

Litigation Pitfalls

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Areas for Discussion

- ▶ Litigation/Settlement
 - ▶ Educating City Staff, Mayor and City Council
- ▶ Rules 26 and 37
- ▶ Document Retention
- ▶ Statutory Amendments

Litigation and Settlement

- ▶ Must educate City Staff, Mayor and Council regarding litigation process, Resolution and/or Trial
- ▶ Not always about who is right or wrong
- ▶ Business decision
 - ▶ Necessary to provide a thorough evaluation and analysis to include all potential risk
 - ▶ Take into account any SIR/Deductible
- ▶ Attorney-client Privilege in Closed Session

Rule 26 - General provisions governing disclosure and discovery

- ▶ Statement of Discovery Issues (Rule 37)
- ▶ Limitations of discovery
- ▶ Retained v. Non-retained Experts

Statement of Discovery Issues

- ▶ The court may enter orders regarding disclosure or discovery or to protect a party or person from discovery being conducted in bad faith or from annoyance, embarrassment, oppression, or undue burden or expense, or to achieve proportionality under Rule 26(b)(2). Utah R. Civ. P. 37(a)(7).

Limitations on Discovery

Tier	Amount of Damages	Total Fact Deposition Hours	Rule 33 Interrogatories including all discrete subparts	Rule 34 Requests for Production	Rule 36 Requests for Admission	Days to Complete Standard Fact Discovery
1	\$50,000 or less	3	0	5	5	120
2	More than \$50,000 and less than \$300,000 or non-monetary relief	15	10	10	10	180
3	\$300,000 or more	30	20	20	20	210

Retained Expert v. Non-Retained

- ▶ (a)(4) Expert testimony.
- ▶ (a)(4)(A) Disclosure of expert testimony. A party shall, without waiting for a discovery request, serve on the other parties the following information regarding any person who may be used at trial to present evidence under Rule 702 of the Utah Rules of Evidence and ***who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony***: (i) the expert's name and qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) all data and other information that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony.

Retained Expert v. Non-Retained

- ▶ (a)(4)(E) Summary of non-retained expert testimony. If a party intends to present evidence at trial under Rule [702](#) of the Utah Rules of Evidence from **any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony**, that party must serve on the other parties a written summary of the facts and opinions to which the witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). A deposition of such a witness may not exceed four hours.

Application - Non-Retained City Employees

- ▶ Do we bear the burden of proof on the issue for which expert testimony is offered?
 - ▶ Defendant's do have the burden of proof on some affirmative defenses
- ▶ Where do City employees fit?
 - ▶ Is the employee “retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony”?

Document Retention

- ▶ **Communication**
 - ▶ Email (sent and received)
 - ▶ Correspondence (sent and received)
 - ▶ Voicemail/text messages
- ▶ **File Documents**
 - ▶ Word Docs,
 - ▶ Scanned Docs
 - ▶ PDFs
- ▶ **Photos**

Litigation File

- ▶ **Communication**
 - ▶ Email - both sent and received
 - ▶ Correspondence - sent and received
 - ▶ Voicemail
- ▶ **File Documents**
 - ▶ PDF v. modifiable programs
- ▶ **Photos - photos of anything that could result in litigation**
- ▶ **Witness statements**
- ▶ **Copies of Signed Documents/Agreements**

Statutory/Rule Amendments

- ▶ Governmental Immunity Amendments
 - ▶ U.C.A. 63G-7-403 - Now includes a 1 year saving Statute
 - ▶ *Zemlicka v. West Jordan City*
- ▶ Rule 35 - Physical and Mental Examination of Persons
 - ▶ Changes disclosures requirement regarding reports
 - ▶ Clarifies disclosure requirements regarding examiner

Questions?

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