Reopening Depositions

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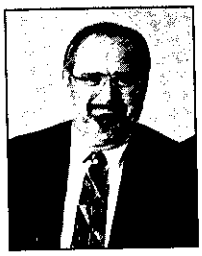
Background

The general practice in Oregon has been that a litigant usually has but one bite at the apple when taking a witness's deposition. Once a deposition of a witness has been taken, the deposition usually cannot be reopened for further questions. (The practice in Oregon is not universal across the country; Colorado practice, for example, permits liberal reopening of depositions.) This practice has applied to depositions even though Oregon rules provide no express limits on the number of times a party may seek information from one person.



In some circumstances, though, fairness dictates that a party be permitted to reopen the deposition of a witness. However, no Oregon rule specifically covers when a party may require reopening, and very few reported Oregon cases have even touched upon the topic of reopening depositions.

The few Oregon cases we have come across that discuss reopening of depositions indicate that grounds for reopening depositions are being decided in state court litigation on an ad hoc basis. *See Harris v. Harris*, 247 Or 479, 480, 430 P2d 993 (1967) (the court noted that in proceedings before the trial court, the defendant's deposition had been recessed to require the defendant to produce certain records and also noted that the plaintiff had obtained an order requiring the defendant to appear for continuation of his deposition after he left to another state); *Burson v. Cupp*, 70 Or App 246, 248, 688 P2d 1382 (1984) (in an action for postconviction relief, the court held that the trial court did not abuse its discretion in refusing to permit the deposition of a witness who had already been deposed).

This article attempts to articulate a standard for reopening depositions in Oregon state court litigation that may enable parties to agree without judicial intervention that a deposition may be reopened for limited purposes.

Suggested Standard in Oregon

Federal law provides some guidance for a standard for reopening depositions that may be applied in Oregon. Pursuant to Rule 30(a)(2)(B), as amended in 1993, if "the person to be examined already has been deposed in the case," either "written stipulation" of the parties or "leave of court" must be obtained to retake or reopen a deposition. Rule 30(a)(2) also provides the standard for granting motions to reopen: such motions "shall be granted to the extent consistent with the principles stated in Rule 26(b)(2)."

Rule 26(b)(2) provides that a court shall limit discovery if:

> "(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit."

Thus, the federal standard contained in Rule 30(a)(2) and Rule 26(b)(2) essentially provides that reopening of a deposition should be allowed unless there was sufficient opportunity to obtain the information previously, *see Graebner v. James River Corp.*, 130 FRD 440, 441 (ND Cal 1989) (defendant's request for second deposition based on "new information" that originated with defendant was denied), or the request would be unnecessarily burdensome or expensive. *See Morse v. Nabisco, Inc.*, 1990 WL 139252, *7 (ND Ill Sept. 14, 1990) (court would not reopen deposition and require answers where expense and delay in reopening would outweigh probative value of answers to questions).

If a standard were articulated that described the Oregon practice, it likely would be that reexamination of the same witness is not permitted unless the party seeking to reopen the deposition lacked an adequate opportunity to examine the witness as to the additional subject matters to be covered through circumstances outside the party's control and such a reexamination would not be unduly burdensome. Looking at cases from other jurisdictions, such circumstances include:

- Substantial changes made to deposition testimony after reading and such changes make the deposition incomplete or useless without further testimony, or are of a nature that the examining party did not have an opportunity to cross-examine.

See, e.g., Lugtig v. Thomas, 89 FRD 639, 642 (ND Ill 1981).

- The deponent was instructed not to answer questions that have been subsequently allowed by court order, or significant misconduct during the deposition occurred that may have affected the witness's testimony.

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See O'Brien v. Amtrak, 163 FRD 232, 236 (ED Pa 1995) (defendants ordered to appear for second depositions and to bear their costs where defense counsel made improper objections throughout first depositions).

• An expert deponent has done further tests or examinations after his or her deposition that may affect the accuracy or validity of initial deposition testimony. *See Wiley v. Brown*, 164 FRD 547, 549 (D Kan 1996).

• Availability of additional documents that were requested in time for review prior to the deposition but that the deponent or party did not timely produce. *See, e.g., Dixon v. Certainteed Corp.*, 164 FRD 685, 692 (D Kan 1996) (newly discovered statements grounds for second deposition); *Orrison v. Balcor Co.*, 132 FRD 202, 203 (ND Ill 1990) (second deposition allowed when plaintiff appeared at deposition with numerous documents not produced previously and that defendants did not have sufficient opportunity to review prior to the deposition).

• Significant changes in pleadings. *See, e.g., Perry v. Kelly-Springfield Tire Co., Inc.*, 117 FRD 425, 425 (ND Ind 1987) (second defendant added by amendment to complaint entitled to depose plaintiff although first defendant had already deposed plaintiff); *Mann v. Newport Tankers Corp.*, 96 FRD 31, 33 (SDNY 1982) (defendants entitled to reopen plaintiff's deposition when new negligence allegations contained in supplemental response to interrogatories were provided long after plaintiff's deposition).

• Extensive delays in litigation during which time the facts, e.g., the deponent's condition in a personal injury action, may have changed. *See Dwyer v. Mazzola*, 567 NYS2d 281, 282 (App Div 1991) (second depositions allowed regarding changes in plaintiff's condition and medical and education records when significant delay was caused in large part by the plaintiff).

In sum, in Oregon state courts, one seeking to reopen a deposition must establish good cause for not having examined the witness in the newly requested areas of inquiry the first time around. If good cause can be established, then reopening should occur unless it would be unduly burdensome.❐

Reined In, But Still Reigning:
Confusion Over the Parol Evidence Rule

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While perhaps not older than dirt, the parol evidence rule is nonetheless ancient.[1] With 135 years of consideration in Oregon's courts alone,[2] how the rule applies should be entirely settled. Not hardly.

STATE OF THE RULE IN '92

As of 1992, there were conflicting answers from Oregon's courts to several fundamental issues of parol evidence or contract litigation.[3] The unresolved issues included:

1. Is the question of integration one of fact or law or is it a mixed issue?

2. Is evidence of the surrounding circumstances to be considered by a trial court when deciding whether contract language is ambiguous?

3. Does the fraud exception to the parol evidence rule render admissible evidence of an alleged misrepresentation that contradicts unambiguous integrated terms?

4. Is a directed verdict appropriate against a breach-of-contract claim when a plaintiff produces evidence sufficient for a jury to find breach of contract but not actual damages?

STILL A MIX IN '96

Four years later, we have a clear answer to one question, an apparent answer to a second, and two others awaiting resolution.

INTEGRATION

In *Abercrombie v. Hayden Corp.*,[4] a threshold question was identifying the standard for reviewing a trial court's determination that a contract was integrated. Curiously, the Oregon Supreme Court did not preface its analysis by acknowledging its checkered history of having in the past sometimes labeled such trial court determinations ones of law[5] and other times a fact[6] and having sometimes reviewed de novo[7] and on other occasions only for substantial evidence.[8] In any event, the supreme court resolved the integration issue, holding that a trial court's determination of integration is one of fact.[9] The supreme court did not, however, go on to review the findings of integration before it because the parties did not dispute that finding. The supreme court therefore did not expressly address whether a finding of integration would, similarly to other findings, be upheld if supported by any competent evidence. The Oregon Court of Appeals, however, has addressed that issue, albeit before *Abercrombie* was decided.

In *Wescold, Inc. v. Logan International, Inc.*,[10] Judge Leeson writing for the court cogently and thoroughly analyzed the issue. Rejecting a simple "any evidence" test, the panel explained that review of an integration finding involves two steps: (1) findings of historical fact, *i.e.*, "what happened," will be reviewed for any evidence to support them, while (2) the court will review de novo the legal effect of those historical facts.[11]

SURROUNDING CIRCUMSTANCES

Abercrombie also served as the occasion for the supreme court to declare whether evidence of surrounding circumstances is admissible for a trial court to consider when deciding if contract language is ambiguous. Again, the supreme court did not acknowledge a checkered history of conflicting case law.[12] Even more remarkably, the supreme court seemingly resolved the issue in a single midparagraph sentence without explaining that, in doing so, it was reversing an en banc opinion of the court of appeals, *Jarrett v. U. S. National Bank*.[13] The supreme court

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