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DISCOVERY RULES: EXPERTS

I. Important Rules relevant to expert witnesses:

a. Utah Rules of Civil Procedure

i. Rule 26(a)(4)(A) (initial disclosures)

ii. Rule 26(a)(4)(B) (limits on expert discovery – deposition or report)

iii. Rule 26(a)(4)(C) (timing to request a report or deposition)

iv. Rule 26(a)(4)(E) (disclosure of non-retained expert testimony)

v. Rule 26(b)(7)(A) (protection of draft reports)

vi. Rule 26(b)(7)(B) (protection, subject to important exceptions, of communications between counsel and the expert)

vii. Rule 26(b)(7(C) (consulting expert testimony disclosures)

b. Federal Rules of Civil Procedure

i. Rule 26(a)(2)(B) (disclosure of written report)

ii. Rule 26(a)(2)(C) (disclosures for non-retained expert)

iii. Rule 26(a)(2)(D) (timing of disclosure)

iv. Rule 26(a)(4)(A) (deposition of expert)

v. Rule 26(a)(4)(B) (draft reports)

vi. Rule 26(a)(4)(C) (protects, subject to important exceptions, communications between counsel and the expert).

vii. Rule 26(b)(4)(D) (consulting expert testimony disclosures)

c. Primary difference between federal and Utah Rules:

i. The federal rules require "a complete statement of all opinions of the witness" as part of the mandatory disclosures. The Utah Rules require a "complete statement of all opinions the expert will offer at trial and the basis and reasons for them" if the other party elects to receive a report instead of a taking a deposition. If a party elects to take a deposition, the report is not required, and the party taking the deposition must ask the "necessary questions to lock in the expert's testimony." *See* Comments to Rule 26 (a).

II. Summary of the timeline under the Utah Rules[1].

a. A party, who bears the burden of proof on an issue, must disclose within 7 days after the close of fact discovery the following information for an expert who is retained or specially employed to provide expert testimony in a case or whose duties as an employee of the party regularly involve giving expert testimony (i.e. tax assessor employee):

i. The experts name, qualifications, publications authored within the last 10 years and case names for the proceeding 4 years where the expert has testified in a case or deposition.

ii. A "brief summary" of the expert's opinions that will be the subject of his testimony.

[1] References are to the Utah Rules unless otherwise stated.

iii. The data and other information that will be relied upon by the witness in forming the opinions. "If the expert has used software programs to make calculations or otherwise summarize or organize data, that information and underlying formulas should be provided in native form so it can be analyzed and understood." Comments to Rule 26(a).

iv. Compensation to be paid the expert.

b. For a non-retained expert (i.e. physician, building inspector, police officer) or an employee who does not regularly testify, a party must disclose the following within 7 days after the close of fact discovery:

i. "A written summary of the facts and opinions to which the witness is expected to testify." Rule 26(a)(4)(E).

c. Within 7 days of the disclosure in (a) above, the opposing party may serve notice of an election to receive a "report" or take a deposition. Failure to make an election precludes future discovery. The rule is silent as to non-retained experts or employees, but it can be implied from the comments, that for non-retained experts or employees, the only election is a deposition.

d. Within 28 days after the election in (c) above, the report must be produced or the deposition completed.

i. If a report is elected, it must be signed by the expert and contain a "complete statement of all opinions the expert will offer at trial and the basis and reasons for them. Such an expert may not testify in the party's case in chief concerning any matter not fairly disclosed in the report."

Rule 26(a)(4)(C)(i). The party offering the expert bears the costs of preparing the report.

ii. If a deposition is elected, it cannot exceed 4 hours and the party taking the deposition must pay for the expert's hourly fees. "[T]he expert is expected to be fully prepared on all aspects of his/her trial testimony at the time of the deposition and may not leave the door open for additional testimony by qualifying answers to deposition questions." Comments to Rule 26.

e. Parties who do not bear the burden of proof can designate an expert within 7 days after the report or deposition is taken by following the procedure summarized in paragraphs (a) through (d) above.

f. Rebuttal experts can be named by following the same procedure as (e).

III. Additional Discovery Limitations

a. Communications between the attorney and the expert do not need to be disclosed unless they "(i) relate to compensation for the expert's study or testimony; (ii) identify facts or data that the parties attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed." Rule 26(b)(7).

b. There is a key distinction between <u>facts and data</u> the "expert <u>considered</u> in forming an opinion" and <u>assumptions</u> that the "expert <u>relied</u> upon in forming the opinions to be expressed." Rule 26(b)(7) (emphasis added) and Federal Rule 26(b)(4)(C) (emphasis added). The comments to the federal Rule provide that

"general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts . . ." are not discoverable.

i. Practice tip. Hpotheticals, rather than the facts of the case, should be used when exploring the likely opinions of a potential expert.

c. Draft reports do not need to be disclosed.

IV. Deposition versus Report

a. Costs. If costs are a concern, a report offers an inexpensive route.

b. Complexity. If the issue is not complex, then a report will be adequate.

c. Familiarity with the expert. A deposition may be helpful if you are unfamiliar with the expert.

d. Motion in limine. If you anticipate bringing a motion in limine, a deposition may be more helpful than a report.

V. Miscellaneous provisions

a. Demonstrative exhibits or aids prepared by the expert do not need to be disclosed until the exhibit change date. Rule 26 Comments.

b. The summary report of the facts and opinions related to the "expert opinion" by a lay expert (doctors, law enforcement officers, employees) does not need to be signed by the witness.

c. Consulting expert. Work product privilege precludes discovery only upon "showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means." Rule 26(b)(7)(C).

d. You must supplement or correct the report or deposition in a timely manner if the prior disclosure is incomplete or incorrect. Federal Rule 26(e)(2). A similar result is implied by the State Rules.

VI. Rules of Evidence

a. Rule 701: Lay witness testimony. Lay expert testimony is frequently admitted when based upon the value of the witnesses' property or business. *See* Mangrum and Benson on Utah Evidence, p. 489. However, lay persons should not testify as to matters that require specialized knowledge unless Rules 702 and 703 are satisfied. *Id*. *citing State v. Rothlisberger*, 2006 UT 49, 147 P.3d 1176.

   i. The difficulty with lay witnesses is determining when their testimony crosses the line into specialized knowledge. For example, a business owner may testify that his office building is $100,000 based upon his perception of the market, his understanding of the occupancy and rents, but he should not testify as to the appropriate method to calculate a cost of capital to discount the rents under an income approach. *See* Mangrum and Benson on Utah Evidence, p. 490, *citations omitted*.

b. Rule 702:

   i. The witness must have the knowledge, skill, experience, training or education to testify as an expert witness. Rule 702(a).

   ii. The witness must establish a threshold showing that the theory or principles are "(i) reliable, (ii) based upon sufficient fact or data, and (iii) have been reliably applied to the facts of the case." Rule 702(b). The threshold showing is satisfied if the theories or principles are "accepted by

the relevant community." Rule 702(b). Federal Rule 702 does not make the threshold distinction.

iii. There are four levels of foundation: (i) competency, (ii) theory, (iii) general application and (iv) specific application. *See* Mangrum and Benson on Utah Evidence, p. 495.

iv. Example: A licensed general certified appraiser who has never valued a public utility prepares an appraisal for a public utility. The appraisal uses an income approach. The income approach applied by the appraiser uses a discounted cash flow that is calculated using an unorthodox method. The expert arguably fails the competency standard. He has a license, but no experience. He might overcome this defect by showing that, while he has not valued a public utility, he has frequently used the same appraisal methods in other context. In that event, his testimony likely passes the competency level and since an income approach is a generally accepted method to value business property, he passes the theory test. However, he might not pass the third test, general application. His unorthodox method of calculating the discounted cash flow is not peer reviewed nor can he show its reliability. If he does pass this third test, then he must show that he actually made the correct calculations.

v. Voir dire. Use voir dire for specific qualification objections. If the concern is one of comparative qualifications between experts, reserve the questions for cross examination. Magnum and Benson on Utah Evidence, P. 505.

c. Rule 703. The expert can rely upon facts and data reasonably relied upon by experts even if otherwise not admissible. This creates a conduit to admit otherwise inadmissible testimony. In the case of a jury trial, the expert cannot testify as to the inadmissible facts and data unless the Court determines their probative value "substantially" outweighs the prejudice.

d. Rule 705. Permits the expert to give an opinion without first disclosing the underlying facts or data. Strategically, it is usually best to bring out the helpful facts and unavoidable unhelpful facts in your direct examination.

VII. Cross examination.

a. Only ask questions you understand.

b. Only ask questions that you know the answer to.

c. Do not assume that you will be able to limit the expert's answer to yes or no. Administrative adjudicators are prone to allowing and expert "fully explain" their answers.

d. Keep it simple. The adjudicator must understand it or it is meaningless.

e. Remember that opposing counsel will have the opportunity for redirect. If possible, it is best to use your own rebuttal expert to make the criticisms.