The Oregon State Court Perpetuation Deposition: Opportunities for the Prepared and Pitfalls for the Unwary

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Background.

Oregon Rule of Civil Procedure 39 I provides a mechanism by which the testimony of a witness who might be unavailable for trial may be "perpetuated" in advance for later use as trial testimony. ORCP 39 I. If the noticing party complies with the formalities of the statute and the other party does not object, then the deposition may be used as trial testimony whether or not the witness is ultimately unavailable for trial. ORCP 39 I(3). This is a significant departure from the general rule.

Generally, testimony adduced in a deposition may not be used at trial unless: 1) it is used for impeachment of a trial witness; 2) it is the admission of a party opponent; or 3) the witness is unavailable. ORS 45.250(1), (2)(a)-(c). A witness will be deemed "unavailable" if the requirements of ORS 45.250(2)(a)-(c) or OEC 804(1) are satisfied. *See Hansen v. Abrasive Eng'g and Mfg., Inc.,* 317 Or 378, 392, 856 P2d 625 (1993) (holding that if the requirements of ORS 45.250(c) are met, there is no need to separately satisfy OEC 804(1)(e)).

Hoping that a court will decide a witness is "unavailable" and therefore admit a deposition as trial testimony carries with it some degree of uncertainty. The court may find, for example, that there is insufficient evidence that a witness is too ill or infirm to testify, or that the proponent of the evidence has failed to show that a witness could not have been subpoenaed for trial. ORS 45.250(2)(b), (c); OEC 804(1)(d); *see also State v. Nielsen,* 316 Or 611, 618, 853 P2d 256 (1993) (witness "unavailability" under OEC 804 is a preliminary question of fact for the court to decide, and must be proved by the proponent of the testimony by a preponderance of the evidence).

The case of *Graham v. Brix Maritime Co.,* 160 Or App 1, 979 P2d 765 (1999), is a perfect example of how betting that a court will deem a witness unavailable can backfire. In *Graham,* the plaintiff, an injured deckhand, sued the company that owned and operated the ship upon which he was injured. *Id.* at 3. The plaintiff sought to introduce as substantive evidence the deposition testimony of one of the ship's captains, arguing that because the captain lived in the state of Washington and was at sea during a portion of the trial, the captain was "unavailable" within the meaning of ORS 45.250(2)(c). *Id.* at 3-4. The trial court excluded the testimony. The court of appeals upheld the trial court, finding that the plaintiff had not met his burden of proving that he could not procure attendance of the witness by subpoena. *Id.* The court reasoned that a witness's residence out of state does not make the witness *per se* unavailable, particularly when the witness was frequently in Oregon and attended his deposition in Oregon. *Id.* at 6.

The Rule 39 I deposition allows a litigant to avoid this uncertainty. The rule allows a party to know in advance whether it has cleared the "unavailability" hurdle. That said, 39 I depositions should be approached with caution and planning because, while unique aspects of the Rule create opportunities—usually for the proponent of the deposition—the flip side of those opportunities is risk for the other party. This article analyzes some of the unique aspects of Rule 39 I and discusses the often overlooked opportunities and pitfalls inherent to the Rule.

ORCP 39 I eliminates the need to prove unavailability AT TRIAL, and places upon the non-noticing party the burden to object TO PERPETUATION.

The first unique aspect of Rule 39 I is that it eliminates the need to prove unavailability at trial, and initially shifts the burden to the other party to object. After commencement of an action "any party wishing to perpetuate the testimony of a witness for the purpose of trial or hearing may do so by serving a perpetuation deposition notice." ORCP 39 I(1). If prior to the time set for the deposition the opposing party does not file an objection, "the testimony taken shall be admissible at any subsequent trial or hearing…" *Id.* at I(3). Thus, if the non-noticing party fails to object, that party forever loses its right to require the noticing party to prove the witness is unavailable.

In addition to initially shifting the burden regarding unavailability, Rule 39 I also lowers the bar in the event of an objection. Whereas at trial the party offering a discovery deposition into evidence must prove to a preponderance that the witness *is* in fact unavailable, if a party objects to a 39 I deposition, the noticing party must only show that a witness *may* be unavailable or, in the alternative, that appearing for trial would be a hardship or that other good cause exists for perpetuation. ORCP 39 I(3). Thus, the Rule favors the ability of a litigant to perpetuate testimony and permits objections to be dealt with far in advance of trial, which allows parties to know where they stand *vis-à-vis* the subject evidence.

All objections must be made during the deposition.

The unique aspect of 39 I depositions that carries with it the most opportunity and risk—depending on your perspective—is the requirement that *all* objections be made during the deposition. "All objections to any testimony or evidence taken at the deposition shall be made at the time and noted upon the record." ORCP 39 I(6). Consequently, perpetuation depositions "follow the routine of a trial with objections to all matters being made at the time of the deposition, but reserving the ruling on the objection for the trial judge." *Grimm v. Ashmanskas,* 298 Or 206, 211-12, 690 P2d 1063 (1984) (discussing common law Oregon State court "perpetuation" deposition procedure for witnesses expected to be unavailable for trial, as that procedure existed prior to the promulgation of section "I" to ORCP 39 by the Council on Court Procedures in 1986).

Courts rigorously enforce the requirement that *all* objections be made during the 39 I deposition and that any objection not made will be waived. *Evers v. Roder,* 196 Or App 758, 760-61, 103 P3d 680 (2004) (holding that objection to admissibility of expert testimony under OEC 104 was waived when not made during 39 I deposition and objection could therefore not be raised at trial); *State ex rel. Oregon Health Sciences University v. Haas,* 325 Or 492, 511-12, 942 P2d 261 (1997) (holding that because OEC 511 postpones the effect of any waiver of privilege during a 39 I deposition until the testimony is offered at trial, objections on grounds of privilege must be made twice in order to be preserved—once during the 39 I deposition and again at trial).

The waiver of all objections not made during the 39 I deposition is a significant departure from the procedure in other depositions. The only objections that need to be made during the typical discovery deposition are objections to form and to other errors that "might be obviated, removed or cured" if an objection was promptly presented. ORCP 41 C(2). Ordinarily, objections to the "competency, relevancy or materiality of testimony are not waived" by failing to make them at the deposition. ORCP 41 C(1). Because the overwhelming majority of depositions are not 39 I depositions, practitioners sometimes assume that the usual rules apply during 39 I depositions and therefore miss crucial objections.

A further nuance is that parties must object not only to questioning and testimony, but to any other "evidence taken" at the 39 I deposition. ORCP 39 I(6). We believe this means that any objections one might make at trial to an exhibit such as lack of foundation, prejudice, relevance, or hearsay need to be made as to any offending exhibits or demonstratives offered during the deposition. The failure to object will be a waiver and the 39 I exhibits will be admitted at trial.

What is a pitfall for one party is an opportunity for the other, and the savvy practitioner should be prepared to maximize the opportunities presented by opposing counsel's failure to object. Of course, the questioning attorney should be prepared to ask unobjectionable questions and lay the foundation for key documents to be admitted during the deposition. But that does not mean that the witness should not also be asked to speculate, opine or even to testify as to hearsay. If no objection is made, none can be made at trial. Advantageous documents which may be difficult to admit at trial due to hearsay or foundational problems can also be shown to the witness. During the deposition the questioner should offer into evidence all exhibits that have been discussed by the witness. Again, if no objection is made at the deposition, none can be made at trial.

Questioning outside the noticed subject areas may be excluded upon objection.

Another difference between discovery and 39 I depositions is the need to include in the 39 I deposition notice a "brief description of the subject areas of testimony…" ORCP 39 I(2)(a). Based upon the plain language of the Rule, the noticing party should describe the subject areas of testimony with as much detail as necessary to provide fair notice to the other party and therefore avoid objections to scope. The other party should be vigilant in objecting to questions that are outside the noticed subject matter. Objections to scope will also be waived if not made during the deposition. ORCP 39 I(3).

What is less obvious is that the party receiving the 39 I notice may need to issue its own notice in response if there are important subject areas of inquiry beyond those presented in the initial notice. Since 39 I depositions "follow the routine of trial," they are "usually restricted to non-leading questions on direct examination and follow standard cross-examination techniques." *Grimm,* 298 Or 206 at 212. This means that the noticing party will be able to successfully object to cross-examination that is outside the scope of the direct examination — just as it could at trial. If the noticing party adheres to the subject areas of the deposition notice, then the other party will be confined to those areas unless the other party issued its own notice setting forth additional subject areas for questioning.

These pitfalls may be avoided if both parties carefully consider all of the potential subject areas of testimony and describe them in the 39 I notice.

The noticing party may be stuck with the perpetuated testimony even if the witness BECOMES available for trial.

Probably the greatest unwritten trap for the proponent of the 39 I deposition is the possibility that one may be stuck with the testimony *even if* the witness ultimately ends up being available for trial. The authors are aware of an instance in which the trial court refused to allow a witness to testify live at trial regarding subject

matter that was covered during a 39 I deposition of the same witness. Although nothing in the Rule expressly permits a trial court to exclude live testimony from a 39 I deponent, arguably such authority arises by implication because the perpetuated testimony is treated in all other ways as the witness's trial testimony. This creates the possibility that because a 39 I deposition was taken, live testimony from a witness who has, for example, recovered his or her health could be excluded. This risk might be mitigated by an advance agreement between counsel that no objection will be raised to live testimony if the witness is ultimately available for trial.

You should maximize your opportunities and avoid pitfalls by preparing for the deposition as you would for trial.

Given the opportunities and risks inherent to 39 I depositions, both parties should prepare for the deposition with the same rigor and attention as they would for trial. If the witness is a "friendly witness" to the noticing party, the witness should be prepared as though that witness were testifying under direct examination at trial. If the witness is potentially adverse to a party's case, then that party should insist upon a discovery deposition prior to the 39 I deposition. ORCP 39 I(5). The Rule allows for a prior discovery deposition as a matter of right, subject to the trial court's discretion to issue orders to protect witnesses from "annoyance, embarrassment, oppression or undue burden…." ORCP 36 C; *Martin v. DHL Express, Inc.*, 235 Or App 503, 509, 234 P3d 997 (2010) (trial court's refusal to allow a discovery deposition prior to 39 I deposition of a witness suffering from acute multiple sclerosis was within the trial court's discretion pursuant to ORCP 36 C).

For convenience's sake, counsel often conduct the discovery deposition immediately prior to the 39 I deposition. This can be a mistake because it often will not afford sufficient time for counsel to develop a quality cross-examination before the 39 I deposition takes place. Therefore, a party seeking a discovery deposition should attempt to schedule it so there is sufficient time to obtain the transcript, formulate a cross-examination strategy, and decide whether additional subject areas should be noticed for perpetuation.

Using Legislative History in Interpreting Statutes After *State v. Gaines*

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As most litigators know, the Oregon Supreme Court's 2009 *State v. Gaines*[1] opinion altered Oregon's statutory interpretation framework by requiring courts to consider legislative history offered by a party. Not surprisingly, in the years since *Gaines*, Oregon's appellate courts have frequently analyzed legislative history when interpreting statutes. Because of that, it is increasingly important for attorneys to know what weight legislative history will be given, as well as what types of legislative history courts find persuasive. Those topics will be explored here by examining several recent appellate court decisions.

Statutory Interpretation—A Brief Primer

Before *Gaines*, courts followed a three-step process in interpreting a statute. First, the court considered the statute's text and context. If the statute's meaning was clear after step one, the court's analysis ended. But if the statute was ambiguous, the court moved to step two and examined legislative history. If the legislative history did not resolve the ambiguity, the court proceeded to the third and final step—application of general maxims of statutory interpretation.[2]

In *Gaines*, the Supreme Court essentially collapsed the first two steps of the process into a single step. The Supreme Court stated that consideration of text and context remained the first step in interpreting a statute, but even if a court found the text and context unambiguous, the court was required to consider any legislative history offered by a party.[3] However, the Supreme Court emphasized that "text and context remain primary, and must be given primary weight in the analysis."[4] Perhaps for that reason, the Supreme Court gave courts wide latitude in determining the "evaluative weight" that should be given to legislative history.[5]

Limits on the Use of Legislative History

While it is clear that legislative history plays a more significant role in interpreting statutes post-*Gaines*, there are limiting principles to keep in mind before spending hours listening to recordings of legislative debates from decades past.

1 *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009).
2 *Portland General Electric Co. v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993).
3 *Gaines*, 346 Or at 171-72.
4 *Id.* at 171.
5 *Id.* at 172.