FORMAL OPINION NO 2005-131

Contacting Adverse Expert Witness in a Criminal Case

Facts:

Defense Lawyer represents a defendant in a criminal case in the state courts. As part of the statutory criminal discovery process, Defense Lawyer provides Prosecutor with the name of an expert witness whom Defense Lawyer intends to have testify. In other situations, Defense Lawyer also supplies an oral summary of the expert's opinion or a written report of the expert's findings and conclusions. Prosecutor furnishes analogous information to Defense Lawyer regarding a witness whom Prosecutor intends to have testify as a witness.

Questions:

1. May Prosecutor contact Defense Lawyer's expert witness regarding the subject of the anticipated testimony?

2. May Defense Lawyer contact Prosecutor's expert witness regarding the subject of the anticipated testimony?

Conclusions:

1. Yes.

2. Yes.

Discussion:

The most pertinent rules are Oregon RPC 3.4(c) (lawyer shall not "knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists") and Oregon RPC 3.3(a)(5) (prohibiting "other illegal conduct or conduct contrary to these Rules"). No rule of professional conduct expressly governs contact between a lawyer involved in litigation and a

witness designated to testify for the other side.[1] Any ethical violation would therefore be entirely derivative of the relevant statutes and applicable court rules, as interpreted by the Oregon appellate courts.[2]

The Oregon criminal discovery statutes expressly require both the prosecution and the defense to furnish to each other the names and addresses of persons intended to be called as witnesses at any stage of the trial, as well as any written or recorded statements of the witnesses or memoranda of any oral statements of such persons (except the defendant). ORS 135.815(1); ORS 135.835(1). The Oregon criminal discovery statutes were intended to eliminate "trials by ambush." *State v. Dickerson*, 36 Or App 479, 485, 584 P2d 787 (1978). The ultimate aim of reciprocal criminal discovery statutes is to ensure that both sides have access to all the facts, so that the jury can best determine where the truth lies. *State v. Mai*, 294 Or 269, 274, 656 P2d 315 (1982). The court in *Dickerson*, 36 Or App at 486, quoted with approval the commentary to the ABA standards on criminal discovery stating: "Where life, liberty and protection of communities from crime are the stakes, gamesmanship is out of place."

The Oregon Supreme Court has held that the purpose of the criminal discovery statutes is to promote access to witnesses identified in the discovery process, and that a lawyer's action in impeding such access violates the criminal discovery statutes. *See State v. Ben*, 310 Or 309, 316, 798 P2d 650 (1990) (defense lawyer's instruction to witness not to speak to prosecutor unless defense was present "definitely contravenes" purpose of criminal discovery statutes); *Mai*, 294 Or at 278 (conduct of defense lawyer in preventing prosecutor from talking to witnesses before trial thwarted investigation of case and preparation for

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[1] For purposes of this discussion, we assume that the adverse expert witness is not represented by counsel in connection with the matter, so that Oregon RPC 4.2 does not apply.

[2] The result in criminal cases differs from that reached in federal civil litigation, due to the different statutory and case-law contexts, although the analytical approach is the same. *See* OSB Formal Ethics Op No 2005-132 (initiation of *ex parte* contact with adverse expert witnesses violates established rules in federal civil litigation, but not in state civil litigation).

cross-examination); *State v. York*, 291 Or 535, 540, 632 P2d 1261 (1981) (prosecutor cannot advise witness it would be better not to talk to defense, because implicit in disciplinary rules and ORS 135.815 is "a policy favorable to access to witnesses and evidence and hostile to improper adversarial interference with such access" that would frustrate case preparation; also, Oregon RPC 3.4(b) expressly prohibits secretion of witnesses).

No distinction is drawn in the relevant statutes or cases between nonexpert witnesses and expert witnesses. A potential exception to criminal discovery is work product or written materials "to the extent that they contain the opinions, theories or conclusions of the attorneys, peace officers or their agents in connection with the investigation, prosecution or defense of a criminal action." ORS 135.855(1)(a). The Commentary to OEC 503(1)(e), however, explains that expert witnesses expected to testify are not considered to be representatives of the lawyer:

> The definition of "representative of the lawyer" is consistent with present Oregon law. It recognizes that in rendering legal service, a lawyer may use advisors and assistants in addition to those employed in the process of communicating. The definition includes an expert who is hired to assist in rendering legal advice or to help in the planning and conduct of litigation, but not one employed to testify as a witness.

Legislative Commentary to OEC 503(1)(e), *reprinted in* Laird C. Kirkpatrick, *Oregon Evidence* § 503.2 (6th ed 2013). Hence, contact with an adverse expert "employed to testify as a witness" is not prohibited under ORS 135.855(1)(a). It is reasonable to deem a person identified in criminal discovery as one intended to be called as a witness as "employed to testify as a witness" within the meaning of OEC 503(1)(e).[3]

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[3] The criminal discovery rules require disclosure of persons whom the lawyer "intends to call as witnesses." ORS 135.815(1); ORS 135.835(1). Compliance with the discovery rules is to be made "as soon as practicable." ORS 135.845(1). An expert not initially listed must be "promptly" disclosed when the decision to call the expert as a witness is made. ORS 135.845(2).

The required disclosure of, and the opposing lawyer's right to contact, a testifying witness does not, however, constitute a waiver of applicable privileges. Privileges pertaining to subject matters outside the scope of the anticipated testimony, for example, would still apply. *See* OEC 511 (voluntary disclosure waiving privileges does not occur until testimony is offered into evidence). There is no waiver of applicable privileges simply because the initiation of contact with adverse experts in criminal cases is deemed not to violate existing disciplinary rules. *Cf.* OSB Formal Ethics Op No 2005-80 (rev 2016). A lawyer could not advise an adverse expert that the contact was "permissible" and thus lead the expert to believe any physician-patient, psychotherapist, or other privilege was no longer applicable for that reason. To so mislead an adverse expert would violate Oregon RPC 8.4(a)(3), which makes it professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

In criminal cases prosecuted in state courts, contact with expert witnesses identified by the opposing side, in and of itself, does not violate any court rules and is not illegal. On the contrary, in the criminal-law context, contact with adverse witnesses is neither expressly nor impliedly prohibited but rather is encouraged. Consequently, both the prosecutor and the defense lawyer may contact adverse expert witnesses to discover their findings and opinions relating to the subject of their anticipated testimony.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 8.6-2 (falsifying evidence), § 8.6-3 (making a witness unavailable), § 8.6-4 (obeying rules of the tribunal) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 106, 116 (2000) (supplemented periodically); and ABA Model RPC 3.3–3.6.