

FORMAL OPINION NO 2005-154
Contacting Adverse Expert Witness
in a Workers' Compensation Proceeding

Facts:

During discovery in a workers' compensation proceeding, Lawyer learns the identity of an expert witness retained by an opposing counsel, and has obtained a copy of the expert's report. Lawyer wishes to contact the expert to discuss the report.

Questions:

1. May Lawyer initiate contact with the opposing counsel's expert witness?
2. Must Lawyer provide any notice to opposing counsel of such contact?

Conclusions:

1. Yes.
2. No, qualified.

Discussion:

No rule of professional conduct expressly governs contact between a lawyer involved in litigation and an expert witness designated to testify for the opposing side. Any ethical violation would therefore derive entirely from the relevant statutes, administrative regulations, and applicable court rules, as interpreted by the Oregon appellate courts. OSB Formal Ethics Op No 2005-131 (contacting adverse expert witness in a criminal case) and OSB Formal Ethics Op No 2005-132 (communicating with adverse expert witnesses in a civil case) provide an analogous analytical framework for resolving the questions raised here.

1. *May Lawyer Initiate Contact with the Adverse Expert?*

Because there is no statute, administrative regulation, or court rule that restricts contact with an adverse expert in a workers' compensation

proceeding, there is no ethical limitation on doing so, except as discussed below.

The Oregon Supreme Court has determined that contact with medical witnesses in a workers' compensation matter is permissible and not in violation of any established rule. *Booth v. Tektronix, Inc.*, 312 Or 463, 823 P2d 402 (1991). Additionally, the administrative regulations approved by the Department of Consumer and Business Services, Workers' Compensation Board, make clear that there is to be very broad discovery in workers' compensation proceedings: "It is the express policy of the Board to promote the full and complete discovery of all relevant facts and expert opinion bearing on a claim being litigated before the Hearings Division. . . ." OAR 438-007-0015(8).

There are no restrictions in the statutes and administrative regulations controlling discovery in workers' compensation proceedings that limit the discovery tools available to accomplish full and complete disclosure of all facts and opinions. For example, there is no counterpart to FRCP 26(b)(2), which specifically limits discovery concerning expert witnesses to reports, depositions, and interrogatories. OAR 438-007-0016 requires each party to disclose the identity of each expert witness that the party intends to have testify at the hearing.

2. *Must Lawyer Provide Any Notice to Opposing Counsel of the Contact?*

There is no requirement that a lawyer making contact with an expert witness hired by the opposing side provide notice of that contact to the opposing lawyer. In *Mershon v. Oregonian Pub.*, 96 Or App 223, 772 P2d 440, *rev den*, 308 Or 315 (1989), the court makes clear that there is unrestricted access to adverse medical witnesses in workers' compensation cases without the necessity of providing any prior notice of intent to make such a contact. The court adopted the Workers' Compensation Board's reasoning in *Allen W. Haes*, 37 Van Natta 1179, 1182 (1985), holding that such a notice requirement would be inconsistent with the stated policy of full, fair, and expeditious disclosure of information between the parties.

Nevertheless, there is a risk that the nature or extent of the *ex parte* contact may invade an applicable privilege or the lawyer work-product doctrine and therefore be considered impermissible as conduct prejudicial to the administration of justice in violation of Oregon RPC 8.4(a)(4) or other rules. *Cf.* OSB Formal Ethics Op No 2005-80 (rev 2016). This potential risk can be minimized by limiting the inquiry to the expert witness's findings, conclusions, and opinions, and avoiding discussion of the expert's communications with opposing counsel.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 8.5-1 to § 8.5-2 (communications with persons other than the client) (OSB Legal Pubs 2015); and *Restatement (Third) of the Law Governing Lawyers* §§ 106, 116 (2000) (supplemented periodically).

