BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

FILED

2016 JAN -5 A 8:58

HEARINGS UNIT
OFFICE OF
INSURANCE COMMISSIONER

In the Matter of:	Docket No. 15-0166
FIRST AMERICAN TITLE INSURANCE COMPANY,	**NOTICE OF HEARING**
Authorized Title Insurer.	

TO: Jerry Kindinger
Ryan, Swanson, & Cleveland PLLC
1201 Third Avenue, Suite 3400
Seattle, WA 98101

COPY TO: Mike Kreidler, Insurance Commissioner
James T. Odiorne, J.D., CPA, Chief Deputy Insurance Commissioner
Doug Hartz, Deputy Commissioner, Company Supervision Division
AnnaLisa Gellermann, Deputy Commissioner, Legal Affairs Division
Marcia G. Stickler, Insurance Enforcement Specialist, Legal Affairs Division
Office of the Insurance Commissioner
PO Box 40255
Olympia, WA 98504-0255

This Notice is provided pursuant to RCW 48.04.010 and RCW 34.05.434.

On December 15, 2015, Marcia G. Stickler, Insurance Enforcement Specialist of the Office of Insurance Commissioner ("OIC") requested a hearing on the proposed imposition of a $100,000 fine against First American Title Insurance Company ("First American") for alleged violations of RCW 48.29.210(2) and regulations in WAC Ch. 284-29 concerning trade association events.

The disputed facts concern First American being approached sometime during 2014 by Snohomish County Camano Association of Realtors (SCCAR) about sponsoring a real estate "Economic Forecast" presentation by an economist from Zillow on October 16, 2014. The facts in the request for hearing allege that First American was responsible for the planning and execution of the event, even though technically a trade association event, and that First American would have Cobalt Mortgage (lender) pay for the lunch. There are allegedly conflicting accounts by First American employees which indicate that it both administered the event, and that it did not. Allegedly, of the 270 members of SCCAR that attended the event, none were affiliate members that were competitors of First American. One employee of an affiliate member of SCCAR, and First American competitor, allegedly contacted SCCAR and was told by its Director that it was a private, closed event, administered entirely by First American, who had total control over who

attended. She also alleged that the Director of SCCAR told her that First American contacted SCCAR to sponsor the event, not the other way around. Another employee of the same competitor then contacted the OIC and complained that First American violated the insurance regulations by disguising their own event as a trade association event. SCCAR's Governmental Affairs Director allegedly also told the OIC investigators that SCCAR's only role at the event was to distribute flyers created by First American.

After First American retained attorneys, allegedly the employees of SCCAR the OIC investigators interviewed then denied telling the OIC previously that the event was limited to First American guests and put on entirely by First American. Allegedly, when the OIC requested information on First American's involvement with the event, First American claimed total employee time was only three hours, and First American would not further elaborate, nor remit any documentation, concerning names, salaries, or other expenses it incurred for the event (other than $875 rental fee).

Given this, the OIC alleges:

- First American's expenses, combined with the rental fee, exceeded the $1,000 limit per WAC 284-29-235(4);
- First American's arrangement with SCCAR violated WAC 284-29-200(6);
- By excluding some SCCAR affiliate members from the event, First American violated WAC 284-29-220(2);
- By giving an educational program without cost on subjects other than solely about title insurance, title to real property, and escrow topics, First American violated WAC 284-29-235; and
- By failing to make available to the OIC records demonstrating compliance with WAC Ch. 284-29, First American violated WAC 284-29-265.

On December 30, 2015, the undersigned held a first prehearing conference. The OIC was represented by Marcia G. Stickler, Insurance Enforcement Specialist, of the OIC's Legal Affairs Division. Attorney Jerry Kindinger represented First American Title.

During the first prehearing conference, counsel for both parties raised the following preliminary legal issues which I address below:

(1) Whether the parties may offer into evidence declarations under oath in lieu of live testimony?

(2) Is there a distinction between how the depositions of parties versus witnesses should be used in proceedings before the OIC?

1. Whether declarations are permitted.

Hearings of the OIC are conducted according to RCW Chapters 48.04 and 34.05. WAC 284-02-070(1)(a). WAC Ch. 10-08 also contains provisions applicable to hearings before the OIC. WAC 284-02-070(2)(a). WAC 284-02-070(2)(d) emphasizes that: "Adjudicative proceedings or

contested case hearings of the insurance commissioner are informal in nature, and compliance with the formal rules of pleading and evidence is not required."

ER 801(c) defines "hearsay" as: "[A] statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A portion of RCW 34.05.452 explains that hearsay evidence is admissible in hearings before the OIC under the following circumstances:

> (1) Evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. The presiding officer shall exclude evidence that is excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state. The presiding officer may exclude evidence that is irrelevant, immaterial, or unduly repetitious.
>
> (2) If not inconsistent with subsection (1) of this section, the presiding officer shall refer to the Washington Rules of Evidence as guidelines for evidentiary rulings.
>
> (3) All testimony of parties and witnesses shall be made under oath or affirmation.

(Emphasis added).

RCW 34.05.461(4) explains that findings of fact in final orders issued by the OIC Presiding Officer are also based on evidence evaluated under the identical reasonable person standard, and which may be inadmissible in a civil trial, but which does not abridge a parties opportunities to confront witnesses and rebut evidence, and states:

> Findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. Findings shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. Findings may be based on such evidence even if it would be inadmissible in a civil trial. However, the presiding officer shall not base a finding exclusively on such inadmissible evidence unless the presiding officer determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence. The basis for this determination shall appear in the order.

(Emphasis added).

RCW 34.05.449(2) emphasizes the importance of providing to parties in an administrative hearing the right to conduct cross-examination of witnesses and states: "To the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted by a limited grant of intervention or by the prehearing order." (Emphasis added).

Furthermore, WAC 10-08-140(2) provides: "Where practicable, the presiding officer may order:

(a) That all documentary evidence which is to be offered during the hearing or portions of the hearing be submitted to the presiding officer and to the other parties sufficiently in advance to permit study and preparation of cross-examination and rebuttal evidence;" (Emphasis added).

However, the right to confront witnesses provided in both Wash. Const. art. 1, § 22 (amendment 10) and the Sixth Amendment to the United States Constitution, are inapplicable to administrative proceedings. *Chmela v. State*, 88 Wn.2d 385, 392, 561 P.2d 1085 (1977) (citations omitted). Moreover, ER 801 and the confrontation clause of the Sixth Amendment are not to be equated. *Id.* (citations omitted). That said, see *Stone v. Prosser Consolidated School Dist.*, 94 Wn. App. 73, 79, 971 P.2d 125 (1999), where the Court concluded that since Washington law provides for the right to confront witnesses in expulsion hearings, a student's substantial interest in attending school, and the threat to this interest posed by a lack of opportunity to confront and question eyewitnesses, outweighed the countervailing administrative interest favoring the admission of hearsay statements.

In *Ingram v. Dep't of Licensing*, 162 Wn.2d 514, 173 P.3d 259 (2007), two individuals who had their driver's licenses suspended by the Department of Licensing argued that the legislature could not have intended hearsay evidence such as a state toxicologist's declaration to be automatically admissible, insisting that court rules of evidence relating to hearsay prohibited the admission of the declaration. The two individuals argued that at least some authentication or foundation must be required. The Court in *Ingram* rejected the individuals' arguments, and responded to the same in relevant part at pages 524-525, stating:

> Generally speaking, administrative hearings proceed under significantly relaxed rules of evidence. *See, e.g.*, RCW 34.05.452(2) (rules of evidence are "guidelines" under Administrative Procedure Act); *Vasquez*, 148 Wn.2d at 316 (evidentiary rules are relaxed at implied consent hearings). Informal administrative hearings often permit the admission of hearsay evidence. *See, e.g.*, RCW 34.05.452(1). By their own provisions, the rules of evidence apply only to court proceedings. ER 101, 1101. This court, which promulgates the rules of evidence, has authority to prescribe rules for courts, but authority to prescribe rules for administrative proceedings has not been expressly delegated to the judicial branch. RCW 2.04.190.
>
> ¶19 The legislature intentionally established a relatively informal and certainly streamlined administrative process for implied consent hearings. One purpose of the implied consent law is to avoid lengthy litigation of license suspension and revocation proceedings. *See Vasquez*, 148 Wn.2d at 316-18. The hearings are limited in scope, may be held telephonically, and are held before an agency employee who is not required to have legal training. *See id.* at 314-15 (citing former RCW 46.20.308(8), .329 (1999)). This streamlined procedure is consistent with allowing relevant evidence without regard to the highly technical rules governing hearsay and foundation.
>
> ¶20 Much of the evidence that the legislature has declared may be considered by the hearing officer during implied consent hearings is, by its nature, hearsay evidence. The officer's sworn report, the department's records, and other documentation that the hearing

officer may consider may be hearsay evidence. RCW 46.20.332. The hearing officer is permitted to issue subpoenas directing persons to produce designated books, documents, or things under the person's control. RCW 46.20.308(8); former WAC 308-103-150(3), (8). Such books or documents may be hearsay evidence. With this in mind, we find the trial court's conclusion that the officer is the only witness authorized to testify via sworn report or declaration is unsupported by the statutes and regulations as a whole. Under the trial court's interpretation, the state toxicologist would have to testify in person. Such a conclusion is inconsistent with the streamlined and informal implied consent law. *See Vasquez*, 148 Wn.2d at 314-15.

See also *Goldsmith v. Dep't of Social & Health Svcs.*, 169 Wn. App. 573, 585, 280 P.3d 1173 (2012) ("Administrative hearings proceed under relaxed rules of evidence.")

While the formality and purpose of the proceedings before the OIC, and the likelihood that the OIC Presiding Officer has legal training, is different than the implied consent hearings in *Ingram*, similar to what the Court in *Ingram* concludes, the use by the OIC and First American of declarations in this matter is permissible. The facts in this matter are distinguishable from those in *Stone* where the right to confront witnesses was deemed paramount, since this matter does not involve the expulsion of a student from school and his or her loss of educational opportunity. Rather, this case involves proposed monetary fines against First American for alleged violations of insurance regulations. As *Ingram* and *Goldsmith* suggest, and WAC 284-02-070(2)(d) provides, administrative proceedings before the OIC proceed under relaxed rules of evidence, and are informal in nature.

While I conclude that both the OIC and First American can use declarations, I make no conclusion as to whether such evidence is hearsay under ER 801(c), or whether it is admissible under the standard articulated in RCW 34.05.452, while mindful of the standard for findings of fact stated in RCW 34.05.461(4). If and when declarations are proposed as evidence, the requisite statutory benchmarks can be applied.

2. Depositions of parties and witnesses.

RCW 34.05.446(2) explains that the OIC may by rule determine whether or not discovery is to be available in adjudicative proceedings, and if so, which forms of discovery may be used. The OIC has done so by codifying WAC 284-02-070(2)(e) which states:

> 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).

CR 32 addresses the use of all or part of a deposition at trial, assuming admissible under the Rules of Evidence, against any party present or represented at the taking of the deposition or given notice thereof.

CR 32(a)(1) states among other things that *any party* may use *any deposition* for the purpose of contradicting or impeaching the testimony of deponent as witness. So, if one is deposed and subsequently a witness at a hearing before the OIC, either the OIC or First American may use that person's earlier deposition testimony to contradict or impeach that person's witness testimony.

CR 32(a)(2) states that the deposition of *a party*, or anyone who at the time the deposition is taken is an officer, director, or managing agent, or one designated under CR 30(b)(6) or CR 31(a) to testify on behalf of a public or private corporation, partnership, association, or governmental agency which is *a party*, may be used by *an adverse party* for any purpose. So the OIC or First American Title may use the deposition of those that qualify under CR 32(a)(2) for any purpose.

CR 32(a)(3) states that the deposition of *a witness, whether or not a party*, may be used *by any party for any purpose* if the court finds: A) that the witness is dead; (B) that the witness resides out of the county and more than 20 miles from the place of trial, unless it appears that the absence of the witness was procured by the party offering the deposition or unless the witness is an out-of-state expert subject to subsection (a)(5)(A) of this rule; (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used. CR 32(a)(3)(B) is likely to have applicability here in these proceedings, given the mention in the OIC's request for hearing of SCCAR and persons involved with that organization. Under this provision, the OIC and First American may use the deposition of a witness (whether or not a party), for any purpose, provided the witness resides outside Thurston County and more than 20 miles from the place of trial (i.e., Tumwater, Washington), unless the person offering the deposition procured the witness' absence.

Consistent with WAC 284-02-070(2)(e), the OIC and First American will use any deposition(s) consistent with CR 32 in its entirety and the specific provisions summarized above.

Having resolved the preliminary issues raised by the parties at the first prehearing conference, I enter the following Order:

YOU ARE HEREBY NOTIFIED that an evidentiary hearing is scheduled for two days: Monday, March 28, 2016 and Tuesday, March 29, 2016, beginning at 9:00 a.m., Pacific Time, both days. It will be held at the Office of the Insurance Commissioner, 5000 Capitol Blvd., Tumwater, WA. The purpose of the hearing is to consider whether a fine should be levied against

First American for alleged violations of RCW 48.29.210(2) and regulations in WAC Ch. 284-29 concerning trade association events.

By March 21, 2016, the parties shall exchange copies of witness and exhibit lists, briefs and any other documents they expect to offer into evidence at the evidentiary hearing. Any witness and exhibit lists, briefs and documents so provided should also be provided to the Hearings Unit at the address below.

The hearing will be governed by the Administrative Procedure Act, Chapter 34.05 RCW, and the model rules of procedure contained in Chapter 10-08 WAC. All parties may be represented and may examine witnesses, respond, and present evidence and argument on all relevant issues.

A party who fails to attend or participate in the hearing or another stage of this proceeding may be held in default in accordance with Chapter 34.05 RCW. *See,* RCW 34.05.434(2)(i).

William Pardee, Presiding Officer, has been designated by the Insurance Commissioner to hear and determine this matter. The hearing will be held under the authority granted by the Insurance Commissioner under Chapter 48.04 RCW.

Pursuant to WAC 284-02-070(1)(c), accommodation will be made for persons needing assistance due to difficulty with language or disability. Further, pursuant to WAC 10-08-040(2) and in accordance with Ch. 2.42 RCW, if a limited English speaking or hearing impaired or speech impaired party or witness needs an interpreter, a qualified interpreter will be appointed. There will be no cost to the party or witness therefore, except as may be provided by Ch. 2.42 RCW. A Request for Accommodation form, with instructions, is attached to the original of this Notice.

All case related documents and correspondence shall be directed to the Hearings Unit, Office of Insurance Commissioner, P.O. Box 40255, Olympia, Washington 98504-0255. All interested individuals and entities who have questions or concerns concerning this proceeding should direct them to the Hearings Unit paralegal, Dorothy Seabourne-Taylor, at the same address. Ms. Seabourne-Taylor's telephone number is (360) 725-7002.

Dated: January 5, 2016

WILLIAM PARDEE
Presiding Officer

Declaration of Mailing

I declare under penalty of perjury under the laws of the State of Washington that on the date listed below, I mailed or caused delivery through normal office mailing custom, a true copy of this document to the following people at their addresses listed above: Jerry Kindinger, Mike Kreidler, James T. Odiorne, J.D., CPA, Doug Hartz, AnnaLisa Gellermann and Marcia G. Stickler.

DATED this 5th day of January, 2016.

DOROTHY SEABOURNE-TAYLOR

OFFICE OF INSURANCE COMMISSIONER
HEARINGS UNIT
Fax: (360) 664-2782

To request an interpreter, complete and mail this form to:

Presiding Officer
Hearings Unit
Office of Insurance Commissioner
P.O. Box 40255
Olympia, WA 98504-0255

REQUEST FOR ACCOMMODATION FOR LANGUAGE OR DISABILITY

I am a party in Matter No. 15-0166 before the Insurance Commissioner.

I request accommodation for the following disability (insert your disability):

_____

I request an interpreter for myself or a witness who will be testifying at the evidentiary hearing.

Please check the statements that apply:

☐ I am a non-English-speaking person and cannot readily speak or understand the English language. My primary language is _____ (insert your primary language). I need an interpreter who can translate to and from the primary language and English.

☐ I am unable to readily understand or communicate the spoken English language because:

- ☐ I am deaf.
- ☐ I have an impairment of hearing.
- ☐ I have an impairment of speech.

[Please state below or on the reverse side any details which would assist the Commissioner or Presiding Officer in arranging for a suitable accommodation for your disability, an interpreter or in providing appropriate mechanical or electronic amplification, viewing, or communication equipment.]

Date: _____ Signed: _____

Please print or type your name: _____
Address: _____
_____
Telephone: _____