

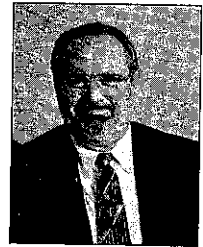
Dual Session

D E P O S I T I O N S

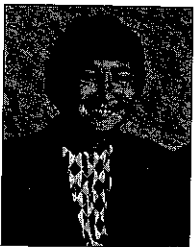
By
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Litigators in Oregon assume that absent special circumstances, a party deponent must appear once, and only once, for a deposition. However, that assumption (no Oregon rule expressly limits the number of times a party may seek information from a witness by deposition) may in a significant number

of cases cause inefficiency and increased expense in the resolution of cases. In appropriate cases, the parties and, if necessary, courts should consider the value of allowing depositions of party witnesses to be held in two sessions, one early in the case to determine the basic factual positions and major disputed issues in a case, and then a second session with the same witness after significant discovery occurs to explore discrete factual



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disputes.

Under current Oregon deposition practice, the reexamination of the same party witness generally is not permitted unless the party seeking to reopen the deposition can establish a good reason and a re-examination would not be unduly burdensome. Typi-

cally, circumstances providing good cause to reopen a deposition include: 1) substantial changes made to deposition testimony after reading and signing; 2) the need for responses to questions not answered and then allowed by court

order or misconduct during the deposition that may have affected the witness's testimony; and 3) subsequent events that may affect the accuracy or completeness of initial testimony, e.g., production of additional documents that the deponent or opposing party did not timely produce, significant changes in pleadings, or unusual delays in litigation during which time facts have changed.

The single-session deposition practice has some benefits. For some witnesses, the litigation process is emotionally difficult, and the general practice limits the emotional burden by requiring a one-time event. The prospect of two separate deposition sessions may be discouraging, painful, or even harmful to some litigants or witnesses, e.g., a child who witnessed an acci-

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dent involving a family member, a person who was sexually harassed on the job, or a person who was physically abused by the defendant. For other witnesses, a dual-session deposition would be burdensome because of the witness's business or profession or other time, financial, or logistical problems, e.g., a busy corporate president who is a peripheral witness or a plaintiff who lives overseas. The usual practice protects these sorts of witnesses from the burden of appearing twice.

However, a number of deleterious practices can occur during litigation because of the traditional "one-bite-at-the-apple" limitation. Lawyers operating under such a limitation must carefully consider when to take the depositions of key witnesses. They will defer key witness depositions until a time

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Dual-Session Depositions

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when they feel comfortable that they know everything necessary about the legal issues and the facts to formulate all the questions required to obtain admissions, to address factual disputes, and to prepare for possible dispositive motions. Often, particularly in complex cases, that point occurs quite late in discovery, to the detriment of efficient resolution of a case. If early depositions of key witnesses were allowed without prejudice to a follow-up deposition after later discovery, it is possible that the fac-

tual and legal issues in a case would be narrowed considerably at the outset. Without an early deposition, counsel may waste time and resources doing discovery on issues that would have been resolved had the key witness testified early on. It also would allow the litigants an opportunity to consider settlement early in the case based in part on exposure to the actual and not the presumed testimony of the opponent's key witnesses.

Litigators also have been known to engage in tactics specifically intended either to circumvent the traditional one-session procedure. Some of these relate to the scheduling of depositions. For example, the deposing attorney may deliberately underschedule the time needed for the witness's deposition, fail to complete the examination, and then hold the deposition open and require the witness to complete testimony later. Even when depositions are scheduled for several days, some lawyers engage in largely wasteful questioning designed to fill

Thus, in some, but not all, cases, the bench and bar should consider the possibility that the important party witnesses should testify in two sessions. ... Where the parties anticipate that settlement discussions early on may be successful, or at least determine that settlement attempts should be made immediately, dual-session depositions are highly useful.

up all of the scheduled time. A lawyer who has filled up all scheduled time will end the questioning with a statement asserting the right to continue the "incomplete" deposition at a later time. The prompt questioner, who has not needed an entire day of testimony, may not be allowed to reopen the deposition. It makes no sense that a lengthy, wasteful questioner is rewarded with a second deposition opportunity.

Thus, in some, but not all, cases, the bench and bar should consider the possibility that the important party witnesses should testify in two sessions. Those cases need not be the largest or most complex cases, although such cases can lend themselves very well to dual-session depositions. Where the parties anticipate that settlement discussions early on may be successful, or at least determine that settlement attempts should be made immediately, dual-session depositions are highly useful. For example, we have entered into stipulations with opposing counsel that permit a few key witnesses to be deposed for a limited time period so that the parties could be in a position to evaluate the case for purposes of alternative dispute resolution attempted early in the case. Dual-session depositions have worked well in our cases where we have tried it. Through the adoption of dual-session stipulations, depositions should be shorter, and settlements may be achievable in a much shorter time frame, alleviating the need for the second deposition session. □



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