

Litigating Open Public Meetings Act Cases

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Why OPMA?

- Not covered by WCIA, which means even non-litigation attorneys may find themselves in court. 😊
- Relatively little case law
 - Compare with case volumes for PRA, employment, torts, etc.
- But now:
 - *West v. King County Regional Housing Authority*, 2024
 - *West v. Lower Duwamish Waterway Group*, 2023 (petition pending)
 - *West v. Economic Alliance of Lewis County*, 2023
 - *West v. Burien City Council*, 2024 (petition pending)

OPMA Lawsuit Nuts & Bolts

- OPMA litigation vs. PRA and other litigation
 - Different incentives to sue
 - Penalties
 - Fees
 - More limited case law
 - Differences in procedural posture?
 - Differences in remedies
 - Invalidation
 - Separate recall litigation



Common Issues in OPMA Lawsuits

- Conflicts/Joint representation
 - In house counsel or law firm representation
 - Evaluate parties, potential for conflicts at outset
 - Individually named councilmembers
 - Evaluate joint representation of councilmembers based on issues
 - RPC 1.7 – Comments 29 to 32

Common Issues in OPMA Lawsuits

Training items that can prevent claims:

- Serial meetings
- Fracturing the quorum
- Reducing quorum
- Secret ballot/straw poll
- Action vs final action
- Courtesy Notices

Common Issues in OPMA Lawsuits

Executive session:

- Proper purpose (RCW 42.30.110(1))
 - Real estate. See *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 421 (2017) (minimum price)
 - Applicant/Appointee review
 - Legal risks/potential litigation. *In re Recall of Lakewood City Council Members*, 144 Wn.2d 583, 586 (2001)
- Proper notice (RCW 42.30.110(2))
 - Included on agenda
 - Publicly announced
 - Proper timing
- Waiver

Early Motion Practice

- CR12(b)(1)
 - Standard
 - Ripeness/Mootness/Standing
- CR 12(b)(6)/12(c)
 - Standard
 - Timing
- CR8 motion for more definite statement
 - Made as an alternative relief in a CR 12 motion, or separately



Early Motion Practice

Attaching agendas/minutes/etc.:

- “[D]ocuments whose contents are alleged in a complaint but which are not physically attached to the pleading may... be considered in a ruling on a CR 12(b)(6) motion to dismiss.” *Wash. State Human Rights Comm’n v. Housing Auth. of City of Seattle*, 21 Wn. App. 2d 978, 983, ¶ 13 (2022) (quoting *Trujillo v. Northwest Trustee Services, Inc.*, 183 Wn.2d 820, 827, n.2 (2015); *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725-26 (2008)).
- The court “may take judicial notice of public documents if their authenticity cannot be reasonably disputed’ without converting the motion to a motion for summary judgment.” *Id.*
- However, submitting documents not contained in original complaint may convert the motion to a summary judgment motion. *Singh v. Federal National Mortgage Ass’n*, 4 Wn. App. 2d 1, 4, ¶ 7 (2018). But if a plaintiff submits documents in response to a defendant’s motion to dismiss, it has previously been described as an assertion of the “invited error doctrine.” *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 728, ¶ 31 (2008).

Managing Discovery

- Affirmative vs defensive
- Depositions
 - Elected officials
 - 30(b)(6) topics & designees
- Motion to compel vs motion for protective order
- Objections (oral and written)



Managing Discovery: Councilmember Depositions

- Washington Courts have acknowledged that high-ranking government officials have greater duties and time constraints than other witnesses and should not be called to testify about their official actions absent extraordinary circumstances, such as when there are no other witnesses to provide better first-hand knowledge of the issue in question. *Clarke v. State Att'y Gen.'s Off.*, 133 Wn. App. 767, 782 (2006).
- More recently, the Washington Supreme Court, in *Stratford v. Umpqua Bank*, 2 Wn. 3d 112, 122 ¶ 34 (2023), recognized that unlike corporate officers, “government officials should not be deposed.”
- See also *Cornelius v. City of Seattle*, 123 Wash. 550 (1923) (motives of members of council voting for ordinance may not be inquired into to determine ordinance’s validity)

Managing Discovery: 30(b)(6) Depositions

- Civil Rule 30(b)(6) requires the agency to identify and prepare designated witnesses so that they “may give complete, knowledgeable and binding answers on behalf of the corporation.” *Flower v. T.R.A. Indus., Inc.*, 127 Wn. App. 13, 39, ¶ 43 (2005) (quotation omitted).
- “[P]roducing an unprepared 30(b)(6) witness is tantamount to failing to appear and is sanctionable.” *Casper v. Esteb Enterprises Inc.*, 119 Wn. App. 759, 768 (2004) (citation omitted).

Managing Discovery: 30(b)(6) Depositions (continued)

- Unlike a fact witness who “testifies as to his individual knowledge and gives personal opinions” a 30(b)(6) designee testifies as to “the corporation’s subjective beliefs and opinions and interpretation” of documents and events. *Flower*, 127 Wn. App. at 40, 45.

Managing Discovery: 30(b)(6) Designees

- The “reasonable particularity” provision of Fed. R. Civ. P. 30(b)(6) has been interpreted to require “the requesting party... to designate, with painstaking specificity, the particular subject areas that are intended to be questioned.” *Memory Integrity, LLC v. Intel Corp.*, 308 F.R.D. 656, 661 (D.Or. 2015) (citations omitted)
- Federal cases interpreting federal rule are “highly persuasive.” *Flower*, 127 Wn. App. at 39, ¶ 43 (quoting *Casper v. Esteb Enters., Inc.*, 119 Wn. App. 759, 767 (2004)).
- Rule requires “painstaking specificity” regarding designated topics because the rule “places substantial responsibilities and burdens on the responding corporate party.” *Preservation Technologies LLC v. MindGeek USA, Inc.*, -- F.R.D. --, 2020 WL 10965163, 2 (C.D. Cal. 2020) (quotation and citation omitted).
- The purpose of CR 30(b)(6) is to facilitate a plaintiff’s gathering of “the corporation’s subjective beliefs and interpretation of documents and events.” *Flower*, 127 Wn. App. 40, ¶ 4. Interrogatories “are a more appropriate discovery vehicle than a Rule 30(b)(6) deposition where a party... seeks to explore facts underlying the legal claims and theories asserted by the opposing party.” *Burgess v. Daimler Truck North America, LLC*, 2024 WL 407476, *5 (E.D. Wash. 2024).

Managing Discovery: Objections

- General objections no longer permitted
- Consider asserting legal argument in your objection itself
- Evaluate import (i.e. relevance)
- Use to control scope of 30(b)(6) topics
- Limited instructions not to answer



Managing Discovery: Objections

- RCW 5.60.060(5) A public officer shall not be examined as a witness as to communications made to him or her in official confidence, when the public interest would suffer by the disclosure.
- RCW 42.23.070 prohibits disclosure of confidential information but no guidance on definition of “confidential.”
 - Local municipal code can supplement
- Executive session information is confidential. AGO 2017 No. 5. Disclosure may be a misdemeanor. Id.

Managing Discovery: MTC/MPO

- To obtain a protective order, party must demonstrate “good cause,” and should show “specific prejudice or harm or prejudice that will result if no protective order is issued.” *McCallum v. Allstate Property and Cas. Ins. Co.*, 149 Wn. App. 412, 423 (2009) (citing *Dreiling v. Jain*, 151 Wn. 2d 900, 916-17 (2004)).
- Proof may be submitted by affidavit. *Id.*
- Court weights “the respective interest of the parties.” *Id.* (citing *Rhinehart v. Seattle Times Co.*, 98 Wn. 2d 226, 236 (1982)).

Managing Discovery ➡ Dispositive Motions

- Evidence/Proof issues
 - Potential stipulations to limit discovery
 - Limited documents associated with most executive session discussions
 - Cases involving serial meetings/discussion
 - Recorded public meetings
- Make good use of your proposed order

Resolving OPMA Lawsuits

- Offer of judgment CR 68
- Settlements
 - Note broad standing provision, RCW 42.30.120
- No equivalent to RCW 42.56.550 (trial by affidavit) but make the argument?
- Equitable remedies (e.g. injunctive relief as in *Beauregard v. WSBA*, 197 Wn. 2d 67 (2021)).



Questions?

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