



ALFA International
THE GLOBAL LEGAL NETWORK

PLACE YOUR BETS!

Managing Risk in an Evolving Insurance Landscape

2025 Insurance Roundtable

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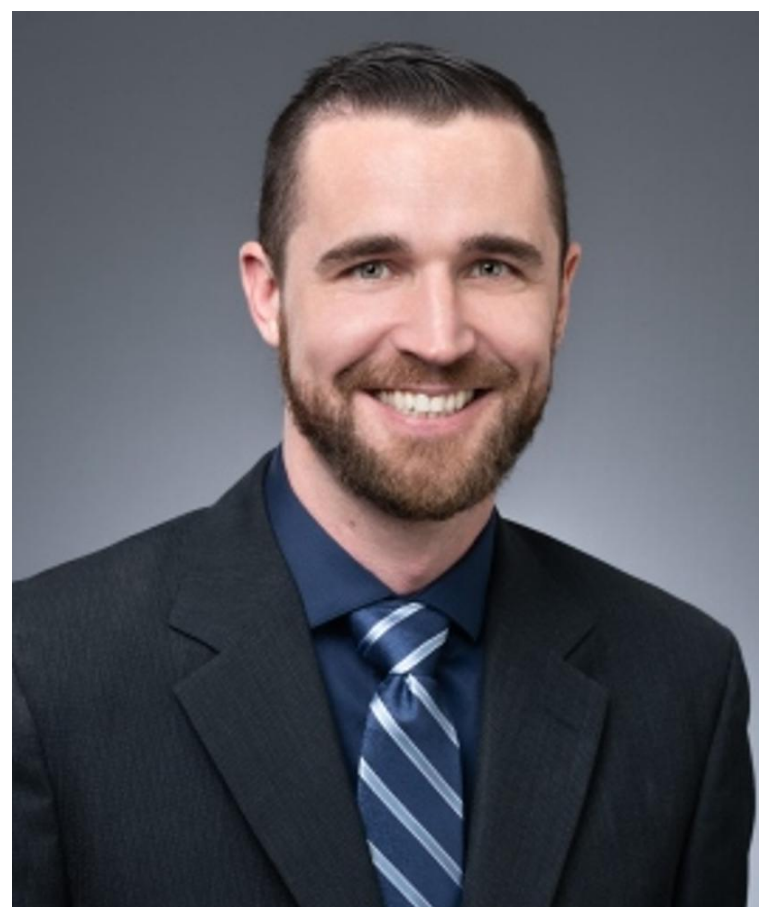
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Doubling Down – Strategies for Responding to Discovery on Discovery



ALFA Panel



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OUTLINE OF ISSUES

- General Overview of the Issues
- Targeted written discovery
- Deposition of individuals with knowledge
- Depositions of Persons Most Knowledgeable
- Case Law Examples in Practice
- General Tips and Practice Pointers





Discovery on Discovery Conceptually

- The concept of “Discovery on Discovery” pertains to litigation efforts made by a party to a case to inquire or learn about *how* one party to the case coordinated its response to a prior discovery effort (whether written discovery or depositions)
- By example – ACME Insurance Company responds to a Plaintiff’s Written Interrogatories and Requests for Production, which then leads to the Plaintiff taking the deposition of the individual who signed verifications for the written discovery responses. Plaintiff’s counsel asks myriad questions about *who* that individual spoke to in order to identify responsive documents, *where* they searched for records and information, etc.





The Dispute on Scope

- Opponents of discovery on discovery claim it exceeds the scope of the Federal Rules of Civil Procedure. They also argue that discovery on discovery is impractical and wasteful because it forces a party to endure overly burdensome requests and incur unnecessary expenses.
- Some suggest that discovery on discovery is proper because discovery is open to any nonprivileged matter relevant to any party's claim or defense.





Attorney-Client Privilege Implications

- The Attorney-Client Privilege insulates Acme from much of the targeted discovery – i.e. any correspondence to which outside counsel was copied for the purpose of privilege.
 - This factor memorializes the importance of keeping counsel involved and copied to any e-mails exchanged internally by a company
 - Utilize counsel as your resource for coordinating the internal search for information and records!





Attorney-Work Product Doctrine

- The Scope of Attorney Work Product is largely State specific
- But information generated by counsel during or in anticipation of litigation is generally protected with limited exceptions
- It is rare that a document or communication would fall within the gambit of “Work Product” but not be within the scope of the Attorney-Client Privilege, but counsel should be mindful of the difference for navigating these issues





Scope of Discovery

- Federal Rule 26(b)(1) clarifies that “Parties may obtain discovery regarding ***any nonprivileged matter that is relevant*** to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake ...Information within this scope of discovery ***need not be admissible*** in evidence to be discoverable.”
- Many states have adopted slightly different approaches, but generally discovery is incredibly broad.





How it Starts

- ACME Insurance Corporation is sued for breach of the policy and bad faith. The insured Plaintiff serves written discovery seeking all persons with knowledge, and all claims documents relating to insurance claims handled by ACME which involve similar allegations of underlying harm. ACME serves a verified written discovery responses attesting it has no responsive documents (or produces responsive documents of claims it deem similar).
- Plaintiff then pursues discovery on the process undertaken to identify responsive documents and information





Written Discovery on Discovery

- After the initial set of discovery, Plaintiff serves interrogatories asking something to the effect of:

“Identify all persons you communicated with at ACME Insurance Corporation to locate documents responsive to Plaintiff’s Request for Production of Documents (set one).”

“Identify all e-mail accounts searched in order to locate documents responsive to Plaintiff’s Request for Production of Documents (set one).”

“Describe your investigation to identify the information responsive to Plaintiff’s Request for Production of Documents (set one)”





Depositions

- After the initial set of discovery, Plaintiff serves Deposition Notices for the signatory of the discovery or the company's Person Most Knowledgeable.
- Categories of Examination samples:

“the collecting and identification of all documents produced by Acme Insurance Corp. in response to Plaintiff's Request for Production of Documents (set one).”

“all persons who participated in the collecting and identification of all documents produced by Acme Insurance Corp. in response to Plaintiff's Request for Production of Documents (set one).”





PMK Depositions

- Testimony is binding upon the company with respect to the categories of examination noticed
- Where does the relevant inquiry end
- Privilege v. Discoverable Information
- What was searched, how the search was performed, and how responsive documents were identified are, typically, discoverable.
- Electronic Discovery Issues





Case Law Examples in Practice

- *Alley v. MTD Products, Inc.*, 2018 WL 4689112, W.D. Penn. filed 9/28/2018
 - Perfect example of a PMK Deposition Notice seeking “Discovery on Discovery” which was met with a Motion to Protective Order
 - Holding:

“Despite Plaintiff’s characterization of its deposition notice, the Court finds that it is an impermissible request for information on Plaintiff’s discovery processes. Other courts faced with discovery disputes regarding requests for information on document storage and retention have found that these requests are impermissible. [Citations Omitted] Therefore, the Court finds that topics one through nine in Plaintiff’s Amended Rule 30(b)(6) Notice of Deposition (ECF No. 57, Ex. B) seek improper discovery on discovery.”





Case Law Examples in Practice – *Cont.*

- *Koninklijke Philips N.V. v. Hunt Control Systems, Inc., 2014 WL 1494517, D. New Jersey, Filed April 16, 2014*
 - Deposition was sought of an IT employee regarding whether the party was using appropriate search tools for ESI Discovery.
 - Holding -- Protective Order blocking discovery was granted:

“First, the Court finds that Philips has made adequate representations to this Court that its approach to conducting and gathering ESI discovery materials is reasonable. Likewise, the Court finds that Hunt has failed to make the requisite showing that Philips' production has been materially deficient.... Lastly, the Court is not persuaded by Hunt's argument that the benefits of the deposition would likely outweigh the burden associated with it.”





Case Law Examples in Practice – *Cont.*

- *Sporck v. Peil*, 759 F.2d. 312 (3d Cir. 1985)
 - Selection process of producing documents by counsel
 - Holding – Process of identifying and producing documents is protected by the Work Product Doctrine:

“Because identification of the documents as a group will reveal defense counsel's selection process, and thus his mental impressions, petitioner argues that identification of the documents as a group must be prevented to protect defense counsel's work product.”





General Tips and Pointers

- Involve counsel in the e-mail exchanges and discussions regarding the identification process of responsive documents
- Seek a protective order when faced with “discovery on discovery”
- If ESI is going to be a component of your case, try to remove the case to Federal Court if Subject Matter Jurisdiction exists
- Move to quash subpoenas where necessary
- Identify any pertinent case law in the subject jurisdiction
- Lean on counsel for input during the discovery process





Questions?

