

OREGON LAW UPDATE

Examination Reports Created for Purposes of Litigation are Discoverable

case in point...

From the desk of Jeff Eberhard: As a general matter, Oregon's civil procedure rules do not allow discovery of documents prepared in anticipation of litigation or documents summarizing the content of an expert's anticipated testimony. However, the Supreme Court has held that ORCP 44C provides an important exception to these general discovery rules. Specifically, the Court held that written reports of physical examinations of the plaintiff created by medical experts retained for the purpose of litigation must be produced if requested. If such a report is not produced the examining medical expert will be excluded from testifying at trial.

Claims Pointer: If requested by the defendant, the plaintiff must produce all written reports of examinations relating to the injuries alleged in the Complaint, even if the examining physician never treated Plaintiff and was retained solely for the purpose of litigation.

A.G. v. Guitron, in the Supreme Court of the State of Oregon (Case No. S059166, December 30, 2011).

The plaintiff filed suit against multiple defendants seeking damages for psychological injuries related to alleged incidents of sexual abuse. Before trial, the defendants requested that Plaintiff produce all treatment and examination records which related to Plaintiff's claimed injuries. Plaintiff produced her treating psychologist's examination records, but withheld examination records created by an expert psychologist who was retained by Plaintiff's attorney and did not provide any treatment to Plaintiff.

At trial, Plaintiff attempted to call the retained expert psychologist to testify. Defendants objected to this expert testifying because Plaintiff failed to produce to Defendants reports of the expert's examinations of Plaintiff. In response, Plaintiff argued that the expert's reports were not discoverable because the expert was retained for the purposes of litigation and did not provide any treatment to Plaintiff. The trial court agreed with the defendants and excluded the retained expert from testifying at trial. Plaintiff appealed the trial court's ruling. The Court of Appeals affirmed. Plaintiff then sought review from the Supreme Court, which was granted.

ORCP 44C provides the following:

"In a civil action where a claim is made for damages for injuries to the party..., upon the request of the party against whom the claim is pending, the claimant shall deliver to the requesting party a copy of all written reports and existing notations of any examinations relating to the injuries for which recovery is sought unless the claimant shows inability to comply."

ORCP 44D further provides that if a party fails to comply with 44C the court may exclude the examining physician or psychologist from testifying at trial.

Despite the seemingly clear language of the rules, Plaintiff argued that ORCP 44C only applies to medical experts who provided treatment to the injured party based on the context and legislative history of this rule. Plaintiff further noted that expert discovery is not allowed in Oregon. After extensively reviewing the legislative and case law history, the Supreme Court held that the plain text of ORCP 44C requires disclosure of "all written reports... of any examinations" relating to Plaintiff's claimed injuries, regardless of whether the examining medical expert provided treatment to Plaintiff or was retained for litigation purposes. In reaching this holding, the Court stated that the unambiguous and broad language used in the rule could not be superseded by the contextual and historical arguments offered by Plaintiff. Accordingly, the Supreme Court concluded that the trial court correctly excluded Plaintiff's retained expert from testifying at trial.



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