

BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

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In the Matter of:

**FIRST AMERICAN TITLE INSURANCE
COMPANY,**

Authorized Title Insurer.

Docket No. 15-0106
HEARINGS UNIT
OFFICE OF
INSURANCE COMMISSIONER
**ORDER ON THE OIC'S MOTION TO
QUASH NOTICE OF DEPOSITION
AND FOR PROTECTIVE ORDER**

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AnnaLisa Gellermann, Deputy Commissioner, Legal Affairs Division
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Background.

On February 17, 2016, the Office of Insurance Commissioner ("OIC") filed a motion to quash a notice of deposition ("Motion") issued by legal counsel for First American Title Insurance Company ("First American"). The notice of deposition concerns the proposed deposition of AnnaLisa Gellermann, Deputy Commissioner for the OIC's Legal Affairs Division, and Chair of the OIC's Compliance Committee ("Committee"). The Motion also requests a protective order that would prevent First American from making further inquiries on the deliberations of the Committee. On February 24, 2016, First American filed its response to the OIC's Motion ("Response"). On March 1, 2016, the OIC submitted its reply to First American's response ("Reply").

At paragraph two of its Motion, the OIC explains that the Committee is a group that consists of the Deputy Commissioners of the OIC, and an Assistant Attorney General, that meet regularly to discuss and determine sanctions when an investigation has revealed that an authorized insurer has engaged in wrongdoing. Paragraph two of the Motion states: "Within statutory boundaries, the [Committee] has complete discretion to determine an appropriate sanction." (Brackets added). In its Motion, the OIC asserts that the Committee determined that First American should be fined

\$100,000 for alleged violations of regulations at WAC 284-29-205 through WAC 284-29-265. Motion, ¶ 3.

The OIC also argues in its Motion (¶¶ 4-7) that the notice of deposition for Deputy Commissioner Gellermann should be quashed, and that its motion for protective order as to the Committee's deliberations should be granted, arguing:

- First American has made no showing that deposing Deputy Commissioner Gellermann is required to develop relevant evidence;
- The mere allegation that Deputy Commissioner Gellermann acted as Chair over the Committee in a manner that First American does not like does not justify deposing her;
- A party is not entitled to probe the deliberations of administrative officials except under exceptional circumstances, which are not present in this case. Probing into the deliberations of the Committee requires a threshold showing of relevance not present here (i.e., First American must demonstrate a deposition is necessary to its defense against the OIC's allegations of wrongdoing). Since First American has made no such showing, the notice of deposition must be quashed, and a protective order must be issued;
- Because First American seeks review of matters committed to the Commissioner and his delegated staff (i.e., Committee), their discovery can lead to no relevant evidence.
- First American knows how the Committee operates. Deputy Commissioner Gellermann and other members of the Committee were given basic information regarding First American's alleged violations, and determined that the proposed \$100,000 fine in question was appropriate.
- First American knows that Deputy Commissioner Gellermann has no other information that will lead to admissible evidence regarding First American's actions. "First American simply wants to inconvenience and harass [Deputy Commissioner] Gellermann and rack up billable hours." (Brackets added).

In its Response to the OIC's Motion, First American asserts at 2:24-4:16 that it would like to depose Deputy Commissioner Gellermann on the following issues which it states are material to this proceeding, and for which her testimony is admissible:

- Matters for which she has been identified in written discovery as a witness;
- Evidence she is aware of to support the allegations in the Notice of Request for Hearing for Imposition of Fine the OIC ("Notice") filed on December 15, 2015;
- What knowledge or evidence she has regarding the subjects identified in requests for production posed to the OIC in this matter;
- Whether the OIC acted in an arbitrary or unreasonable manner, and her role in such alleged conduct; and
- Whether a fine has ever been assessed against First American in this matter.

At 5:11-13 of its Response, First American asserts that the OIC has not shown "good cause" under CR 26(e) for a protective order to be granted. First American emphasizes at 5:14-17 of its

Response that it set the deposition of Deputy Commissioner Gellermann only after contacting Marcia Stickler, Insurance Enforcement Specialist for the OIC, and allowing both Deputy Commissioner Gellermann and Ms. Stickler to select the date and time convenient to both of them. First American also notes that it committed to limit the length of the deposition to one-half day. *Id.*

Law Governing Discovery and Protective Orders in Matters before the OIC Hearings Unit.

WAC 284-02-070 articulates the standard for discovery in hearings before the OIC Hearings Unit, and states in part:

(e) Discovery is available in adjudicative proceedings pursuant to Civil Rules 26 through 37 as now or hereafter amended without first obtaining the permission of the presiding officer or the administrative law judge in accordance with RCW 34.05.446(2).

(i) Civil Rules 26 through 37 are adopted and incorporated by reference in this section, with the exception of CR 26 (j) and (3) and CR 35, which are not adopted for purposes of this section.

(ii) The chief presiding officer or administrative law judge is authorized to make any order that a court could make under CR 37 (a) through (e), including an order awarding expenses of the motion to compel discovery or dismissal of the action.

(iii) This rule does not limit the chief presiding officer's or administrative law judge's discretion and authority to condition or limit discovery as set forth in RCW 34.05.446(3).

(Emphasis added).

RCW 34.05.446(3) provides the OIC's Presiding Officer with discretion to decide whether depositions may be taken, or protective orders may be granted, in a hearing before the OIC's Hearings Unit, and states:

Except as otherwise provided by agency rules, the presiding officer may decide whether to permit the taking of depositions, the requesting of admissions, and all other procedures authorized by rules 26 through 36 of the superior court civil rules. The presiding officer may condition use of discovery on a showing of necessity and unavailability by other means. In exercising such discretion, the presiding officer shall consider: (a) Whether all parties are represented by counsel; (b) whether undue expense or delay in bringing the case to hearing will result; (c) whether the discovery will promote the orderly and prompt conduct of the proceeding; and (d) whether the interests of justice will be promoted.

(Emphasis added).

CR 26.

CR 26 articulates the allowable discovery methods, and the scope of discovery and its limits, and

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states in part:

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in section (a) shall be limited by the court if it determines that:

(A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under section (c).

(Emphasis added).¹

CR 26(c) provides courts with the ability to issue protective orders limiting discovery to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, and states:

Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or

¹ FED. R. CIV. P. 26(b) contains language very similar to CR 26(b).

alternatively, on matters relating to a deposition, the court in the county where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (1) that the discovery not be had;
- (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
- (5) that discovery be conducted with no one present except persons designated by the court;
- (6) that the contents of a deposition not be disclosed or be disclosed only in a designated way;
- (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
- (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(Emphasis added).²

In examining the standard for a court to issue a protective order under CR 26(c), in *Marine Power & Equip. Co. v. Dep't of Transportation*, 107 Wn.2d 872, 875-876, 734 P.2d 480 (1987) the Court stated:

² FED. R. CIV. P. 26(c) contains language very similar to that in CR 26(c). Where a Washington civil rule is identical to its federal counterpart, federal cases interpreting the federal rule are highly persuasive. *Casper v. Esteb Enters.*, 119 Wn. App. 759, 767, 82 P.3d 1223 (2004) (citing *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 188, 35 P.3d 351 (2001), cert. denied, 536 U.S. 941, 153 L.Ed.2d 806, 122 S.Ct. 2624 (2002)).

CR 26(c) provides a court may "for good cause shown . . . make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . ." The United States Supreme Court has stated:

Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required. . . . The trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery. The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders.

(Footnote omitted.) *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36, 81 L. Ed. 2d 17, 104 S. Ct. 2199 (1984).

In *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 519, 20 P.3d 447 (2001) the Court articulates the broad discretion vested in the trial court to order pretrial discovery, and the potential broad scope of such discovery:

A trial court has wide discretion in ordering pretrial discovery, which will not be disturbed absent a manifest abuse of discretion or a showing that it based its order on untenable grounds. In general, parties may obtain nonprivileged discovery regarding any matter relevant to the subject matter of the pending action."

(Emphasis added).

As a general matter, relevancy must be broadly construed at the discovery stage such that information is discoverable if there is any possibility it might be relevant to the subject matter of the action. *EEOC v. Electro-Term*, 167 F.R.D. 344, 346 (1996). "Relevant information includes any matter that is or may become an issue in litigation." *Id.* (citations omitted). However, there is substantial case law standing for the proposition that high-ranking government officials are generally not subject to depositions *unless* they have some personal knowledge about the matter *and* the party seeking the deposition makes a showing that the information cannot be obtained elsewhere. *Alexander v. FBI*, 186 F.R.D. 1, 4 (1998) (citations omitted); *Byrd v. District of Columbia*, 259 F.R.D. 1, 7 (2009) (citations omitted). A protective order for a high-ranking official should be granted if the court determines that (1) the individual is high-ranking and (2) applying a balancing test, the movant's concern of harm to the official outweighs "the adversary's significant interest in preparing for trial." *Byrd*, 259 F.R.D. at 6 (citations omitted). Certain high administrative heads are considered high-ranking officials. *Id.* at 7 (citations omitted). A movant must "make a specific demonstration of facts to support [its] request for the protective order and may not rely on conclusory or speculative statements concerning the need for a protective order." *Id.* at 7 (citation omitted).

I conclude that the Deputy Commissioners of the OIC on the Committee, including Deputy Commissioner Gellermann, are high-ranking officials. That said, the OIC has not demonstrated facts to support its Motion, but instead makes conclusory and speculative statements that First American simply wants to inconvenience and harass Deputy Commissioner Gellermann, parties

are not permitted to probe the deliberations of administrative officials except under circumstances not present in this case, deposing Deputy Commissioner Gellermann will not lead to relevant evidence, and First American already knows how the Committee works. As the case law above suggests, First American's deposition of Deputy Commissioner Gellermann is relevant because it would include matters at issue in this matter: Namely, whether a fine should be levied against First American. The OIC admits in its Motion that members of the Committee, including Deputy Commissioner Gellermann, were given basic information regarding First American's alleged violations, and determined that a \$100,000 fine was appropriate. The members of the Committee, including Deputy Commissioner Gellermann, have personal knowledge about how the proposed fine against First American was arrived at, and this information can only be obtained from members of the Committee. Under *Alexander v. FBI*, Deputy Commissioner Gellermann may be deposed.

The OIC has not demonstrated good cause under CR 26(c) to impose a protective order that would prevent Deputy Commissioner Gellermann, or other members of the Committee, from being deposed. The OIC has not shown that Deputy Commissioner Gellermann, or others similarly situated, have to be protected from annoyance, embarrassment, oppression, or undue burden or expense. First American has never deposed any member of the Committee, and has scheduled only a half-day to depose Deputy Commissioner Gellermann at a date and time convenient to both her and Marcia Sticker, Insurance Enforcement Specialist for the OIC.

In *United States v. Lormar Discount, Ltd.*, 61 F.R.D. 420, 423 (1973), the United States and an Internal Revenue Service agent, filed a motion to quash notice of depositions of two federal agents which the Court denied, stating:

Under the facts and circumstances of this case, where the in-court examination of government officials possessing knowledge concerning this investigation relating to this suit would be severely curtailed by the government's decision to call only one revenue agent, the denial of pre-hearing discovery would drastically diminish the respondent's ability to prepare his defense. Accordingly the government's motion to quash notice of depositions and to deny respondent's motion for the production of documents is hereby denied. If the government feels at a later time that the depositions are being conducted in an unreasonable fashion, the proper procedure is to apply for relief from this Court under Rule 30(d) of the Federal Rules of Civil Procedure which specifically provides for the limiting of discovery under proper circumstances. In this manner the interests of both the government and the respondent can properly be accommodated.

(Emphasis added).

As with the government officials being deposed in *Lormar Discount*, CR 30(d) provides an avenue for the OIC to later cease a deposition and file a motion for a protective order if necessary.

CR 30.

CR 30(d) provides grounds for the party being deposed to object to the course of questioning if it

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is annoying, embarrassing, or oppressive, and move the court for an order canceling the deposition, or limiting the scope and manner of taking the deposition as provided in CR 26(c), and provides:

(d) Motion To Terminate or Limit Examination. At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the county where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(Emphasis added).

Ruling.

The OIC's Motion is denied. At this stage I will not quash the notice of deposition of Deputy Commissioner Gellermann, and will not impose a broad-based protective order concerning deliberations of the Committee. However, if at a later stage, the OIC deems it necessary and files a duly supported motion under either CR 26(c) or CR 30(d), I will consider that motion. While deposing Deputy Commissioner Gellermann, I ask that counsel for First American not abuse the opportunity to do so, and be mindful of the standards for proper discovery under CR 26(b)-(c), and CR 30(d), articulated above.

Dated: March 8, 2016



WILLIAM PARDEE
Presiding Officer

CERTIFICATE OF SERVICE

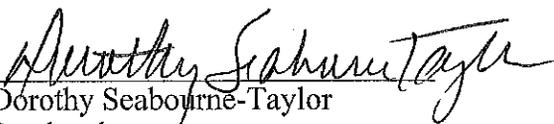
The undersigned certifies under the penalty of perjury under the laws of the state of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be filed and served the foregoing Order on the OIC's Motion to Quash Notice of Deposition and for Protective Order on the following people at their addresses listed below:

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Mike Kreidler, Insurance Commissioner
James T. Odiorne, J.D., CPA, Chief Deputy Insurance Commissioner
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AnnaLisa Gellermann, Deputy Commissioner, Legal Affairs Division
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Dated this 8th day of March, 2016, in Tumwater, Washington.


Dorothy Seabourne-Taylor
Paralegal
Hearings Unit