is waived if not made during the deposition. ORCP 41 C(2) ("Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers…or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.").

Engaging in misconduct such as improper argumentation on the record in response to the opposing lawyer's misconduct is also a bad idea as it undermines the responding lawyer's otherwise valid objections and exposes that lawyer to the prospect of sanctions. *Redwood v. Dobson*, 476 F.3d 462, 468-470 (7th Cir. 2007) provides an excellent illustration of what can happen when decorum breaks down on both sides of a deposition. In that case the Court held that "[m]utual enmity does not excuse [a] breakdown of decorum," censured three lawyers, and admonished that "repetition of this performance, in any court within this circuit, will lead to sterner sanctions, including suspension or disbarment." *Id.* at 470.

The only reasonable response to deposition misconduct is to make a concise, non-argumentative objection, and ensure that the misconduct itself, as well as all objections, are on the record. Keep in mind that some types of misconduct will not be captured if a deposition is recorded only by stenographic means. For example, the misconduct of an attorney who speaks in a mocking tone to a witness or who raises his voice to yell at the witness or opposing attorney may not be adequately reflected on the record without some form of audio recordation. The misconduct of an attorney who attempts to pace around the witness or enter into the witness's personal space as a means of intimidation may not be reflected on the record unless the deposition is recorded by video.

III. Options for Seeking Judicial Intervention.

There are two primary ways to seek judicial intervention to remedy improper deposition conduct – immediate intervention during the deposition, and traditional written motions. Both approaches have their benefits and detriments, but one of these approaches is usually better than the other depending upon the particular deposition and the type of misconduct at issue.

A. Immediate Court Intervention During the Deposition.

The most common form of immediate judicial intervention in depositions is by means of a telephonic hearing during the deposition. Before seeking such a hearing, however, the lawyer should know whether the judge or court assigned to the case prefers to handle deposition disputes by telephone or by formal written motion.

Federal courts in Oregon are generally willing to handle disputes as they arise during a deposition. The local rules provide that "[i]f the parties have a dispute that may be resolved with assistance from the Court, or if unreasonable or bad faith deposition techniques are being used, the deposition may be

suspended so that a motion may be made immediately and heard by an available judge, or the parties may hold a telephone conference pursuant to LR 16-2(c)." LR 30-6. Oregon federal judges have also been known to order depositions to be conducted in their courtrooms if there are concerns about pervasive misconduct.

In preparing for this article the authors also spoke with the Presiding Judges of the Multnomah and Washington County Circuit Courts as well as the immediate past Presiding Judge of the Clackamas County Circuit Court to determine whether those Courts encourage immediate telephonic hearings to resolve deposition disputes. The Multnomah and Washington County Circuit Courts were generally open to handling deposition disputes by immediate telephonic hearing, and would endeavor to find a judge to hear an oral motion immediately when possible. *See* Multnomah County Deposition Guidelines, https://mbabar.org/assets/depoguide2012.pdf (last visited February 16, 2018). ("If the parties have a problem which may be solved by assistance from the court, they should briefly suspend the deposition and contact the presiding court for hearing on the record by phone or at the courthouse.") On the other hand, the Clackamas County Circuit Court generally prefers written motions, having concluded that written motions allow a judge to give an issue full consideration and make the best decision. Of course, if a case is assigned to a particular judge, the lawyer should know and follow the preferences of that judge.

Determining whether an oral telephonic motion will be well received by the court is only the first step. Assuming the court will entertain an immediate telephonic motion, then the lawyer must still consider whether such a motion is the best way to raise the particular dispute.

There are several potential downsides to raising a deposition dispute through an immediate telephonic motion. First, the judge available to decide the motion may know nothing about the case and have only a few minutes out of an already busy schedule to make a decision. Accordingly, there may be a higher risk of an undesirable decision on an important issue. Second, it may be difficult to accurately and dispassionately characterize the issue for the judge in the heat of the moment. We recommend against a telephonic hearing if there is a significant risk the lawyer will come across as agitated or emotional – because that will only decrease the likelihood of a positive ruling. Third, if the issue is one that will take numerous transcript references to give the judge the full picture, then the issue should not be presented through a telephonic motion.

If the issue is one that is obvious and easily described, however, then it may be a good candidate for a telephonic motion. An example may be obvious speaking objections that plainly coach the witness, and that can easily be read to the judge by the court reporter. Another good example is an instruction not to answer certain questions when there is no proper basis for the instruction. An instruction not to answer can only be made to protect a privilege, to enforce a limitation previously ordered by the court, or when the deposition is suspended in order to seek protection from bad faith, oppressive or harassing questions. ORCP 39D, E; Fed. R. Civ. P. 30(c), (d). If an instruction not to answer is made for reasons other than those permitted, then the dispute may be ideal for resolution through an immediate telephonic hearing.

Unless the dispute involves fairly obvious misconduct that can be easily and clearly presented to the judge receiving the telephone call, then the lawyer should consider resolving the dispute by means of a traditional written motion.

B. Traditional Written Motions to the Court.

Like telephonic motions, traditional written motions have benefits and detriments. The primary benefit is that the lawyer has adequate time to prepare a motion that best presents the issue for decision by the court. It is for this reason that the authors generally prefer this method, particularly if the ruling will be of great importance to the remainder of the deposition and the case. On the other hand, written motions tend to be more costly than telephonic motions and often take far longer to decide. This could result in a deposition being reconvened months after the conduct giving rise to the written motion.

Even if a lawyer has decided a written motion is the best way to resolve a particular dispute, the lawyer must still decide whether to immediately suspend the deposition, or to continue with it and hold it open subject to a later ruling by the court. This decision should be guided by the answer to one key question: will continuation of the deposition in the presence of the misconduct harm your client's interests? For example, if the lawyer defending the deposition insists that a question has been "asked and answered" when that is plainly not the case, then the deposition may still be able to proceed on other subjects without harming the interests of the deposing lawyer's client. Holding the deposition open and moving the court to compel the witness to answer should fully protect the client's interests. On the other hand, if yelling or clear harassment by a questioning lawyer has emotionally shaken the witness to the point that he cannot give his best testimony, that is the precise scenario when a deposition should be suspended and promptly followed by a written motion. Likewise, if speaking objections or witness coaching are pervasive, it would be of little benefit to continue the deposition. If in this scenario the lawyer believes a telephonic motion cannot adequately present the issue, then the deposition should be suspended pending the court's ruling on a written motion.

IV. How to Present the Written Motion.

A. Use the Best and Most Complete Record.

If a deposition dispute is important enough to justify the time and expense of a written motion, then the movant should not cut corners. If the best way to present the motion is with a transcript and video, then do both. The record should be complete, in that it takes nothing out of context and includes all material relevant to the dispute – good and bad. Better rulings will be achieved when the court is presented with a complete record, rather than only those cherry-picked snippets that aid the movant's cause. If material has been cherry-picked, the inclusion of all relevant material by the lawyer opposing the motion will result in a loss of credibility for the movant.

B. Choose Your Tone Wisely.

All too often residual emotion from the deposition dispute creeps into the written motion, even when it is filed days after the dispute took place. This must be avoided. The best tone for any motion, but in particular a motion accusing another lawyer of improper conduct during the course of a deposition, should be non-hysterical and as non-emotional in tone as possible. The focus should be on what really matters, and only those types of misconduct that are most important should be raised for decision. For example, if the motion seeks protection from a lawyer who has been yelling at the witness, the same motion should not raise a minor point about the same lawyer taking a few too many breaks. Inclusion of the latter will diminish the importance of the former. The movant should also avoid the "he said, she said" trap. Only those disputes that can be clearly presented from the record should be included in the motion. The court will be more likely to deny all relief if it is presented with back and forth conduct, the true responsibility for which is usually difficult to discern.

C. Available Relief.

Courts have broad flexibility to order relief designed to prevent deposition misconduct. If a deposing lawyer is asking bad faith or harassing questions, for example, courts have the power to impose conditions upon the continuation of the deposition, or even to cancel the deposition in its entirety. ORCP 39 E(1); Fed. R. Civ. P. 30(d)(3). Courts may order that a deposition be continued at the courthouse, or that the questioning lawyer be videotaped as a condition to continuing with the deposition.

Courts also have broad discretion to fashion relief for deposition misconduct by the lawyer defending the deposition. Such relief can include an instruction that only certain objections are allowed to be made, and can also include stiff sanctions. *Castillo v. St. Paul Fire & Marine Ins. Co.* provides an excellent example of the types of relief available when the lawyer defending the deponent is engaged in obstructionist tactics. 938 F.2d 776 (7th Cir. 1991). In *Castillo*, counsel defending the plaintiff's deposition engaged in obstructionist tactics such as improper objections, instructions not to answer and argument on the record. The trial court characterized the conduct as "the most outrageous example of evasion and obfuscation that I have seen in years." *Id.* at 777. The trial court ordered a modest sanction of $6,317.66 to be divided equally between the plaintiff and his counsel, and ordered the deposition to continue without further interference from plaintiff's counsel. *Id.* at 779. When the deposition was resumed, plaintiff's counsel continued to engage in obstructionist tactics in violation of the trial court's order.

The trial court concluded the misconduct was designed to prevent the defendant from knowing what plaintiff's case was about, dismissed plaintiff's case with prejudice and held plaintiff's lawyer in civil contempt. *Id.* at 779-780. The Seventh Circuit upheld the sanctions, stating "[a]ll this trouble was the [plaintiff's] and his counsels' own doing. It almost appears as if for some reason they did not want the case tried. If that be so, at least to that extent, they prevail as it will not be." *Id.* at 781. *Castillo* is an excellent example of the types of relief a deposing lawyer can request in response to obstructionist tactics.

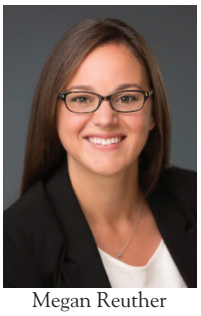
V. Conclusion.

Lawyers should carefully consider when and how to seek court intervention to resolve deposition disputes. As noted above, the timing of such a request can be critical, in particular if a witness's ability to accurately testify has been impaired by bad faith or harassing questions early in a deposition. The format of the request – telephonic or written – is also of key strategic importance. In all cases, the lawyer should use the timing and format that is best suited to the particular dispute at hand.

THE DRAMATIC EXPANSION OF OREGON'S ABSOLUTE LITIGATION PRIVILEGE

By Paul Conable and Megan Reuther, Tonkon Torp LLP


Paul Conable


Megan Reuther

Oregon courts have long recognized the absolute litigation privilege as a bar to claims for defamation based on statements made in the course of or incident to judicial and quasi-judicial proceedings. In recent years, however, Oregon's absolute litigation privilege has expanded dramatically, well beyond the scope originally contemplated. It exists now largely unchecked, immunizing a wide variety of statements and conduct, including those made outside judicial proceedings, against claims sounding in every kind of tort.

The origin of the absolute litigation privilege in Oregon.

As originally conceived, Oregon's absolute litigation privilege protected statements made in the course of litigation. Like the analogous legislative (or parliamentary) privilege, the litigation privilege grew out of recognition of the importance of protecting the right to speak freely on important matters in the public fora. Thus, the privilege was described in terms of a right to speak without fear of reprisal: "A communication made by an attorney in a judicial proceeding is absolutely privileged if it is pertinent and relevant to the issues, although it may be false and malicious." *Irwin v. Ashurst*, 158 Or. 61, 68 (1938). Its primary function was "the promotion of the public welfare, the purpose being that members of the legislature, judges of courts, jurors, lawyers and witnesses may speak their minds freely and exercise their respective functions without incurring the risk of a criminal prosecution or an action for the recovery of damages." *Moore v. Sater*, 215 Or. 417, 420 (1959).

This focus on immunizing potentially defamatory in-court communications is also reflected in Sections 586 and 587 of the *Restatement (Second) of Torts* (1977), and in the law of the many states that follow the *Restatement*. Indeed, Sections 586 and 587 are listed under defenses to actions for defamation, implicitly limiting the reach of the absolute privilege. Section

586 states, "An attorney at law is absolutely privileged to publish *defamatory* matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding." (Emphasis added.) Section 587 extends the same privilege to "[a] party to a private litigation." *See Lee v. Nash,* 65 Or. App. 538, 542 (1983), *rev. den.,* 296 Or. 253 (1984) (citing *Restatement* Section 586 with approval).

The scope and evolution of Oregon's absolute litigation privilege.

From the beginning, Oregon courts identified two threshold requirements that a statement must satisfy before qualifying for the privilege. The statement (1) must have "some reference to the subject matter of the pending litigation," and (2) must be made "in connection with a judicial proceeding." *Wollam v. Brandt,* 154 Or. App. 156, 162 (1998); *Chard v. Galton,* 277 Or. 109, 112 (1977). Over time, Oregon courts have expanded and stretched these requirements, thereby widening the application of the privilege by liberalizing the threshold inquiries.

To satisfy the first requirement, a communication need only have "some relation" to the litigation or any issue involved therein. *Chard*, 277 Or. at 112-15. This is not a searching inquiry. Rather, the privilege "embraces anything that may possibly be pertinent." *Irwin*, 158 Or. at 70; *Levegue v. Paulson*, 126 Or. App. 12, 16 ("All doubt should be resolved in favor of its relevancy or pertinency."). In fact, under Oregon's broad interpretation of the "some relation" requirement, it is hard to imagine a communication by a party or lawyer that could not be characterized as having some reference to a judicial proceeding.

Likewise, to satisfy the second requirement, a communication need only have some connection with a judicial or quasi-judicial proceeding. Originally, the requisite connection mainly included defamatory statements made in pleadings, in the courtroom, or in correspondence between opposing parties or their attorneys. *See, e.g., Moore,* 215 Or. at 420 (privilege applies to statements made in pleadings); *Chard,* 277 Or. at 114 (privilege applied to statements in letter from attorney to insurance company regarding settlement of clients' claims). However, over time, the privilege has been extended to certain unsworn, out-of-court statements. *See Moore v. West Lawn Mem'l Park, Inc.,* 266 Or. 244, 251 (1973) (privilege extended to letter written to State Board of Funeral Directors and Embalmers regarding plaintiff's qualifications for funeral director's license); *Ramstead v. Morgan*, 219 Or. 383, 400-01 (1959) (privilege extended to unsolicited letter sent by defendant to grievance committee of Oregon State Bar); *Cushman v. Edgar*, 44 Or. App. 297, 302 (1980) (privilege extended to defendant's letter to the Governor requesting an investigation into an incident involving police). In so doing, Oregon courts have made an express decision to break with the *Restatement* and extend the privilege to nearly anything that may be at some point related to a judicial proceeding. *Ducosin v. Mott*, 292 Or. 764, 768 (1982).

Significantly, the absolute litigation privilege can apply *even in the absence of an actual judicial or quasi-judicial proceeding*. For example, in *Ramstead*, the court applied the privilege to a letter to the Oregon State Bar written by a former client complaining about his lawyer's bad behavior, even though the bar never commenced any formal investigative proceeding based on the letter. 219 Or at 396 ("Considering the purpose of the rule, we think that relevant statements made in a complaint designed to initiate such quasi-judicial action should also be protected."). To the same effect, the Court in *Wollam* applied the privilege to a threatening letter between counsel, even though the threat never matured into a lawsuit. 154 Or. at 156. This application of the privilege outside an actual, existing proceeding is a crucial feature of Oregon's absolute litigation privilege jurisprudence that, taken together with Oregon's departures from the *Restatement*, helps explain the breadth of Oregon's privilege.

The further expansion of the absolute litigation privilege in Oregon.

In *Franson v. Radich*, 84 Or. App. 715 (1987), the Court of Appeals "further, and dramatically, extended the application of the absolute privilege in two respects." *Mantia v. Hanson*, 192 Or. App. 412, 425 (2003) (describing *Franson*). First, the Court extended the privilege beyond statements, declaring that it also applies to conduct undertaken in connection with litigation. *Franson,* 84 Or. App. at 719. Since then, Oregon courts have extended the absolute litigation privilege to such non-testimonial acts as obtaining and publishing allegedly privileged and confidential material from a litigation opponent. *See, e.g., Yeti Enters. Inc. v. NPK, LLC*, 2015 WL 3952115, at *5 (D. Or. June 29, 2015).

Second, the *Franson* court expanded the privilege to torts outside the defamation and false light categories. *Franson*, 84 Or. App. at 719; *see also Wollam,* 154 Or. App. at 162 n.5 (stating, "absolute privilege applies not only to defamation actions, but to any tort action based on statements made in connection with a judicial proceeding"). Although the litigation privilege originated as a bar to defamation claims, Oregon courts now have extended the privilege to all tort actions. *See, e.g., Wollam,* 154 Or. App. at 162 n.5 (invasion of privacy, intentional interference with contract); *Hiber v. Creditor's Collection Serv. of Lincoln Cty., Inc.*, 154 Or. App. 408, 410 (1998) (false imprisonment); *Yeti Enters.,* 2015 WL 3952115, at *5 (invasion of privacy, intentional interference with contract, intentional infliction of emotional distress).

Oregon's absolute litigation privilege check: wrongful initiation suits.

Although it is referred to as the "absolute litigation privilege," there is one exception recognized in Oregon. Oregon courts have explained that the privilege does not protect conduct that constitutes wrongful initiation of civil proceedings. *See Mantia*, 192 Or. App. at 412. A plaintiff need not actually bring a wrongful initiation claim to circumvent the privilege. Rather, the plaintiff can proceed on a theory of tortious interference, so long as the alleged tortious conduct would satisfy the elements of wrongful initiation. *Id.* at 414. *See also Top Serv. Body Shop, Inc. v. Allstate Ins. Co.,* 283 Or. 201, 210 (1978).

To adequately plead a claim for wrongful initiation, a party must show that

> (1) the plaintiff in the antecedent proceedings lacked probable cause to prosecute those proceedings; (2) the primary purpose of those proceedings was something other than to secure an adjudication of the claims asserted there; and (3) the antecedent proceedings were terminated in favor of the party now asserting the tortious interference claim.

Mantia, 190 Or. App. at 429 (citing to the *Restatement* for clarity). Obviously, this is an extremely difficult standard to satisfy.

First, the plaintiff must prove that the party invoking the privilege lacked probable cause to initiate the prior proceeding. Generally, the standard for probable cause to bring a civil action is less stringent than that required to prosecute a criminal action. *Blandino v. Fischel,* 179 Or. App. 185, 190, *rev. den.*, 334 Or. 492 (2002). "Evidence that the underlying action was undertaken upon the advice of counsel, relied on in good faith, that the action had a reasonable probability of success is enough to establish probable cause." *Roop v. Parker Nw. Paving Co.*, 194 Or. App. 219, 238 (2004).

Second, "[t]o subject a person to liability for wrongful civil proceedings, the proceedings must have been initiated or continued primarily for a purpose other than that of securing the proper adjudication of the claim on which they are based." *Restatement (Second) of Torts* § 676 (1977) (cited favorably by *Wroten v. Lenske*, 114 Or. App. 305, 308 (1992)). The *Restatement* provides several examples of proceedings initiated for purposes other than securing the proper adjudication of the claim on which they are based, including "instituting a civil proceeding when one does not believe his claim to be meritorious"; "when the proceedings are begun primarily because of hostility or ill will"; or "when the proceedings are initiated solely for the purpose of depriving the person against whom they are brought of a beneficial use of his property." *Id.*

Finally, the prior civil proceedings must be terminated in favor of the person against whom they were brought. This can occur by "(1) the favorable adjudication of the claim by a competent tribunal, or (2) the withdrawal of the proceedings by the person bringing them, or (3) the dismissal of the proceedings because of his failure to prosecute them." *Restatement (Second) of Torts* § 674 (1977). Significantly, "If an appeal is taken, the proceedings are not terminated until the final disposition of the appeal and of any further proceedings that it may entail." *Id.* (cited favorably in *Portland Trailer & Equip., Inc. v. A-1 Freeman Moving & Storage, Inc.*, 182 Or. App. 347, 357 (2002)).

This final requirement is particularly difficult in Oregon because, as noted above, Oregon courts will recognize the absolute litigation privilege even without the initiation of civil proceedings. Thus, how can a party plead and prove that an antecedent proceeding has been terminated in its favor when no antecedent proceeding was ever commenced? Consider, for example, an unscrupulous party that files a lien without having a valid property interest to support the lien, and thereby encumbers property to the detriment of the owner. The filing of a lien is, at least arguably, as much an act of litigation as were the letters in *Ramstead* and *Wollam*. As a result, the party filing the wrongful lien could hide behind the litigation privilege. And, the only avenue available to circumvent the

litigation privilege is by filing a wrongful initial claim, a claim that is unavailable to our injured property owner because filing the wrongful lien did not actually initiate proceedings.

Conclusion.

Oregon's absolute litigation privilege is powerful. It currently immunizes (1) conduct or testimony; (2) made in connection with an actual or potential judicial or quasi-judicial proceeding, even if no actual proceeding materializes; (3) against claims brought under any tort. As a result, the privilege has outstripped its check: the availability of a wrongful initiation suit. Accordingly, statements or conduct made outside of an actual proceeding are in many instances untouchable, representing a dramatic expansion of a privilege originally intended to bar claims of defamation based on statements made in court. Thus, the absolute litigation privilege in Oregon – a privilege originally recognized to reflect the high value our legal system places on free speech in public fora – could be used to immunize bad-faith actions by non-litigants, even where those actions damage innocent parties.

RECENT SIGNIFICANT OREGON CASES

By Stephen K. Bushong
Multnomah County Circuit Court

Claims and Defenses


Honorable
Stephen K. Bushong

Graydog Internet, Inc. v. Giller, 362 Or 177 (2017)

Plaintiff Graydog Internet, Inc. (Graydog) is a corporation with two shareholders, Westervelt—the company's president and majority shareholder—and Giller—an employee and minority shareholder. Graydog sued Giller, seeking a declaration that Giller was an "at will" employee who could be terminated without cause. Giller filed a third-party complaint against Westervelt, seeking money damages on breach of contract and other claims. Graydog then sought to purchase Giller's shares under ORS 60.952(6), which is triggered by the filing of a proceeding by a minority shareholder in a closely held corporation claiming to be oppressed by the majority. The trial court denied Graydog's "election" to purchase Giller's stock. The Court of Appeals reversed, but the Supreme Court reversed the Court of Appeals. The Supreme Court concluded that "Giller's third-party complaint against Westervelt is not a 'proceeding under subsection (1),' and, therefore, it did not trigger the election provision of ORS 60.952(6)." 362 Or at 202.

Larisa's Home Care, LLC v. Nichols-Shields, 362 Or 115 (2017)

Plaintiff—a nursing home operator—sued the estate of one of its former residents (Prichard) for unjust enrichment. Plaintiff alleged that it charged Prichard the lower rates charged to Medicaid-qualified residents because Prichard's son (Gardner) lied in Prichard's Medicaid application. Plaintiff's theory was that Prichard was unjustly enriched because she should have been paying the higher rates charged to private, non-Medicaid-eligible patients for care at plaintiff's adult foster home. After a bench trial, the trial court ruled in plaintiff's favor and entered judgment for $48,477. The Court of Appeals reversed, concluding that there was no unjust enrichment under the circumstances. The Supreme Court reversed the Court of Appeals. The court explained that "both the *Restatement (3d) Restitution* and our case law are in accord that a person—and his or her estate—have been unjustly enriched if the person obtains benefits by making false representations about his or her financial state." 362 Or at 134-35. Applying that principle in this case, the court concluded that (1) "from the perspective of third parties such as plaintiff, Prichard is liable for false representations by her agent, Gardner" (*id.* at 139); (2) "Plaintiff provided valuable care to Prichard at a substantially discounted rate, precisely because of those false representations" (*id.*); (3) "Prichard's estate is substantially larger because Prichard did not have to pay plaintiff the private-pay rates" (*id.*); and (4) it would be "unjust and inequitable for Prichard's beneficiaries to retain the benefits that Prichard had gained through the misrepresentation." *Id.*

Dickson v. TriMet, 289 Or App 774 (2018)

Two bus riders—plaintiffs Dickson and Thompson—were stabbed by another passenger (Vanhagen) while riding on a TriMet bus. A jury found TriMet liable for plaintiffs' injuries. TriMet contended on appeal that the trial court should have granted its motion for directed verdict against one of the plaintiffs (Thompson) because he failed to give timely notice of his negligence action against TriMet as required by the Oregon Tort Claims Act (OTCA), ORS 30.260 to 30.300. The Court of Appeals agreed with TriMet, concluding that Thompson's tort claim notice—filed more than 180 days after the stabbing incident—was untimely. The court explained that "no reasonable trier of fact could conclude that Thompson did not know of the critical facts that supported his claim that TriMet negligently failed to protect him from Vanhagen at the time the injury occurred." 289 Or App at 782.

Harryman v. Fred Meyer, Inc., 289 Or App 324 (2017)

Plaintiff got in an argument while waiting in a checkout line at a Fred Meyer store. The argument escalated into a fight. Ultimately, plaintiff pulled out a handgun and shot the other customer in the leg. Fred Meyer employees then tackled and disarmed plaintiff. He was convicted of assault with a firearm and was sentenced to 70 months in prison. Plaintiff then sued Fred Meyer, seeking to recover damages for injuries he claims he sustained when he was pushed to the floor. The trial court granted Fred Meyer's motion for summary judgment based on ORS 31.180, which provides that it is a defense to a personal injury action that the injured person was engaged in conduct at the time that would constitute a Class B felony. The Court of Appeals affirmed. The court concluded that (1) the statutory defense applied because "plaintiff's injuries occurred 'at the time' of the commission of the felony and that defendant's felonious conduct was a substantial factor contributing to his

injury" (289 Or App at 330); and (2) there was no triable issue of fact on whether the force used on plaintiff was not "justifiable"—thereby qualifying for an exception to the statutory defense—because plaintiff "failed to produce any evidence on summary judgment that the physical force used to restrain and disarm plaintiff was not justifiable[.]" *Id.* at 331.

Dischinger Orthodontics v. Regence BlueCross BlueShield, 288 Or App 297 (2017)

Plaintiffs brought a class action lawsuit, alleging that defendant breached insurance contracts with its policyholders by retaining excessive earnings and distributing them as compensation to defendant's corporate executives, in violation of defendant's articles of incorporation and state law. Under ORS 65.084, the validity of a nonprofit corporation's actions may not be challenged based on the corporation's power or lack of power to act, except as provided in the statute. The trial court concluded that the statute applies, so plaintiffs lack standing to bring their claims. The Court of Appeals affirmed. The court concluded that "plaintiffs' contention that defendant's actions are not within the corporation's purposes as defined in its articles is a claim that defendant lacked the power to act." 288 Or App at 303. Thus, "ORS 65.084 is applicable and prevents plaintiffs from bringing these claims." *Id.*

Hunsinger v. Graham, 288 Or App 169 (2017)

Plaintiff—the son and personal representative of an elderly person (Goodrich), now deceased—brought claims against Goodrich's attorney (Autio) for elder abuse and breach of fiduciary duty. Autio had drafted a power-of-attorney form, a promissory note, and a deed conveying Goodrich's property to Goodrich's granddaughter (defendant Graham). The trial court granted Autio's motion for summary judgment, concluding that the breach of fiduciary duty claim is barred by the two-year limitations period in ORS 12.110(1), and the elder abuse claim failed because plaintiff failed to offer evidence from which a factfinder could find that Autio knowingly acted or failed to act under circumstances in which a reasonable person knew or should have known that Graham was financially abusing Goodrich. The Court of Appeals affirmed. The court concluded that (1) "plaintiff's evidence did not present a genuine issue of material fact on the necessary requirement for constructive knowledge that Graham would financially abuse Goodrich" (288 Or App at 189); and (2) the statute of limitations on the fiduciary duty claim began to run when plaintiff learned during probate proceedings more than 2 years before filing suit "that Graham had taken money from Goodrich's account to make 'payments' on the property and that Autio's advice was implicated in the transactions." *Id.* at 190. One judge dissented in part, concluding that genuine issues of material fact precluded summary judgment on the elder abuse claim. In the dissent's view, when Autio arranged the transfer of the property to Graham and then recommended that Graham get the money from Goodrich to pay for the property, "a reasonable person should have known that financial abuse of the type in which Graham ostensibly was engaged was transpiring" within the meaning of ORS 124.100(5). *Id.* at 192 (Lagesen, J., dissenting).

Iverson's Unlimited, Inc. v. Winco Foods, LLC, 288 Or App 10 (2017)

Plaintiff (Iverson) provided unloading services to commercial carriers of goods being delivered to WinCo supermarkets. As part of its contract, Iverson provided WinCo with confidential unloading data. During a subsequent request for proposals (RFP) process, WinCo gave Iverson's competitors access to some of Iverson's confidential data. After losing the bid to a competitor, Iverson sued WinCo, asserting claims for breach of an oral contract and misappropriation of trade secrets. The trial court granted WinCo's motion for summary judgment, concluding that Iverson's damages were not caused by the use of the unloading data. The Court of Appeals reversed. The court concluded that Iverson had submitted evidence that "presented a genuine issue of material fact on causation asking how its competitors used Iverson's trade secrets to formulate their bids." 288 Or App at 19.

Jensen v. Hillsboro Law Group, PC, 287 Or App 697 (2017)

Plaintiff was the president of DPU, a company involved in arbitration with its lawyers over fees. Plaintiff retained defendant attorney to represent DPU in the arbitration, but plaintiff did not want to be personally involved. The arbitration panel ultimately issued a joint award against DPU and plaintiff personally. Plaintiff asked defendant to correct what he believed to be an error, but defendant refused, indicating that he represented only DPU, not plaintiff. Plaintiff, proceeding *pro se*, then sued defendant for legal malpractice and breach of contract. Defendant moved for summary judgment, contending among other things that he owed no contractual or other duty to plaintiff because he only represented DPU. The trial court granted defendant's motion; the Court of Appeals reversed. The court explained that, to establish a lawyer-client relationship, plaintiff must show that "(1) the client subjectively believed the relationship existed and (2) that belief was objectively reasonable, such that the lawyer should have understood that the relationship existed." 287 Or App at 708. In this case, there was a triable issue of fact as to whether a lawyer-client relationship existed, even though plaintiff testified at his deposition that defendant did not represent him at the arbitration. The fee agreements and billing statements were addressed and referred to plaintiff, providing some evidence "supporting a reasonable belief that defendant continued to owe [plaintiff] a duty to protect his legal interests apart from the interests of DPU." *Id.*

Procedure

Law v. Zemp, 362 Or 302 (2018)

Plaintiff obtained a money judgment against defendant Zemp, and sought an order under ORS 70.295 and ORS 63.259 to charge Zemp's interest in limited partnerships and a limited liability company to satisfy the judgment. The trial court issued the charging order, which included ancillary provisions requiring the companies to refrain from certain kinds of transactions and provide extensive financial information to the judgment creditor. On appeal, the companies contended that these ancillary provisions were not authorized by the statutes. The Supreme Court held that "a trial court has either general or specific statutory authority to include, in a charging order,

ancillary provisions that it finds necessary to allow a judgment creditor access to a debtor-partner's distributional interest in a company, as long as those provisions do not unduly interfere with the company's management." 362 Or at 304. Because the record did not establish that the standard was met in this case, the court vacated the challenged order and remanded to the trial court for further proceedings.

TriMet v. Aizawa, 362 Or 1 (2017)

TriMet filed a condemnation action as part of constructing the Portland-Milwaukie light-rail line. TriMet served defendant with an offer of compromise for compensation of $22,000 plus attorney fees and costs pursuant to ORCP 68 and ORS 35.300. In response to the fee request, TriMet objected to post-offer fees incurred in determining the amount of the fee award, contending that ORS 35.300(2) does not authorize recovery of those fees. The statute states that, if an offer of compromise is accepted and does not specify the amounts of costs and attorney fees, the court shall enter judgment for the amount offered "and, in addition, for costs and disbursements, attorney fees and expenses that are determined by the court to have been incurred before service of the offer on the defendant." ORS 35.300(2). The Supreme Court, construing the statute, concluded that "[t]he legislative history confirms what the text, read in context, implies: A property owner who accepts an offer of compromise under ORS 35.300(2) may recover both the pre-offer costs and fees reasonably incurred in litigating the merits of the condemnation action and the post-offer costs and fees reasonably incurred in determining the amount of the resulting fee award." 362 Or at 14.

Ossanna v. Nike, Inc., 290 Or App 16 (2018)

Defendant Nike fired plaintiff from his job as an electrician in Nike's maintenance department. Nike contended that it fired plaintiff because he used a Nike on-site basketball court during a prohibited time in violation of company policy. Plaintiff alleged that Nike's reason was a pretext, and that Nike actually discharged him in retaliation for plaintiff's safety complaints about Nike's electrician apprenticeship program. A jury returned a verdict in Nike's favor. The Court of Appeals reversed and remanded for a new trial. The court concluded that the trial court erred in failing to instruct the jury on plaintiff's "cat's paw" theory that plaintiff's supervisors' improper motives should be imputed to the corporate decision-maker who fired him. The court explained that "the trial court was required to discern the applicable law even if plaintiff's theory presented a matter of first impression." 290 Or App at 25. The court concluded that the trial court erred because (1) "plaintiff's proposed jury instruction correctly stated the applicable law" (*id.* at 32); (2) "the pleadings support his special jury instruction" (*id.* at 33); (3) the evidence at trial supported the proposed instruction (*id.* at 35-6); (4) the instructions that were given did not sufficiently inform the jury "that it could find for plaintiff on a cat's paw theory" (*id.* at 36); and (5) the error caused plaintiff prejudice because it "probably created an erroneous impression of the law in the minds of the members of the jury and that erroneous impression may have affected the outcome of the case." *Id.* at 38.

State v. T.W.W., 289 Or App 724 (2018)

This civil commitment case includes a discussion of standards for appellate review in equitable cases. The trial court concluded—based on the court's observations of appellant's hostile, agitated, aggressive, and out-of-control behavior in the courtroom—that appellant posed a danger to others. In reversing, the Court of Appeals concluded that, aside from the trial court's conclusory description, the record "contains no evidence that appellant committed an act of physical aggression at any time relevant to the commitment proceeding, nor is there record evidence that he explicitly threatened to commit an act of violence." 289 Or App at 731. One judge dissented. In the dissent's view, the court should affirm because (1) the "appellant—the party bearing the burden of demonstrating error by the trial court—failed to make an adequate record of what transpired at the hearing" (*id.* at 737, Lagesen, J., dissenting); and (2) that failure meant that, on appeal, the court was "not in a position to evaluate, meaningfully, the correctness of the trial court's assessment of appellant's dangerousness based on its direct observations of appellant's conduct." *Id.*

Wells Fargo Bank, N.A. v. Jasper, 289 Or App 610 (2017)

In this foreclosure action, after personally serving summons and complaint on defendant, plaintiff received a letter from an attorney stating his intent to appear on defendant's behalf. No appearance was ever filed; after seven months, plaintiff sent the attorney a notice of intent to seek a default pursuant to ORCP 69. The attorney responded by email that he no longer represented defendant. Plaintiff then moved for an order of default. The trial court entered the default and later denied defendant's motion for relief from judgment under ORCP 71 B(1)(d). The Court of Appeals reversed. The court concluded that "when a party attempts to serve a 10-day notice of intent to take default on another party by providing notice to an attorney under ORCP 9 B, and the serving party receives actual notice that the other party is not represented by that attorney, it is improper to seek an order of default without serving the party correctly." 289 Or App at 615.

City of Cave Junction v. State of Oregon, 289 Or App 216 (2017)

The city of Cave Junction brought a declaratory judgment action to address a perceived conflict between its business licensing requirements and the Oregon Medical Marijuana Act (OMMA). The city's municipal code required licensees to conduct their businesses in a manner that comports with municipal, state, and federal laws. That requirement posed a potential obstacle to marijuana businesses allowed under the OMMA because cultivation, possession, and distribution of marijuana are illegal under the federal Controlled Substances Act. While the case was pending, the legislature amended state law to give local governments the express authority to prohibit medical marijuana dispensaries, and the city enacted municipal code provisions governing the licensing of marijuana businesses instead of banning them. The Court of Appeals concluded that those changes "rendered moot the question of whether the trial court was correct to declare that HB 3460, SB 1531, and SB 863 do not preempt local governmental authority to prohibit medical marijuana dispensaries." 289 Or App at 225.

Cooksley v. Lofland, 289 Or App 103 (2017)

Plaintiff received $15,000 in personal-injury-protection (PIP) benefits from her insurer after sustaining injuries in an automobile accident. Defendant's insurer then reimbursed plaintiff's insurer for the $15,000 in PIP benefits. After judgment was entered on a $100,000 jury award in plaintiff's favor, defendant moved for partial satisfaction of the judgment under ORS 31.355(2) to account for the $15,000 PIP reimbursement paid by defendant's insurer. The trial court granted the motion; the Court of Appeals affirmed. The court explained that the trial court did not err because "the verdict form did not indicate whether the jury considered the PIP reimbursement in awarding damages[.]" 289 Or App at 107.

Sherertz v. Brownstein Rask, 288 Or App 719 (2017)

Plaintiff brought a legal malpractice action, alleging that the defendant law firm was negligent in preparing an estate plan. A jury returned a defense verdict. On appeal, plaintiff contended that the trial court erred in instructing the jury that: "Attorneys are not negligent merely because they do not achieve the result desired by the client. An attorney does not guarantee a good result by undertaking to perform a service." 288 Or App at 721 (quoting instruction). The Court of Appeals agreed, reversing and remanding for a new trial. The court explained that, in the context of a third-party estate planning claim, where the plaintiff is not the client, "the facts surrounding a lawyer's alleged promised result to a client become the central point of inquiry" in determining whether the lawyer owed a duty to the non-client. *Id.* at 724. The instruction at issue here—a modification of UCJI 44.03, which applies in some medical malpractice cases—"carried with it a significant risk of confusing the jury as to the importance of 'the result' promised by defendant law firm in determining duty and breach." *Id.* at 726.

Chief Aircraft, Inc. v. Grill, 288 Or App 729 (2017)

Plaintiff sells aircraft parts. Defendant—an aircraft part purchaser—became upset with plaintiff's handling of a transaction and posted derogatory comments about plaintiff on a website called Ripoff Report. Plaintiff sued for defamation and intentional infliction of emotional distress. The trial court denied defendant's special motion to strike under the anti-SLAPP statute, ORS 31.150 to 31.155. The Court of Appeals, applying *Neumann v. Liles*, 358 Or 706 (2016), affirmed. The court concluded that "a reasonable factfinder could conclude that the two statements at issue in defendant's Ripoff Report posting . . . imply an assertion of objective fact. Accordingly, those statements, if false, are not protected by the First Amendment." 288 Or App at 736.

Miscellaneous

Wittemyer v. City of Portland, 361 Or 854 (2017)

OHSU v. Oregonian Publishing Co., LLC, 362 Or 68 (2017)

In *Wittemyer,* the Supreme Court concluded that, "based on the text, historical context, and legislative history of Article IX, section 1a of the Oregon Constitution, the city's arts tax is not a prohibited 'poll or head tax.'" 361 Or at 884. In *OHSU,* the Supreme Court held that Oregon's Public Records Law did not require OHSU to produce a list of tort claimants because "the requested record contains protected health information and ORS 192.420(1) does not require the disclosure of that information." 362 Or at 70.

Schutz v. La Costita III, Inc., 288 Or App 476 (2017)

Plaintiff worked as a temporary office assistant for defendant O'Brien Constructors, LLC. She attended an after-work gathering with other employees, where she drank to the point of intoxication. After leaving the restaurant, plaintiff was seriously injured in a head-on collision when she drove her car the wrong way on a freeway exit ramp. Plaintiff then brought a negligence action against her supervisor and employer for organizing and pressuring plaintiff to attend the event where excessive amounts of alcohol would be served. The trial court granted defendants' motion for summary judgment, concluding that they could not be liable for negligence under ORS 471.565(1), which provides that a social host who serves alcohol to a guest cannot be liable for injuries caused by intoxication if the guest voluntarily consumed the alcohol. The Court of Appeals reversed. The court agreed with the trial court that "plaintiff's claims are barred by ORS 471.565(1)" (288 Or App 484), but concluded—applying *Horton v. OHSU,* 359 Or 168 (2016)—that "ORS 471.565 is unconstitutional because it falls within a category of legislation that the remedy clause [Article I, section 10, of the Oregon Constitution] prohibits[.]" 288 Or App at 488.

Vasquez v. Double Press Mfg., Inc., 288 Or App 503 (2017)

Plaintiff was seriously injured while working on agricultural machinery manufactured and sold by defendant. He brought claims for negligence and products liability. The jury found that plaintiff was 40 percent at fault for his injuries and returned a verdict in plaintiff's favor for more than $2 million in economic damages and $8 million in noneconomic damages. The trial court denied defendant's motion to reduce the noneconomic damages award to $500,000 under ORS 31.710(1), concluding that, under *Lakin v. Senco Products, Inc.,* 329 Or 62 (1999), the statutory cap on noneconomic damages violated plaintiff's right to trial by jury under Article I, section 17 of the Oregon Constitution. The Court of Appeals originally affirmed, but withdrew its opinion after the Supreme Court overruled *Lakin* in *Horton v. OHSU,* 359 Or 168 (2016). On reconsideration, the court—applying *Horton*—again affirmed the trial court, but for a different reason. The court concluded that "application of ORS 31.710(1) to plaintiff's jury award violates the remedy clause in Article I, section 10" of the Oregon Constitution. 288 Or App at 526.

Rains v. Stayton Builders Mart, Inc., 289 Or App 672 (2018)

In this personal injury case, the Court of Appeals concluded—consistent with *Vasquez v. Double Press Mfg., Inc.,* 288 Or App 503 (2017)—that "reducing plaintiffs' noneconomic damages awards under ORS 31.710(1) would violate the remedy clause of Article I, section 10, of the Oregon Constitution." 289 Or App at 675.