Multnomah Bar Association

MULTNOMAH COUNTY DEPOSITION GUIDELINES

Presented by the Multnomah Bar Association Court Liaison Committee.

The attorneys and judges of Multnomah County have asked for clarification of local deposition practice. These guidelines are the result of a collaboration between the bench and bar, and are designed to provide uniformity and thereby reduce disputes during discovery depositions. No attempt is made to cover every potential area of dispute; instead, the intent is to cover the majority of avoidable problems arising during discovery depositions.

SCOPE OF DEPOSITION. ORCP 36B(1) provides that any matter not privileged may be inquired into during deposition if reasonably calculated to lead to admissible evidence. If unreasonable or bad faith deposition techniques are being used, the deposition may be suspended briefly, and a motion to limit pursuant to ORCP 39E may be made and heard by an available judge.

OBJECTIONS. ORCP 39D(3) creates a mechanism so that the attorney whose question is objected to may accept the objection as an invitation to correct an alleged defect in the question; rejection of the invitation may result in exclusion of the question and answer at trial. Attorneys should not state anything more than the legal grounds for the objection to preserve the record, and objection should be made without comment to avoid contamination of the answers of the witness. Argument in response to the objection is neither necessary nor desirable.

INSTRUCTIONS NOT TO ANSWER. The only basis for an instruction not to answer a question reasonably calculated to lead to the discovery of admissible evidence is in response to an attempt by the attorney taking the deposition to inquire into an area of privacy right, privilege, an area protected by the constitution, statute, work product, or questioning amounting to harassment of the witness. Any other objection to inquiry, such as lack of foundation, competence, asked and answered, etc., can be preserved with recitation of a brief objection.

DEPOSITION DISPUTES. 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. Presiding court will provide names of judges and will give preference to judges who have previously heard matters in the case or judges on the Multnomah County Motion Panel.

PENDING QUESTIONS. If a break in questioning is requested, it shall be allowed so long as a question is not pending. If a question is pending, it shall be answered before a break is taken, unless the question involves a matter of privacy right, privilege or an area protected by the constitution, statute or work product.

PERSONS PRESENT. Any party may attend a deposition. Non-party witnesses are excluded at the request of any party. Parties and non-witness may be excluded by the court upon hearing, or if they disrupt the proceedings.

Approved, MBA Board of Directors, September 1992
Revised December 1992
Reviewed and reapproved, MBA Board of Directors, March 7, 2012

CIVIL MOTION PANEL STATEMENT OF CONSENSUS
Current as of February 1, 2013

The Civil Motions Panel of the Circuit Court is a voluntary group of judges who agree to take on the work of hearing and deciding pretrial motions in civil actions that are not assigned specially to a judge. Periodically, the motion panel judges discuss their prior rulings and the differences and similarities in their decisions. When it appears panel members have ruled similarly over time on any particular question, it is announced to the bar as a "consensus" of the members.

The current consensus of the Panel's members are set out below. The statements do not have the force of law or court rule; the statements are not binding on any judge. A consensus statement is not a pre-determination of any question presented on the merits to a judge in an action. In every proceeding before a judge of this court, the judge will exercise independent judicial discretion in deciding the questions presented by the parties.

1. ARBITRATION

A. Motions - Once a case has been transferred to arbitration, all matters are to be heard by the arbitrator. UTCR 13.040(3). A party may show cause why a motion should not be decided by the arbitrator.

B. Punitive Damages - Where the actual damages alleged are less than $50,000, the pleading of a punitive damages claim which may be in excess of the arbitration amount does not exempt a case from mandatory arbitration.

2. DISCOVERY

A. Medical Examinations (ORCP 44)

1. Vocational Rehabilitation Exams - Vocational rehabilitation exams have been authorized when the exam is performed as part of an ORCP 44 examination by a physician or a psychologist.

2. Recording Exams and Presence of Third Persons - Audio recordings have been allowed absent a particularized showing that such recording will interfere with the exam. Videotaping or the presence of a third person has been denied absent a showing of special need (e.g., an especially young plaintiff).

3. We have ordered the pretrial disclosure of the percentage of an examiner's income received from forensic work and amount of the examiner's charges. We have ordered that the information be provided for the most recent three years. We have permitted the information to be provided by an affidavit from the examiner, instead of the underlying documentation. We have not conditioned the examination itself on the disclosure of the information.

Motion Panel Statement of Consensus
As Of February 1, 2013

B. Depositions

1. Attendance of Experts - Attendance of an expert at a deposition has generally been allowed, but has been reviewed on a case-by-case basis upon motion of a party.

2. Attendance of Others - Persons other than the parties and their lawyers have been allowed to attend a deposition, but a party may apply to the court for the exclusion of witnesses.

3. Out-of-State Parties - A non-resident plaintiff is normally required to appear at plaintiffs expense in Oregon for deposition. Upon a showing of undue burden or expense, the court has ordered, among other things, that plaintiff's deposition occur by telephone with a follow-up personal appearance deposition in Oregon before trial. Non-resident defendants normally have not been required to appear in Oregon for deposition at their own expense. The deposition of non-resident corporate defendants, through their agents or officers, normally occurs in the forum of the corporation's principal place of business. However, the court has ordered that a defendant travel to Oregon at either party's expense, to avoid undue burden and expense and depending upon such circumstances as whether the alleged conduct of the defendant occurred in Oregon, whether defendant was an Oregon resident at the time the claim arose, and whether defendant voluntarily left Oregon after the claim arose.

4. Videotaping - Videotaping of discovery depositions has been allowed with the requisite notice. The notice must designate the form of the official record. There is no prohibition against the use of BOTH a stenographer and a video, so long as the above requirements are met.

5. Speaking Objections - Attorneys should not state anything more than the legal grounds for the objections to preserve the record, and objection should be made without comment.

C. Experts

Discovery under ORCP 36B(1) generally has not been extended to the identity of nonmedical experts.

D. Insurance Claims Files

An insurance claim file "prepared in anticipation of litigation" has been held to be protected by the work product doctrine regardless of whether a party has retained counsel. Upon a showing of hardship and need pursuant to ORCP 36B(3) by a moving party, the court has ordered inspection of the file in camera and allowed discovery only to the extent necessary to offset the hardship (i.e., not for production of entire file).

Motion Panel Statement of Consensus
As Of February 1, 2013

E. Medical Chart Notes

1. Current Injury - Medical records, including chart notes and reports, have been generally discoverable in personal injury actions. These are in addition to reports from a treating physician under ORCP 44. The party who requests an ORCP 44 report has been be required to pay the reasonable charges of the practitioner for preparing the report.

2. Other/Prior Injuries - ORCP 44C authorizes discovery of prior medical records "of any examinations relating to injuries for which recovery is sought." Generally, records relating to the "same body part or area" have been discoverable, when the court was satisfied that the records sought actually relate to the presently claimed injuries.

F. Photographs

Photographs generally have been discoverable.

G. Privileges

Psychotherapist - Patient - ORCP 44C authorizes discovery of prior medical records of any examinations relating to injuries for which recovery is sought. Generally, records relating to the same or related body part or area have been discoverable. In claims for emotional distress, past treatment for mental conditions has been discoverable. See OEC 504(4)(b)(A).

H. Tax Returns

In a case involving a wage loss claim, discovery of those portions of tax returns showing an earning history, i.e., W-2 forms, has been held appropriate, but not those parts of the return showing investment data or non-wage information.

I. Witnesses

1. Identity - the court has required production of documents, including those prepared in anticipation of litigation, reflecting the names, addresses and phone numbers of occurrence witnesses. To avoid having to produce documents which might otherwise be protected, attorneys have been allowed to provide a "list" of occurrence witnesses, including their addresses and phone numbers.

2. Statements - Witness statements, if taken by a claims adjuster or otherwise in anticipation of litigation, have been held to be subject to the work-product doctrine. Generally, witness statements taken within 24 hours of an accident, if there is an inability to obtain a substantially similar statement, have been discoverable. ORCP 36B(3) specifies that any person, whether a party or not, may obtain his or her previous statement concerning the action or its subject matter.

Motion Panel Statement of Consensus
As Of February 1, 2013

J. Surveillance Tapes

Surveillance tapes of a plaintiff taken by defendant generally have been protected by the work-product privilege, and not subject to production under a hardship or need argument.

3. VENUE

A. Change of Venue (*forum non conveniens*) - Generally, the court has not allowed a motion to change venue within the tri-county area (from Multnomah to Clackamas or Washington counties) on the grounds of *forum non conveniens*.

B. Change of Venue - FELA - The circuit court generally has followed the federal guidelines regarding choice of venue for FELA cases.

4. MOTION PRACTICE

A. Conferring and Good Faith Efforts to Confer (UTCR 5.010) -
1. **"Conferring."** We have held that "to confer" means to talk in person or on the phone.

2. **Good Faith Efforts to Confer.** Because "confer" means to talk in person or on the phone, a "good faith effort to confer" is action designed to result in such a conversation. In various cases, motion judges have held that a letter to opposing counsel, even one that includes an invitation to call for a discussion, does not constitute a good faith effort to confer unless the moving attorney also makes a follow-up phone call to discuss the matter. We have held that a phone call leaving a message must be specific as to the subject matter before it constitutes a good faith effort to confer. Likewise, a message that says simply: "This is Jane. Please call me about Smith v. Jones," is not enough. Last minute phone messages or FAX transmissions immediately before the filing of a motion have been held not to satisfy the requirements of a good faith effort to confer.

3. **Complying with the Certification Requirement**. UTCR 5.010(3) specifies that the certificate of compliance is sufficient if it states either that the parties conferred, or contains **facts** showing good cause for not conferring. The judges on the Motion Panel have held that the certificate is not sufficient if it simply says "I made a good faith effort to confer." It must either state that the lawyers actually talked or state the facts showing good cause why they did not.

B. Copy of Complaint - The failure to attach a marked copy of the complaint to a Rule 21 motion pursuant to UTCR 5.020(2) has resulted in denial of the motions. UTCR 1.090.

Motion Panel Statement of Consensus
As Of February 13, 2013

5. DAMAGES

Non-economic Cap - The court has not struck the pleading of non-economic damages over $500,000 on authority of ORS 31.710 (*former* ORS 18.560) (Note: the Oregon Supreme Court ruled that ORS 18.560(1) violates Article I section 17, Oregon Constitution, to the following extent:". . . . The legislature may not interfere with the full effect of a jury's assessment of noneconomic damages, at least as to civil cases in which the right to jury trial was customary in 1857, or in cases of like nature." *Lankin v. Senco Products, Inc.*, 329 Or 62, 82 (1999)).

6. REQUESTING PUNITIVE DAMAGES

A. All motions to amend to assert a claim for punitive damages are governed by ORS 31.725, ORCP 23A, UTCR Chapter 5 and Multnomah County SLR Chapter 5. Enlargements of time are governed by ORS 31.725(4), ORCP 15D and UTCR 1.100.

B. A party may not include a claim for punitive damages in its pleading without court approval. A party may include in its pleading a notice of intent to move to amend to claim punitive damages. While discovery of a party's ability to pay an award of punitive damages is not allowed until a motion to amend is granted per ORS 31.725(5), the court has allowed parties to conduct discovery on other factual issues relating to the claims for punitive damages once the opposing party has been put on written notice of an intent to move to amend to claim punitive damages.

C. All evidence submitted must be admissible per ORS 31.725(3); evidence to which an objection is not made is deemed received. Testimony generally is presented through deposition or affidavit; live testimony has not been permitted at the hearing absent extraordinary circumstances and prior court order.

D. If the motion is denied, the claimant has been permitted to file a subsequent motion based on a different factual record (i.e. additional or different facts) without the second motion being deemed one for reconsideration prohibited by Multnomah County SLR 5.045.

E. For cases in mandatory arbitration, the arbitrator has the authority to decide any motion to amend to claim punitive damages. The arbitrator's decision may be reconsidered by a judge as part of de novo review under UTCR 13.040(3) and 13.100(1).

GENERAL PROVISIONS GOVERNING DISCOVERY
RULE 36

A Discovery methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

B Scope of discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

B(1) **In general.** For all forms of discovery, parties may inquire regarding any matter, not privileged, which is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

B(2) **Insurance agreements or policies.**

B(2)(a) A party, upon the request of an adverse party, shall disclose:

B(2)(a)(i) the existence and contents of any insurance agreement or policy under which a person transacting insurance may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment; and

B(2)(a)(ii) the existence of any coverage denial or reservation of rights, and identify the provisions in any insurance agreement or policy upon which such coverage denial or reservation of rights is based.

B(2)(b) The obligation to disclose under this subsection shall be performed as soon as practicable following the filing of the complaint and the request to disclose. The court may supervise the exercise of disclosure to the extent necessary to insure that it proceeds properly and expeditiously. However, the court may limit the extent of disclosure under this subsection as provided in section C of this rule.

B(2)(c) Information concerning the insurance agreement or policy is not by reason of disclosure admissible in evidence at trial. For purposes of this subsection, an application for insurance shall not be treated as part of an insurance agreement or policy.

B(2)(d) As used in this subsection, "disclose" means to afford the adverse party an opportunity to inspect or copy the insurance agreement or policy.

B(3) **Trial preparation materials.** Subject to the provisions of Rule 44, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection B(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that party. Upon request, a person who is not a party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person or party requesting the statement may move for a court order. The provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion. For purposes of this subsection, a statement previously made is (a) a written statement signed or otherwise adopted or approved by the person making it, or (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

C Court order limiting extent of disclosure. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or (9) that to prevent hardship the party requesting discovery pay to the other party reasonable expenses incurred in attending the deposition or otherwise responding to the request for discovery.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion. [CCP 12/2/78; §B amended by 1979 c.284 §23; §B(3) amended by CCP 12/13/80; §B amended by CCP 12/11/10]

PERPETUATION OF TESTIMONY
OR EVIDENCE BEFORE ACTION
OR PENDING APPEAL
RULE 37

A Before action.

A(1) **Petition.** A person who desires to perpetuate testimony or to obtain discovery to perpetuate evidence under Rule 43 or Rule 44 regarding any matter that may be cognizable in any court of this state may file a petition in the circuit court in the county of such person's residence or the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: (a) that the petitioner, or the petitioner's personal representatives, heirs, beneficiaries, successors, or assigns are likely to be a party to an action cognizable in a court of this state and are presently unable to bring such an action or defend it, or that the petitioner has an interest in real property or some easement or franchise therein, about which a controversy may arise, which would be the subject of such action; (b) the subject matter of the expected action and petitioner's interest therein and a copy, attached to the petition, of any written instrument the validity or construction of which may be called into question or which is connected with the subject matter of the expected action; (c) the facts which petitioner desires to establish by the proposed testimony or other discovery and petitioner's reasons for desiring to perpetuate; (d) the names or a description of the persons petitioner expects will be adverse parties and their addresses so far as one is known; and, (e) the names and addresses of the parties to be examined or from whom discovery is sought and the substance of the testimony or other discovery which petitioner expects to elicit and obtain from each. The petition shall name persons to be examined and ask for an order authorizing the petitioner to take their depositions for the purpose of perpetuating their testimony, or shall name persons in the petition from whom discovery is sought and shall ask for an order allowing discovery under Rule 43 or Rule 44 from such persons for the purpose of preserving evidence.

A(2) **Notice and service.** The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court at a time and place named therein, for the order described in the petition. The notice shall be served either within or without the state in the manner provided for service of summons in Rule 7, but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served with summons in the manner provided in Rule 7, an attorney who shall represent them and whose services shall be paid for by petitioner in an amount fixed by the court, and, in case they are not otherwise represented, shall cross examine the deponent. Testimony and evidence perpetuated under this rule shall be admissible against expected adverse parties not served with notice only in accordance with the applicable rules of evidence. If any expected adverse party is a minor or incompetent, the provisions of Rule 27 apply.

A(3) **Order and examination.** If the court is satisfied that the perpetuation of the testimony or other discovery to perpetuate evidence may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written questions; or shall make an order designating or describing the persons from whom discovery may be sought under Rule 43 specifying the objects of such discovery; or

shall make an order for a physical or mental examination as provided in Rule 44. Discovery may then be had in accordance with these rules. For the purpose of applying these rules to discovery before action, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such discovery was filed.

B Pending appeal. If an appeal has been taken from a judgment of a court to which these rules apply or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony or may allow discovery under Rule 43 or Rule 44 for use in the event of further proceedings in such court. In such case the party who desires to perpetuate the testimony or obtain the discovery may make a motion in the court therefor upon the same notice and service thereof as if the action was pending in the circuit court. The motion shall show: (1) the names and addresses of the persons to be examined or from whom other discovery is sought and the substance of the testimony or other discovery which the party expects to elicit from each; and (2) the reasons for perpetuating their testimony or seeking such other discovery. If the court finds that the perpetuation of the testimony or other discovery is proper to avoid a failure or delay of justice, it may make an order as provided in subsection (3) of section A of this rule and thereupon discovery may be had and used in the same manner and under the same conditions as are prescribed in these rules for discovery in actions pending in the circuit court.

C Perpetuation by action. This rule does not limit the power of a court to entertain an action to perpetuate testimony.

D Filing of depositions. Depositions taken under this rule shall be filed with the court in which the petition is filed or the motion is made. [CCP 12/2/78]

PERSONS WHO MAY ADMINISTER OATHS FOR DEPOSITIONS; FOREIGN DEPOSITIONS RULE 38

A Within Oregon.

A(1) Within this state, depositions shall be preceded by an oath or affirmation administered to the deponent by an officer authorized to administer oaths by the laws of this state or by a person specially appointed by the court in which the action is pending. A person so appointed has the power to administer oaths for the purpose of the deposition.

A(2) For purposes of this rule, a deposition taken pursuant to Rule 39 C(7) is taken within this state if either the deponent or the person administering the oath is located in this state.

B Outside the state. Within another state, or within a territory or insular possession subject to the dominion of the United States, or in a foreign country, depositions may be taken: (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States; (2) before a person appointed or commissioned by the court in which the action is pending, and such a person shall have the power by virtue of such person's appointment or commission to administer any necessary oath and take testimony; or (3) pursuant to a letter rogatory. A commission or letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the state, territory, or country)." Evidence obtained in a foreign country in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

C Foreign depositions and subpoenas.

C(1) **Definitions.** For the purpose of this section:

C(1)(a) "Foreign subpoena" means a subpoena issued under authority of a court of record of any state other than Oregon.

C(1)(b) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

C(2) **Issuance of subpoena.**

C(2)(a) To request issuance of a subpoena under this section, a party or attorney shall submit a foreign subpoena to a clerk of court in the county in which discovery is sought to be conducted in this state.

C(2)(b) When a party or attorney submits a foreign subpoena to a clerk of court in this state, the clerk, in accordance with that court's procedure and requirements, shall assign a case number and promptly issue a subpoena for service upon the person to whom the foreign subpoena is

directed. If a party to an out-of-state proceeding retains an attorney licensed to practice in this state, that attorney may assist the clerk in drafting the subpoena.

C(2)(c) A subpoena under this subsection shall:

(i) Conform to the requirements of these Oregon Rules of Civil Procedure, including Rule 55, and conform substantially to the form provided in Rule 55 A but may otherwise incorporate the terms used in the foreign subpoena as long as those terms conform to these rules; and

(ii) Contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

C(3) **Service of subpoena.** A subpoena issued by a clerk of court under subsection (2) of this section shall be served in compliance with Rule 55.

C(4) **Effects of request for subpoena.** A request for issuance of a subpoena under this section does not constitute an appearance in the court. A request does allow the court to impose sanctions for any action in connection with the subpoena that is a violation of applicable law.

C(5) **Motions.** A motion to the court, or a response thereto, for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court pursuant to this section is an appearance before the court and shall comply with the rules and statutes of this state. The motion shall be submitted to the court in the county in which discovery is to be conducted.

C(6) **Uniformity of application and construction.** In applying and construing this section, consideration shall be given to the need to promote the uniformity of the law with respect to its subject matter among states that enact it. [CCP 12/2/78; amended by 1979 c.284 §24; §A amended by CCP 12/12/92; §§B,C amended by CCP 12/11/10; §C amended by 2013 c.1 §2]

DEPOSITIONS UPON
ORAL EXAMINATION
RULE 39

A When deposition may be taken. After the service of summons or the appearance of the defendant in any action, or in a special proceeding at any time after a question of fact has arisen, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) a special notice is given as provided in subsection C(2) of this Rule. The attendance of a witness may be compelled by subpoena as provided in Rule 55.

B Order for deposition or production of prisoner. The deposition of a person confined in a prison or jail may only be taken by leave of court. The deposition shall be taken on such terms as the court prescribes, and the court may order that the deposition be taken at the place of confinement or, when the prisoner is confined in this state, may order temporary removal and production of the prisoner for purposes of the deposition.

C Notice of examination.

C(1) **General requirements.** A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify such person or the particular class or group to which such person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

C(2) **Special notice.** Leave of court is not required for the taking of a deposition by plaintiff if the notice (a) states that the person to be examined is about to go out of the state, or is bound on a voyage to sea, and will be unavailable for examination unless the deposition is taken before the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, and (b) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and such signature constitutes a certification by the attorney that to the best of such attorney's knowledge, information, and belief the statement and supporting facts are true.

If a party shows that when served with notice under this subsection, the party was unable through the exercise of diligence to obtain counsel to represent such party at the taking of the deposition, the deposition may not be used against such party.

C(3) **Shorter or longer time.** The court may for cause shown enlarge or shorten the time for taking the deposition.

C(4) **Non-stenographic recording.** The notice of deposition required under subsection (1) of this section may provide that the testimony will be recorded by other than stenographic means, in which event the notice shall designate the manner of recording and preserving the deposition. A court may require that the deposition be taken by stenographic means if necessary to assure that the recording be accurate.

C(5) **Production of documents and things.** The notice to a party deponent may be accompanied by a request made in compliance with Rule 43 for the production of documents and tangible things at the taking of the deposition. The procedures of Rule 43 shall apply to the request.

C(6) **Deposition of organization.** A party may in the notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall provide notice of no fewer than three (3) days before the scheduled deposition, absent good cause or agreement of the parties and the deponent, designating the name(s) of one or more officers, directors, managing agents, or other persons who consent to testify on its behalf and setting forth, for each person designated, the matters on which such person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection does not preclude taking a deposition by any other procedure authorized in these rules.

C(7) **Deposition by telephone.**

Parties may agree by stipulation or the court may order that testimony at a deposition be taken by telephone. If testimony at a deposition is taken by telephone pursuant to court order, the order shall designate the conditions of taking testimony, the manner of recording the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If testimony at a deposition is taken by telephone other than pursuant to court order or stipulation made a part of the record, then objections as to the taking of testimony by telephone, the manner of giving the oath or affirmation, and the manner of recording the deposition are waived unless seasonable objection thereto is made at the taking of the deposition. The oath or affirmation may be administered to the deponent, either in the presence of the person administering the oath or over the telephone, at the election of the party taking the deposition.

D Examination; record; oath; objections.

D(1) **Examination; cross-examination; oath.** Examination and cross-examination of deponents may proceed as permitted at trial. The person described in Rule 38 shall put the deponent on oath.

D(2) **Record of examination.** The testimony of the deponent shall be recorded either stenographically or as provided in subsection C(4) of this rule. If testimony is recorded pursuant to subsection C(4) of this rule, the party taking the deposition shall retain the original recording without alteration, unless the recording is filed with the court pursuant to subsection G(2) of this rule, until final disposition of the action. Upon request of a party or deponent and payment of the reasonable charges therefor, the testimony shall be transcribed.

D(3) **Objections.** All objections made at the time of the examination shall be noted on the record. A party or deponent shall state objections concisely and in a non-argumentative and non-suggestive manner. Evidence shall be taken subject to the objection, except that a party may instruct a deponent not to answer a question, and a deponent may decline to answer a question, only:

(a) when necessary to present or preserve a motion under section E of this rule;

(b) to enforce a limitation on examination ordered by the court; or

(c) to preserve a privilege or constitutional or statutory right.

D(4) **Written questions as alternative.** In lieu of participating in an oral examination, parties may serve written questions on the party taking the deposition who shall propound them to the deponent on the record.

E Motion for court assistance; expenses.

E(1) **Motion for court assistance.** At any time during the taking of a deposition, upon motion and a showing by a party or a deponent that the 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. The motion shall be presented to the court in which the action is pending, except that non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination. If the order terminates the examination, it shall be resumed thereafter only on order of the court in which the action is pending. Upon demand of the moving party or deponent, the parties shall suspend the taking of the deposition for the time necessary to make a motion under this subsection.

E(2) **Allowance of expenses.** Subsection A(4) of Rule 46 shall apply to the award of expenses incurred in relation to a motion under this section.

F Submission to witness; changes; statement.

F(1) **Necessity of submission to witness for examination.** When the testimony is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection C(4) of this rule, and if any party or the witness so requests at the time the deposition is taken, the recording or transcription shall be submitted to the witness for examination, changes, if any, and statement of correctness. With leave of court such request may be made by a party or witness at any time before trial.

F(2) **Procedure after examination.** Any changes which the witness desires to make shall be entered upon the transcription or stated in a writing to accompany the recording by the party taking the deposition, together with a statement of the reasons given by the witness for making them. Notice of such changes and reasons shall promptly be served upon all parties by the party taking the deposition. The witness shall then state in writing that the transcription or recording is correct subject to the changes, if any, made by the witness, unless the parties waive the statement or the witness is physically unable to make such statement or cannot be found. If the statement is not made by the witness within 30 days, or within a lesser time upon court order, after the deposition is submitted to the witness, the party taking the deposition shall state on the transcription or in a writing to accompany the recording the fact of waiver, or the physical incapacity or absence of the witness, or the fact of refusal of the witness to make the statement, together with the reasons, if any, given therefor; and the deposition may then be used as fully as though the statement had been made unless, on a motion to suppress under Rule 41 D, the court finds that the reasons given for the refusal to make the statement require rejection of the deposition in whole or in part.

F(3) **No request for examination.** If no examination by the witness is requested, no statement by the witness as to the correctness of the transcription or recording is required.

G Certification; filing; exhibits; copies.

G(1) **Certification.** When a deposition is stenographically taken, the stenographic reporter shall certify, under oath, on the transcript that the witness was duly sworn and that the transcript is a true record of the testimony given by the witness. When a deposition is recorded by other than stenographic means as provided in subsection C(4) of this rule, and thereafter transcribed, the person transcribing it shall certify, under oath, on the transcript that such person heard the witness sworn on the recording and that the transcript is a correct transcription of the recording. When a recording or a non-stenographic deposition or a transcription of such recording or non-stenographic deposition is to be used at any proceeding in the action or is filed with the court, the party taking the deposition, or such party's attorney, shall certify under oath that the recording, either filed or furnished to the person making the transcription, is a true, complete, and accurate recording of the deposition of the witness and that the recording has not been altered.

G(2) **Filing.** If requested by any party, the transcript or the recording of the deposition shall be filed with the court where the action is pending. When a deposition is stenographically taken, the stenographic reporter or, in the case of a deposition taken pursuant to subsection C(4) of this rule, the party taking the deposition shall enclose it in a sealed envelope, directed to the clerk of the court or the justice of the peace before whom the action is pending or such other person as may by writing be agreed upon, and deliver or forward it accordingly by mail or other usual channel of conveyance. If a recording of a deposition has been filed with the court, it may be transcribed upon request of any party under such terms and conditions as the court may direct.

G(3) **Exhibits.** Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party. Whenever the person producing materials desires to retain the originals, such person may substitute copies of the originals, or afford each party an opportunity to make copies thereof. In the event the original materials are retained by the person producing them, they shall be marked for identification and the person producing them shall afford each party the subsequent opportunity to compare any copy with the original. The person producing the materials shall also be required to retain the original materials for subsequent use in any proceeding in the same action. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

G(4) **Copies.** Upon payment of reasonable charges therefor, the stenographic reporter or, in the case of a deposition taken pursuant to subsection C(4) of this rule, the party taking the deposition shall furnish a copy of the deposition to any party or to the deponent.

H Payment of expenses upon failure to appear.

H(1) **Failure of party to attend.** If the party giving the notice of the taking of the deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court in which the action is pending may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by such other party and the attorney for such other party in so attending, including reasonable attorney's fees.

H(2) **Failure of witness to attend.** If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because the attending party expects the deposition of that witness to be taken, the court may order the party giving the notice

to pay to such other party the amount of the reasonable expenses incurred by such other party and the attorney for such other party in so attending, including reasonable attorney's fees.

I Perpetuation of testimony after commencement of action.

I(1) After commencement of any 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.

I(2) The notice is subject to subsections C(1) through (7) of this rule and shall additionally state:

I(2)(a) A brief description of the subject areas of testimony of the witness; and

I(2)(b) The manner of recording the deposition.

I(3) Prior to the time set for the deposition, any other party may object to the perpetuation deposition. Such objection shall be governed by the standards of Rule 36 C. At any hearing on such an objection, the burden shall be on the party seeking perpetuation to show that: (a) the witness may be unavailable as defined in ORS 40.465 (1)(d) or (e) or 45.250 (2)(a) through (c); or (b) it would be an undue hardship on the witness to appear at the trial or hearing; or (c) other good cause exists for allowing the perpetuation. If no objection is filed, or if perpetuation is allowed, the testimony taken shall be admissible at any subsequent trial or hearing in the action, subject to the Oregon Evidence Code.

I(4) Any perpetuation deposition shall be taken not less than seven days before the trial or hearing on not less than 14 days' notice. However, the court in which the action is pending may allow a shorter period for a perpetuation deposition before or during trial upon a showing of good cause.

I(5) To the extent that a discovery deposition is allowed by law, any party may conduct a discovery deposition of the witness prior to the perpetuation deposition.

I(6) The perpetuation examination shall proceed as set forth in section D of this rule. All objections to any testimony or evidence taken at the deposition shall be made at the time and noted upon the record. The court before which the testimony is offered shall rule on any objections before the testimony is offered. Any objections not made at the deposition shall be deemed waived. [CCP 12/2/78; §F amended by 1979 c.284 §25; §F amended by CCP 12/13/80; amended by CCP 12/13/86; amended by 1987 c.275 §2; §I amended by 1989 c.980 §5; §§C,E,G amended by CCP 12/12/92; §I amended by CCP 12/14/96; §§D,E amended by CCP 12/12/98; §C amended by CCP 12/1/12]

FAILURE TO MAKE DISCOVERY; SANCTIONS RULE 46

A Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may move for an order compelling discovery as follows:

A(1) **Appropriate court.**

A(1)(a) **Parties.** A motion for an order directed against a party may be made to the court in which the action is pending and, on matters relating to a deponent's failure to answer questions at a deposition, a motion may also be made to the circuit court for the county where the deponent is located.

A(1)(b) **Non-parties.** A motion for an order directed against a deponent who is not a party shall be made to the circuit court for the county where the non-party deponent is located.

A(2) **Motion.** If a party fails to furnish a report under Rule 44 B or C, or if a deponent fails to answer a question propounded or served under Rule 39 or Rule 40, or if a corporation or other entity fails to make a designation under Rule 39 C(6) or Rule 40 A, or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B(2), or if a party in response to a request for production or inspection submitted under Rule 43 fails to produce or to permit inspection as requested, the discovering party may move for an order compelling discovery in accordance with the request. Any motion made under this subsection shall identify at the beginning of the motion the items that the moving party seeks to discover. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order. If the court denies the motion in whole or in part, it may make any protective order it would have been empowered to make on a motion made pursuant to Rule 36 C.

A(3) **Evasive or incomplete answer.** For purposes of this section, an evasive or incomplete answer is to be treated as a failure to answer.

A(4) **Award of expenses of motion.** If the motion is granted, the court may, after an opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct, or both of them, to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. If the motion is denied, the court may, after an opportunity for hearing, require the moving party or the attorney advising the motion, or both of them, to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust. If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

B Failure to comply with order.

B(1) **Sanctions by court in the county where the deponent is located.** If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit court judge of the county in which the deponent is located, the failure may be considered a contempt of court.

B(2) **Sanctions by court in which action is pending.** If a party or an officer, director, or managing agent or a person designated under Rule 39 C(6) or Rule 40 A to testify on behalf of a

party fails to obey an order to provide or permit discovery, including an order made under section A of this rule or Rule 44, the court in which the action is pending may make any order in regard to the failure as is just including, but not limited to, the following:

B(2)(a) **Establishment of facts.** An order that the matters that caused the motion for the sanction or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.

B(2)(b) **Designated matters.** An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence.

B(2)(c) **Strike, stay, or dismissal.** An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

B(2)(d) **Contempt of court.** In lieu of or in addition to any of the orders listed in paragraph B(2)(a), B(2)(b), or B(2)(c) of this rule, an order treating as a contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

B(2)(e) **Inability to produce person.** Any of the orders listed in paragraph B(2)(a), B(2)(b), or B(2)(c) of this rule when a party has failed to comply with an order under Rule 44 A requiring the party to produce another person for examination, unless the party failing to comply shows inability to produce the person for examination.

B(3) **Payment of expenses.** In lieu of or in addition to any order listed in subsection B(2) of this rule, the court shall require the party failing to obey the order or the attorney advising that party, or both, to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

C Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter, as requested under Rule 45, and if the party requesting the admission thereafter proves the genuineness of the document or the truth of the matter, the party requesting the admission may apply to the court for an order requiring the other party to pay the party requesting the admission the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that: the request was held objectionable pursuant to Rule 45 B or C; the admission sought was of no substantial importance; the party failing to admit had reasonable grounds to believe that it might prevail on the matter; or there was other good reason for the failure to admit.

D Failure of party to attend own deposition or to respond to request for production or inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 39 C(6) or Rule 40 A to testify on behalf of a party fails to appear before the officer who is to take the deposition of that party or person, after being served with a proper notice, or to comply with or to serve objections to a request for production or inspection submitted under Rule 43, after proper service of the request, the court where the action is pending on motion may make any order in regard to the failure as is just including, but not limited to, any action authorized under paragraphs B(2)(a), B(2)(b), and B(2)(c) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party, or both, to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award

of expenses unjust. The failure to act described in this section may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 36 C. [CCP 12/2/78; §§A(2),D amended by CCP 12/13/80; §§A,B amended by CCP 12/12/92; §B amended by 1999 c.59 §4; §A amended by CCP 12/11/04; amended by CCP 12/6/14]

ORS CHAPTER 40 – EVIDENCE CODE

RELEVANCY

40.150 Rule 401. Definition of "relevant evidence." "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. [1981 c.892 §21]

40.155 Rule 402. Relevant evidence generally admissible. All relevant evidence is admissible, except as otherwise provided by the Oregon Evidence Code, by the Constitutions of the United States and Oregon, or by Oregon statutory and decisional law. Evidence which is not relevant is not admissible. [1981 c.892 §22]

40.160 Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion or undue delay. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence. [1981 c.892 §23]

40.170 Rule 404. Character evidence; evidence of other crimes, wrongs or acts. (1) Evidence of a person's character or trait of character is admissible when it is an essential element of a charge, claim or defense.

(2) Evidence of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(a) Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(b) Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same or evidence of a character trait of peacefulness of the victim offered by the prosecution to rebut evidence that the victim was the first aggressor;

(c) Evidence of the character of a witness, as provided in ORS 40.345 to 40.355; or

(d) Evidence of the character of a party for violent behavior offered in a civil assault and battery case when self-defense is pleaded and there is evidence to support such defense.

(3) Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(4) In criminal actions, evidence of other crimes, wrongs or acts by the defendant is admissible if relevant except as otherwise provided by:

(a) ORS 40.180, 40.185, 40.190, 40.195, 40.200, 40.205, 40.210 and, to the extent required by the United States Constitution or the Oregon Constitution, ORS 40.160;

(b) The rules of evidence relating to privilege and hearsay;

(c) The Oregon Constitution; and

(d) The United States Constitution. [1981 c.892 §24; 1997 c.313 §29]

40.172 Rule 404-1. Pattern, practice or history of abuse; expert testimony. (1) In any proceeding, any party may introduce evidence establishing a pattern, practice or history of abuse of a person and may introduce expert testimony to assist the fact finder in understanding the significance of such evidence if the evidence:

(a) Is relevant to any material issue in the proceeding; and

(b) Is not inadmissible under any other provision of law including, but not limited to, rules regarding relevance, privilege, hearsay, competency and authentication.

(2) This section may not be construed to limit any evidence that would otherwise be admissible under the Oregon Evidence Code or any other provision of law.

(3) As used in this section, "abuse" has the meaning given that term in ORS 107.705. [1997 c.397 §2]

Note: 40.172 was added to and made a part of 40.010 to 40.585 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

40.175 Rule 405. Methods of proving character. (1) In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(2)(a) In cases in which character or a trait of character of a person is admissible under ORS 40.170 (1), proof may also be made of specific instances of the conduct of the person.

(b) When evidence is admissible under ORS 40.170 (3) or (4), proof may be made of specific instances of the conduct of the person. [1981 c.892 §25; 1997 c.313 §34]

40.180 Rule 406. Habit; routine practice. (1) Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

(2) As used in this section, "habit" means a person's regular practice of meeting a particular kind of situation with a specific, distinctive type of conduct. [1981 c.892 §21]

40.185 Rule 407. Subsequent remedial measures. When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This section does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment. [1981 c.892 §27]

40.190 Rule 408. Compromise and offers to compromise. (1)(a) Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

(b) Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

(2)(a) Subsection (1) of this section does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

(b) Subsection (1) of this section also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. [1981 c.892 §28]

40.195 Rule 409. Payment of medical and similar expenses. Evidence of furnishing or offering or promising to pay medical, hospital or similar expenses occasioned by an injury is not admissible to prove liability for the injury. Evidence of payment for damages arising from injury or destruction of property is not admissible to prove liability for the injury or destruction. [1981 c.892 §29]

40.200 Rule 410. Withdrawn plea or statement not admissible. (1) A plea of guilty or no contest which is not accepted or has been withdrawn shall not be received against the defendant in any criminal proceeding.

(2) No statement or admission made by a defendant or a defendant's attorney during any proceeding relating to a plea of guilty or no contest which is not accepted or has been withdrawn shall be received against the defendant in any criminal proceeding. [1981 c.892 §29a]

40.205 Rule 411. Liability insurance. (1) Except where lack of liability insurance is an element of an offense, evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully.

(2) Subsection (1) of this section does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proving agency, ownership or control, or bias, prejudice or motive of a witness. [1981 c.892 §30]

40.210 Rule 412. Sex offense cases; relevance of victim's past behavior or manner of dress. (1) Notwithstanding any other provision of law, in a prosecution for a crime described in ORS 163.266 (1)(b) or (c), 163.355 to 163.427, 163.670 or 167.017, in a prosecution for an attempt to commit one of those crimes or in a proceeding conducted under ORS 163.760 to 163.777, the following evidence is not admissible:

(a) Reputation or opinion evidence of the past sexual behavior of an alleged victim or a corroborating witness; or

(b) Reputation or opinion evidence presented for the purpose of showing that the manner of dress of an alleged victim incited the crime or, in a proceeding under ORS 163.760 to 163.777, incited the sexual abuse, or indicated consent to the sexual acts that are alleged.

(2) Notwithstanding any other provision of law, in a prosecution for a crime or an attempt to commit a crime listed in subsection (1) of this section or in a proceeding conducted under ORS 163.760 to 163.777, evidence of an alleged victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless the evidence other than reputation or opinion evidence:

(a) Is admitted in accordance with subsection (4) of this section; and

(b) Is evidence that:

(A) Relates to the motive or bias of the alleged victim;

(B) Is necessary to rebut or explain scientific or medical evidence offered by the state; or

(C) Is otherwise constitutionally required to be admitted.

(3) Notwithstanding any other provision of law, in a prosecution for a crime or an attempt to commit a crime listed in subsection (1) of this section or in a proceeding conducted under ORS 163.760 to 163.777, evidence, other than reputation or opinion evidence, of the manner of dress of the alleged victim or a corroborating witness, presented by a person accused of committing the crime or, in a proceeding conducted under ORS 163.760 to 163.777, by the respondent, is also not admissible, unless the evidence is:

(a) Admitted in accordance with subsection (4) of this section; and

(b) Is evidence that:

(A) Relates to the motive or bias of the alleged victim;

(B) Is necessary to rebut or explain scientific, medical or testimonial evidence offered by the state;

(C) Is necessary to establish the identity of the alleged victim; or

(D) Is otherwise constitutionally required to be admitted.

(4)(a) If the person accused of a crime or an attempt to commit a crime listed in subsection (1) of this section, or the respondent in a proceeding conducted under ORS 163.760 to 163.777, intends to offer evidence under subsection (2) or (3) of this section, the accused or the respondent shall make a written motion to offer the evidence not later than 15 days before the date on which the trial in which the evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which the evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and, in a criminal proceeding, on the alleged victim through the office of the prosecutor.

(b) The motion described in paragraph (a) of this subsection shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subsection (2) or (3) of this section, the court shall order a hearing in camera to determine if the evidence is admissible. At the hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding ORS 40.030 (2), if the relevancy of the evidence that the accused or the respondent seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in camera or at a subsequent hearing in camera scheduled for the same purpose, shall accept evidence on the issue of whether the condition of fact is fulfilled and shall determine the issue.

(c) If the court determines on the basis of the hearing described in paragraph (b) of this subsection that the evidence the accused or the respondent seeks to offer is relevant and that the probative value of the evidence outweighs the danger of unfair prejudice, the evidence shall be admissible in the trial to the extent an order made by the court specifies evidence that may be offered and areas with respect to which a witness may be examined or cross-examined.

(d) An order admitting evidence under this subsection in a criminal prosecution may be appealed by the state before trial.

(5) For purposes of this section:

(a) "Alleged victim" includes the petitioner in a proceeding conducted under ORS 163.760 to 163.777.

(b) "In camera" means out of the presence of the public and the jury.

(c) "Past sexual behavior" means sexual behavior other than:

(A) The sexual behavior with respect to which the crime or attempt to commit the crime listed in subsection (1) of this section is alleged; or

(B) In a proceeding conducted under ORS 163.760 to 163.777, the alleged sexual abuse.

(d) "Trial" includes a hearing conducted under ORS 163.760 to 163.777. [1981 c.892 §31; 1993 c.301 §1; 1993 c.776 §1; 1997 c.249 §20; 1999 c.949 §3; 2013 c.687 §21; 2013 c.720 §5]

40.215 Rule 413. Measures and assessments intended to minimize impact of or plan for natural disaster. Evidence of measures taken or vulnerability assessments conducted before a natural disaster occurs that were intended to minimize the impact of or plan for the natural disaster is not admissible to prove negligence or culpable conduct in connection with damage, harm, injury or death resulting from the natural disaster. [2015 c.541 §2]

PRIVILEGES

40.225 Rule 503. Lawyer-client privilege. (1) As used in this section, unless the context requires otherwise:

(a) "Client" means a person, public officer, corporation, association or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(b) "Confidential communication" means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(c) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(d) "Representative of the client" means:

(A) A principal, an officer or a director of the client; or

(B) A person who has authority to obtain professional legal services, or to act on legal advice rendered, on behalf of the client, or a person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the person's scope of employment for the client.

(e) "Representative of the lawyer" means one employed to assist the lawyer in the rendition of professional legal services, but does not include a physician making a physical or mental examination under ORCP 44.

(2) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(a) Between the client or the client's representative and the client's lawyer or a representative of the lawyer;

(b) Between the client's lawyer and the lawyer's representative;

(c) By the client or the client's lawyer to a lawyer representing another in a matter of common interest;

(d) Between representatives of the client or between the client and a representative of the client; or

(e) Between lawyers representing the client.

(3) The privilege created by this section may be claimed by the client, a guardian or conservator of the client, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the

communication is presumed to have authority to claim the privilege but only on behalf of the client.

(4) There is no privilege under this section:

(a) If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(b) As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(c) As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;

(d) As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(e) As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

(5) Notwithstanding ORS 40.280, a privilege is maintained under this section for a communication made to the office of public defense services established under ORS 151.216 for the purpose of seeking preauthorization for or payment of nonroutine fees or expenses under ORS 135.055.

(6) Notwithstanding subsection (4)(c) of this section and ORS 40.280, a privilege is maintained under this section for a communication that is made to the office of public defense services established under ORS 151.216 for the purpose of making, or providing information regarding, a complaint against a lawyer providing public defense services.

(7) Notwithstanding ORS 40.280, a privilege is maintained under this section for a communication ordered to be disclosed under ORS 192.410 to 192.505. [1981 c.892 §32; 1987 c.680 §1; 2005 c.356 §1; 2005 c.358 §1; 2007 c.513 §3; 2009 c.516 §1]

40.230 Rule 504. Psychotherapist-patient privilege. (1) As used in this section, unless the context requires otherwise:

(a) "Confidential communication" means a communication not intended to be disclosed to third persons except:

(A) Persons present to further the interest of the patient in the consultation, examination or interview;

(B) Persons reasonably necessary for the transmission of the communication; or

(C) Persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.

(b) "Patient" means a person who consults or is examined or interviewed by a psychotherapist.

(c) "Psychotherapist" means a person who is:

(A) Licensed, registered, certified or otherwise authorized under the laws of any state to engage in the diagnosis or treatment of a mental or emotional condition; or

(B) Reasonably believed by the patient so to be, while so engaged.

(2) A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purposes of diagnosis or treatment of the patient's mental or emotional condition among the patient, the patient's psychotherapist or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(3) The privilege created by this section may be claimed by:

(a) The patient.

(b) A guardian or conservator of the patient.

(c) The personal representative of a deceased patient.

(d) The person who was the psychotherapist, but only on behalf of the patient. The psychotherapist's authority so to do is presumed in the absence of evidence to the contrary.

(4) The following is a nonexclusive list of limits on the privilege granted by this section:

(a) If the judge orders an examination of the mental, physical or emotional condition of the patient, communications made in the course thereof are not privileged under this section with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(b) There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient:

(A) In any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense; or

(B) After the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

(c) Except as provided in ORCP 44, there is no privilege under this section for communications made in the course of mental examination performed under ORCP 44.

(d) There is no privilege under this section with regard to any confidential communication or record of such confidential communication that would otherwise be privileged under this section when the use of the communication or record is allowed specifically under ORS 426.070, 426.074, 426.075, 426.095, 426.120 or 426.307. This paragraph only applies to the use of the communication or record to the extent and for the purposes set forth in the described statute sections. [1981 c.892 §33; 1987 c.903 §1]

40.235 Rule 504-1. Physician-patient privilege. (1) As used in this section, unless the context requires otherwise:

(a) "Confidential communication" means a communication not intended to be disclosed to third persons except:

(A) Persons present to further the interest of the patient in the consultation, examination or interview;

(B) Persons reasonably necessary for the transmission of the communication; or

(C) Persons who are participating in the diagnosis and treatment under the direction of the physician, including members of the patient's family.

(b) "Patient" means a person who consults or is examined or interviewed by a physician.

(c)(A) "Physician" means a person authorized and licensed or certified to practice medicine, podiatry or dentistry in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a physical condition.

(B) "Physician" includes licensed or certified naturopathic and chiropractic physicians and dentists.

(2) A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications in a civil action, suit or proceeding, made for the purposes of diagnosis or treatment of the patient's physical condition, among the patient, the patient's physician or persons who are participating in the diagnosis or treatment under the direction of the physician, including members of the patient's family.

(3) The privilege created by this section may be claimed by:

(a) The patient;

(b) A guardian or conservator of the patient;

(c) The personal representative of a deceased patient; or

(d) The person who was the physician, but only on behalf of the patient. Such person's authority so to do is presumed in the absence of evidence to the contrary.

(4) The following is a nonexclusive list of limits on the privilege granted by this section:

(a) If the judge orders an examination of the physical condition of the patient, communications made in the course thereof are not privileged under this section with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(b) Except as provided in ORCP 44, there is no privilege under this section for communications made in the course of a physical examination performed under ORCP 44.

(c) There is no privilege under this section with regard to any confidential communication or record of such confidential communication that would otherwise be privileged under this section when the use of the communication or record is specifically allowed under ORS 426.070, 426.074, 426.075, 426.095, 426.120 or 426.307. This paragraph only applies to the use of the communication or record to the extent and for the purposes set forth in the described statute sections. [1981 c.892 §33a; 1987 c.903 §2; 2005 c.353 §1; 2013 c.129 §3]

40.240 Rule 504-2. Nurse-patient privilege. A licensed professional nurse shall not, without the consent of a patient who was cared for by such nurse, be examined in a civil action or proceeding, as to any information acquired in caring for the patient, which was necessary to enable the nurse to care for the patient. [1981 c.892 §33b]

40.245 Rule 504-3. School employee-student privilege. (1) A certificated staff member of an elementary or secondary school shall not be examined in any civil action or proceeding, as to any conversation between the certificated staff member and a student which relates to the personal affairs of the student or family of the student, and which if disclosed would tend to damage or incriminate the student or family. Any violation of the privilege provided by this subsection may result in the suspension of certification of the professional staff member as provided in ORS 342.175, 342.177 and 342.180.

(2) A certificated school counselor regularly employed and designated in such capacity by a public school shall not, without the consent of the student, be examined as to any communication made by the student to the counselor in the official capacity of the counselor in any civil action or proceeding or a criminal action or proceeding in which such student is a party concerning the past use, abuse or sale of drugs, controlled substances or alcoholic liquor. Any violation of the privilege provided by this subsection may result in the suspension of certification of the professional school counselor as provided in ORS 342.175, 342.177 and 342.180. However, in the event that the student's condition presents a clear and imminent danger to the student or to others, the counselor shall report this fact to an appropriate responsible authority or take such other emergency measures as the situation demands. [1981 c.892 §33c]

40.250 Rule 504-4. Regulated social worker-client privilege. A regulated social worker under ORS 675.510 to 675.600 may not be examined in a civil or criminal court proceeding as to any communication given the regulated social worker by a client in the course of noninvestigatory professional activity when the communication was given to enable the regulated social worker to aid the client, except when:

(1) The client or a person legally responsible for the client's affairs gives consent to the disclosure;

(2) The client initiates legal action or makes a complaint against the regulated social worker to the State Board of Licensed Social Workers;

(3) The communication reveals a clear intent to commit a crime that reasonably is expected to result in physical injury to a person;

(4) The communication reveals that a minor was the victim of a crime, abuse or neglect; or

(5) The regulated social worker is a public employee and the public employer has determined that examination in a civil or criminal court proceeding is necessary in the performance of the duty of the regulated social worker as a public employee. [1981 c.892 §33d; 1989 c.721 §46; 2009 c.442 §28]

40.252 Rule 504-5. Communications revealing intent to commit certain crimes. (1) In addition to any other limitations on privilege that may be imposed by law, there is no privilege under ORS 40.225, 40.230, 40.250 or 40.264 for communications if:

(a) In the professional judgment of the person receiving the communications, the communications reveal that the declarant has a clear and serious intent at the time the communications are made to subsequently commit a crime involving physical injury, a threat to the physical safety of any person, sexual abuse or death or involving an act described in ORS 167.322;

(b) In the professional judgment of the person receiving the communications, the declarant poses a danger of committing the crime; and

(c) The person receiving the communications makes a report to another person based on the communications.

(2) The provisions of this section do not create a duty to report any communication to any person.

(3) A person who discloses a communication described in subsection (1) of this section, or fails to disclose a communication described in subsection (1) of this section, is not liable to any other person in a civil action for any damage or injury arising out of the disclosure or failure to disclose. [2001 c.640 §2; 2007 c.731 §4; 2015 c.265 §3]

Note: 40.252 was added to and made a part of 40.225 to 40.295 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

40.255 Rule 505. Husband-wife privilege. (1) As used in this section, unless the context requires otherwise:

(a) "Confidential communication" means a communication by a spouse to the other spouse and not intended to be disclosed to any other person.

(b) "Marriage" means a marital relationship between husband and wife, legally recognized under the laws of this state.

(2) In any civil or criminal action, a spouse has a privilege to refuse to disclose and to prevent the other spouse from disclosing any confidential communication made by one spouse to the other during the marriage. The privilege created by this subsection may be claimed by either spouse. The authority of the spouse to claim the privilege and the claiming of the privilege is presumed in the absence of evidence to the contrary.

(3) In any criminal proceeding, neither spouse, during the marriage, shall be examined adversely against the other as to any other matter occurring during the marriage unless the spouse called as a witness consents to testify.

(4) There is no privilege under this section:

(a) In all criminal actions in which one spouse is charged with bigamy or with an offense or attempted offense against the person or property of the other spouse or of a child of either, or with an offense against the person or property of a third person committed in the course of committing or attempting to commit an offense against the other spouse;

(b) As to matters occurring prior to the marriage; or

(c) In any civil action where the spouses are adverse parties. [1981 c.892 §34; 1983 c.433 §1]

40.260 Rule 506. Member of clergy-penitent privilege. (1) As used in this section, unless the context requires otherwise:

(a) "Confidential communication" means a communication made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) "Member of the clergy" means a minister of any church, religious denomination or organization or accredited Christian Science practitioner who in the course of the discipline or practice of that church, denomination or organization is authorized or accustomed to hearing confidential communications and, under the discipline or tenets of that church, denomination or organization, has a duty to keep such communications secret.

(2) A member of the clergy may not be examined as to any confidential communication made to the member of the clergy in the member's professional character unless consent to the disclosure of the confidential communication is given by the person who made the communication.

(3) Even though the person who made the communication has given consent to the disclosure, a member of the clergy may not be examined as to any confidential communication made to the member in the member's professional character if, under the discipline or tenets of the member's church, denomination or organization, the member has an absolute duty to keep the communication confidential. [1981 c.892 §35; 1999 c.7 §1]

40.262 Rule 507. Counselor-client privilege. A professional counselor or a marriage and family therapist licensed by the Oregon Board of Licensed Professional Counselors and Therapists under ORS 675.715 shall not be examined in a civil or criminal court proceeding as to any communication given the counselor or therapist by a client in the course of a noninvestigatory professional activity when such communication was given to enable the counselor or the therapist to aid the client, except:

(1) When the client or those persons legally responsible for the affairs of the client give consent to the disclosure. If both parties to a marriage have obtained marital and family therapy by a licensed marital and family therapist or a licensed counselor, the therapist or counselor shall not be competent to testify in a domestic relations action other than child custody action concerning information acquired in the course of the therapeutic relationship unless both parties consent;

(2) When the client initiates legal action or makes a complaint against the licensed professional counselor or licensed marriage and family therapist to the board;

(3) When the communication reveals the intent to commit a crime or harmful act; or

(4) When the communication reveals that a minor is or is suspected to be the victim of crime, abuse or neglect. [1989 c.721 §20]

Note: 40.262 was added to and made a part of 40.010 to 40.585 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

40.264 Rule 507-1. Certified advocate-victim privilege. (1) As used in this section:

(a) "Certified advocate" means a person who:

(A) Has completed at least 40 hours of training in advocacy for victims of domestic violence, sexual assault or stalking, approved by the Attorney General by rule; and

(B) Is an employee or a volunteer of a qualified victim services program.

(b) "Confidential communication" means a written or oral communication that is not intended for further disclosure, except to:

(A) Persons present at the time the communication is made who are present to further the interests of the victim in the course of seeking safety planning, counseling, support or advocacy services;

(B) Persons reasonably necessary for the transmission of the communication; or

(C) Other persons, in the context of group counseling.

(c) "Qualified victim services program" means:

(A) A nongovernmental, nonprofit, community-based program receiving moneys administered by the state Department of Human Services or the Oregon or United States Department of Justice that offers safety planning, counseling, support or advocacy services to victims of domestic violence, sexual assault or stalking; or

(B) A sexual assault center, victim advocacy office, women's center, student affairs center, health center or other program providing safety planning, counseling, support or advocacy services to victims that is on the campus of or affiliated with a two- or four-year post-secondary institution that enrolls one or more students who receive an Oregon Opportunity Grant.

(d) "Victim" means a person seeking safety planning, counseling, support or advocacy services related to domestic violence, sexual assault or stalking at a qualified victims services program.

(2) Except as provided in subsection (3) of this section, a victim has a privilege to refuse to disclose and to prevent any other person from disclosing:

(a) Confidential communications made by the victim to a certified advocate in the course of safety planning, counseling, support, or advocacy services.

(b) Records that are created or maintained in the course of providing services regarding the victim.

(3) The privilege established by this section does not apply to the disclosure of confidential communications, only to the extent disclosure is necessary for defense, in any civil, criminal or administrative action that is brought against the certified advocate, or against the qualified victim services program, by or on behalf of the victim.

(4) The privilege established in this section is not waived by disclosure of the communications by the certified advocate to another person if the disclosure is reasonably necessary to accomplish the purpose for which the certified advocate is consulted.

(5) This section does not prohibit the disclosure of aggregate, non-personally identifying data.

(6) This section applies to civil, criminal and administrative proceedings and to institutional disciplinary proceedings at a two-year or four-year post-secondary institution that enrolls one or more students who receive an Oregon Opportunity Grant. [2015 c.265 §2]

Note: Section 5, chapter 265, Oregon Laws 2015, provides: **Sec. 5.** (1) Sections 2 [40.264] and 4 [147.600] of this 2015 Act and the amendments to ORS 40.252 by section 3 of this 2015 Act become operative on October 1, 2015.

(2) The Attorney General may take any action before the operative date specified in subsection (1) of this section to enable the Attorney General, on or after the operative date specified in subsection (1) of this section, to exercise all the duties, powers and functions conferred on the Attorney General by sections 2 and 4 of this 2015 Act.

(3) Section 2 of this 2015 Act applies only to proceedings occurring on or after the operative date specified in subsection (1) of this section.

(4) Sections 2 and 4 of this 2015 Act and the amendments to ORS 40.252 by section 3 of this 2015 Act apply to communications and records made before, on or after the operative date specified in subsection (1) of this section, unless the communications were disclosed to a third party before the operative date specified in subsection (1) of this section. [2015 c.265 §5]

Note: 40.264 was added to and made a part of 40.225 to 40.295 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

40.265 Rule 508a. Stenographer-employer privilege. A stenographer shall not, without the consent of the stenographer's employer, be examined as to any communication or dictation made by the employer to the stenographer in the course of professional employment. [1981 c.892 §36]

40.270 Rule 509. Public officer privilege. A public officer shall not be examined as to public records determined to be exempt from disclosure under ORS 192.501 to 192.505. [1981 c.892 §37]

40.272 Rule 509-1. Sign language interpreter privilege. (1) As used in this section:

(a) "Person with a disability" means a person who cannot readily understand or communicate the spoken English language, or cannot understand proceedings in which the person is involved, because of deafness or because of a physical hearing impairment or cannot communicate in the proceedings because of a physical speaking impairment.

(b) "Sign language interpreter" or "interpreter" means a person who translates conversations or other communications for a person with a disability or translates the statements of a person with a disability.

(2) A person with a disability has a privilege to refuse to disclose and to prevent a sign language interpreter from disclosing any communications to which the person with a disability was a party that were made while the interpreter was providing interpretation services for the person with a disability. The privilege created by this section extends only to those communications between a person with a disability and another, and translated by the interpreter, that would otherwise be privileged under ORS 40.225 to 40.295. [1993 c.179 §2; 2007 c.70 §11]

Note: 40.272 was added to and made a part of 40.225 to 40.295 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

40.273 Rule 509-2. Non-English-speaking person-interpreter privilege. (1) As used in this section:

(a) "Interpreter" means a person who translates conversations or other communications for a non-English-speaking person or translates the statements of a non-English-speaking person.

(b) "Non-English-speaking person" means a person who, by reason of place of birth or culture, speaks a language other than English and does not speak English with adequate ability to communicate in the proceedings.

(2) A non-English-speaking person has a privilege to refuse to disclose and to prevent an interpreter from disclosing any communications to which the non-English-speaking person was a party that were made while the interpreter was providing interpretation services for the non-English-speaking person. The privilege created by this section extends only to those communications between a non-English-speaking person and another, and translated by the interpreter, that would otherwise be privileged under ORS 40.225 to 40.295. [1993 c.179 §3]

Note: 40.273 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 40 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

40.275 Rule 510. Identity of informer. (1) As used in this section, "unit of government" means:

(a) The federal government or any state or political subdivision thereof;

(b) A university that has commissioned police officers under ORS 352.121 or 353.125; or

(c) A tribal government as defined in ORS 181A.680, if the information referred to in this section relates to or assists in an investigation conducted by an authorized tribal police officer as defined in ORS 181A.680.

(2) A unit of government has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(3) The privilege created by this section may be claimed by an appropriate representative of the unit of government if the information was furnished to an officer thereof.

(4) No privilege exists under this section:

(a) If the identity of the informer or the informer's interest in the subject matter of the communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the unit of government.

(b) If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case to which the unit of government is a party, and the unit of government invokes the privilege, and the judge gives the unit of government an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the judge may direct that testimony be taken if the judge finds that the matter

cannot be resolved satisfactorily upon affidavit. If the judge finds that there is a reasonable probability that the informer can give the testimony, and the unit of government elects not to disclose identity of the informer, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the judge may do so on the judge's own motion. In civil cases, the judge may make any order that justice requires. Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the unit of government. All counsel and parties shall be permitted to be present at every stage of proceedings under this paragraph except a showing in camera, at which no counsel or party shall be permitted to be present.

(c) If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible. The judge may require the identity of the informer to be disclosed. The judge shall, on request of the unit of government, direct that the disclosure be made in camera. All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of proceedings under this paragraph except a disclosure in camera, at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made in camera, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the unit of government. [1981 c.892 §38; 2011 c.506 §2; 2011 c.644 §§10,37; 2013 c.180 §§2,3; 2015 c.174 §2]

40.280 Rule 511. Waiver of privilege by voluntary disclosure. A person upon whom ORS 40.225 to 40.295 confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This section does not apply if the disclosure is itself a privileged communication. Voluntary disclosure does not occur with the mere commencement of litigation or, in the case of a deposition taken for the purpose of perpetuating testimony, until the offering of the deposition as evidence. Voluntary disclosure does not occur when representatives of the news media are allowed to attend executive sessions of the governing body of a public body as provided in ORS 192.660 (4), or when representatives of the news media disclose information after the governing body has prohibited disclosure of the information under ORS 192.660 (4). Voluntary disclosure does occur, as to psychotherapists in the case of a mental or emotional condition and physicians in the case of a physical condition upon the holder's offering of any person as a witness who testifies as to the condition. [1981 c.892 §39; 2003 c.259 §1]

40.285 Rule 512. Privileged matter disclosed under compulsion or without opportunity to claim privilege. Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was:

(1) Compelled erroneously; or

(2) Made without opportunity to claim the privilege. [1981 c.892 §40]

40.290 Rule 513. Comment upon or inference from claim of privilege. (1) The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn from a claim of privilege.

(2) In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(3) Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom. [1981 c.892 §41]

40.295 Rule 514. Effect on existing privileges. Unless expressly repealed by section 98, chapter 892, Oregon Laws 1981, all existing privileges either created under the Constitution or statutes of the State of Oregon or developed by the courts of Oregon are recognized and shall continue to exist until changed or repealed according to law. [1981 c.892 §42]

WITNESSES

40.310 Rule 601. General rule of competency. Except as provided in ORS 40.310 to 40.335, any person who, having organs of sense can perceive, and perceiving can make known the perception to others, may be a witness. [1981 c.892 §43]

40.315 Rule 602. Lack of personal knowledge. Subject to the provisions of ORS 40.415, a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. [1981 c.892 §44]

40.320 Rule 603. Oath or affirmation. (1) Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the conscience of the witness and impress the mind of the witness with the duty to do so.

(2) An oath may be administered as follows: The person who swears holds up one hand while the person administering the oath asks: "Under penalty of perjury, do you solemnly swear that the evidence you shall give in the issue (or matter) now pending between _____ and _____ shall be the truth, the whole truth and nothing but the truth, so help you God?" If the oath is administered to any other than a witness, the same form and manner may be used. The person swearing must answer in an affirmative manner.

(3) An affirmation may be administered as follows: The person who affirms holds up one hand while the person administering the affirmation asks: "Under penalty of perjury, do you promise that the evidence you shall give in the issue (or matter) now pending between _____ and _____ shall be the truth, the whole truth and nothing but the truth?" If the affirmation is administered to any other than a witness, the same form and manner may be used. The person affirming must answer in an affirmative manner. [1981 c.892 §45]

40.325 Rule 604. Interpreters. Except as provided in ORS 45.275 (7), an interpreter is subject to the provisions of the Oregon Evidence Code relating to qualification as an expert and the administration of an oath or affirmation that the interpreter will make a true and impartial interpretation of the proceedings in an understandable manner using the interpreter's best skills and judgment in accordance with the standards and ethics of the interpreter profession. [1981 c.892 §47; 1981 s.s. c.3 §138; 1989 c.224 §7; 1991 c.750 §7; 2001 c.242 §4; 2005 c.385 §3; 2015 c.155 §5]

40.330 Rule 605. Competency of judge as witness. The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point. [1981 c.892 §48]

40.335 Rule 606. Competency of juror as witness. A member of the jury may not testify as a witness before that jury in the trial of the case in which the member has been sworn to sit as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury. [1981 c.892 §49]

40.340 [1981 c.892 §50; repealed by 1987 c.352 §1]

40.345 Rule 607. Who may impeach. The credibility of a witness may be attacked by any party, including the party calling the witness. [1981 c.892 §51]

40.350 Rule 608. Evidence of character and conduct of witness. (1) The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but:

(a) The evidence may refer only to character for truthfulness or untruthfulness; and

(b) Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(2) Specific instances of the conduct of a witness, for the purpose of attacking or supporting the credibility of the witness, other than conviction of crime as provided in ORS 40.355, may not be proved by extrinsic evidence. Further, such specific instances of conduct may not, even if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness. [1981 c.892 §52]

40.355 Rule 609. Impeachment by evidence of conviction of crime; exceptions. (1) For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record, but only if the crime:

(a) Was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted; or

(b) Involved false statement or dishonesty.

(2)(a) If a defendant is charged with one or more of the crimes listed in paragraph (b) of this subsection, and the defendant is a witness, evidence that the defendant has been convicted of committing one or more of the following crimes against a family or household member, as defined in ORS 135.230, may be elicited from the defendant, or established by public record, and admitted into evidence for the purpose of attacking the credibility of the defendant:

(A) Assault in the fourth degree under ORS 163.160.

(B) Menacing under ORS 163.190.

(C) Harassment under ORS 166.065.

(D) Attempted assault in the fourth degree under ORS 163.160 (1).

(E) Attempted assault in the fourth degree under ORS 163.160 (3).

(F) Strangulation under ORS 163.187.

(G) The statutory counterpart in another jurisdiction to a crime listed in this paragraph.

(b) Evidence may be admitted into evidence for the purpose of attacking the credibility of a defendant under the provisions of this subsection only if the defendant is charged with

committing one or more of the following crimes against a family or household member, as defined in ORS 135.230:

(A) Aggravated murder under ORS 163.095.

(B) Murder under ORS 163.115.

(C) Manslaughter in the first degree under ORS 163.118.

(D) Manslaughter in the second degree under ORS 163.125.

(E) Assault in the first degree under ORS 163.185.

(F) Assault in the second degree under ORS 163.175.

(G) Assault in the third degree under ORS 163.165.

(H) Assault in the fourth degree under ORS 163.160.

(I) Rape in the first degree under ORS 163.375 (1)(a).

(J) Sodomy in the first degree under ORS 163.405 (1)(a).

(K) Unlawful sexual penetration in the first degree under ORS 163.411 (1)(a).

(L) Sexual abuse in the first degree under ORS 163.427 (1)(a)(B).

(M) Kidnapping in the first degree under ORS 163.235.

(N) Kidnapping in the second degree under ORS 163.225.

(O) Burglary in the first degree under ORS 164.225.

(P) Coercion under ORS 163.275.

(Q) Stalking under ORS 163.732.

(R) Violating a court's stalking protective order under ORS 163.750.

(S) Menacing under ORS 163.190.

(T) Harassment under ORS 166.065.

(U) Strangulation under ORS 163.187.

(V) Attempting to commit a crime listed in this paragraph.

(3) Evidence of a conviction under this section is not admissible if:

(a) A period of more than 15 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date; or

(b) The conviction has been expunged by pardon, reversed, set aside or otherwise rendered nugatory.

(4) When the credibility of a witness is attacked by evidence that the witness has been convicted of a crime, the witness shall be allowed to explain briefly the circumstances of the crime or former conviction; once the witness explains the circumstances, the opposing side shall have the opportunity to rebut the explanation.

(5) The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

(6) An adjudication by a juvenile court that a child is within its jurisdiction is not a conviction of a crime.

(7) A conviction of any of the statutory counterparts of offenses designated as violations as described in ORS 153.008 may not be used to impeach the character of a witness in any criminal or civil action or proceeding. [1981 c.892 §53; 1987 c.2 §9; subsection (6) of 1993 Edition enacted as 1993 c.379 §4; 1999 c.1051 §121; 2001 c.714 §1; 2003 c.577 §3; 2009 c.56 §1]

Note: 40.355 (7) was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 40 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

40.360 Rule 609-1. Impeachment for bias or interest. (1) The credibility of a witness may be attacked by evidence that the witness engaged in conduct or made statements showing bias or interest. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the statement shall be shown or disclosed to the opposing party.

(2) If a witness fully admits the facts claimed to show the bias or interest of the witness, additional evidence of that bias or interest shall not be admitted. If the witness denies or does not fully admit the facts claimed to show bias or interest, the party attacking the credibility of the witness may then offer evidence to prove those facts.

(3) Evidence to support or rehabilitate a witness whose credibility has been attacked by evidence of bias or interest shall be limited to evidence showing a lack of bias or interest. [1981 c.892 §54; 1999 c.100 §1]

40.365 Rule 610. Religious beliefs or opinions. Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the credibility of the witness is impaired or enhanced. [1981 c.892 §54a]

40.370 Rule 611. Mode and order of interrogation and presentation. (1) The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to make the interrogation and presentation effective for the ascertainment of the truth, avoid needless consumption of time and protect witnesses from harassment or undue embarrassment.

(2) Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(3) Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. [1981 c.892 §54b]

40.375 Rule 612. Writing used to refresh memory. If a witness uses a writing to refresh memory for the purpose of testifying, either while testifying or before testifying if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce into evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this section, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial. [1981 c.892 §55]

40.380 Rule 613. Prior statements of witnesses. (1) In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor

its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(2) Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in ORS 40.450. [1981 c.892 §55a; 1983 c.433 §2; 1983 c.740 §5]

40.385 Rule 615. Exclusion of witnesses. At the request of a party the court may order witnesses excluded until the time of final argument, and it may make the order of its own motion. This rule does not authorize exclusion of:

(1) A party who is a natural person;

(2) An officer or employee of a party which is not a natural person designated as its representative by its attorney;

(3) A person whose presence is shown by a party to be essential to the presentation of the party's cause; or

(4) The victim in a criminal case. [1981 c.892 §56; 1987 c.2 §5; 2003 c.14 §20]

OPINIONS AND EXPERT TESTIMONY

40.405 Rule 701. Opinion testimony by lay witnesses. If the witness is not testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to those opinions or inferences which are:

(1) Rationally based on the perception of the witness; and

(2) Helpful to a clear understanding of testimony of the witness or the determination of a fact in issue. [1981 c.892 §57]

40.410 Rule 702. Testimony by experts. If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise. [1981 c.892 §58]

40.415 Rule 703. Bases of opinion testimony by experts. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. [1981 c.892 §59]

40.420 Rule 704. Opinion on ultimate issue. Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. [1981 c.892 §60]

40.425 Rule 705. Disclosure of fact or data underlying expert opinion. An expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination. [1981 c.892 §61]

40.430 Rule 706. Impeachment of expert witness by learned treatise. Upon cross-examination, an expert witness may be questioned concerning statements contained in a published treatise, periodical or pamphlet on a subject of history, medicine or other science or art if the treatise, periodical or pamphlet is established as a reliable authority. A treatise, periodical or pamphlet may be established as a reliable authority by the testimony or admission of the witness, by other expert testimony or by judicial notice. Statements contained in a treatise, periodical or pamphlet established as a reliable authority may be used for purposes of impeachment but may not be introduced as substantive evidence. [1999 c.85 §2]

HEARSAY

40.450 Rule 801. Definitions for ORS 40.450 to 40.475. As used in ORS 40.450 to 40.475, unless the context requires otherwise:

(1) A "statement" is:

(a) An oral or written assertion; or

(b) Nonverbal conduct of a person, if intended as an assertion.

(2) A "declarant" is a person who makes a statement.

(3) "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(4) A statement is not hearsay if:

(a) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

(A) Inconsistent with the testimony of the witness and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition;

(B) Consistent with the testimony of the witness and is offered to rebut an inconsistent statement or an express or implied charge against the witness of recent fabrication or improper influence or motive; or

(C) One of identification of a person made after perceiving the person.

(b) The statement is offered against a party and is:

(A) That party's own statement, in either an individual or a representative capacity;

(B) A statement of which the party has manifested the party's adoption or belief in its truth;

(C) A statement by a person authorized by the party to make a statement concerning the subject;

(D) A statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or

(E) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

(c) The statement is made in a deposition taken in the same proceeding pursuant to ORCP 39 I. [1981 c.892 §62; 1987 c.275 §3]

40.455 Rule 802. Hearsay rule. Hearsay is not admissible except as provided in ORS 40.450 to 40.475 or as otherwise provided by law. [1981 c.892 §63]

40.460 Rule 803. Hearsay exceptions; availability of declarant immaterial. The following are not excluded by ORS 40.455, even though the declarant is available as a witness:

(1) (Reserved.)

(2) A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) A statement of the declarant's then existing state of mind, emotion, sensation or physical condition, such as intent, plan, motive, design, mental feeling, pain or bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of the declarant's will.

(4) Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the memory of the witness and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Evidence that a matter is not included in the memoranda, reports, records, or data compilations, and in any form, kept in accordance with the provisions of subsection (6) of this section, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Records, reports, statements or data compilations, in any form, of public offices or agencies, including federally recognized American Indian tribal governments, setting forth:

(a) The activities of the office or agency;

(b) Matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, in criminal cases, matters observed by police officers and other law enforcement personnel;

(c) In civil actions and proceedings and against the government in criminal cases, factual findings, resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness; or

(d) In civil actions and criminal proceedings, a sheriff's return of service.

(9) Records or data compilations, in any form, of births, fetal deaths, deaths or marriages, if the report thereof was made to a public office, including a federally recognized American Indian tribal government, pursuant to requirements of law.

(10) To prove the absence of a record, report, statement or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement or data compilation, in any form, was regularly made and preserved by a public office or agency, including a federally recognized American Indian tribal government, evidence in the form of a

certification in accordance with ORS 40.510, or testimony, that diligent search failed to disclose the record, report, statement or data compilation, or entry.

(11) Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) A statement of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, a public official, an official of a federally recognized American Indian tribal government or any other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Statements of facts concerning personal or family history contained in family bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) The record of a document purporting to establish or affect an interest in property, as proof of content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office, including a federally recognized American Indian tribal government, and an applicable statute authorizes the recording of documents of that kind in that office.

(15) A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in a document in existence 20 years or more the authenticity of which is established.

(17) Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) (Reserved.)

(18a)(a) A complaint of sexual misconduct, complaint of abuse as defined in ORS 107.705 or 419B.005, complaint of abuse of an elderly person, as those terms are defined in ORS 124.050, or a complaint relating to a violation of ORS 163.205 or 164.015 in which a person 65 years of age or older is the victim, made by the witness after the commission of the alleged misconduct or abuse at issue. Except as provided in paragraph (b) of this subsection, such evidence must be confined to the fact that the complaint was made.

(b) A statement made by a person concerning an act of abuse as defined in ORS 107.705 or 419B.005, a statement made by a person concerning an act of abuse of an elderly person, as those terms are defined in ORS 124.050, or a statement made by a person concerning a violation of ORS 163.205 or 164.015 in which a person 65 years of age or older is the victim, is not excluded by ORS 40.455 if the declarant either testifies at the proceeding and is subject to cross-examination, or is unavailable as a witness but was chronologically or mentally under 12 years of age when the statement was made or was 65 years of age or older when the statement was made. However, if a declarant is unavailable, the statement may be admitted in evidence only if the proponent establishes that the time, content and circumstances of the statement provide indicia of reliability, and in a criminal trial that there is corroborative evidence of the act of abuse and of the alleged perpetrator's opportunity to participate in the conduct and that the statement possesses indicia of reliability as is constitutionally required to be admitted. No statement may be admitted under this paragraph unless the proponent of the statement makes known to the

adverse party the proponent's intention to offer the statement and the particulars of the statement no later than 15 days before trial, except for good cause shown. For purposes of this paragraph, in addition to those situations described in ORS 40.465 (1), the declarant shall be considered "unavailable" if the declarant has a substantial lack of memory of the subject matter of the statement, is presently incompetent to testify, is unable to communicate about the abuse or sexual conduct because of fear or other similar reason or is substantially likely, as established by expert testimony, to suffer lasting severe emotional trauma from testifying. Unless otherwise agreed by the parties, the court shall examine the declarant in chambers and on the record or outside the presence of the jury and on the record. The examination shall be conducted immediately prior to the commencement of the trial in the presence of the attorney and the legal guardian or other suitable person as designated by the court. If the declarant is found to be unavailable, the court shall then determine the admissibility of the evidence. The determinations shall be appealable under ORS 138.060 (1)(c) or (2)(a). The purpose of the examination shall be to aid the court in making its findings regarding the availability of the declarant as a witness and the reliability of the statement of the declarant. In determining whether a statement possesses indicia of reliability under this paragraph, the court may consider, but is not limited to, the following factors:

(A) The personal knowledge of the declarant of the event;

(B) The age and maturity of the declarant or extent of disability if the declarant is a person with a developmental disability;

(C) Certainty that the statement was made, including the credibility of the person testifying about the statement and any motive the person may have to falsify or distort the statement;

(D) Any apparent motive the declarant may have to falsify or distort the event, including bias, corruption or coercion;

(E) The timing of the statement of the declarant;

(F) Whether more than one person heard the statement;

(G) Whether the declarant was suffering pain or distress when making the statement;

(H) Whether the declarant's young age or disability makes it unlikely that the declarant fabricated a statement that represents a graphic, detailed account beyond the knowledge and experience of the declarant;

(I) Whether the statement has internal consistency or coherence and uses terminology appropriate to the declarant's age or to the extent of the declarant's disability if the declarant is a person with a developmental disability;

(J) Whether the statement is spontaneous or directly responsive to questions; and

(K) Whether the statement was elicited by leading questions.

(c) This subsection applies to all civil, criminal and juvenile proceedings.

(d) This subsection applies to a child declarant, a declarant who is an elderly person as defined in ORS 124.050 or an adult declarant with a developmental disability. For the purposes of this subsection, "developmental disability" means any disability attributable to mental retardation, autism, cerebral palsy, epilepsy or other disabling neurological condition that requires training or support similar to that required by persons with mental retardation, if either of the following apply:

(A) The disability originates before the person attains 22 years of age, or if the disability is attributable to mental retardation the condition is manifested before the person attains 18 years of age, the disability can be expected to continue indefinitely, and the disability constitutes a substantial handicap to the ability of the person to function in society.

(B) The disability results in a significant subaverage general intellectual functioning with concurrent deficits in adaptive behavior that are manifested during the developmental period.

(19) Reputation among members of a person's family by blood, adoption or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood or adoption or marriage, ancestry, or other similar fact of a person's personal or family history.

(20) Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation of a person's character among associates of the person or in the community.

(22) Evidence of a final judgment, entered after a trial or upon a plea of guilty, but not upon a plea of no contest, adjudging a person guilty of a crime other than a traffic offense, to prove any fact essential to sustain the judgment, but not including, when offered by the government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) Notwithstanding the limits contained in subsection (18a) of this section, in any proceeding in which a child under 12 years of age at the time of trial, or a person with a developmental disability as described in subsection (18a)(d) of this section, may be called as a witness to testify concerning an act of abuse, as defined in ORS 419B.005, or sexual conduct performed with or on the child or person with a developmental disability by another, the testimony of the child or person with a developmental disability taken by contemporaneous examination and cross-examination in another place under the supervision of the trial judge and communicated to the courtroom by closed-circuit television or other audiovisual means. Testimony will be allowed as provided in this subsection only if the court finds that there is a substantial likelihood, established by expert testimony, that the child or person with a developmental disability will suffer severe emotional or psychological harm if required to testify in open court. If the court makes such a finding, the court, on motion of a party, the child, the person with a developmental disability or the court in a civil proceeding, or on motion of the district attorney, the child or the person with a developmental disability in a criminal or juvenile proceeding, may order that the testimony of the child or the person with a developmental disability be taken as described in this subsection. Only the judge, the attorneys for the parties, the parties, individuals necessary to operate the equipment and any individual the court finds would contribute to the welfare and well-being of the child or person with a developmental disability may be present during the testimony of the child or person with a developmental disability.

(25)(a) Any document containing data prepared or recorded by the Oregon State Police pursuant to ORS 813.160 (1)(b)(C) or (E), or pursuant to ORS 475.235 (4), if the document is produced by data retrieval from the Law Enforcement Data System or other computer system maintained and operated by the Oregon State Police, and the person retrieving the data attests that the information was retrieved directly from the system and that the document accurately reflects the data retrieved.

(b) Any document containing data prepared or recorded by the Oregon State Police that is produced by data retrieval from the Law Enforcement Data System or other computer system maintained and operated by the Oregon State Police and that is electronically transmitted through public or private computer networks under an electronic signature adopted by the Oregon State Police if the person receiving the data attests that the document accurately reflects the data received.

(c) Notwithstanding any statute or rule to the contrary, in any criminal case in which documents are introduced under the provisions of this subsection, the defendant may subpoena the analyst, as defined in ORS 475.235 (6), or other person that generated or keeps the original document for the purpose of testifying at the preliminary hearing and trial of the issue. Except as provided in ORS 44.550 to 44.566, no charge shall be made to the defendant for the appearance of the analyst or other person.

(26)(a) A statement that purports to narrate, describe, report or explain an incident of domestic violence, as defined in ORS 135.230, made by a victim of the domestic violence within 24 hours after the incident occurred, if the statement:

(A) Was recorded, either electronically or in writing, or was made to a peace officer as defined in ORS 161.015, corrections officer, youth correction officer, parole and probation officer, emergency medical services provider or firefighter; and

(B) Has sufficient indicia of reliability.

(b) In determining whether a statement has sufficient indicia of reliability under paragraph (a) of this subsection, the court shall consider all circumstances surrounding the statement. The court may consider, but is not limited to, the following factors in determining whether a statement has sufficient indicia of reliability:

(A) The personal knowledge of the declarant.

(B) Whether the statement is corroborated by evidence other than statements that are subject to admission only pursuant to this subsection.

(C) The timing of the statement.

(D) Whether the statement was elicited by leading questions.

(E) Subsequent statements made by the declarant. Recantation by a declarant is not sufficient reason for denying admission of a statement under this subsection in the absence of other factors indicating unreliability.

(27) A report prepared by a forensic scientist that contains the results of a presumptive test conducted by the forensic scientist as described in ORS 475.235, if the forensic scientist attests that the report accurately reflects the results of the presumptive test.

(28)(a) A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that:

(A) The statement is relevant;

(B) The statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts; and

(C) The general purposes of the Oregon Evidence Code and the interests of justice will best be served by admission of the statement into evidence.

(b) A statement may not be admitted under this subsection unless the proponent of it makes known to the adverse party the intention to offer the statement and the particulars of it, including the name and address of the declarant, sufficiently in advance of the trial or hearing, or as soon as practicable after it becomes apparent that such statement is probative of the issues at hand, to provide the adverse party with a fair opportunity to prepare to meet it. [1981 c.892 §64; 1989 c.300 §1; 1989 c.881 §1; 1991 c.391 §1; 1995 c.200 §1; 1995 c.476 §1; 1995 c.804 §2; 1999 c.59 §13; 1999 c.674 §1; 1999 c.945 §1; 2001 c.104 §11; 2001 c.533 §1; 2001 c.870 §5; 2003 c.538 §2; 2005 c.118 §3; 2007 c.63 §2; 2007 c.70 §12; 2007 c.636 §3; 2009 c.610 §9; 2011 c.661 §14; 2011 c.703 §21]

40.465 Rule 804. Hearsay exceptions when the declarant is unavailable. (1) "Unavailability as a witness" includes situations in which the declarant:

(a) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of a statement;

(b) Persists in refusing to testify concerning the subject matter of a statement despite an order of the court to do so;

(c) Testifies to a lack of memory of the subject matter of a statement;

(d) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(e) Is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of an exception under subsection (3)(b), (c) or (d) of this section, the declarant's attendance or testimony) by process or other reasonable means.

(2) A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

(3) The following are not excluded by ORS 40.455 if the declarant is unavailable as a witness:

(a) Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(b) A statement made by a declarant while believing that death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(c) A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(d)(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood or adoption or marriage, ancestry, or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated; or

(B) A statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(e) A statement made at or near the time of the transaction by a person in a position to know the facts stated therein, acting in the person's professional capacity and in the ordinary course of professional conduct.

(f) A statement offered against a party who intentionally or knowingly engaged in criminal conduct that directly caused the death of the declarant, or directly caused the declarant to become unavailable as a witness because of incapacity or incompetence.

(g) A statement offered against a party who engaged in, directed or otherwise participated in wrongful conduct that was intended to cause the declarant to be unavailable as a witness, and did cause the declarant to be unavailable.

(h) A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of the Oregon Evidence Code and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this paragraph unless the proponent of it makes known to the adverse party the intention to offer the statement and the particulars of it, including the name and address of the declarant, sufficiently in advance of the trial or hearing, or as soon as practicable after it becomes apparent that the statement is probative of the issues at hand, to provide the adverse party with a fair opportunity to prepare to meet it. [1981 c.892 §65; 2005 c.458 §1]

40.470 Rule 805. Hearsay within hearsay. Hearsay included within hearsay is not excluded under ORS 40.455 if each part of the combined statements conforms with an exception set forth in ORS 40.460 or 40.465. [1981 c.892 §66]

40.475 Rule 806. Attacking and supporting credibility of declarant. When a hearsay statement, or a statement defined in ORS 40.450 (4)(b)(C), (D) or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the hearsay statement of the declarant, is not subject to any requirement under ORS 40.380 relating to impeachment by evidence of inconsistent statements. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination. [1981 c.892 §67]

DEPOSITION OF _____(loss of consortium)

DOA: _____

INTRODUCTION

Ever had your deposition taken? Circumstances.
Review any documents in preparation of your deposition?

Name

Taking depo, informal-formal, under oath, court reporter, testimony used for various purposes, be sure that you understand, assume that you do.

Presently on any medications that could effect your answers today?

You were here for your husband's / wife's deposition, now I want to hear from you make sure he/she got it all right

PERSONAL INFORMATION

Current address?

Are any of your children living with you?

Do any of you or your wife's children live in the area?
Socialize with them? When was the last time you saw them?

HOBBIES AND INTERESTS

NOW:

Everyday Activities

Describe your daily routine: M-F, S-S

What are you able to do? What is difficult to do? What can you no longer do?

How often, when do it, why can't do it, last time did it prior to accident/surgery

Describe your home

Own?
Size, upstairs/downstairs,
Who does the maintenance? Pay him
Who does the upkeep? What done recently
Insullation- 1996

Describe your yard
Acerage
Who does the maintenance? Pay him
Who does the upkeep? What done recently
Animals?
Hot tub: new? Type, who put it in? Where?

Where is the truck that was involved in the accident?
Describe the truck, power steering, how shift?
Damage to truck? Was it totalled? Driven since the accident?

Tell me about your:
Family
Friends

Belong to
Church
Civic Organizations
Community
Organized groups
Social

What did you do for Thanksgiving- photos?
Plans for Christmas
Fourth of July

When was the last time you went out of state
For work
Arizona in June or July 1999
For pleasure

Taken any vacations recently?
Go to the beach, the mountains, central oregon,
Camping- RV etc.
Visit family
Have you gone out of

Go back and review and ask how different from pre-accident

EMPLOYMENT

What did your husband do prior to the accident- ***review tax returns***

Describe his employment
Worked for yourself
How get jobs
Ask about each job on the tax return/ 1109s

Ever haul out of state? ***Medical records say so***

If no job now
Why
Where
Pay
Efforts to look for work
Resume
Interviews

Past employment
How long been driving a truck
Describe the first truck drove, how learn
Power steering

Business records: look at what have now

Required to report to anyone
Explain
Where are your tax returns

MEDICAL BACKGROUND

Identity of family doctor
    Present/ past

Does hubby take you to the doctor

All hospitalizations of the witness
    All visits to ER
    All operations
    All x-rays and MRIs

General state of health
    Smoker
    Ever diagnosed or told: who, when, circumstances:

Current height and weight

HISTORY OF OTHER ACCIDENTS, INJURIES OR CLAIMS

All prior mva accidents with husband

All subsequent mva accidents with husband

Injuries
    Falls or pregnancy

REVIEW MEDICALS

Ask about any questions

IF LOSS OF CONSORTIUM
RELATIONSHIP WITH HUSBAND/WIFE

What is your marital status
Married before
    How did they end
Characterize marriage as strong
Loving and Caring
How long married
Ever file for divorce or seek counseling
Ever contemplated divorce

Heard your husband talk about caring for you
    Accurate
    Hear from your words
    Moral support
    Help your recovery

Do you think this accident affected your marriage?
    Stronger or worse?
    Give him comfort

Would you say your marriage is better now or worse

Resent in any way having to wait on her

Didn't get upset or angry with her or angry with her or anything like that

Do you love your husband
    He love you
    Committed to him
    He committed to you

Activities do together
    Shopping
    Out to eat

You have filed a loss of consortium claim, is that correct?
    Claiming your sex life was affected by the accident?
    What was normal before accident

How often
Talked about it
Why do you think lower sex drive
Heart, diabetes, your disability effect it at all
Is your husband affectionate with you
Are you affectionate
Love him any less
Are you as carring towards him

Quality of your marriage as good?

See each other more now?

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Dunn Carney ATTORNEYS AT LAW Allen Higgins & Tongue LLP

February 11, 2016

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Via E-mail and
Via U.S. Mail

Re: [redacted]
[redacted] County Circuit Court No. [redacted]
Our File No. [redacted]

Dear_____ :

Your deposition is scheduled for Monday, January 17, 2010 beginning at 7:00 a.m. at the [redacted] located at [redacted], [redacted], Oregon, 97103.

I will see you at noon on Sunday.

Very truly yours,

Anne D. Foster

ADF:emm

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Dunn Carney Allen Higgins & Tongue LLP ATTORNEYS AT LAW

January 6, 2011

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Re: [redacted]
[redacted] County Circuit Court No. [redacted]
Our File No. [redacted]

Dear :

As you know, on January 17, 2011, you will be a witness in a deposition. Now is the time to answer your questions about the deposition process and to discuss how you can become a better deposition witness. I would like to meet with you on Sunday, January 16, 2011 to prepare for your deposition. I would be happy to meet you in [redacted]. I am going to have [redacted] call you to schedule a time. I have also attached a copy of [redacted] deposition transcript for your review.

Fortunately, there is no great mystery to being a good witness. It is a learned skill and depends on the conscientious application of certain techniques, some of which are listed below. Before I review specific techniques, however, I will discuss what depositions are and why they are taken.

What is a deposition?

A deposition is a question-and-answer session between the attorneys to a lawsuit and a witness. It is usually held in a lawyer's office. Those present are

1. you, the witness,
2. a court reporter to record your testimony,
3. lawyers for all parties to the lawsuit, and
4. the parties themselves or their representatives.

A judge does *not* attend the deposition and will not even review the deposition transcript unless called upon to do so by one of the parties.

The procedure itself is straightforward. After everyone is seated and ready, the court reporter will ask you to raise your right hand and take the oath. The lawyers in the room will then take turns asking you questions, but most will

be from the lawyer calling the deposition (the "opposing attorney"). The court reporter will record everything said by the lawyers and by you. This record will later be made into a typed and bound, word-for-word transcript of the questions asked and answers given during the deposition.

Depositions can seem informal. The participants drink coffee, take off their jackets, and occasionally get up and move around the room. But don't let the informality mislead you. Depositions are vitally important, and what you say can be used against you.

Why are depositions taken?

Fundamentally, lawyers take depositions to discover what a witness knows and to preserve testimony for trial. You are being deposed for some of the following reasons:

1. To discover what you know about the case – the opposing attorney is searching for evidence.

2. To find evidence favorable to the other side. To this end, the opposing attorney may attempt to maneuver you into making statements against your interest.

3. To commit you to statements under oath. If you testify under oath in your deposition that something occurred on June 1, 1994, and you attempt to change your testimony later, the opposing attorney can read that portion of the deposition at the trial, thereby using your deposition testimony against you.

4. To discredit your testimony or the testimony of other witnesses through you.

Your obligation as a witness, and how to deal with the opposing attorney

Your first duty as a witness is to tell the truth. This is your obligation even if the truth will hurt your case. Beforehand, we should review weak spots in the case so that we'll know how to address them if questions arise during the deposition. Most lawyers are skilled at taking depositions and will know how to make an untruthful witness very uncomfortable. If you find yourself reluctant to give a completely candid answer because it would damage your case, know that the damage is usually much smaller than that caused by a less-than-candid answer.

Having said that, you must be prepared for an opposing attorney who will emphasize the strong points of his or her client's case, ignore or try to explain away the weak points, and ridicule your story and contrive ways to suggest that

you are not telling the truth or are in error. Therefore, although you must be accurate and candid, you also need to be on guard. The following ten thoughts may help you be a good witness and avoid improper or "tricky" questions.

10 Deposition Tips

1. *Pause and think before answering.* Listen to the question. Concentrate on every word and wait until you hear the last word of the question before you answer. In ordinary conversation we cut one another off frequently. In a deposition, however, pause to think before you answer. That way, you will not inadvertently give away information that the opposing attorney never thought of asking for.

Following this rule may seem unnecessary when you are asked simple questions, but follow it anyway. The more the rule becomes second nature, the better able you are to concentrate on the substance of your testimony. Also, the rule permits you, rather than the opposing attorney, to dictate the tempo of the deposition. This will be important if you get tired or feel under pressure. Most important, the rule allows your attorneys to formulate and state objections to a question *before* you answer.

2. *Never volunteer information.* A lot of damage is done in a lawsuit by a "helpful" witness. We all like to be helpful, but it's unwise in a deposition to volunteer information of any kind. For example, if a friend or coworker asks you whether you know what time it is, you may say, "ten o'clock"; in a deposition, your answer to that question should be simply "yes" or "no." If your answer is "yes," let the opposing attorney follow up with a question, such as "what time is it?" Generally, keep your answers short and to the point. Remember that every word is another target for the opposing attorney.

3. *Make sure you understand the question.* Never answer a question unless you fully understand it. It's up to the examiner to frame intelligible, unambiguous questions. If the opposing attorney can't do it, don't help.

You may not understand a question because the opposing attorney is imprecise. For example, he or she may ask you if a certain letter was sent after "that." If you're not sure what "that" refers to, say that you don't understand the question. Don't say, "if you mean this, then my answer would be such and such; if you mean that, then my answer would be so and so." You may give the opposing attorney ideas that hadn't occurred to him or her. Say only that you do not understand the question.

If something interferes with your ability to hear the question, insist that the full question be repeated to you. You have an absolute right to ask for clarification of a question at any time. This does not mean that you should be

over-technical or picky about every question. But if a question is ambiguous or unintelligible, insist that it be repeated or restated in terms that you can understand.

4. *If you don't remember, say so.* Sometimes you won't remember important facts. If you don't remember the facts that would answer a particular question, say that. The deposition is not a test. If you are pretty sure of the answer but not 100 percent sure, say that. It is extremely dangerous for a witness to testify from assumption rather than memory.

5. *Don't guess.* If you don't know an answer to a question, say so. "I do not know" is a totally proper deposition answer. Witnesses often feel that they "should know the answer" to a question, then conceal their lack of knowledge by guessing. Everyone – even the opposing attorney – knows that the memory of any witness will have limits.

6. *Always read the fine print.* Documents often form the central evidence of a lawsuit, and they can be a proper subject for questions in a deposition. You may be asked if you are familiar with a certain document; if you are, you may be asked detailed questions about its contents. The lawyer may also read a portion of a document to you and then ask you questions about it. If this occurs, a few rules may be helpful.

First, never testify about the content of a document you are not fully familiar with, unless the document is before you and you've been given an opportunity to read it. Second, refer to the document if necessary. If the opposing attorney needs the document to phrase a question, insist that the document be returned to you before you answer. Third, if the opposing attorney suggests that the document states a certain fact, always check to see whether it does before you answer. Sometimes inadvertently, sometimes intentionally, a lawyer may read too much or too little into a document.

7. *Silence and off-the-record comments.* Sometimes attorneys engage in a subtle ploy of suggesting, by silence, that you should give a different answer. You may become uncomfortable or assume that your answer is incomplete and feel compelled to explain. The opposing attorney may encourage you with silent signals (tilted head, raised eyebrows), or may stare at you with a look of disbelief.

Ignore the silent treatment. When you have answered a question, stop and wait for the next one. Sometimes, the opposing attorney is simply thinking about how to word the next question. You may be tempted to fill the silence with words – don't.

Sometimes, too, the attorney will "go off the record"; however, he or she can ask you about what you've said when you are back on the record. Never say

anything in the presence of the opposing attorney that you would not want in the record.

8. *Stick to your answers.* You may hear the same question more than once. The opposing attorney may ask the same question ten different ways and then ask it once more prefixed by, "I cannot remember if I have asked you this, but ...." Attorneys usually use this tactic for one of two reasons: they're trying to get a different answer by changing the form of the question, or they're trying to emphasize something that they think strengthens their case.

If your original answer was accurate, stick to it. The fact that the opposing attorney keeps coming back to the question does not mean that you are not answering properly.

9. *Objections.* I may object to certain questions. Try not to be distracted by that. If I object, stop and wait for me to finish. The court reporter will note the objection for later ruling by the judge. You will usually be expected to answer. Occasionally, however, I may instruct you not to answer the question. In that instance, and only in that instance, do not answer.

10. *What happens after the deposition.* Under court rules, you have a right to read the transcript of your deposition and correct mistakes, and you will then be asked to sign the deposition on a separate form. Sometimes I recommend waiving this process. After a transcript is prepared, I will review the transcript and raise any concerns with you.

Generally, however, the best time to correct mistakes in your testimony is before the transcript has been prepared. There will be periods during the deposition when we can take a break. Raise any concerns you have during the break so we discuss how to correct an error in your testimony or how to raise an additional point that you believe is important.

I hope that these suggestions are helpful. As the deposition date nears, we can discuss in greater detail some of the suggestions offered in this letter.

Very truly yours,

Anne D. Foster

ADF:emm
Attachment

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The following information and instructions are offered in an effort to better acquaint you with what is expected of you and how you can be an effective witness at the time of deposition. We will, of course, meet with you prior to your deposition to thoroughly discuss what will occur and to go through your testimony with you. The purpose of this letter is merely to give you some preliminary background about your deposition.

1. PROCEDURE:

Under our law, the opposing lawyer has the right to take your deposition. This means that you will be put under oath, just as you would be in court, and he will ask you questions relating to the case. The opposing lawyer's questions and your answers will be taken down by a court reporter. Your testimony at deposition becomes a permanent part of the record of your case. Depositions are taken in order to find out what witnesses know and to establish as many facts as possible before trial. Your lawyer will also be present.

The purpose of the deposition is to inquire about any and all facts which the opposing lawyer may use to assist him in the preparation and trial of the lawsuit. He will also use the deposition to 1) **evaluate how you will appear to a jury,** and 2) **determine the settlement value of the case.**

There will be no judge or jury present. After the deposition is completed, the reporter will transcribe the questions and answers, and all parties will receive copies.

Your deposition, when properly given, can go a long way toward assisting your lawyer in handling your litigation either by way of settlement or at the trial. What YOU do at the deposition can help you or hurt you, depending upon your **attitude, truthfulness, and appearance.**

If your case goes to trial, this deposition can be used in cross-examination by the other side if your testimony at trial differs from your testimony at the deposition.

2. YOUR PHYSICAL APPEARANCE:

You should remember that usually the first opportunity that the opposing counsel has to see you comes at the time of the giving of your deposition. First impressions are important. It is important that you strive to make a good impression upon opposing counsel and his client, and you should appear at the deposition dressed as you would expect to dress if you were actually going to court to appear before the jury.

- While you do not need to appear in a business suit, you should wear clean, neat and conservative clothing.

- You should avoid extreme styles of clothing, and excessive, gaudy or very expensive jewelry.

- Treat all persons present at the deposition with courtesy.

- Come prepared to exhibit any and all injuries which you have suffered. If this presents a possibly embarrassing situation, let your lawyer know in advance so that he can take care of it.

3. HOW TO HANDLE YOURSELF IN THE DEPOSITION:

Consider this an important and solemn occasion, and avoid getting chummy with opposing lawyer or his client.

TELL THE TRUTH! We know that you would not deliberately state a falsehood, but it is important that you not be trapped into something that is not true. For this reason, LISTEN TO EACH QUESTION CAREFULLY AND BE SURE THAT YOU UNDERSTAND IT BEFORE ANSWERING. If you do not understand a question, ask that it be repeated or rephrased. When you understand the question, then answer it honestly and in a straightforward manner.

In a lawsuit, honesty is the best policy. DO NOT try to determine whether a truthful answer will help or hinder your case. It is your lawyer's job to deal with the facts in your case. You will only hurt your case by trying to do your lawyer's job. Telling the truth requires that a witness testify accurately about what he knows. If you tell the truth and tell it accurately, nobody can cross you up.

WHEN YOU DON'T KNOW THE ANSWER: ***Never*** guess at an answer! If you don't know the answer, say that you don't know or don't recall. ***Never*** state as a fact things you don't know for sure are true. You may feel that this will make you appear ignorant or evasive, but remember that if you try to estimate or guess and are later proved to be wrong, it will look like you deliberately told a lie or that you don't know what you are talking about. Remember that no one can remember every minute detail. However, you will remember the important things and you should give an honest and full answer to questions on these points. Please **do not** volunteer information not requested.

a. UNDERSTAND THE QUESTION before you attempt to give an answer. You cannot possibly give a truthful and accurate answer unless you understand the question. If you don't understand, ask the lawyer to repeat it. Do not be afraid to ask the lawyer several times to repeat the question.

b. TAKE YOUR TIME. Give the question as much thought as it requires to understand it and formulate your answer; then give the answer. Do not give a snap answer without thinking. If you need a break, tell the lawyer. The deposition may take several hours and you should be comfortable.

c. GIVE AN AUDIBLE ANSWER so the court reporter can understand it. Don't nod your head to indicate "yes" or "no", and do not answer "uh-huh", "uh-uh", etc. Speak slowly and clearly.

d. DON'T try to "yes-but…" Give the explanation first.

e. DON'T try to memorize your story. Justice requires only that a witness tell his story truthfully and to the best of his ability.

f. BEWARE OF QUESTIONS INVOLVING DISTANCES AND TIME. If you make an estimate, make sure that everyone understands that you are estimating. Think clearly about speeds, distances, and intervals of time. If you do not know an answer, say so! Do not give it your best guess.

g. DON'T FENCE OR ARGUE WITH THE LAWYER on the other side. He has a right to question you. Don't answer with a question unless the question you are asked is not clear.

h. DON'T LOSE YOUR TEMPER, no matter how hard you are pressed. If you lose your temper, you may lose the case and you have played right into the hands of the other side. Getting angry destroys the effect of your testimony and you say things that may be used to your disadvantage later. Under no circumstances should you argue with the opposing attorney. Give him only the information which you have. That is all he is entitled to. Give him the information in the same tone of voice and manner that you do in answer to your own attorney's questions. The mere fact that you get emotional about a certain point could be to your opponent's advantage in a lawsuit.

i. IF ASKED WHETHER you have talked to your lawyer or to an investigator, admit it freely. This is perfectly proper.

j. AVOID JOKING AND WISECRACKS. A lawsuit is a serious matter.

k. NEVER VOLUNTEER ANY INFORMATION; JUST ANSWER THE QUESTION. Wait until the question is asked, answer it, and STOP TALKING. If "yes" or "no" will answer the question, give that answer and stop. The other lawyer will probably be friendly and will not "bully" you in any manner. His theory will probably be that the more he can get you to say, the more apt you are to put your "foot in your mouth." An incorrect statement may hurt your case.

l. LISTEN TO YOUR LAWYER. From time to time, your lawyer may object to a question. When he does, stop speaking immediately, listen to his objection, and follow his instructions.

m. WAIT UNTIL THE LAWYER HAS FINISHED ASKING THE QUESTION. Do not anticipate what the question is before it is finished, and do not start nodding your head or answering until the question is finished. This is a common mistake by people having their depositions taken because we all do this in casual conversation with others. Even though you know what the question is going to be, wait until the attorney is finished speaking.

n. BE CAREFUL OF QUESTIONS IN WHICH THE ATTORNEY PUTS WORDS IN YOUR MOUTH. An attorney sometimes will phrase the answer himself and ask if that answer is correct. For example, "You have had some pain for awhile, but you feel fine now, is that correct?" "You would agree with me, would you not, Mr. Witness, that you have no way of knowing what color the traffic signal was for my client?" These questions are different than merely asking you "Do you have pain now?" or "Are you able to tell us what color the traffic signal light was for my client at the time of the accident?" The difference is that the attorney is suggesting an answer to you and asking you to agree with it. Do not be intimidated. Do not let the attorney put words in your mouth unless you fully agree with what he has said.

o. DON'T attempt to justify or apologize for your answer.

p. DON'T promise to "find out" information that you do have on hand unless your attorney advises it.

q. DON'T reach in your pocket for your social security card or other documents unless your attorney advises it.

r. DON'T magnify or underplay your injuries or losses. Be conservative with respect to a description of your injuries. Adopt an unexaggerated attitude toward your injuries, but be sure to be complete.

s. DON'T overlook any injuries or complaints.

4. <u>CONCLUSION</u>.

REMEMBER: Perhaps the most important aspect of your lawsuit is you and the appearance you make. If you give the appearance of earnestness, fairness, and honesty, and if in giving your deposition you keep in mind these suggestions, you will be taking a great stride toward successful and satisfactory completion of the litigation in which you are involved.

We hope this information has been helpful to you in understanding what a deposition is and how important it is to your case.