

INTERVIEWING EMPLOYEES AND FORMER EMPLOYEES  
OF A DEFENDANT OR PROSPECTIVE DEFENDANT

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During the loss scene investigation, subrogation counsel or his or her investigator or adjuster will wish to interview witnesses. Some of the witnesses at the loss site may be employees or representatives of adverse or potentially adverse parties. In most cases, these witnesses will not already have retained counsel.

An adjuster is free to interview any witness without limitation. An investigator may be limited in interviewing witnesses. If an investigator is a “nonlawyer assistant”, then the investigator is governed by the same ethical guidelines as an attorney. Rule 5.3 of the American Bar Association (“ABA”) Model Rules of Professional Conduct, entitled “Responsibilities Regarding Nonlawyer Assistants”, imposes restrictions on nonlawyer assistants:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner in a law firm should make reasonable efforts to ensure that the firm has measures in effect giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer should make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for the conduct of such person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
  - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
  - (2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and in either case knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ABA Rule 5.3.

Nonlawyer assistants are defined in the commentary to Rule 5.3:

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student intern, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services.

Comment, ABA Rule 5.3. Investigators are included in this definition. However, an ABA formal opinion has commented that an "investigator" is limited to investigators who "act as the lawyer's 'alter-ego.'" ABA Comm. on Ethics and Professional Responsibility Formal Op. 95-396, p. 1 (1995).

The ABA Committee further stated that:

[I]f the lawyer has direct supervisory authority over the investigator, then in the context of contacts with represented persons, the lawyer would be ethically responsible for such contacts made by the investigator if she had not made reasonable efforts to prevent them (Rule 5.3(b)); if she instructed the investigator to make them (Rule 5.3(c)(1)); or if, specifically knowing that the investigator planned to make such contacts she failed to instruct the investigator not to do so (Rule 5.3(c)(2)).

The Committee believes, however, that if, despite instruction to the contrary, an investigator under her direct supervisory authority (or one not under such authority) made such contacts, she would not be prohibited by Rule 5.3 from making use of the result of the contact.

ABA Comm. on Ethics and Professional Responsibility Formal Op. 95-396, p. 17. If the investigator is retained by the attorney, counsel may have direct supervisory authority over the investigator. If so, the investigator falls within the definition of a nonlawyer assistant and would be governed by the same ethical guidelines as an attorney.

There is no mention in Rule 5.3, its comment, or elsewhere that an adjuster is considered a nonlawyer assistant. Accordingly, there is no proscription against an adjuster speaking with any witness.

If the adjuster or an investigator does speak with a witness, then Rule 26 of the Federal Rules of Civil Procedure affords a nominal privilege for the witness statement obtained. Of course, this privilege can be defeated by the exceptions of Rule 26, as discussed below, or through the adjuster's deposition and requests for the adjuster's files.

If an investigator is a nonlawyer assistant and attempts to interview a witness at the loss scene who is adverse or potentially adverse, then the investigator must follow the guidelines of Rule 4.3 of the ABA Model Rules of Professional Conduct, entitled "Dealing With the Unrepresented Person and Communicating with One of Adverse Interest". Of course, this is equally applicable to counsel. The Rule provides:

- (a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.
- (b) During the course of a lawyer's representation of a client, a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.
- (c) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer should make reasonable efforts to correct the misunderstanding.

#### Rule 4.3.

In the event that some of the adverse or potentially adverse witnesses are already represented by an attorney, then subrogation counsel and his or her nonlawyer assistant are prohibited from engaging in any communication with that witness. Rule 4.2 of the American Bar Association ("ABA") Model Rules of Professional Conduct, entitled "Communication with Person Represented by Counsel", governs a lawyer's contact with an employee of a party already represented by an attorney. The Rule provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Rule 4.2.

If these witnesses are former employees of an adverse or potentially adverse party who is represented by counsel, then subrogation counsel and his or her nonlawyer assistant may be permitted to interview these witnesses provided certain guidelines are followed. Counsel also must first ascertain whether the former employee has retained counsel, and if so, contact should be terminated immediately. The attorney also must follow these additional guidelines that were recently described by the United States District Court for the Middle District of Florida in NAACP v. State of Florida, 2000 WL 1725228 \*4 (M.D. Fla. September 21, 2000) which, in citing to Rule 4.2, permitted an ex-parte communication with former employees of an adverse employer:

- a) Plaintiffs' counsel shall identify themselves immediately upon contacting any former employees as the attorney representing the Plaintiffs in the instant suit and specify the purpose of the contact;
- b) Plaintiffs' counsel shall ascertain whether the former employee is associated with the [defendant employer] or is represented by counsel. If so, the contact must terminate immediately;
- c) Plaintiffs' counsel shall advise the former employee that participation in the interview is not mandatory and that he/she may choose not to participate or to participate in the presence of personal counsel or counsel for the [defendant employer]. Counsel must immediately terminate the interview if the former employee advises he/she does not wish to continue;
- d) Plaintiffs' counsel shall advise the former employee to avoid disclosure of privileged material. In the course of the interview, Plaintiffs' counsel shall not attempt to solicit privileged information and shall terminate the interview

should it appear that the former employee may reveal privileged matters;

- e) Plaintiffs' counsel shall create and preserve a list of all former employees contacted, the date(s) of contact(s), the length of the contact(s), and shall maintain and preserve any and all statements, notes or other evidence of such contacts whether by phone or in person;
- f) Any information, communications, or other evidence obtained by Plaintiffs' counsel in the course of interviewing former employees of the [defendant employer] may not later be used by the Plaintiffs against the [defendant employer] as a binding admission for the purposes of Rule 801(d)(2)(D) of the Federal Rules of Evidence; and
- g) Should the [defendant employer] have reason to believe that a violation of either the ethical rules or this Court's order has occurred, the [defendant employer] shall file an appropriate motion with this Court.

Id. at \*5.

Federal Rules of Civil Procedure 26 governs the discoverability of witness statements taken in the course of a loss scene investigation. Rule 26(b) states in pertinent part:

... a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order.

F.R.C.P. 26(b). This rule is aimed at protecting the mental impressions and legal theories of an attorney and has its origins in Hickman v. Taylor, 329 U.S. 495, 510-11 (1947).

Pursuant Rule 26(b)(3), witness statements taken by an attorney are protected as work-product. In re Convergent Technologies Second Half 1984 Securities Litigation, 122 F.R.D. 555 (N.D. Cal. 1988). The first step in determining under what circumstances a statement may or may not be discoverable is an examination of the statement itself. An attorney's notes of an interview, as distinguished from a verbatim transcript or first person statement, are properly treated as opinion work-product and are not discoverable. The Director of the Office of the Thrift Supervision v. Finson & Elkins, L.L.P., 168 F.R.D. 445 (D. D.C. 1996); and In re Grand Jury Investigation, 599 F.2d 1224 (3d Cir. 1979). Rule 26(b)(3) define a statement as:

(A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

If the document in a party's possession is a statement pursuant to Rule 26(b)(3), as opposed to attorney notes, it is discoverable under three circumstances. The first circumstance is a situation where the party seeking discovery is able to establish "a substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." F.R.C.P. 26(b)(3). As far as witness statements are concerned, a substantial need is shown if the party seeking production establishes that the witness is unable to recall significant aspects of what he witnessed. Phillips v. Dallas Carriers Corp., 133 F.R.D. 475 (N.D. N.C. 1990).

A substantial need is also shown when a witness is no longer available to testify. United States v. Davis, 131 F.R.D. 391 (S.D. N.Y. 1990). See also Hamilton v. Canal Barge Company, Inc., 395 F. Supp. 975 (E.D. La. 1974) (court permitted discovery of eyewitness

statements to an accident taken on day of accident by insurance company's adjuster where injured party no longer alive to give his account of accident); Copperweld Steel Co. v. Demag-Mannesmann-Bohler, 578 F.2d 953, 963, n. 14 (3d Cir. 1978) (upholding court order to compel production of plaintiff's counsel's memorandum regarding interview with now-deceased witness whom defendant had no chance to interview prior to his death); and In re Grand Jury Investigation, 599 F.2d at 1331-33 (finding sufficient need to overcome work product when memorandum sets out content of an interview with deceased employee).

The second circumstance is a statement made by a party. A statement made by a party is always discoverable and there is no requirement of showing substantial need. F.R.C.P. 26(b)(3).

The third exception is that a non-party may obtain his or her statement without a showing of substantial need. Id. If the non-party witnesses request their statements, then the attorney is obligated to produce them. If the attorney does not produce the statements to the non-parties, then the non-parties have standing to move for a court order and are entitled to an award of expenses. Id.

The courts are split as to whether the non-party witness may share and/or produce the statement to other persons. For example, in Convergent Technologies, supra., the court held that a non-party is entitled to a copy of his own statement. Convergent Technologies, 122 F.R.D. at 559. However, the court held that the non-party may not give it to opposing counsel. In Hirstein v. American Motors Corp., 112 F.R.D. 436 (N.D. Ind. 1986), the court held that a defendant had to provide witnesses with copies of their statements pursuant to Rule 26(b)(3) in a products liability action. The court, however, also held that the defendant was not entitled to a protective order preventing the witnesses from providing counsel for plaintiff with copies of the statements.



Accordingly, a witness statement taken by subrogation counsel is protected in federal court as attorney work product unless a party requesting the witness statement can demonstrate a substantial need for it. If the statement is from a party in a case, the statement is discoverable. Finally, if the statement was made by a non-party witness, that non-party may obtain the statement but there is a split of authority on whether the non-party can then turn the statement over to opposing counsel.

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