FORMAL OPINION NO. 2005-132

Communicating with Adverse Expert Witness: Dissuasion of Witness from Testifying

Facts:

During the course of preparation in a civil case in either state or federal court, Lawyer learns the identity of (1) a fact witness and (2) an expert retained by opposing counsel.

Questions:

1. May Lawyer contact the fact witness without notice to or consent from opposing counsel?

2. May Lawyer contact the expert without notice to or consent from opposing counsel?

3. May Lawyer attempt to dissuade either witness from testifying?

Conclusions:

1 Yes, qualified.

2. No, in federal civil litigation; for state civil litigation, see discussion.

3. No.

Discussion:

1. *Contact with Adverse Fact Witnesses.*

Oregon RPC 3.4(c) provides that a 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) prohibits "other illegal conduct or conduct contrary to these Rules." Neither Oregon nor federal statutes, cases, or court rules of procedure and evidence prohibit a lawyer from contacting unrepresented[1] fact witnesses. Oregon and federal appellate cases have

[1] The lawyer may not contact a witness who is represented by counsel. Oregon RPC 4.2. *See* OSB Formal Ethics Op Nos 2005-6, 2005-126. The lawyer also may not contact a management employee or certain other persons employed by a represented entity. *See* OSB Formal Ethics Op No 2005-80.

not interpreted existing statutes or rules so as to prohibit such contact. Moreover, the existence of formal civil discovery mechanisms does not prohibit lawyers from using other lawful methods of obtaining information from fact witnesses.[2]

2. *Contact with Adverse Expert Witnesses.*

In contrast with the federal rules, Oregon rules of civil procedure contain no provision for obtaining formal discovery of expert witnesses. *See* FRCP 26(b)(4). Therefore, the propriety of a lawyer's contact with an expert witness depends on whether the lawyer is involved in state or federal civil litigation.[3]

a. *Violation of rules of a tribunal.*

FRCP 26(b)(4) provides that the facts known and opinions held by experts may be obtained "only" as provided in the federal civil procedure rules, that is, through written interrogatories, unless the parties agree or the court orders otherwise. The Ninth Circuit has interpreted FRCP 26(b)(4) to prohibit contact with adverse expert witnesses retained to testify at trial. *See Campbell Industries v. M/V Gemini,* 619 F2d 24, 27 (9th Cir 1980) (district court ruled and party conceded on appeal that contacts with expert retained by other side was a "flagrant abuse" of federal discovery rules, which require court permission for oral discovery of experts). Contact with an adverse expert retained to testify in federal civil litigation would violate the rules of the tribunal and Oregon RPC 3.4(c).

Oregon has no equivalent to FRCP 26(b)(4) or any other rule for formal discovery of adverse experts in civil cases.[4] Accordingly, contact

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[2] *See Trans-World Investments v. Drobny,* 554 P2d 1148, 1151 (Alaska 1976) (informal methods of discovery encouraged as facilitating early evaluation and settlement of litigation); *International Business Machines Corp. v. Edelstein,* 526 F2d 37, 43 (2d Cir 1975) (district court could not interfere with counsel's ability to conduct pretrial interviews with government witnesses confidentially, without presence of opposing counsel or reporter); *Gregory v. United States,* 369 F2d 185, 188 (DC Cir 1966) (both sides have equal right to interview witnesses, especially eyewitnesses).

[3] The result in federal civil litigation differs from that reached in criminal cases, due to the different statutory and case-law contexts, although the analytical approach is the same. *See* OSB Formal Ethics Op No 2005-131 (ex parte contact with adverse expert witness not ethically prohibited in criminal case).

[4] ORS 135.815 and 138.835 provide for reciprocal disclosure of trial witnesses in criminal cases.

with adverse experts does not violate any established rule of procedure or evidence in violation of Oregon RPC 3.3(a)(5) or 3.4(c).

b. *Prejudice to the administration of justice.*

Conduct that prejudices the administration of justice is prohibited by Oregon RPC 8.4(c). In federal civil litigation, the "flagrant abuse" of established procedures limiting contact with experts would prejudice the administration of justice by undermining the functioning of the proceeding. Oregon RPC 8.4(a)(4). In state court civil litigation, however, contact with expert witnesses, which is not expressly prohibited, would not of itself necessarily prejudice either the procedural functioning of the proceeding or a substantive right of a party. *Cf. In re Haws,* 310 Or 741, 746–747, 801 P2d 818 (1990) (two-month delay in forwarding client's nonexempt wages to bankruptcy trustee did not prejudice the administration of justice).

Even when contact with an adverse expert is not prohibited, other principles may limit the contact. An expert witness not retained to testify at trial is considered to be a representative of the lawyer and the expert's opinions and knowledge are privileged. *See* Commentary to OEC 503(1)(e) (definition of representative of lawyer does not include an expert "employed to testify as a witness"); FRE 501 (privileges in civil cases are a matter of state law). Unauthorized efforts to discover privileged opinions and knowledge would prejudice the administration of justice. Moreover, any suggestion by a lawyer that there is no privilege would violate Oregon RPC 8.4(a)(3), which prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice."

3. *Attempt to Dissuade Witness from Testifying.*

Even when allowed, there are ethical limits to a lawyer's ex parte investigation of witnesses. For example, a lawyer cannot misrepresent the identity or motive of the interviewer. *See* Oregon RPC 4.3, 8.4(a)(3); *cf.* OSB Formal Ethics Op No 2005-42; *In re Chambers,* 292 Or 670, 680–681, 642 P2d 286 (1982) (lawyer unethically told adverse party he was insurance investigator rather than lawyer). Harassing interview or investigation techniques may violate Oregon RPC 4.4(a) (lawyer cannot take action that would harass or maliciously injure another).

A lawyer may also not attempt to influence the witness by improper means. Offering an illegal inducement or offering payment contingent on the content of the witness's testimony or the outcome of the case is prohibited by Oregon RPC 3.4(b). Attempting to persuade a witness not

to testify would be prejudicial to the administration of justice, because, if successful, it would obviously constitute substantial harm to the functioning of the proceeding as well as to the substantive interest of a party. Oregon RPC 8.4(a)(4). Moreover, Oregon RPC 3.4(f)[5] prohibits a lawyer from advising or causing a witness to secrete himself or herself, which would be the practical effect of a successful attempt to persuade a witness not to testify. Even if unsuccessful, the attempt is prejudicial to the administration of justice. *In re Boothe,* 303 Or 643, 653, 740 P2d 785 (1987).

Approved by Board of Governors, August 2005.

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[5] Oregon RPC 3.4(f) provides:

> A lawyer shall not . . . advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for purposes of making the person unavailable as a witness therein. . . ."

COMMENT: This opinion replaces OSB Formal Ethics Op No 2005-118. For additional information on this general topic, and other related subjects, see THE ETHICAL OREGON LAWYER §§7.53–7.57 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§106, 116 (2003); and ABA Model Rules 3.3–3.4.