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

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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

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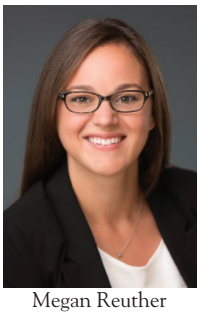
Megan Reuther

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