beneficiary "gained an unfair advantage by devices which reasonable people regard as improper." *Slusarenko v. Slusarenko*, 209 Or. App. at 325-26.

Happy hunting and may justice be done.

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Ethics in Deposition: Do the Rules of Professional Conduct Require Self-Restraint by the Questioning Lawyer?

By David B. Markowitz and Joseph L. Franco

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The following excerpt from a recent Oregon trial describes a scenario that many litigators have encountered: a malleable deponent who is inadequately protected by counsel.

"Q … During that March 12, 2009 deposition, you asked a number of questions, got a whole lot of confessions. Did you observe the quality of [Lawyer's] representation of his client in that deposition?

A Yes.

Q Will you tell the jury what you observed.

A Well, I used this term in my deposition a week or so ago with these lawyers. And what I observed was what I call sitting there like a bump on a log. [Lawyer] appeared to me to be basically letting me have my way with his client. And his client was sinking fast."

With the defending lawyer failing to protect his witness, and a witness who is on the ropes and subject to manipulation, are there any bounds beyond which an ethical questioner should or must not go? While numerous cases and articles address the ethical duties of a lawyer defending a client's deposition, comparatively little attention has been paid to the questioning lawyer's duties. These duties are most important, and easiest to violate, when the deponent is malleable and inadequately protected.

This article suggests that Oregon's Rules of Professional Conduct should and do constrain a questioning lawyer's conduct during a deposition, particularly when the deponent and opposing counsel are themselves unwilling or unable to impose meaningful constraints.

Misrepresentations to the Witness or Opposing Counsel

While questioning a weak deponent, the lawyer may gleefully muse: I wonder just how far can I take this witness? There are any number of ethically sound questioning techniques designed to obtain the information and admissions you need from such a witness. A skilled questioner often will obtain what is needed before the witness or opposing counsel realize the import of what has transpired. In this process of having one's way with the witness, however, the questioning lawyer should always take care not to cross the line between skilled, creative questioning and misrepresentation.

The ethical prohibitions against false statements and misrepresentations apply to a lawyer's conduct during depositions. Oregon Rule of Professional Conduct ("Rule") 4.1 provides that "[i]n the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person…" Rule 8.4(a)(3) in turn provides that it is "misconduct for a lawyer to…(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law." ORPC 8.4(a)(3). A misrepresentation may include "both affirmative statements and nondisclosure of material facts." *In re Kluge*, 332 Or 251, 255, 27 P3d 102 (2001) (defining "misrepresentation" for purposes of DR 1-102). In *Kluge,* the accused was disciplined for lying about being a notary and administering an oath to the deponent. *Id.* at 256. The misrepresentation was deemed to be material because the misrepresentation and unauthorized oath "could or would have influenced [the] decision to proceed with the deposition." *Id.*

A misrepresentation made during a deposition may not even need to be material in order to result in discipline. Rule 3.3, Candor Toward the Tribunal, prohibits a lawyer from knowingly making *any* false statement of fact or law to a tribunal. ORPC 3.3(a)(1). Under the ABA Model Rules of

Professional Conduct ("Model Rules"), "tribunal" is defined to include depositions. Cmt. to Model Rule 3.3 (defining "tribunal" to include "an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition";) *see also In re Hostetter*, 348 Or 574, 590, 238 P3d 13 (2010) (finding the commentary to the Model Rules persuasive authority). Oregon adopted the definition of "tribunal" from the Model Rules without modification. *See* ORPC 1.0(p) and Model Rule 1.0(m). If, consistent with the Model Rules, the Oregon Supreme Court were to interpret "tribunal" to include depositions, then a false statement made during a deposition would not need to be material to result in discipline.

There are a number of ways in which the questioner might make a misrepresentation during a deposition. The misrepresentation could be an overt lie to the deponent and counsel, such as in *Kluge*. It might also be made on the record as part of the questioning. The authors have defended depositions in which opposing counsel have prefaced a question with the phrase "I will represent to you that…" There is little doubt that the above sentence would be deemed a "representation," even if part of a question. If the questioning lawyer knows the representation is false, then the lawyer may be subject to discipline. In any event, such statements on the record by the questioning lawyer are unnecessary. The questioning lawyer may achieve the same result through use of a hypothetical question, which avoids the risk that a false preface to a question will be deemed a misrepresentation.

Another, perhaps less clear-cut example is the use of a leading question containing a statement that the questioner knows to be false. Such questions often are nothing more than a statement of fact by the lawyer, which the witness affirms or denies by answering "yes" or "no." *State v. Sing*, 114 Or 267, 288, 229 P 921 (1924). For example, in an automobile injury case assume the lawyer knows through photographic evidence that the signal light was red when her client entered the intersection. The lawyer nevertheless asks the following leading question of a third party: "The light was green when [client] entered the intersection, correct?" Is it conceivable that such a question could be deemed a false statement for purposes of Rule 3.3 or 4.1?

Bluffing during a deposition can also result in an ethical violation. *See Cincinnati Bar Assoc. v. Statzer*, 800 NE2d 1117 (Ohio 2003). In *Statzer,* a lawyer who deposed her former legal assistant stacked some audio cassettes next to her on the table and insinuated that the cassettes contained damaging recordings of the deponent. *Id.* at 119. The questioning lawyer referred to the tapes throughout the deposition in an attempt to secure the witness's compliance with questioning. *Id.* at 1120. The tapes were either blank or held information unrelated to the deponent. *Id.* The questioning lawyer was found to have violated Ohio's version of DR 1-102(A)(4) which prohibits the lawyer from engaging in fraud, deceit, dishonesty or misrepresentation, and DR 7-106(C)(1) which prohibits a lawyer from appearing before a tribunal and alluding to matter that will not be supported by admissible evidence. *Id.* Whether these same facts would lead to a violation under Oregon's version of the Model Rules is not certain, but it is nevertheless a risk. This risk is heightened if the term "tribunal" is deemed to encompass ancillary proceedings such as depositions for purposes of Rule 3.3, Candor to the Tribunal. For this reason, one commentator has urged that lawyers proceed with caution when bluffing during a deposition. Michael Downey, *Know the Boundaries: The Ethics of Bluffing*, 47 No. 6 DRIFTD, June 2005 at 54.

Eliciting Testimony the Questioning Lawyer Knows to Be False

If a witness is vulnerable, the questioning lawyer may be able to intentionally elicit testimony that the lawyer knows to be false. For example, it may be beneficial to the questioning lawyer's case for a contract to have been signed on January 1 rather than February 1. The questioning lawyer knows from independent sources that the contract was indeed signed on February 1. The questioning lawyer nevertheless waits until the end of the day when the witness is weary and asks the following leading question: "So you signed the contract at issue on January 1, correct?" The witness, simply wanting the ordeal to end, responds: "Sure, yeah."

As noted in the section above, an intentionally false statement within a leading question might be deemed a false statement. Beyond that, there are other potential issues with attempting to elicit false testimony during a deposition. At a minimum, the lawyer may not use the untrue testimony at a trial or hearing because Rule 3.3(a)(3) prohibits the lawyer from offering evidence the lawyer knows to be false. It may also be that the questioning lawyer's

purposeful elicitation of false testimony would violate Rule 3.4(b), which prohibits a lawyer from "assist[ing] a witness to testify falsely…"

In addition, the intentional procurement of false testimony may constitute "conduct that is prejudicial to the administration of justice." ORCP 8.4(a)(4). A violation of Rule 8.4(a)(4) exists if: 1) the lawyer's conduct was improper; 2) the improper conduct took place within a judicial proceeding, or a proceeding with the trappings of a judicial proceeding; and 3) the improper conduct had or could have had a prejudicial effect on the administration of justice. *In re Paulson*, 346 Or 676, 683, 216 P3d 859 (2009). It is not a stretch to suggest that the purposeful procurement of false testimony on the record could satisfy all three elements.

Harassing or Embarrassing the Deponent or Opposing Counsel

Aggressive questioning of a witness can certainly be appropriate, but it should at all times remain professional. Questions that are designed to merely harass or embarrass a witness are improper and may result in discipline. A lawyer should not ask questions during a deposition that "have no substantial purpose other than to embarrass, delay, harass or burden" the deponent. ORPC 4.4(a). In addition to a violation of Rule 4.4, a number of jurisdictions have found such tactics constitute conduct prejudicial to the administration of justice. *In re Hammer,* 718 SE2d 442 (SC 2011) (the questioning lawyer inappropriately asked the deponent about his sexual orientation, whether he had HIV, and if he had Alzheimer's disease); *The Florida Bar v. Ratiner,* 46 So3d 35 (Fla 2010) (belligerent conduct toward opposing counsel constituted conduct prejudicial to the administration of justice).

Conclusion

Even if the deponent or the defending lawyer does not place effective limits on the deposition questioner, the ethical rules sometimes call for restraint. The occasions for restraint discussed above are not exhaustive, but are instead meant to be food for additional thought. There are myriad ways in which the Oregon Rules of Professional Conduct may be implicated during a deposition. How they are implicated will depend on the unique facts of every case.

Comments from the Editor

An Alternative to Mock Jury Trials

By Dennis Rawlinson, Miller Nash LLP

Dennis Rawlinson

Most of us recognize the value of using jury-trial consultants and conducting mock jury trials to develop trial themes, determine any gaps in our cases, and discern their strengths, weaknesses, and worth.

Engaging trial consultants and conducting mock jury trials can be expensive. The expense can usually be justified only in the most substantial cases we handle. It is difficult, if not impossible, to justify such an expense in a case involving $100,000 or less.

Yet there are some alternatives to consider in our trial preparation. There are other, less expensive ways to determine:

- whether we have selected a persuasive theme.
- whether we can get our point across in 30 seconds or less.
- the strengths and weaknesses of our case.
- whether we have developed a proper "story" for our case.
- whether gaps or questions are raised by our story.
- whether we have personalized our story characters.
- whether we have successfully reduced our case to a single persuasive sentence.

What are these less expensive alternatives to mock jury trials? Every day we have opportunities to spend time with "regular folks" whose reactions and opinions concerning our cases may well be as helpful as those of the jury consultant or those of a mock jury panel. Many of these people are available to us at little or no expense.

1. Gas-Station Attendants. Next time you stop to get fuel for your automobile, select a time of the day that is early or late enough that the gas station will not be busy. Service stations providing 24-hour service are ideal in providing these opportunities.

As the gas-station attendant is filling your automobile's tank, get out of your car and ask the person's indulgence in listening to the facts of a case you are handling and providing you with his or