ORCP 39 C(6) DOES NOT CIRCUMVENT OREGON'S BAR ON PRE-TRIAL EXPERT DISCOVERY

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Organizational depositions are a powerful discovery tool with unique benefits. Through their use, parties may require a corporate deponent to prepare with information reasonably available to the organization, and designate a witness whose testimony will be binding. ORCP 39 C(6); FRCP 30(b)(6); *see e.g. Great Am. Ins. Co. of N.Y. v. Vegas Const. Co.*, 251 FRD 534, 538 (D Nev 2008). The requirement that an organization prepare with information reasonably available frequently gives rise to disputes about whether the corporate designee has been adequately prepared. *Bd. of Tr. of the Leland Stanford Junior Univ. v. Tyco Int'l Ltd.*, 253 FRD 524, 526 (CD Cal 2008) (holding that Rule 30(b)(6) requires the designee to review matters known or reasonably available to the organization in preparation for the deposition).

One issue the authors have seen arise with increasing frequency in this context is whether, and to what extent, an organizational witness must be prepared to testify about facts and opinions developed by an expert retained by the organization for purposes of litigation. The suggestion is that expert information is "reasonably available" to the organization, and should therefore be discoverable at least in part.

This article discusses the somewhat unique approach the Oregon Rules of Civil Procedure take to expert discovery, and concludes that Oregon's general rule against expert discovery precludes use of the Rule 39 C(6) "preparation" requirement as a Trojan Horse to invade expert work product that is otherwise non-discoverable. This article also considers federal case law interpreting the Federal Rules of Civil Procedure as a source of guidance and concludes that, if anything, federal case law supports the authors' conclusions about Rule 39 C(6).

I. Oregon's Rules of Civil Procedure Generally Prohibit Expert Discovery.

When it comes to the subject of pre-trial expert discovery, the "Oregon Rules of Civil Procedure authorize what is colloquially referred to as 'trial by ambush.'" *Hinchman v. UC Market. LLC*, 270 Or App 561, 569 (2015). The absence of expert discovery in Oregon resulted from a deliberate decision by the legislature to omit from the Oregon Rules of Civil Procedure a provision modeled after the federal rules that would have expressly authorized expert discovery. *Stevens v. Czerniak*, 336 Or 392, 403-404 (2004). In part, concerns over the "increased costs that expert discovery brings and on the peer pressure against testifying that can occur when a party discloses his or her expert's name" were responsible for the legislature's deliberate decision to preclude expert discovery. *Id.* at 404.

The contours of Oregon's prohibition on expert discovery are broad. Generally speaking, the identity and substance of the expert's anticipated testimony are not subject to discovery. *Hinchman*, 270 Or App 569. The breadth of the rule against expert discovery is also embodied in ORCP 47 E, a unique summary judgment procedure adopted by Oregon in light of the prohibition on expert discovery. The rule permits a party to create an issue of material fact and avoid summary judgment based upon anticipated expert testimony while disclosing virtually no information about the expert. *Lavoie v. Power Auto, Inc.*, 259 Or App 90, 96 (2013) (A Rule 47 E affidavit need not recite the issues upon which the expert will testify, but merely needs to state that "an expert has been retained and is available and willing to testify to admissible facts or opinions that would create a question of fact.") (internal quotation marks omitted). The rule provides that summary judgment motions "are not designed to be used as discovery devices to obtain the names of potential expert witnesses or to obtain their *facts* or opinions." ORCP 47 E (emphasis added). From the text of Rule 47 E, it is clear that facts developed by an expert are exempted from discovery, in addition to the expert's identity and opinions. Accordingly, a party cannot bypass the rule by claiming that she is simply seeking discovery of facts rather than mental impressions or opinions.

Following its decision in *Stevens*, *supra*, the Supreme Court again recognized the general prohibition on expert discovery in *Gwin v. Lynn*, 344 Or 65 (2008). In *Gwin*, the defendant sought to depose an individual who had percipient, non-expert, involvement in the underlying subject matter of the case, but whom the plaintiff also intended to call as an expert witness at trial. The court concluded that a witness could be both a fact witness and an expert witness, but made clear that a witness could not be considered a "fact" witness if the person obtained "evidence principally for the purpose of rendering an expert opinion in that trial." *Id.* at 67, n 1. The court in *Gwin* allowed a deposition to proceed because the facts sought pertained "to the witness's direct involvement in or observation of the relevant events that are personally known to the witness and that were not gathered primarily for the purpose of rendering an expert opinion." *Id.* at 67. The court was equally clear that the defendant was not entitled to inquire as to the witness's expertise or opinions, and that should questioning stray into those areas, the lawyer defending the deposition would be permitted to instruct the witness not to answer pursuant to ORCP 39 D(3)(c). *Id.* at 73-74.

While ORCP 44 allows discovery of expert physical and mental examinations of a party, this exception has no application in the vast majority of civil cases and we are left with a rule of broad application that generally prohibits expert discovery. So the question becomes, is there anything in the text of Rule 39 C(6) that somehow permits discovery of an expert's identity, facts or opinions? There is not.

II. The Rule 39 C(6) "Preparation" Requirement Does Not Circumvent the General Rule Barring Expert Discovery.

Rule 39 C(6) requires an organizational designee to be prepared to testify as to "matters known or reasonably available to the organization." One can imagine an opposing lawyer making the simplistic argument that facts and opinions developed by experts are "reasonably available" to an organization and therefore must be disclosed. Such an argument is misguided for a variety of reasons.

Rule 39 C(6) contains no exception to the general rules that privileged, work product and expert witness information is non-discoverable. *See* ORCP 36 B(1), (3) (prohibiting discovery of privileged materials, and requiring the showing of a substantial need for trial preparation materials); *Stevens,* 336 Or at 405 (generally precluding discovery of expert witness identities and information). An express exception to these general rules would be necessary because "in a civil action, a party has no obligation to disclose information to another party in advance of trial unless the rules of civil procedure or some other source of law requires the disclosure." *Stevens,* 336 Or at 400 *citing State ex rel Union Pacific Railroad v. Crookham*, 295 Or 66, 68-69 (1983).

Moreover, the existence of such an exception is foreclosed by the court's decision in *Stevens*, which concluded that Oregon's rules of civil procedure do not require pre-trial "disclosure of either an expert's name or the substance of the expert's testimony." *Stevens,* 336 Or at 404. The court made no exception for Rule 39 C(6).

We have found no Oregon appellate decisions addressing Rule 39 C(6) that suggest the "preparation" requirement might somehow render expert witness identities, facts or opinions discoverable. Ordinarily, one would look to analogous federal rules when faced with a dearth of case law interpreting a particular Oregon procedural rule. *See Vaughan v. Taylor,* 79 Or App 359, 363, n 3 (1986) (in construing the Oregon Rules of Civil Procedure, relying primarily on cases and treatises construing the analogous federal rules). In this context, however, the federal and state procedural rules are not entirely analogous. While ORCP 39 C(6) and FRCP 30(b)(6) are highly similar, the two sets of rules are generally at odds over the availability of expert discovery. Nevertheless, the federal rules may provide some limited guidance.

III. Federal Case Law Does Not Suggest A Contrary Result.

Case law interpreting the Federal Rules of Civil Procedure cannot provide highly persuasive authority on a question concerning the availability of expert discovery under Oregon's procedural rules given the stark differences on that point between the two sets of rules. That said, the federal rules and case law do provide some guidance on this subject and support the concept that an organizational deposition is not the proper vehicle for an end-around expert discovery rules.

For example, when the federal rules prohibit certain types of expert discovery, that prohibition is not dependent upon the particular procedural vehicle through which the discovery is sought. This is evident in the context of testifying versus consulting experts. Information about the former is discoverable pursuant to Rule 26(a)(2). Information regarding consulting experts generally is not discoverable pursuant to Rule 26(b)(4)(D). *See Spirit Master Funding, LLC v. Pike Nurseries Acquisition, LLC,* 287 FRD 680, 686 (ND Ga 2012) (denying document requests and holding that investigative findings and opinions of consulting experts were protected work product subject to disclosure only if the requesting party makes the difficult showing of "exceptional circumstances"). So seriously do federal courts take the "consulting expert" protection that they will extend it to experts who were initially designated as testifying experts and participated in the discovery process, but before providing a report are re-designated as "consulting" experts. *See Estate of Manship v. U.S.,* 240 FRD 229, 233, 239 (MD La 2006) (issuing a protective order preventing the depositions of experts re-designated as consulting experts).

There is nothing in these cases to suggest that expert information exempted from discovery might somehow become discoverable if it is sought through a particular procedural device. The prohibition on consulting expert discovery contained in Federal Rule 26(b)(4)(D) is plainly applicable to all discovery devices, as is Oregon's even broader prohibition on expert discovery. Accordingly, federal case law lends support to the rule that a party cannot obtain otherwise impermissible expert discovery in Oregon state courts through use of a Rule 39 C(6) organizational deposition.

In addition, some federal district courts within the Ninth Circuit have held that Rule 30(b)(6) organizational depositions are an inappropriate way to obtain what amounts to expert discovery. *See Dagdagan v. City of Vallejo*, 263 FRD 632, 635-636, 639-640 (ED Cal 2009). In *Dagdagan* the plaintiff noticed a Rule 30(b)(6) deposition but counsel did not limit his questions to factual matters within the purview of the Rule 30(b)(6) designees, and instead asked opinion questions that would only be appropriate for a testifying expert. *Id.* at 635, 639. The court noted that the federal rules distinguish between testifying experts and other witnesses and noted that "even retained experts, much less employees of the entity defendant, are immune from Rule 26 expert inquiry if they have not been designated by a party to testify as an expert." *Id.* at 635. The court declined to compel responses to questions that sought what amounted to expert opinion testimony in the context of a Rule 30(b)(6) deposition. *Id.* at 636, 640. Citing *Dagdagan*, the court in *Boyer v. Reed Smith, LLP*, No. C12-5815 RJB, 2013 WL 5724046, *3-4 (WD Wash Oct 21, 2013) built on this proposition in concluding that Rule 30(b)(6) questions seeking opinions about whether "certain 'practices' complied with corporate 'policies'" sought expert opinions and were therefore not among the information "known or reasonably available to the organization." *Id.* These cases holding that expert opinion discovery cannot be compelled through a Rule 30(b)(6) organizational deposition support the proposition that a party likewise may not do so with an Oregon Rule 39 C(6) deposition – particularly when Oregon's procedural rules generally bar pre-trial expert discovery.

IV. Conclusion.

Oregon's prohibition on pre-trial expert discovery is a broad rule of general application. Nothing in the text of Rule 39 C(6) addresses, much less provides for an exception to, this general rule. The Rule 39 C(6) "preparation" requirement does not change the equation. When it comes to Oregon's general prohibition on expert discovery, there is simply no reason to treat Rule 39 C(6) differently than other procedural devices.