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## Remote Depositions: New Rules of the Road

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The national percentage of federal civil lawsuits decided at trial dropped from 5.5% in 1962 to 0.8% in 2013. In 2019, 98.6% of civil cases settled before trial in the District of Oregon, while 99.1% settled in Oregon state courts. The demise of trials in Oregon and around the country has led some to argue that the single most important event in litigation has become the deposition. Unsurprisingly, the time and resources being invested into depositions has been steadily increasing as trials have become less common. In many cases, it has become unthinkable and, some would say, inexcusable, to conduct a deposition without packing the conference room with lawyers, clients, a court reporter, a videographer, and enough technology to rival NASA mission control.

As of March 2020, the litigation landscape could not have been more deposition-centric, and the vast majority of depositions were taking place in person. According to a survey by Veritext Legal Solutions, 87% of litigators said they either never or rarely ever participated in remote depositions if given the option. It was this landscape onto which COVID-19 landed – and changed everything. Gone, with staggering speed, were the days of looking our opponents in the whites of their eyes. Suddenly, the most important event in litigation had to be reimagined, and the courts quickly made clear that parties would not be allowed to wait for things to get back to normal before moving cases into and through the deposition phase. *See, e.g. Ogilvie v. Thrifty Payless*, 2020 U.S. Dist. LEXIS 83620, at *6 (W.D. Wash. May 12, 2020); *United States ex rel. Chen v. K.O.O. Constr., Inc.*, 2020 U.S. Dist. LEXIS 81866, at *3-4 (S.D. Cal. May 8, 2020) ("it is not feasible for a court to extend deposition deadlines because no one knows when that will occur, and there are alternatives, *e.g.* remote depositions").

Forced to do so, lawyers adapted quickly. An estimated 90% of depositions were held remotely in the early days of the pandemic according to a study by PwC's Strategy& and Verbit. In the months that have followed, the prevalence of remote depositions has fluctuated along with lawyer, law firm, court, and government opinions and regulations about COVID-19. Lessons related to the conduct of remote depositions have been learned, and remote deposition protocols have been tested. Through the trial and error process, we have experienced first-hand the unique challenges presented by remote depositions. Technology is more important than ever because technology failures are now truly fatal, and given the multitude of users connecting remotely to any given deposition, the

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# Comments from the Editor

## Direct Versus Cross-Examination: A Study in Contrast

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The comparison of the general rules for conducting direct examinations and cross-examinations exposes a common theme. Whatever the rule that applies to direct examination, usually the directly opposite rule applies to cross-examination.


Dennis P. Rawlinson

This contrast is not surprising. After all, direct examinations generally consist of eliciting helpful information from cooperative witnesses whose credibility we are attempting to bolster. On the other hand, on cross-examination we are generally attempting to elicit helpful information from an uncooperative witness whose credibility we are attempting to impeach.

A review of six general rules of cross-examination and comparing those rules with comparable rules for direct examination will demonstrate the contrast.

### 1. End strongly, start slowly.

A good direct examination, redirect examination, or recross-examination should start and end strongly (taking advantage of the persuasive techniques of primacy and recency). Similarly, cross-examination should finish strongly ending with the traditional "zinger," a point that is a guaranteed winner in that it is absolutely admissible, is central to your theory, evokes your theme, is undeniable, and can be stated with conviction. In direct examination the same kind of impact can be made with a "zinger" in the opening line of questions.

In contrast, however, a cross-examination should usually not begin with a "zinger." Why? Because employing an initial "zinger" will alienate the cross-examination witness and make it impossible to draw from that witness helpful points to generally bolster your case (before turning to hostile questions and ending with a "zinger").

Starting slowly on cross-examination will allow you to take full advantage of information available from the cross-examination witness before you allow your relationship with him or her to deteriorate into alienation.

First, you can elicit friendly background information that is not threatening, but that may support your theory and theme, such as the achievements and extraordinary training of a defendant who you are attempting to show knew full well what he or she was doing at the time of the complained-of conduct.

Second, after exhausting the friendly information, you can ask questions to build the value of your case by providing affirmative information that will fill in gaps and will be more persuasive coming from an adverse rather than a friendly witness.

Finally, uncontroverted information that is well documented or well settled can be solicited before resorting to your first challenging information questions and finally your hostile questions to the cross-examination witness.

### 2. Indirection.

During direct examination, in the interest of assisting your witness and drawing a clear, easy-to-follow picture for the fact-finder, the examiner works hard to make it clear where he or she is going. In contrast, on cross-examination, making it clear to the witness where you are going will only encourage the witness to become evasive, hostile, and argumentative.

For instance, if you are trying to make the point that the witness should have understood the contract or letter the witness read, and you ask the question directly, you will probably not get the answer you want. On the other hand, you can achieve the same goal by indirection. Before concentrating on the simple language of the agreement or letter that the witness has admitted receiving and reading, you can establish the witness's extensive experience, achievements, and laudable business practices through a series of questions with which the witness will have to agree and that will lead to only one conclusion concerning the witness's understanding of the agreement or letter.

Questions that could be asked to set up the indirection:

- You have more than 30 years of experience negotiating contracts, don't you?
- You've been highly successful in negotiating successful contracts over your career?
- You regularly hire lawyers to assist you in reviewing important documents?
- To the extent that you don't review important documents, you have someone on whom you can rely review them?
- You insist that important and crucial points that are discovered in documents are brought to your attention?
- It is this kind of detailed, cautious, and deliberate procedure that has led to your success?

Having established a general practice of careful reading of documents, while at the same time flattering the witness's achievements and work habits, will allow you by indirection either to obtain the admission or to frame a question concerning understanding of the agreement or letter that will make apparent the answer you should have gotten. If you had flagged in advance where you were going and why you were asking the background questions, the result might have been quite different.

### 3. Details first.

Often in direct examination the most effective procedure is to cover details only after the witness has described the "action" of his or her recollections. Put differently, it is generally prudent not to interrupt the action of the witness's story

on direct examination with detailed questions about distances, thought processes, and emotional reactions until the action has been told and completed in a series of frames where each point adds an additional action step and captures the fact-finder's attention.

In contrast, on cross-examination the details must be elicited initially so that you can use them to "herd" and "corral" the witness to provide you with the admissions you need. Until the factual background has been laid by the adverse witness that limits the routes of escape and explanation, cross-examination is often ineffective.

### 4. Scatter circumstantial evidence.

In argument and on direct examination, assembling circumstantial evidence often makes the contention of the proponent persuasive. If the contention of the proponent is that someone was late for an appointment and therefore negligent in his or her driving, assembling circumstantial evidence about the importance of the appointment, the time of the appointment, the time of the accident, the speed of the car at the time of the accident, and the conduct after the accident, including an immediate phone call to the location of the appointment, supports the persuasiveness of the contention.

In contrast, on cross-examination assembling circumstantial evidence to support a contention will make the contention obvious to the adverse witness and result in encouraging that witness to be evasive, hostile, and argumentative. Thus the circumstantial evidence points should be separated and scattered so that they are obtained either from different witnesses or at different points in the examination so that your ultimate objective and contention is not obvious.

### 5. Short questions and short answers.

During direct examination the examiner strives for short questions and long narrative answers by the witness. This allows the attention of the fact-finder to focus on the witness, not the examiner. Open questions are used. The witness is left unfettered to improve his or her credibility.

In contrast, allowing the adverse witness to launch into long answers and explanations will doom the cross-examination. The questions should be not only short, but also closed-ended to control and limit the adverse witness's response. By inching along and adding only one fact at a time, the examiner can control the adverse witness and give the adverse witness little room for argument and evasion.

### 6. Attention on the cross-examiner.

As referred to above, during classic direct examination, the examiner attempts to place the attention of the fact-finder on the witness. The examiner simply shepherds the witness in telling his or her story in a natural, credible, and easy-to-follow manner. In contrast, on cross-examination, the attention should be on the cross-examiner. Cross-examination is often the opportunity for the cross-examiner to argue his or her themes or theories by asking questions the answers to which are often irrelevant. By raising impeaching, contrasting, and contradictory points, the examiner brings attention to himself or herself and thereby exposes the weakness of the recently conducted direct examination.

As with all rules, there are always exceptions. When in doubt, however, we may do well in cross-examination to simply conduct ourselves in a manner opposite to how we conduct ourselves in direct examination.

### SIX GENERAL RULES OF CROSS-EXAMINATION

1. **End strongly, start slowly.**
2. **Indirection.**
3. **Details first.**
4. **Scatter circumstantial evidence.**
5. **Short questions and short answers.**
6. **Attention on the cross-examiner.**

# Remote Depositions: New Rules of the Road

*Continued from page 1*

opportunity for those failures is exponentially higher. Relatedly, the nuances presented by the various remote platforms, along with user error and general discomfort with the technology, can make it more difficult to achieve one of our primary deposition goals, *i.e.* creating a clear and usable record. On the subject of general discomfort, many lawyers are skeptical about deposition integrity when they are not in the room with the witness, particularly when a defending lawyer is.

Taken together, these challenges, among others not highlighted here, may elicit objections to the format or conduct of the deposition, potentially rendering the entire process pointless, or leading to costly motion practice.

To avoid this fate, lawyers have to agree on remote deposition protocols intended to guarantee deposition integrity, mitigate against technology failures, and eliminate needless objections. To be sure, there are additional issues to consider when agreeing to remote deposition protocols, but we suggest that certain protocols have emerged as the most useful for addressing these specific challenges.

### 1. Minimum Technical Requirements

Excluding the equipment used by the court reporter and videographer, only three pieces of hardware are necessary for a successful remote video deposition:

g) Electronic Device, *e.g.*, computer or tablet;
h) Webcam; and
i) Microphone.

As with many things, however, the issue is quality. Nobody benefits if the deposition is delayed or postponed because of technical issues. Similarly, it is important to avoid any possibility that your opposing counsel can object to the manner of the deposition based on the quality or performance of the equipment. Accordingly, make sure to reach a written stipulation in advance of the deposition about the sufficiency of the equipment all parties will be using during the deposition. This

includes a stipulation about the technical requirements of all computers, webcams, and microphones, as well as minimum internet connections speeds (10 Megabits per second ("Mbps") for downloads and 5 Mbps for uploads). Finally, any technical requirement stipulation must guarantee that all participants to the deposition have the equipment. Thus, the stipulation should include language to the effect that for any witness noticed for a remote deposition who does not have the agreed upon technology, counsel who noticed the deposition must provide the deponent with the requisite equipment and internet access.

### 2. Equipment Testing

Every lawyer thrown into the world of remote video platforms in the past 18 months has experienced technical difficulties. The best way to avoid these is to practice with the technology well in advance. Remote deposition protocols should dictate that at least 24 hours before the remote deposition is scheduled to begin, counsel, the witness, and the remote deposition vendor must conduct a test of the system, equipment, and internet connection that will be used to conduct the remote deposition. This includes running an internet speed test.

### 3. Video Record

Wherever possible, continued use of a separate videographer to video record the deposition, in addition to the video-conferencing platform, is recommended. In every case, however, the parties must agree which video recording will be the official video record for use at trial and stipulate to that in the remote deposition protocols.

### 4. Technical Issues During Deposition

Even the most prepared and practiced remote deposition can be derailed by technical issues. Stipulate that any pauses, lags or disruptions in technology, including but not limited to interruptions in internet connection, will not result in waiver of objections by any party. Also stipulate that if any pauses, lags or disruptions occur, the resulting time lost, or the time spent resolving the issue, does not count against the allotted deposition time.

### 5. Remote Oath

Fed. R. Civ. P. 30(b)(5) requires that, "[u]nless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28," and that officer must administer the oath or affirmation to the deponent. Thus, it is imperative to include a stipulation that: (a) the remote deposition will be deemed to have been taken before an appropriate officer despite the court reporter not being in the same physical location as the witness, and (b) the witness may be sworn in remotely with the same effect as an oath administered in person.

### 6. On Record Stipulations

Possibly the most important stipulations to include in a remote deposition agreement are those that waive the right to object based solely on the fact that a deposition was taken and recorded remotely. All parties must agree in writing that they will stipulate on the record at the commencement of the deposition:

a) their consent to this manner of deposition;
b) their waiver of any objection to this manner of deposition, including any objection to the admissibility at trial of this testimony based on this manner of deposition; and
c) that despite the fact that this deposition is being conducted remotely, the appropriate state or federal rules relating to objections during depositions, including waiver of objections not promptly made on the record, still apply in this deposition.

### 7. Exhibits

As remote depositions have become the rule, lawyers have developed innumerable ways to accomplish their varying goals regarding presentation of deposition exhibits. Assuming that the court reporter is not going to be physically present with the witness, the method we have found to be most useful is a hybrid approach where the witness, counsel and the court reporter are provided with hard copies of potential deposition exhibits while, at the same time, the remote platform allows documents to be displayed and annotated electronically. The additional question of when to allow defending counsel and the witness to access and review the potential exhibits will depend on the case, but that should also be articulated in the exhibit protocol, *e.g.* "Questioning Attorney will arrange to have delivered to Witness, Defending Attorney, and Court Reporter copies of any potential deposition exhibits. The parties agree that the packages containing the potential deposition exhibits will remain sealed until Questioning Attorney instructs Witness to open the package."

Finally, it is important to leave room for the possibility that an important document did not make it into the potential exhibit package, either because it was mistakenly excluded or because questioning revealed the need for additional documents. Thus, any exhibit protocol should state that a questioning attorney will not be precluded from electronically marking and introducing an exhibit during examination on the basis that the exhibit was not provided in advance to the witness or counsel in hard copy, provided that the defending lawyer and the witness can view the entire exhibit (including all pages of a document from which the exhibit came) during the deposition.

### 8. Deposition Integrity

Deposition integrity, i.e. making sure the witness is not communicating or being coached off camera, is a concern unique to remote video depositions, where questioning counsel is not present with the witness to ensure that all answers are derived only from the witness' own recollection. There is much debate about the extent to which precautions must be taken to ensure deposition integrity. We recommend the following:

a) a stipulation by the parties that, while on the record, the witness will power down all devices not being used for the deposition;

b) a stipulation by the witness, on the record at the commencement of the deposition, that:
   - the witness will not communicate in any way with anyone not on the record during the deposition
   - the witness will not email, chat online, or text during the deposition
   - if anyone attempts to communicate with the witness, the witness will immediately notify all parties
   - to the extent possible, the witness will not read any communication that anyone attempts to send to them;

c) if the witness is alone in the room, have the witness confirm on the record that there is nobody else in the room and agree that if anyone enters the room, the witness will notify all participants immediately (if desired, the parties might also agree to have all witnesses pan the camera around the room to confirm the witness is alone);

d) a stipulation that if anyone other than the witness is physically present in the room, they must identify themselves at the commencement of the deposition on camera.

   NOTE: There is some disagreement about whether to require an individual who is physically present with the witness to remain on camera for the entirety of the deposition. Our experience is that this position, when unsupported by specific reasons it might be necessary to do so, can lead to unnecessary argument at the deposition. Consider doing this only if there is good cause for doing so.

As noted previously, there are many additional details to include in a remote deposition agreement, some of which will be case specific, but these have consistently been the most important to a smooth and predictable deposition, and to a clear and usable deposition record.

Notably, the 87% of lawyers in the Veritext poll who said that, pre-pandemic, they would never voluntarily take a remote deposition, have changed their tune. Those same attorneys, who were forced to take remote depositions during the pandemic, were asked if they would continue with remote depositions once COVID-19 was no longer a concern. 57% responded that they would do so often, very often, or all the time, and 26% said they would do so at least occasionally. Only 4% said they would go back to exclusively live depositions.

It appears, for now at least, that remote depositions are here to stay. Even if you count yourself among the 4% of lawyers who prefer returning to the traditional method, your opponent is statistically more likely to disagree, and courts have demonstrated they will support remote deposition requests. But we have found that with the right preparation and protocols, lawyers can achieve their deposition goals just as easily, and sometimes more easily, in a remote deposition. Have your rules of the road prepared in advance in order to avoid the most common remote deposition pitfalls, and to ensure that format alone does not interfere with your deposition goals.




*The Litigation Journal welcomes timely, practical, and informational articles from Oregon attorneys. If you or someone else in your law firm has produced a written piece that would be of interest to the 1,200-member Litigation Section, please consider publishing it in the Litigation Journal. We welcome new articles and articles that have been previously prepared for or published in a firm newsletter or other publication.*

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For an example of a complete Proposed Order Regarding Remote Depositions, please visit www.markowitzherbold.com/Proposed-Order-Regarding-Remote-Depositions.

# The Craft of Storytelling

*By William A. Barton*
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William A. Barton

Storytelling is as old as campfires, yet it wasn't until the mid-80s that it crept into the legal profession's lexicon as an essential jury trial skill. Stories teach without preaching; stories are how we make sense of the world.

Today it's almost passé: every judge and advocacy teacher says "tell a good story…." Maybe you have a natural pushback to storytelling and think it's the stuff of bombast, the field of extroverts and raconteurs, or "that's just not me." While the purpose of storytelling generally is to entertain, when applied forensically, its mission is to persuade. All trial lawyers will improve their advocacy by studying and applying aspects of storytelling.

Most of the forensic literature on storytelling is generated by the plaintiffs' bar. It, however, can easily be adapted to defense work when grounded on themes of personal responsibility, accountability, and the importance of rules. My recently deceased friend, defense attorney Richard Bodyfelt, didn't just represent Ford Motor Company. When Dick spoke, you could actually hear Henry Ford in the back room, working on an American dream.

When a persuasive story is delivered, it looks, seems, and feels so natural, but it's the product of hours and hours of calculated thought and preparation. This article is not an invitation for you to wing it, to be someone you're not, or presume a level of competence beyond your comfort level or experience. It's a serious sustained process of case analysis, framing, and presentation that is analytical, powerful, creative, energizing, and effective.

Storytelling in the courtroom is different from theatre and film. Unlike the theatre, there is no "fourth wall" in courtroom storytelling. Stage actors pretend the audience isn't there. In your courtroom performance you talk directly to the audience/jury.[1] Another major difference between trial performance and theatre, film, or a novel is that in trials the jurors will finish your story: their verdict writes the ending.

Storytelling empowers you as the speaker. There's no need for notes because you're actually living the story. Storytelling permits each of us to argue naturally and powerfully from the inside out, rather than intellectually from the outside in or top down. Stories de-emphasize the logical and reinforce the emotions and intuitions all human beings possess. Stories touch feelings in a way that sterile facts and statistics can't. Curiosity invites the listeners in; the storyteller uses words to paint images on the canvas of their minds. Both you and the jury become emotionally immersed and involved.

What are the ingredients of an effective, persuasive trial story, and how do you deliver it? Foremost, it's not an argument: it's an organizing, motivational instrument or tool, a framing device. So, what does competence look like? See if you agree: experienced lawyers (1) state the issues(s) in the case, (2) list the witnesses, (3) summarize their testimony, and (4) present within the context of an arching timeline, all delivered with personal confidence in themselves and their clients.

This traditional menu can be improved upon, Plaintiffs' lawyers should start by using the 7-step template on opening statements set forth in David Ball's *Damages 3rd*.[2] Most lawyers stop at Ball's formula; effective storytelling is the next step.

Where to start your story is important and often can be outcome determinative. You want the jury's attention focused on the other party, not your client. Let me illustrate: probably the most difficult case of my career took 21 years and involved 7 appeals. It's an insurance "bad faith" case, *Goddard v. Farmers Ins. Co. of Oregon*, 344 Or 232, 179 P3d 645 (2008).[3] In focus groups I repeatedly lost the case when I started my trial with the events of the night when the Farmers' insured, later convicted of manslaughter, killed my client while driving drunk. I only won by going back 8 years earlier when an aggressive Farmers Insurance agent sold a $100,000 policy to an alcoholic living in a dilapidated trailer house at a time when Oregon's auto insurance minimum was only $15,000. He paid his premiums on time without a bounced check or a claim. Then one night the unforgivable happened — he left a tavern drunk and killed my client in a head-on crash. That is the story of an insurance "bad faith" case I could win.

The problem with starting with your client is that you tacitly invite the jury to constantly scrutinize their choices: it's called "counter-factual" reasoning. The jurors replay the liability facts over and over in their heads, coming up with all the ways the event wouldn't have happened if only the plaintiff hadn't_____ (left for work early, taken the elevator, worn high-heeled shoes or perfume…the list never ends). This approach is wedded to the availability bias meaning you make the case "what it is about."

Pick a point of view or person to tell the story from. Dramatize your direct examination. Make it happen…Now! Invite the witness to "paint us a word picture" to "take the jury back," to "set the scene for us (include your judge as a "13th juror") here in court. Where are we, who's sitting where, what can we smell?" Your story must create vivid 3-D color pictures (trial visualization), sensory impressions and stimulate the emotions. We don't describe events, we create images. For example, describing a rain gauge as "empty" tells us the rain

1 Gianna, Dominic, *Opening Statements*, Thomson Reuters (2019), Chapters 9 and 10.

2 Ball, David, *David Ball on Damages 3rd Ed.*, Trial Guides LLC (2012) p. 117 (With fewer and fewer jury trials occurring, Ball's approach to the opening statement is a major contribution to advocacy.).

3 See *Goddard v. Farmers Ins. Co. of Oregon*, 202 Or App 79, 81-83, 120 P3d 1260, 1262-1264 (2005) for a recitation of the legal history of the case to that date.

didn't fall that day. But talking about the "dust in the rain gauge" creates a lasting visual image.

How do you create a dramatic story the jurors want to solve, to correct an injustice? A short answer is to provide a hero and a villain. Every case is about righting a wrong, doing justice. Jurors want to decide early on who is to blame, who wears the black hat to reduce their internal struggle. So, who's your villain, and why?

Only after focusing on the opponents' choices, wrongful acts, and self-interest motives do you then tell your client's personal story. Go back in time to show, not tell, how the adversary's bad choices led him/her directly to the courtroom, the place where your client has been forced to come to make the evildoer accept responsibility for their bad choices.

Is the story ultimately about your client? Yes and no, but it's really more about the listeners. Jurors may empathize with your client, but they are really rooting for their own selves and desires. Jurors vote for their views, not the evidence. When we, as audience members, empathize with a character for personal reasons, we are really rooting for the character (ourselves) to overcome our own obstacles. Great stories are really about us! "If a story is not about the hearer he will not listen."[4] To me, there are always three stories: the plaintiff's, the defendant's, and the jury's. In simple terms, your job is to tell the jury's story — in your client's voice.

Jurors interpret evidence in the context of their personal stories. They decide what happened by creating their own story of the events. Stories answer the question "what happened," show the jurors "why" it happened, and motivate them into action. The message they are sending is the message inside themselves. Persuasion comes from the inside. Human beings are moved by their own inner messages, not one received from a stranger paid to win a case. Jurors decide cases not by who has the best case, but by deciding in their heads (and hearts) who should win!

The most powerful tools in your arsenal are a winning trial story unified by a powerful theme. The challenge for us is how to get your trial story to align most closely with the jurors' inner scripts. Inductive focus groups will reveal the jurors' inner scripts. Your jury trial story consists of two major components:

1. Your trial theme: It's a phrase or silver bullet that connects complex evidence with the jurors' experiences, beliefs, and predispositions. Think of it as a mental handle. Carefully review the key instructions and look for helpful words or phrases buried in them.
2. Your trial theory (story): It's a brief road map of who, what, when, and most important, why? Think of it as an elevator speech.[5]

The trial theme provides and communicates the moral foundation for the jurors to convert their preferences into opinions and then express their opinions forcefully to their fellow jurors during deliberation. A theme must account for all of the evidence. It ties all of the facts of the story together and provides a short telegram-like statement that explains the facts and provides the jurors with the motive to vote for you. The theme helps the jurors fit the story into the slot of their own attitudes, beliefs, and values.

Good themes are often rhythmical. "If it doesn't fit, you must acquit." Repetition or parallelism (lookout, speed, and control) also count a great deal. Theme words in threes make a difference and are easy to remember (care, skill, and diligence). Themes explain esoteric legal principles to a jury. Gerry Spence summarized the Karen Silkwood case, which involved exposure to radioactive plutonium and the legal principle of strict liability, to a jury in his trial theme: "if the lion got away, Kerr McGee must pay."

I'm offering my narrated storytelling check list to help you.[6] Rewrite it, make it your own.

## Checklist

1. What are my best and worst facts?
2. Generate a set of proposed jury instructions and special verdict form. They are the legal framework within which my trial themes and story must flourish.
3. What are my opponent's best facts? How can I either eliminate them (ORE 401 and 403 pretrial motions), neutralize them, or better yet, turn them to my advantage and own them?
4. Determine who I want to place the "focus of judgment" on, to shine the spotlight on, and why? Stories need villains and heroes. By their verdict, the jury writes the last chapter to my story and thereby become HEROES themselves.
5. What are my themes, i.e., silver bullets that answer every question? Are there any phrases from key instructions I can coopt as themes?
6. 6. Where do I want to start my trial story? Remember, the "focus of judgment," availability, and confirmation (hindsight) biases.
7. From whose perspective am I going to tell the story, and where's the suspense?
8. Draft 5-6 sentences (in pencil with a large eraser) that tell my trial story. It's an elevator speech. Sunday comics tell a story in just a few frames. What's my beginning, middle, and end?
9. How am I going to visually SHOW the jurors what happened? This doesn't mean telling them! What are my visual aids (create demonstrative exhibits)? What are my best exhibits that tell my story?
10. The jury's answer on the verdict form is my report card. What rhetorical questions can I ask during my closing that will channel their thinking? What are the best facts and arguments favorable jurors can use in deliberations to persuade adverse jurors?

4 Steinbeck, John, *East of Eden*, Penguin Classics (2016).

5 Romano, John (ed.), *Anatomy of a Personal Injury Lawsuit 4th Ed.*, Trial Guides LLC, AAJ Press (2015) Volume II, Chapter 23.

6 See DeCaro and Mattheo, *The Lawyers Winning Edge*, Bradford Publishing (2004) Chapter 8, page 123 (My list is a modification of the worksheet in this chapter.).

11. Make a jury notebook for each juror. Exhibits don't have to be listed chronologically. The first 6 exhibits should tell my trial story.
12. What aspect(s) of the case am I most passionate about? Why?

**Exercises** (These may seem silly to a serious lawyer, but they will dramatically improve your communication skills and presentation.):

1. Now SHOW my trial story to an 8th grader. What would the pictures show if a very short comic strip told my story?
2. Practice pantomiming my story. This will get me thinking about the effective use of my hands and body.
3. Whisper my story.

Now you're ready to generate an opening and deliver it to a focus group. What's their feedback, and what are your responsive changes?

### Bibliography

If you want to deep dive into storytelling I suggest reading:


1. "How to Make a Complex Case Come Alive" by Gerry Spence published in the *ABA Journal* in April 1986 (pdf of this article is available online via a Google search);
2. *Opening Statements*, (2019) by Dominic Gianna (Chapters 9 and 10);
3. *Courtroom Persuasion 2d Ed.* by Russ Hermann (This is the magnum opus on persuasion.);
4. *Advanced Case Framing* by Mark Mandell (The latest iteration in storytelling, Mark offers insightful suggestions such as the strategic use of "I can't get over it" facts.);
5. *The Lawyer's Winning Edge*, Chapters 2 and 3, by DeCaro and Matheo; and
6. *David Ball on Damages 3rd Ed.* by David Ball (This is a wonderful advocacy tool kit for plaintiffs' lawyers.).


### Conclusion

When done well forensic storytelling appears natural, almost spontaneous. Let's be clear, it's not. It's the result of hours of preparation and practice. Try it, you'll like it.

# Recent Significant Oregon Cases


*By The Honorable Stephen K. Bushong*
*Multnomah County Circuit Court*


Hon. Stephen K. Bushiong

### Claims and Defenses

*Sherman v. Dept. of Human Services*, 368 Or 403 (2021)

Plaintiff alleged that defendant negligently failed to protect her from child abuse while she was in foster care. Defendant moved to dismiss, arguing that it was immune from liability under ORS 30.265(6)(d)—a provision of the Oregon Tort Claims Act (OTCA)—that provides for immunity on claims barred by a statute of ultimate repose. The trial court granted defendant's motion to dismiss, concluding that the claims were barred by the statute of ultimate repose for negligent injury in ORS 12.115. Plaintiff appealed, arguing that ORS 12.117(1) exempts child abuse claims from the statute of ultimate repose in ORS 12.115. The Court of Appeals agreed with plaintiff and reversed. The Supreme Court affirmed the Court of Appeals' decision. The court rejected defendant's argument that ORS 30.275(9) supersedes ORS 12.117, rendering that statute ineffective as to child abuse claims against a public agency, stating that "ORS 30.275(9) does not sweep as broadly as defendant contends." 368 Or at 411. The court also rejected defendant's argument that the legislature did not intend ORS 12.117 to apply to child abuse claims against public bodies. Applying ordinary principles of statutory interpretation, the court concluded that the governing statute, ORS 30.265(6)(d), "provides public bodies with protections outside the OTCA that are equivalent to those that are applicable to nongovernmental entities; it does not provide the state with greater or inapplicable protections. *Id.* at 418-19 (emphasis in original).

*Wright v. Turner*, 368 Or 207 (2021)

Plaintiff was a passenger in a truck that was struck by a car during a storm. After the truck came to a stop on the median strip of the highway, another vehicle spun out of control and hit the truck. Plaintiff was seriously injured and brought this action against her insurer to recover Underinsured Motorist (UIM) benefits. A jury found that plaintiff's injuries resulted in damages of $979,540. The UIM policy included a limit of $500,000 for damages "resulting from any one automobile accident." 368 Or at 209 (quoting policy). In a second trial, a jury found that plaintiff was injured in two separate accidents, but it could not separate the cause of her injuries between the two accidents. Based on that finding, the trial court awarded the full measure of damages. The Court of Appeals reversed, agreeing with defendant that the trial court should have required the jury to apportion the damages between the two accidents. The Supreme Court reversed the Court of Appeals, affirming

the trial court's judgment. The court explained that the law "permits a jury to decide, as a matter of fact, that a plaintiff's injuries were caused by the concurrence of two accidents." *Id.* at 228. Accordingly, "the trial court did not err in instructing the jury that if it found that two accidents occurred, it must determine whether it could 'separate the cause' of plaintiff's injuries, and if it found that it could not, that plaintiff's injuries were indivisible." *Id.*

*Borough v. Caldwell*, 314 Or App 48, 314 Or App 62 (2021)

These cases arose from a trust created in 2008, the trust settlor's execution of an option agreement in 2015 to give Cody and Sophia Duerst (the Duersts) an option to purchase the main trust asset, and the successor trustee's expressed intention in 2018 to sell that asset to the Duersts in accordance with the option agreement. In Borough I, the Court of Appeals affirmed the trial court's conclusion that the option agreement was a valid amendment of the trust agreement because the settlor's "intent is clear, and he substantially complied with the trust's amendment procedure." 314 Or App at 58. In Borough II, the Court of Appeals held that the trial court erred in dismissing claims filed by the settlor's adult children in probate court seeking to invalidate the sale of the property to the Duersts. The court explained that the declaration of the validity of the option agreement in Borough I did not have claim preclusive effect because "a declaratory action determines only what it actually decides and does not have a claim preclusive effect on other contentions that might have been advanced." 314 Or App at 70.

*Pringle Square, LLC v. Berrey Family, LLC*, 314 Or App 10 (2021)

Plaintiff Pringle Square filed this interpleader action under ORCP 31 to resolve competing claims to over $400,000 that Pringle Square had received after selling one of its properties. The trial court determined that the interpleaded funds should be awarded to defendant Berrey Family, LLC ("the LLC") as repayment of loans made by the LLC to plaintiff, and not to First-Citizens Bank and Trust Company (FCB). FCB claimed the funds based on a judgment of over $48 million in FCB's favor against Dan Berrey individually, the trustees of the Berrey Trust, and a charging order entered by the circuit court charging the membership interests of Dan Berrey and Berrey Trust in the LLC. The trial court ruled that loans to Pringle Square had been made by the LLC, not by Dan Berrey individually, and rejected FCB's claim that the doctrine of unclean hands precluded awarding the funds to the LLC. The Court of Appeals affirmed, noting that the LLC's claim to the funds—based on a loan agreement—was a legal, not equitable, claim. The court concluded "as a matter of law, the equitable doctrine [of unclean hands] did not apply to the legal claim" of the LLC." 314 Or App at 21.

*Lowell v. Medford School Dist. 549C*, 313 Or App 599 (2021)

Plaintiff provided piano tuning services and assisted in producing concerts for the Medford School District. He brought this defamation action after district employees complained that plaintiff had been intoxicated on school premises. The trial court granted the School District's motion for summary judgment, concluding that the defense of absolute privilege applied, precluding any liability for defamation. The Court of Appeals affirmed. The court rejected plaintiff's argument that the privilege defense applies only to statements of public officials who exercise policymaking governmental authority. Instead, the court, applying *Christianson v. State of Oregon*, 239 Or App 451 (2010), concluded that "the privilege applies to any public employees in the performance of their duties." 313 Or App at 604.

*Peterson Machinery Co. v. May*, 313 Or App 454 (2021)

Plaintiff Peterson Machinery Co. (Peterson) brought this action for misappropriation of trade secrets after one of its employees—defendant May— went to work for a competitor. The trial court granted defendants' motion for summary judgment, concluding that there was no evidence that May had misappropriated any trade secrets. The Court of Appeals affirmed. The court explained that, under its prior caselaw, "certain customer information can be a trade secret" but "information that is generally known in an industry is not a trade secret." 313 Or App at 466. In this case, the court concluded that "May's ability to remember information that he learned when he was working at Peterson and evidence of his continued use of his relationships that he developed while working as an employee of Peterson are insufficient to create a genuine issue of material fact to support a claim of misappropriation of trade secrets." *Id.* at 474.

*Ortega v. Martin*, 313 Or App 252 (2021)

Plaintiff sustained severe injuries when he collided with a dory boat while surfing in Pacific City. The issue on remand from the Supreme Court was whether the state was entitled to recreational immunity under ORS 105.682. The trial court denied the state's motion for summary judgment on recreational immunity grounds, and the case went to trial, resulting in a verdict for plaintiff. On appeal, the state argued that statutes encouraging, preserving and facilitating the recreational use of the coastal shore were sufficient for the court to conclude that "the state permits recreational use of the public shore as a matter of state law." 313 Or App at 256 (emphasis in original). The Court of Appeals rejected that argument, explaining that if the legislature had intended "to create a blanket recreational immunity for all of the ocean shore, regardless of the state's conduct as to that land[,] we would expect a far less convoluted approach than the 'directly or indirectly permit' test in ORS 105.682." *Id.* at 260. The court affirmed the trial court's denial of summary judgment, concluding that "the question of immunity will generally involve the application of the recreational immunity statute to the particular facts of the case—a question that is not properly before us on review of the denial of a motion for summary judgment." *Id.* at 261.

*Tokarski v. Wildfang*, 313 Or App 19 (2021)

Plaintiffs own lots in the Golf Course Estates at Creekside in Salem. Defendant Creekside Homeowners Association, Inc. (HOA) brought a lawsuit against entities owned by plain-

tiffs to prevent them from closing the golf course. Plaintiffs responded by filing this lawsuit, alleging that the HOA and its board of directors were inappropriately using funds in the HOA's reserve account to pay for the litigation seeking to prevent the golf course closure. Plaintiffs alleged that using the reserve account to fund that litigation violated the HOA Covenants, Codes, and Restrictions (CC&Rs). Defendants filed a special motion to strike under Oregon's anti-SLAPP statute, ORS 31.150, contending that the complaint targeted protected petitioning activity. The trial court denied the motion; the Court of Appeals affirmed. The court first explained that plaintiffs' claims challenged defendants' exercise of the constitutional right to petition protected by ORS 31.150(2)(d): "Whether lawful or unlawful, defendants' decision to use reserve funds to fund litigation was in furtherance of their right to petition, and that is the precise conduct targeted by most of the claim in the complaint." 313 Or App at 25. The merits of whether that conduct is wrongful "are taken into account when the court considers whether a plaintiff has made a *prima facie* case in support of a claim challenged by a special motion to strike." *Id.* As to the sufficiency of plaintiffs' *prima facie* case, the court noted that the legislature intended that a defendant bringing a special motion to strike under ORS 31.150 "would employ a claim-by-claim analysis as to whether a particular claim should be stricken." *Id.* Because defendants here did not engage in the required analysis, the court considered whether plaintiffs' evidence "is sufficient to permit any of the claims to go forward, without examining whether plaintiffs have established a *prima facie* case on all claims[.]" *Id.* at 26. Plaintiffs' *prima facie* case was sufficient to avoid dismissal because the CC&R provision governing reserve accounts "unambiguously prohibits the use of reserve funds for anything but the repair and replacement of improvements without a vote of the HOA membership that did not happen here." *Id.*

*Kelly v. State Farm Fire and Casualty Co.*, 312 Or App 361 (2021)

After a fire destroyed plaintiff's house, he filed a breach of contract action against his insurer for failing to pay the entire claim. Defendant alleged in response that the insurance contract was void due to misrepresentations plaintiff made during the claim investigation. The court granted defendant's motion for summary judgment, concluding that the contract was void. The Court of Appeals affirmed. The court noted that, among other things, the insurer had paid "Additional Living Expense" benefits based on plaintiff's representation that he had paid $1,500 per month in rent while living at the "Boxwood property" after the fire. In fact, plaintiff incurred no rental expense because he owned the Boxwood property. The court concluded that "the trial court did not err in concluding that plaintiff's misrepresentation that he was living at the Boxwood property at a cost of $1,500 per month was material for purposes of the 'Concealment, Misrepresentation or Fraud' provision in his insurance policy." 312 Or App at 376. The court recognized that forfeiting the entire policy "is undoubtedly a harsh penalty" but concluded that "it is the penalty that the legislature appears to have intended in enacting ORS 742.208, and it is what the policy requires under existing case law." *Id.*

## Procedure

*Cox v. HP Inc.*, 368 Or 477 (2021)

Plaintiff was severely injured when a hydrogen generator at defendant HP's campus exploded. HP brought a third-party claim against TUV Rheinland of North America (TUV), alleging that TUV had negligently certified the design of the generator. The trial court denied TUV's motion to dismiss for lack of personal jurisdiction. The Supreme Court issued a peremptory writ of mandamus, directing the trial court to dismiss HP's claims against TUV for lack of personal jurisdiction. The court explained that TUV's activities in Oregon "consisted of limited efforts to reach Oregon manufacturers that might need testing and certification services for their products and the present litigation stems not from any services that TUV provided to an Oregon manufacturer but, instead, from services that TUV performed elsewhere for a product unlike any that TUV had previously certified in Oregon and for a manufacturer with no prior product sales in Oregon." 368 Or at 509.

*Deep Photonics Corp. v. LaChapelle*, 368 Or 274 (2021)

In this shareholder derivative action, plaintiffs brought breach of fiduciary duty claims against the corporation's directors. A jury awarded plaintiffs $10 million in damages. The issues on appeal were (1) whether plaintiffs' claims were properly tried to a jury; and (2) whether the trial court erred in denying defendants' leave to amend their answer during trial to assert an affirmative defense based on an "exculpation" provision in the certificate of incorporation. On the jury trial question, the Supreme Court acknowledged that "shareholder derivative claims arose in courts of equity to allow a shareholder to bring a breach of fiduciary duty claim against directors—a claim that properly belonged to the corporation—because the law courts would not permit an action by a shareholder on behalf of the corporation." 368 Or at 286. But, the court explained, the right to a jury trial focused on "the nature of the relief sought rather than on the historical origins of shareholder derivative suit." *Id.* at 287 (internal quote and citation omitted). The court noted that a claim seeking relief in the form of money damages has been considered legal in nature and subject to the jury trial right in the Seventh Amendment to the United States Constitution. The court saw "no basis for reaching a different conclusion as to the jury trial right in Article I, section 17" of the Oregon Constitution. *Id.* With respect to the "exculpation provision"—which under Delaware law could limit the personal liability of the corporation's directors—the court concluded that defendants' reliance on that provision "constituted an affirmative defense that defendants were required to plead in their answer[.]" *Id.* at 300. Finally, the court concluded that the trial court did not abuse its discretion when it "properly considered the effect of the motion to amend, exercised its discretion, and denied the motion." *Id.* at 302.

*Laack v. Botello*, 314 Or App 268 (2021)

In this dispute between neighbors, plaintiffs sought to quiet title to two strips of land, and to recover damages for trespass. Defendant answered and filed counterclaims for adverse pos-

session. After defendant's counsel failed to appear at several required status conferences, the trial court sanctioned defendant by striking his pleadings, dismissing his counterclaims, and entering a default judgment in plaintiffs' favor. The Court of Appeals reversed. The court stated that it understood "the trial court's frustration with defense counsel's seeming inattentiveness and failure to move the case along, but, in the absence of explicit statutory authorization, we conclude that the trial court lacked statutory or inherent authority to sanction defendant by striking defendant's responsive pleadings and dismissing his counterclaims and, therefore, erred in entering an order and judgment of default." 314 Or App at 272-73.

*Lemus v. Potter,* 314 Or App 201 (2021)

Plaintiff and Matthew Potter were involved in a two-car accident. Matthew showed plaintiff his driver's license and an insurance card issued to his parents, Gary and Diane Potter. A month before the statute of limitations ran, plaintiff filed a complaint naming "Gary Potter" as defendant. About 2 days before the statute of limitations ran, plaintiff filed an amended complaint naming the defendant in the caption as "Gary Potter aka Matthew Donald Potter." Defendant Gary Potter filed a timely answer admitting that his son Matthew had been involved in the accident but denying that he had been involved. The trial court granted summary judgment "as to Defendant Gary Potter" but did not dismiss the action "as to Defendant Matthew Potter." At the time of trial, plaintiff moved to file a second amended complaint to state a claim against Matthew, not Gary, Potter. The trial court denied the motion, concluding that substituting Matthew Potter for Gary Potter would change the party against whom the claim was asserted and that the second amended claim would not relate back under ORCP 23 to the time of filing the earlier complaint. The court then granted Gary Potter's motion for directed verdict and dismissed the amended complaint. The Court of Appeals affirmed, agreeing with the trial court that allowing the second amended complaint "would change the party against whom plaintiff's negligence claim was asserted." 314 Or App at 213.

*Mendoza v. Xtreme Truck Sales, LLC*, 314 Or App 87 (2021)

The Court of Appeals held that the trial court erred in denying as untimely the defendant's motion under ORCP 54 E(3) for costs and attorney fees after an arbitrator's award to plaintiff was less than the amount of defendant's offer of judgment. The motion was timely because it was filed three days after the court entered judgment on the arbitration award. The word "judgment" in ORCP 54 E(3) referred to the judgment entered on the arbitration award, not the arbitrator's decision. 314 Or App at 94-95.

*Magno, LLC v. Bowden*, 313 Or App 686 (2021)

The Court of Appeals held that the trial court did not err in awarding defendant attorney fees under ORS 20.105(1) because there was no objectively reasonable basis for plaintiff's filing an action to foreclose on a judgment lien. The court noted "the absence of any statutory provision authorizing foreclosure as a means of enforcing a judgment that constitutes a lien on residential property and the specific procedure outlined in ORS chapter 18 for the sale of a residence subject to a judgment lien." 313 Or App at 696.

*Burley v. Clackamas County*, 313 Or App 287 (2021)

After prevailing on her whistleblower-retaliation claim, plaintiff sought to recover $878,327.50 in attorney fees. The trial court reduced the award based on limitation on liability provided in ORS 30.272. Plaintiff appealed, arguing that the statutory limitation only applied to claims that arise out of a single accident or occurrence, and her claim arose from numerous distinct and successive whistleblowing events. The Court of Appeals affirmed, concluding that, under Dowers Farms v. Lake County, 288 Or 669, 678 (1980), the term "accident or occurrence" as used un the statute "may be read as if it said 'the tort.'" 313 Or App at 291. Thus, the statutory "single accident or occurrence" limitation "is a reference to a single tort, whether the tort has its origin in a single event or a course of conduct over a period of time." *Id.* at 292.

*Yeatts v. Polygon Northwest, Co.*, 313 Or App 220 (2021)

Plaintiff sustained serious injuries when he fell from a third story platform while working as a framer on a construction project. Plaintiff was employed by Wood Mannix LLC (Wood Mannix), the subcontractor hired by the general contractor, defendant Polygon Northwest, Co. (Polygon), to do the framing work on the project. Plaintiff sued Polygon under the Employment Liability Law (ELL), alleging that Polygon could be liable as an indirect employer because it retained the right to control the risk-producing activity. At trial, plaintiff requested Uniform Civil Jury Instruction (UCJI) 55.15, which states that a defendant employer under the ELL cannot avoid the duties imposed by the statute by delegating those duties to another person or company. The trial court declined to give the instruction, concerned that it could be confusing to the jury in light of Polygon's main defense that it was not subject to the ELL at all because it had delegated control of the framing work to Wood Mannix. The trial court entered judgment in Polygon's favor after the jury returned a verdict finding that Polygon was 49 percent at fault and plaintiff was 51 percent at fault. The Court of Appeals reversed and remanded for a new trial. The court explained that UCJI 55.15 is a correct statement of Oregon law and the trial court erred by refusing to give the instruction "because it was supported by the pleadings and evidence, was not unduly cumulative, and would have avoided confusion." 313 Or App at 238. The trial court's failure to give the instruction "could have affected the jury's verdict and was not harmless." *Id.* at 235.

*Willamette River I v. Boespflug*, 312 Or App 558 (2021)

Several years after plaintiffs obtained a default judgment against defendant, defendant moved for relief from judgment under ORCP 71, contending that the judgment was void because he was never properly served. Plaintiffs had personally served the person in charge at Tamarack Resort, where defendant was listed as a registered agent, and mailed the summons and complaint to five Idaho addresses previously used by defendant. The trial court denied the motion, concluding that the methods of service used were reasonably calculated to give defendant notice sufficient to comply with ORCP 7 D(1).

The Court of Appeals reversed. The court concluded that the first method was insufficient because "plaintiffs received no objectively reasonable indication that the person [in charge at Tamarack Resort] had regular, frequent, or predictable contact with defendant[.]" 312 Or App at 570. The Idaho mailings "also failed to provide adequate notice of the pending action where plaintiffs' complaint alleged that defendant had 'left Idaho' and 'left the United States,' and where plaintiffs had no assurance that defendant would or had received the papers." *Id*.

### Miscellaneous

*Chaimov v. Dept. of Admin. Services*, 314 Or App 253 (2021)

The Court of Appeals concluded that state agencies that submit bill-drafting requests to the Office of Legislative Counsel (LC) are "clients" of LC for purposes of the lawyer-client privilege in OEC 503. As a result, "communications between the agencies and LC before and during the drafting process are exempt from disclosure under ORS 192.355(9) of the Public Records Law." 314 Or App at 255.

*Bowers v. Betschart*, 313 Or App 294 (2021)

Defendant—the Lane County Clerk—refused to place on the ballot plaintiffs' initiative petition that proposed to amend the Lane County Charter. The Court of Appeals, affirming the trial court, concluded that defendant "correctly reviewed the proposed amendment of the Lane County Charter for compliance with the separate-vote requirement of ORS 203.725(2) before submitting it to the voters and that the statutory separate-vote requirement itself does not conflict with the state or federal constitutions in any of the ways identified by plaintiffs." 313 Or App at 316.