



You Don't Have to Be a Stable Genius to Deal with Expert Witnesses

Expert Witnesses in State and Federal Criminal Cases

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Expert Witness Disclosure Issues in State and Federal Criminal Cases

Roadmap

- ❖ Statutes
 - ❖ Federal
 - ❖ F. R. Cr. P. 16
- ❖ Oregon
 - ❖ ORS 135.805 to 135.873
- ❖ U.S. Constitution
 - ❖ *Brady v. Maryland*

Federal Rules of Criminal Procedure – Rule 16

- ❖ Government's Disclosure Relating to Expert Witnesses
 - ❖ Section (a)(1)(G)
 - ❖ “At the defendant's request...”
 - ❖ “...the government must give to the defendant a written summary of any testimony that the government intends to use under [FREs 702, 703, or 705] during its case-in-chief at trial.”
 - ❖ “The summary *** must describe the **witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.**”

Federal Rules of Criminal Procedure – Rule 16

- ❖ Government's Disclosure Relating to Expert Witnesses

- ❖ Subsection (a)(1)(G) *cont'd*

- ❖ There is also a provision regarding the defendant's mental condition.
 - ❖ *If* (1) the defendant gives notice of an insanity defense, (2) the government requests disclosure of any mental examination of the defendant, (3) the defense complies, *and* (4) the defense requests reciprocal disclosure...
 - ❖ ...the government must provide a written summary of any expert testimony it intends to put on at trial regarding the defendant's mental condition.

Federal Rules of Criminal Procedure – Rule 16

- ❖ Defense's Disclosure Relating to Expert Witnesses
 - ❖ Subsection (b)(1)(C)
 - ❖ Same obligation as the government's:
 - ❖ *At the government's request*, the defendant must give a written summary of any expert witness testimony it intends to use as evidence at trial.
 - ❖ That summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

Federal Rules of Criminal Procedure – Rule 16

- ❖ Defense's Disclosure Relating to Expert Witnesses
 - ❖ Subsection (b)(1)(C)
 - ❖ However, the obligation is **different** in that it's triggered *only if either...*
 - ❖ “(i) the defendant requests disclosure under subdivision (a)(1)(G) and the government complies; or
 - ❖ (ii) the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.”

Federal Rules of Criminal Procedure – Rule 16

- ❖ [Defense's] Information *Not* Subject to Disclosure
 - ❖ Subsection (b)(2)
 - ❖ “Except for scientific or medical reports...”
 - ❖ “Rule 16(b)(1) does not authorize discovery or inspection of:
 - ❖ (A) reports, memoranda, or other documents made by the defendant, or the defendant’s attorney or agent, during the case’s investigation or defense; or
 - ❖ (B) a statement made to the defendant, or the defendant’s attorney or agent, by:
 - ❖ (i) the defendant;
 - ❖ (ii) a government or defense witness; or
 - ❖ (iii) a prospective government or defense witness.”

Oregon Revised Statutes 135.805, *et seq.*

- ❖ ORS 135.805 – Applicability
 - ❖ Provides that the provisions of this and the following pretrial discovery sections "are applicable to all criminal prosecutions in which the charging instrument has been brought in a court of record."

Oregon Revised Statutes 135.805, *et seq.*

❖ ORS 135.815 – Disclosure to Defendant

- ❖ As amended by 2019 Or. Laws, Ch. 475, § 11 (S.B. 999)
 - ❖ Except as otherwise provided, the district attorney must disclose the following items within the DA's possession or control (defined broadly):
 - ❖ (a) Witnesses (including experts!) the DA intends to call at trial — their names, addresses, *relevant* recorded/written statements, and memoranda of oral statements
 - ❖ (c) Reports or statements of experts, made in connection with the particular case, including...
 - ❖ ... results of physical/mental examinations and of specific tests/experiments the DA intends to offer as evidence at trial
 - ❖ (g) Any material or information that tends to:
 - ❖ (iii) impeach a person the DA intends to call as a witness (including experts!)

Oregon Revised Statutes 135.805, *et seq.*

❖ ORS 135.835 – Disclosure to the State

- ❖ Same obligations (minus Brady) with respect to experts:
 - ❖ Except as otherwise provided, the defense must disclose the following items within the defense's possession or control:
 - ❖ (a) Witnesses (including experts!) the defense intends to call at trial — their names, addresses, relevant recorded/written statements, and memoranda of oral statements
 - ❖ (c) Reports or statements of experts, made in connection with the particular case, including...
 - ❖ ...results of physical/mental examinations and of scientific tests/experiments the defense intends to offer as evidence at trial

Oregon Revised Statutes 135.805, *et seq.*

- ❖ ORS 135.855 – Exempt Materials and Information
 - ❖ “Work product, legal research, records, correspondence, reports or memoranda...”
 - ❖ “...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.”

Oregon Revised Statutes 135.805, *et seq.*

❖ ORS 135.873 – Protective Orders

- ❖ This section allows courts, upon a showing of good cause, to order disclosures be denied, restricted, or otherwise protected.
 - ❖ Protecting crime victims and children
 - ❖ Sealing materials of a sexual nature
- ❖ Relevant for our purposes is subsection (7)(c), which provides an exception to any protective order for: *having the information or materials examined by an expert witness for the court or any party.*

United States Constitution

❖ Brady Doctrine

- ❖ In Law and Literature (2009), Seventh Circuit Court of Appeals Judge Richard Posner praised My Cousin Vinny as being “particularly rich in practice tips,” including “the importance of the Brady doctrine,” according to the film’s [Wikipedia page](#).

❖

United States Constitution

❖ Brady v. Maryland, 373 U.S. 83 (1963)

- ❖ Under the Brady doctrine, the state must turn over to the defense evidence that is both favorable and “material either to guilt or to punishment.”
 - ❖ 373 U.S. at 87
- ❖ Oregon courts interpret that to mean the state must turn over evidence that is material, favorable, and in the possession of the prosecution.
 - ❖ See, e.g., *State v. West*, 250 Or. App. 196, 204 (2012).
- ❖ A Brady due process violation occurs “irrespective of the good faith or bad faith of the prosecution.”
 - ❖ 373 U.S. at 87

United States Constitution

❖ Brady's Progeny

- ❖ Evidence is "material" if it is both relevant and its non-disclosure is prejudicial.
 - ❖ *State v. Cockrell*, 284 Or. App. 674, 685-86 (2017) (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).
- ❖ Evidence is "favorable" if it is either directly exculpatory or impeachment evidence.
 - ❖ *Id.*
 - ❖ *See also Giglio v. U.S.*, 405 U.S. 150 (1972) (holding that impeachment evidence, even that affecting the credibility of witnesses other than the defendant, is Brady material).

United States Constitution

❖ • Brady's Progeny cont'd

- ❖ *U.S. v. Agurs*, 427 U.S. 97, 110-11 (1976) (holding that prosecutors must turn over Brady material whether or not defense counsel requests it).
- ❖ *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (clarifying the materiality standard for a Brady violation as requiring the defendant to show only that the undisclosed evidence “undermines confidence” in the trial outcome).
- ❖ *Id.* at 437-38 (holding that Brady material includes evidence in the possession of law enforcement, *even if the prosecution does not possess or even know about it*).

United States Constitution

❖ Brady's Relevance to Experts

- ❖ *Hilliard v. Williams*, 516 F.2d 1344, 1346 (6th Cir. 1975) (prosecutor suppressed an exculpatory FBI report that determined that blood stains were not blood stains)
- ❖ *Gordon v. Thornberg*, 790 F. Supp. 374 (D.R.I. 1992) (prosecutor suppressed an exculpatory FBI report that determined that the defendant's shoes had no flammable substances on them)
- ❖ *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988) (state lab technician omitted from her report that the bodily fluids found on the victim did not match the defendant's fluids)
 - ❖ See Paul C. Giannelli and Kevin C. McMunigal, Prosecutors, Ethics, and Expert Witnesses, 76 Fordham L. Rev. 1493, 1514-15 (2007) (listing at footnote 134 "[n]umerous scientific evidence cases . . . involv[ing] Brady issues).

Disclosure Issues and Practical Considerations

Overview:

- Expert Disclosure Issues in Federal Court
- Expert Disclosure Issues in State Court
- Practical Considerations for Dealing with Experts
 - Privilege Issues
 - Finding Experts
 - Consulting versus Testifying Experts

Expert Disclosure Issues in Federal Civil Cases (Who, What, When)

WHO:

FRCP 26(a)(2)(B): All testifying experts must disclose their opinions in written reports. These experts include both retained experts and experts “whose duties as the party’s employee regularly involve giving expert testimony.” FRCP 26(a)(2)(B).

NOTE: This does not include non-testifying (consulting) experts.

Expert Disclosure Issues in Federal Civil Cases (Who, What, When)

WHAT:

FRCP 26(a)(2)(B): The expert must prepare and sign the written report. It must include:

- A statement of all of the opinions expressed by the expert, and the basis and reasoning to support the opinions;
- All data and other information the expert considered in forming the opinions;
- Any exhibits the expert will use as a summary of or in support of the opinions;
- The expert's qualifications
 - List of all publications authored by the expert in the past 10 years
 - The expert's hourly rate for the report and testimony,
 - A list of any other cases in which the expert has testified in deposition or trial in the past four years.

FRCP 26(e)(1): Duty to supplement with new information

Practice Tip: Pay attention to Daubert! (Pronounced Dow-Bert; not the French way!)

Expert Disclosure Issues in Federal Civil Cases (Who, What, When)

WHEN:

FRCP 26(a)(1)(A) – Initial disclosures:

- Generally, within 14 days after Rule 26 scheduling conference
- Schedule is set by the court
- Some exemptions – set forth in FRCP 26(a)(1)(B)

FRCP 26(a)(2)(A) – Expert disclosures:

- A party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705

Expert Disclosures in Oregon State Court

- Generally, there are none before trial!
- Stevens v. Czerniak, 336 Or 392, 84 P3d 140 (2004):

“Having considered the text, context, and legislative history of ORCP 36, we agree with petitioner that the legislature did not intend to authorize pretrial disclosure of either an expert’s name or the substance of the expert’s testimony. Without a specific provision authorizing expert discovery, the trial court lacked authority to require the parties to disclose that information in advance of trial.”

Stevens, 336 Or at 404-405.
- During trial, experts must disclose any factual matter relied upon.
- Practice Tip: Beware of drafts! (Federal Rules explicitly provide that they are privileged; Oregon’s do not)

Some additional practical considerations about dealing with experts generally (based upon federal practice):

- Personality matters!
- Find them on PACER or the Oregon equivalent
- Don't let them talk to each other without you there!
- Drill "Attorney Client Privileged and Attorney Work Product" into them
- Do an engagement letter before working with them or sharing privileged information
- Run conflicts on experts

Qualifying an Expert Witness

Who May Give An Expert Opinion?

Federal Rule 702: Expert Testimony

- Expertise Through Knowledge, Skill, Experience, Training, or Education
- Helpful to the Trier of Fact
- Based In Sufficient Facts or Data
- Reliable Application of Reliable Principles/Methods

Federal Rule 701: Lay Opinion

- Can't be based scientific, technical, or other specialized knowledge within the scope of Rule 702.

Oregon Rule 702:

- “If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.”

Are Treating Physicians Experts?



Who is Reliable?



Daubert:



How Do Courts Apply These Standards?

- ❖ Flexibly

- ❖ Not uniformly



Circuits	NINTH	THIRD	ELEVENTH
REVERSED	9	0	2
AFFIRMED	10	13	25



Expert Opinion on Ultimate Issue

- Federal Rule of Evidence 704:
 - (a) In General — Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue. (b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.
- Oregon Evidence Code 704:
 - Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact



Expert witnesses and gender disparity

- According to data compiled by The Expert Institute in 2014, 83% of expert witnesses retained by attorneys are male, and, on average, they are paid 60% more than their female counterparts for litigation-related services. In the medical field, the income disparity climbs to 93%.
- A study that examined federal case law opinions between 1980 and 1993 in the U.S. District Court and the U.S. Circuit Court of Appeals for the District of Columbia found that women testified infrequently as the sole expert for a party, accounting for only 7% of solo appearances.

Gender bias theories

- Social role theory: people have different expectations for how men and women should behave
- Role incongruity theory: prejudice results from a mismatch between stereotypes about a person's group and beliefs about what is needed to succeed in a given social role
- In line with these theories, studies have shown that men may be more influential and persuasive than women, especially in "masculine" roles, and that women who "act like men" when in "masculine" roles are perceived negatively compared with their male counterparts.

Studies regarding expert witnesses and the role of gender

- Gender plays a role in juror perceptions of expert testimony, particularly in more complicated cases.
- Experts whose gender is congruent with the case domain are perceived as more persuasive than incongruent experts. In other words, female experts may be perceived as more credible where the subject matter of their testimony aligns with female-oriented societal stereotypes.
- Expert likability is particularly important for women, but may not matter much for men.
- Eye contact is particularly important for the credibility of male experts.
- The conflict between stereotypes associated with women and stereotypes associated with the expert witness role means that “a woman is likely to face a double standard where she must meet the expectations required of her as a result of her gender, but must also meet (or more likely exceed) the expectations required for competence as an expert witness.”
- Fortunately, though gender stereotypes influenced perceptions of experts, they generally were not determinative of ultimate case decision (e.g., verdict, sentence). However, in the civil context, they sometimes influenced ultimate decisions such as damages awards.

Tips for prepping expert witnesses from the gender bias literature

- Make sure your expert can effectively teach jurors. Help them connect their research and evidence to the facts of the case.
- Expert witnesses must portray competence and knowledge. Again, particularly for women, don't underestimate the importance of sharing details regarding background information that establishes the expert's professional experiences and expertise.
- Prepare female expert witnesses for personally intrusive questions.
- Consider the domain of the case and the complexity of the data when choosing your expert witness.
- Both men and women experts may need to attend to gender role expectations to maintain perceived credibility as expert witnesses. Female experts in particular should use a more conversational tone, avoid overly technical terms, and explain key terms. High levels of eye contact with whomever is asking the question and with the trier of fact is important for male experts.
- Researchers recommend that female experts use the name of the defendant or plaintiff rather than referring to them generically, and use inclusive statements, i.e., "we" or "us" when discussing members of the scientific community.
- To increase likability, female experts should appear pleasant, warm, relaxed yet professional, and smile when appropriate. They should demonstrate some feminine traits rather than adopting masculine characteristics.

