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Depositions in Insurance Coverage and Bad Faith Litigation: 30(b)(6) and Fact Witnesses

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Depositions in Insurance Coverage and Bad Faith Litigation: 30 (b) (6) and Fact Witnesses

Sherilyn Pastor and Alan Palmer Jacobus

February 23, 2021

STRAFFORD CONTINUING EDUCATION WEBINARS

Sherilyn Pastor

SHERI PASTOR is the Practice Leader of McCarter & English's Insurance Recovery Group. She has secured, by judgment and settlement, hundreds of millions of dollars in insurance assets for corporate policyholders. She also assists clients in assessing their potential risks and in analyzing their insurance programs.

Ms. Pastor is President of the American College of Coverage and Extracontractual Counsel. She is the past Chair of the ABA's Insurance Coverage Litigation Committee (policyholder side) and a recipient of the YMCA's Tribute to Women in Industry award. Ms. Pastor was named one of New Jersey's "Best 50 Women in Business" by NJBIZ.

Alan Palmer Jacobus

- Alan Palmer Jacobus is a commercial litigator practicing in San Francisco, California. Mr. Jacobus is an experienced trial lawyer and litigator of insurance coverage and bad faith disputes. He has a multi-jurisdictional practice and is licensed to practice in California, Illinois, and Louisiana. Mr. Jacobus was the Chair of the Insurance Section of Bar Association San Francisco for 2019 and still proudly serves on its Executive Committee.

Disclaimer

- The views expressed by the participants in this program are not those of the participants' employers, their clients, or any other person or organization. The opinions expressed are academic in nature and are not legal, regulatory, or risk management advice. The views presented are for educational purposes only, and provided for use only during this program.

Why Is This Topic Important?

- Depositions are a key trial and settlement preparation tool
- Careful preparation can be valuable / mistakes can be critical
- Planning to take and defend depositions is key
- Assumptions as to confidentiality of information may be incorrect
- Not just a strategic concern; it is also an ethical one
- May change trial strategy
- May change settlement strategy

Main Topics Covered

- Taking and defending depositions in insurance coverage and bad faith actions
- Disputes over privileged or confidential information
- Overall theme—discovery, especially depositions, and confidentiality ***must*** be considered and ***planned for*** at ***every*** stage of the case

Perceptions of Current Judicial Attitude Toward Discovery

- Pendulum has swung
- Abuses are less tolerated
- Includes overbroad discovery requests
- Includes evasive discovery responses
- Informal conferences and resolution

Hypothetical Facts

- Insured: Enviro-Friendly Dry Clean Company
- Insurer: Superlative Insurance Corporation
- Policy: Commercial General Liability Policy
- The claim: Flowers, Inc., a flower distributing company with 20 employees, sued Enviro-Friendly, claiming that chemicals from Enviro-Friendly's property are seeping through the ground and onto Flowers, Inc.'s property.

PART I
Fact and Entity Depositions

Introduction: Role of Fact Witnesses in Coverage and Bad Faith Litigation

- Knowledgeable of the facts relating to coverage and bad faith
- Insurer witnesses
- Policyholder witnesses
- Third-party witnesses

Identifying Fact Witnesses (Also Checklist for Entity Deposition Notice)

- Claims file
- Former employees of adversary? (*Jackson v. Ingersoll-Rand Co.*, 42 Cal. App. 4th 1163, 50 Cal. Rptr. 2d 66 (1996))
- Policy
- Underwriters
- Claims handlers
- Communications with auditors or reinsurers
- Public filings

Identifying Fact Witnesses (Continued)
(Also Checklist for Entity Deposition Notice)

- Similar claims
- Manuals / statutes (or regulations)
- Automated claims adjusting programs
- Policyholder's files
- Third-party witness files
- Investigator's files
- Discovery responses

Taking the Fact Witness Deposition

- Limits on number of depositions
- Notice / Timing
- Preparation
  - Know what needs to be proved under the policy and regarding bad faith
  - More than just the policy language—cases interpreting the language
- Cover authentication *and* hearsay issues for documents

Defending the Fact Witness Deposition

- Representing current employees (*Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981))
- Representing former employees (*In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litigation*, 658 F.2d 1355 (9th Cir. 1981); *cf. Clark Equip. Co. v. Lift Parts Manf'g Co.*, 1985 WL 2917 (N.D. Ill. Oct. 1, 1985))
- Other witnesses?

Introduction: Role of Entity Representative Depositions in Coverage and Bad Faith Litigation

- Fed. R. Civ. P. 30 (b) (6):

Notice or Subpoena Directed to an Organization. In its notice or subpoena, a party may name as the deponent a[n] entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. [. . . .]

Role of Entity Representative Depositions in Coverage and Bad Faith Litigation--Keys

- "[R]easonable particularity"
- "[I]nformation known or reasonably available to the organization"
- ***If properly noticed <u>and</u> questions posed properly,*** "binds" the entity

Policy Behind Entity Representative Depositions

- Entity protected against serial, cumulative, or duplicative depositions (*QBE Ins. Corp. v. Jorda Enters.*, 277 F.R.D. 676 (S.D. Fla. 2012))
- Provides remedy for the "run-around"
- Get the whole story
- Binds the entity
- Preclusive effect

Taking the Entity Representative Deposition

- Entity representative depositions (FED. R. CIV. P. 30 (b) (6))
  - Insurance companies
  - Entity policyholders
  - Third-parties
- Goals of deposition
  - Obtain information, including overall entity knowledge
  - Prepare for dispositive motions, settlement, trial
    - Impeachment at trial
  - Bind party—preclusive effect
  - Development of case themes

Taking the Entity Representative Deposition

- Timing
- Notice
  - Topics with reasonable particularity (*McBride v. Medicaloges, Inc.*, 250 F.R.D. 581 (D. Kan. 2008))
  - ***Not "person most knowledgeable"*** but prepared (*QBE Ins. Corp. v. Jorda Enters.*, 277 F.R.D. 676 (S.D. Fla. 2012))
  - Avoid burden (*Edelen v. Campbell Soup Co.*, 265 F.R.D. 676 (N.D. Ga. 2010))
  - Documents
- Confirm topics for which witness designated
- Questions outside noticed topics

Identifying Entity Representative Witnesses

- Current employee, former employee, or someone else?
  - No witness available? (*Ecclesiastes 9:10-11-12, Inc. v. LMC Holdings Co.*, 497 F.3d 1135 (10th Cir. 2007))
  - Education rather than personal knowledge is the key (*PPM Fin. Inc. v. Norandal USA, Inc.*, 392 F.3d 889 (7th Cir. 2004))
- "Professional" witness
- May be more than one witness
  - Underwriters versus claims handlers; different time periods; etc.
- ***Duty to prepare***
- Familiarity with documents (policy, underwriting file, claims file, procedures, etc.)

Defending the Entity Representative Deposition

- Duty to comply with rules
- Objections
  - Before deposition?
  - Unartfully posed questions—"you"
  - Separate depositions for person and entity
- Responding to questions outside notice
  - "Reasonably available"
- Protective order
- Preparation
  - Binders or other materials?
- Use at trial?
  - Foundation and hearsay issues (*Williams Advance Materials, Inc. v. Target Tech. Co., LLC*, 2009 WL 3644357 (W.D.N.Y. Oct. 28, 2009))

PART II
Privilege and Confidentiality

ABA Model Rule of Professional Conduct 1.6

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to comply with other law or a court order;

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Professional Responsibilities

CAL. R. PROF. CONDUCT 3-100 Confidential Information of a Client:

(A) A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client . . . .

- **CAL. BUS. & PROF. CODE § 6068 (e):**

  It is the duty of an attorney to . . . maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

Issues Not Necessarily Limited to Depositions

- Privilege and work product issue should be considered and planned for before litigation even begins
- Issues may arise during written discovery responses or disclosures
- Consider litigating the issues early
- Be careful what you ask for
- Waiver can occur by not following procedure (*Hobley v. Burge*, 433 F.3d 946 (7th Cir. 2006)

Introduction: Attorney-Client Privilege

- CAL. EVID. CODE § 954:

  [T]he client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by:

  (a) The holder of the privilege;

  (b) A person who is authorized to claim the privilege by the holder of the privilege; or

  (c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

Introduction: Attorney-Client Privilege

CAL. EVID. CODE § 954:

"'[C]onfidential communication between client and lawyer' means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons . . ., and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship."

Introduction: Attorney-Client Privilege

- State law likely to apply unless substantive law is federal (*Tompkins v. R.J. Reynolds Tobacco Co.*, 92 F. Supp. 2d 70 (N.D.N.Y. 2000))
- Federal Rule 501. Privilege in General

  The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:

  - the United States Constitution;
  - a federal statute; or
  - rules prescribed by the Supreme Court.

  But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Challenging Privilege / Protection: Waiver—Advice of Counsel

- Insurer claims its actions were reasonable based on advice its counsel provided
- *State Farm Mut. Auto. Ins. Co. v. Superior Court (Johnson Kinsey, Inc.)*, 228 Cal. App. 3d 721, 724, 279 Cal. Rptr. 116, 117-118 (1991)

Challenging Privilege / Protection: Waiver—Offensive Use

- Party claims relief, while withholding evidence based on privilege
- *Pillsbury Winthrop Shaw Pittman LLP v. Brown Sims, P.C.*, 2010 WL 56045 (S.D. Tex. Jan. 6, 2010)

Policy Behind the Attorney-Client Privilege

- The privilege "protect[s] not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice" (*Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981))
- A client cannot protect from disclosure information or documents otherwise discoverable by claiming the attorney-client privilege shields them from production, solely because the information or documents were communicated to an attorney (*Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1995))

Challenging Privilege / Protection: Claims Handling Activities

- Privileged in the first place? (*Chicago Meat Processors, Inc. v. Mid-Century Ins. Co.*, 1996 WL 172148 (N.D. Ill. Apr. 10, 1996); *cf. Aetna Cas. & Sur. Co. v. Superior Court (Pietrzak)*, 153 Cal. App. 3d 467, 200 Cal. Rptr. 471 (1984))
  - *Boone v. Vanliner Ins. Co.*, 91 Ohio St. 209, 744 N.E.2d 154 (2001)
  - *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254 (Del. 1995)
  - *State Farm Mut. Auto. Ins. Co. v. Lee*, 199 Ariz. 52, 13 P.3d 1169 (2000)

Challenging Privilege / Protection: Common Interest Doctrine

- *Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co.*, 144 Ill. 2d 178, 579 N.E.2d 322, 161 Ill. Dec. 774 (1991)
- *W. States Ins. Co. v. O'Hara*, 357 Ill. App. 3d 509, 828 N.E.2d 842, 293 Ill. Dec. 532 (2005)
- "[F]undamentally unsound?" *Bituminous Cas. Corp. v. Tonka Corp.*, 140 F.R.D. 381 (D. Minn. 1992)

Challenging Privilege / Protection: Cooperation Condition

- *Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co.*, 144 Ill. 2d 178, 579 N.E.2d 322, 161 Ill. Dec. 774 (1991)
- *EDO Corp. v. Newark Ins. Co.*, 145 F.R.D. 18 (D. Conn. 1992)

Work Product Protection

- FED. R. CIV. P. 26 (b) (3):

Trial Preparation: Materials.

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents . . . that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

Work Product Protection

- Common law roots (*Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 2d 451 (1946))
  - May be broader than attorney-client privilege—"mental impressions"
- Analysis is frequently similar to the attorney-client privilege
- "[A]nticipation of litigation or for trial" (*DeNova v. United States DOL* (*In re Kaiser Aluminum & Chem. Co.*), 214 F.3d 586 (5th Cir. 2000); s*ee also OneBeacon Ins. Co. v. T. Wade Welch & Assoc.*, 2013 WL 6002166 (S.D. Tex. Nov. 12, 2013))
- "[P]roportional" (FED. R. CIV. P. 26 (b) (1))

Work Product Protection: What Does It Protect?

- Mental processes of the attorney, providing a protected area within which he can analyze and prepare his client's case (*Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 2d 451 (1946))
- Can be broadly applied (*Sporck v. Peil*, 759 F.2d 312 (3d Cir. 1985) and *In re LTV Sec. Litigation*, 89 F.R.D. 595 (N.D. Tex. 1981) (holding counsel's organization of non-privileged documents is protected from disclosure because it would provide insight into counsel's theory of the case))

Work Product Protection: Nuts and Bolts

- Establish a bright line
  - Timing
  - Definition of assignments
  - Division of assignments

Work Product Protection: Waiver Issues?

- Unlike attorney-client privilege, work-product protections may not be waived by disclosure to third-parties (*See In re Grand Jury Proceedings*, 43 F.3d 966 (5th Cir. 1994); *Shields v. Sturm Ruger & Co.*, 864 F.2d 379 (5th Cir. 1989))
  - Fundamental distinction with attorney-client privilege waiver
- Sword and shield waiver (*Pillsbury Winthrop Shaw Pittman LLP v. Brown Sims, P.C.*, 2010 WL 56045 (S.D. Tex. Jan. 6, 2010))

Conclusion

- Preparation to take and defend depositions is key in coverage and bad faith litigation is key
- Litigation over asserted privileges or protections is increasingly likely and should be expected

Thank you

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