

LEGAL, ETHICAL, AND PRACTICAL CONSIDERATIONS FOR AN INSURER'S WITNESS INTERVIEWS IN THE CONTEXT OF A FIDELITY BOND OR COMMERCIAL CRIME POLICY CLAIM INVESTIGATION

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I. Introduction

Conducting witness interviews can be one of the most important and most critical aspects of the investigation of a complex claim under a fidelity bond or commercial crime policy. Information and perspective obtained during witness interviews often reveal the true and complete facts of the claim. Moreover, the witness interviews generally provide a much broader view of the claim than many of the carefully edited and crafted documents that may make up the proof of loss or accompanying written materials.

Since witness interviews can be so critical during the investigation process, there are a number of practical, legal, and ethical issues for the investigating parties to consider. On the practical side, there are the preparation and decision making processes, including the determination of who should be interviewed, who should conduct certain interviews, and where and how certain interviews should be conducted. On the legal side, there are issues of constitutional and attorney-client privileges which may affect both the strategy of the investigation and the insurer's ability to gather information. On the ethical side, there are issues related to the representation of and potential access to particular witnesses, as well as required disclosures to witnesses. Because each of these issues can and often do significantly impact the investigative process, this article carefully examines each.

II. The Importance of The Witness Interview

Putting the human face on a complex fidelity bond claim is an important part of the investigative process. After all, it is the human component which largely forms the basis for any employee dishonesty claim, as well as most other types of fidelity bond claims. But for the dishonest conduct, robbery, forgery, or other fraudulent conduct which caused an insured to sustain a covered loss, there would be no claim on the applicable fidelity bond or commercial crime policy and, therefore, no investigation.

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The alleged wrongdoers associated with the claims, as well as various employees of the insured and other related individuals and companies, are generally the key witnesses who can properly and thoroughly explain the facts behind the schemes which allegedly resulted in losses to an insured. An insured's legal counsel or risk management professionals can draft a carefully worded presentation which neatly packages the description of an alleged loss, but the real facts and the real flavor of the situation, as well as some of the most important issues which determine coverage, may not be revealed until the opportunity to question the relevant fact witnesses who were involved is made available to the insurer.

Witness interviews will often fill in many blanks left in and answer the open questions which appear in the summary or overview of the alleged loss which is initially presented to the insurer by the insured on paper. Witness interviews will reveal the behind-the-scenes relationships which existed and will tend to explain how the circumstances which allowed a loss to occur existed. Witness interviews will provide prospective and insight into many important, but often omitted, details of the loss and coverage issues. When dealing with the most difficult questions and issues, witness interviews may be determining factors which either prove or disprove coverage.

A systematic approach to the witness interview process will assist the investigator in organizing and compiling the best way to identify, to locate, and to question the important witnesses for any claim. After all, identifying and locating the important witnesses, as well as conducting a productive interview, are the keys to a successful investigative process.

A. IDENTIFY THE KEY WITNESSES

First, it is important to properly and completely identify the key fact witnesses early in the investigation process. Knowing who the important players are will help to define the scope of the investigation and will create an outline for the structure of the overall investigation.

A starting point to identify key witnesses may be to ask the insured to compile a list of the names of the persons with knowledge of relevant facts, as well as a description of each such person and a summary of the information that person either has or is believed to have. That request would, in essence, be the equivalent of an interrogatory asking the insured to identify the fact witnesses in the case. In connection with this exercise, it is usually helpful to obtain from the insured a list of persons who were interviewed or questioned by the insured during its own

investigation, as well as a copy of any notes or reports kept by the insured from those interviews.¹

Of course, an accused wrongdoer and any persons who are alleged to be in collusion with the wrongdoer are the key witnesses who should appear on the initial investigation and interview list. Close co-workers and others who know those individuals well should also be possible interviewees. The key representatives of the insured with knowledge of the alleged loss should also appear at the top of the interviewee list. The person or persons who prepared the proof of loss, calculated the loss, and compiled the evidence of the loss should also be the subject of an interview. It is almost always important to obtain the insured's viewpoint of and description of the loss in a personal interview, rather than just on paper.

Following the identification of the alleged wrongdoers and the insured's key representatives, it is important to branch out and to analyze who the other important witnesses might be. The initial interviews with the primary witnesses involved in a loss will often serve the purpose of providing the investigator with additional names of important witnesses. The key documents which substantiate an alleged loss may also identify important fact witnesses.

In the context of this identification process, some attention should be given to a strategy for the order of the interviews. For example, it may be important to "pin down" the story of certain key witnesses before interviewing other individuals. Certain witnesses may provide the basic facts which will be necessary to interview another set of individuals. Certain fact witness interviews may provide the information which will form the basis for the questioning in later interviews. Depending upon the strategy in a given investigation, it may be helpful to work from the broadest interviews to the most narrow interviews.

B. IDENTIFY KEY DOCUMENTATION FOR THE QUESTIONING

The documents involved in a particular loss may provide the investigator with a wealth of questions which need to be answered by individuals involved in a particular claim. Therefore, a thorough review of the notice and proof of loss, plus any accompanying documents, is absolutely necessary prior to conducting any of the interviews. If claims relating to loan losses are involved, it is imperative to study the loan files first. If allegedly forged notes or other original documents are involved, a careful review of those documents is needed. Review all pertinent correspondence. Review all documents which reflect the calculation of the amount of loss. Review entity records, such as meeting minutes, audit reports, and any other available

¹When requests for these types of information and these types of documents are made, claims of privilege may be asserted by an insured. Privilege should rarely protect any such information, however. For a complete discussion of the issues which may be raised in the context of a privilege argument, *see* Section VIII of this article.

information which might provide some insight into the facts of the claim and the way in which the insured operated. Review applicable personnel files, employment records, and related documents.

All of these records will provide the framework for outlining the questions which will be necessary to ask various witnesses. Where appropriate, prepare extra copies of the pertinent documents to use just as you would utilize deposition exhibits. Use the key documents as a "road map" for the questions. Be sure to determine which witnesses have which information in connection with the key documents.

C. CONDUCT A THOROUGH INVESTIGATION

In general, include in the interview all of the questions and possible topics which could possibly be relevant in the investigation. A second interview of the witness may not be possible, as a result of many different circumstances. Therefore, it is important to try to anticipate all of the subjects which should be addressed during the first, and perhaps only, interview with a person. In addition, having time pass between interviews may disadvantage the insurer. The closer in time that the interview is conducted to the actual events in question, the better. Human memories are fragile things, and time has a way of eroding evidence and important recollections. The freshest perspective on the key facts is the most valuable one.

Additionally, including all of the important subjects during the first interview will ensure that the witness' story regarding the topics addressed will be a consistent one. If multiple interviews are conducted, the witness may have an opportunity to change his or her story or to adjust certain facts to fit theories which he or she is trying to assert. Obtaining the most candid answers possible from the insured's representatives, or any other witnesses, is always the goal.

The nature of the particular claim at issue will determine how broad the investigation needs to be. Under certain circumstances, it may be necessary to investigate the structure of the insured entity, when subsidiaries or related companies were acquired by the insured, which named insured or part of the named insured sustained the loss and how, the application process for the bond in question, including how the application questions were answered, the discovery of the claim, any prior similar incidents, the work history and employment record of any accused employees, and many other subjects. In other words, in addition to the specific facts of the loss, there may be many other related and important coverage issues which must be explored.

An investigation of concurrent criminal proceedings may also be necessary. If a suspicious activity report was filed by a financial institution, or if criminal charges have been filed or are pending, it may be necessary to determine what allegations have been made in the course of those proceedings. If any concurrent civil litigation,

bankruptcy proceedings, or other matters are ongoing, those cases may be important sources of information.

D. COMPARE STORIES OF WITNESSES

While the witness interviews may serve a primary purpose of gathering all of the basic facts involved in a claim, they may also provide some insight into the behind-the-scenes details which a proof of loss may not reveal. Comparing the stories of the various witnesses may be very helpful in determining who is being truthful and who may have a hidden agenda. Comparing the stories of the witnesses may also reveal where the gaps in the proof needed to support the proof of loss remain. Finally, comparing the stories of the witnesses will reveal where any inconsistencies exist on key issues such as the amount of loss, the discovery of the loss, the timing related to the loss and the discovery, and other related issues. These issues may be key coverage issues, depending upon the particular facts and the particular claims.

The particular knowledge which certain witnesses had, and when they had it, will often be determinative regarding issues such as discovery of loss, termination of coverage (for a particular employee and/or for the insured), and other related subjects. Comparing the stories of the witnesses on these complex subjects will often provide the interviewer with a substantial amount of information which was not otherwise disclosed in the claim documents.

III. The Structure for the Interview

Preparing for the witness interviews and analyzing the structure which will be required for the interviews are key steps in the investigation. Walking into an interview without the necessary preparation may result in a complete waste of time for both the interviewer and the interviewee. Therefore, it is important to have at least an initial plan and basic goals for each interview. The interviewer's preparation will be essential in setting the tone for the interview and letting the interviewee know that his or her time is valuable and respected.

A. BACKGROUND INFORMATION

With each witness, obtaining background information is very important. Be sure to cover basic details such as the person's full name and address, in the event you need to locate them again. Establish each person's employment history with the company in question and the relationship of the person to the other fact witnesses and to the accused employee, in the case of an employee dishonesty claim. When necessary, become familiar with the witness' educational background and special training, as well as the witness' prior employment history and record. Try to develop an understanding of the personal relationships and dynamic within the organization of the insured. Determine who reports to whom within the company structure.

Determine who had oversight responsibility for which employees. Learn about the decision-making structure of the organization and which employees had which authority. Make an attempt to gain an understanding of the motives and interests of each witness.

Quite often, background information will become very important in the investigation. Therefore, never underestimate the need to obtain that information during the initial stages of the interview. Determine with whom the witness has already spoken about the investigation or the facts involved in the claim. Compile a list of persons with whom the witness has discussed the facts of the claim. Determine why such conversations have taken place. Find out how many prior interviews the witness has given on the subject of the claim. Try to determine what the witness reported in each prior interview. Find out if the scope of the information reported by the witness has expanded or contracted over the course of the various interviews.

B. RELATIONSHIPS OF PEOPLE AND FACTS

One of the reasons witness interviews are important in the context of a complex claim investigation is that the interviews will reveal the way in which both human relationships and the facts of the claim relate to one another. During the interviews, tie the interviewee's knowledge together with the relevant facts of the case. Use the human capital which is available in the interview process to determine which individuals have relationships with others, and how the key facts tie together. Use the witness' knowledge and experience in order to build the basic information of the investigation.

Determine which witnesses have loyalties to which other persons. Try to determine basic biases. The more that the interviewer can determine about the witness, the more helpful the information obtained from that witness will be.

The interviewee may be the best source of information to determine which employees or other witnesses should have critical information about the claim. Over time, at least pieces of the basic facts which are associated with the claim will probably have been disclosed, at least inadvertently, to various individuals and witnesses. Each person may not appreciate the importance of the small piece of information which he or she has. Often, the critical role of the investigator is to piece together all of that disparate information which the various individuals have, in order to completely describe the scheme and causes of the alleged loss.

C. DETERMINING THE KEY FACTS

Cover all of the key facts and allegations of the case with each witness, as appropriate. Use the interview to determine the scope of the witness' knowledge and to focus on the relevant facts. Where it becomes clear that the witness does not know anything about the key facts of the claim itself, determine what other useful

information that person may have about other witnesses and the insured in general.

Try to establish a reliable time line and a complete description of the relevant events through the use of the witness' knowledge and memory. When necessary, use relevant documents with the witnesses to assist them in recalling the timing and sequence of events.

It is important to make sure that the key facts, as outlined in the proof of loss and accompanying documents, are verifiable through the witnesses, and that the events described in the claim documents were described in a complete and accurate fashion. Discrepancies in these critical facts should be carefully noted, because they can have a substantial impact upon the coverage analysis.

D. EXPLAINING THE KEY DOCUMENTS

Use the knowledge of the witnesses about a company's records and documents to your benefit. Utilize the witness' experience to your advantage in learning about the key documents for a case. Determine what types of documents the insured used for various purposes, and what types of documents you should be reviewing in order to completely understand the claim and the insured's procedures. Use the interviews to determine what documents you should review, but have not yet seen. Also use the interview to determine the scope of records which should exist.

Since the witnesses who are being interviewed will have most likely dealt with the relevant documents of a claim on a regular basis during their employment, they will be the best source of information to explain the documents and their significance.

E. FINDING THE UNTOLD STORY

In the scope of an investigation and the interview process, some of the best information comes, not as a result of a direct question, but as a result of a good conversation with the witness. Therefore, consider the tactic of giving the witness some leeway in answering questions. Ask open ended questions to see what additional information the witness may volunteer. The best information is sometimes obtained inadvertently.

Since the interview is likely a fact-finding mission, try to obtain all of the facts you possibly can. In the investigation stage, all facts are helpful in the sense of developing the overall complexion of the case. If there are facts which are either helpful or harmful to establishing coverage, they need to be uncovered sooner rather than later. Integral issues such as discovery and potential termination of coverage are often woven into the overall facts of the loss. Keep all of the potential coverage issues in mind when interviewing each potential witness. Follow up on related questions. Follow up on any issues which the interviewee mentions. Do not be too

rigid in following a list of prepared questions that you overlook the important details or related information which the witness may mention casually.

Try to make the witness feel at ease so that he or she will speak in a narrative, rather than being abrupt or short or responding only to specific questions. The more comfortable the witness feels, the more likely he or she is to speak freely and to disclose information about which the interviewer may not even know to ask.

F. LOCATING OTHER KEY WITNESSES

Use the knowledge of the witnesses who take part in the interviews to your benefit in identifying and locating other witnesses. The witnesses who are interviewed will probably know much better than the investigator which persons are likely to have relevant knowledge about a claim. Seek input from the witnesses by directly asking them what other persons might have information relevant to the investigation.

In addition, use the interviews with witnesses as an opportunity to obtain information about the location of other individuals who are likely to be interviewed. Witnesses will often know where to locate former co-workers, other employees, witnesses from related entities, and persons who were involved in the events which form the basis for the claim in general. The use of that informal process of locating missing witnesses may be much more successful and trying to use general investigative tools to find people who may not wish to be found.

IV. Strategic Considerations for Interviews

Strategic considerations of conducting interviews, just as strategic decisions about the examination of witnesses in jury trials, can be very important to the overall objective of obtaining complete information about a claim. Sometimes the who, where, and when of the interview process can make a big difference in the usable information which an interviewer is able to obtain. Give some thought to how to best employ all of the resources which are at the insurer's disposal in the investigation.

A. WHO SHOULD CONDUCT THE INTERVIEW

One key decision upon which to focus early in the planning process is who should conduct certain interviews. Often, the decision-making process to determine who should interview a particular witness can be as important as the content of the interview itself. Depending upon the personality of the witness, the nature of the case and the facts, and the overall circumstances of the investigation, it may be quite critical to select the proper interviewer in order to maximize the information which can be obtained from a witness.

For example, the gender and demeanor of the interviewer may have an impact upon how comfortable a witness feels and the amount of information which the witness may be willing to disclose. Therefore, the question of whether to use of either a female or male interviewer should be given some attention, depending upon the personality and identity of the witness. The personality of the interviewer should also be considered in the context of the goals of the interview. An overbearing personality or style will generally turn off many witnesses, and they may be less likely to be cooperative and to disclose information. Making a witness feel at ease may be one of the most important intangible aspects of the interview, in order to obtain as much useful information as possible from the witness.

B. LEGAL AND STRATEGIC CONSIDERATIONS FOR LAWYER AND NON-LAWYER INTERVIEWERS

Sometimes, an attorney may not be the best choice to use as the interviewer for a particular fact witness. With some witnesses, the use of an attorney may be overwhelming to the witness, and may cause the witness to be reluctant to disclose all of the important information which he or she knows. With some witnesses, the fear of the legal process may adversely affect the witness' willingness to talk. Paying attention to these types of details may pay off with a better interview and more beneficial information.

In some situations, a technical specialist or financial expert might conduct the most effective interview, depending upon the types of information which are sought from a particular witness. Representatives of an insured might be more forthcoming with a claims person or representative of his insurer, rather than an attorney retained by the insurer. Many of these issues are case specific, and it will be necessary to individually review the circumstances which are presented.

In other situations, an attorney with a pleasant demeanor and a commanding knowledge of all of the intricacies which may be involved in a complex claim will be the most productive choice for interviews. That type of person, who can set a witness at ease, but who will understand all of the nuances to explore in the claim, may have the best and most comprehensive investigation results.

When deciding what type of person to use in the interview process, it is not wise to choose a non-attorney strictly for the purpose of avoiding certain legal or ethical restrictions placed on an attorney in the course of the representation of a client. Various legal authorities indicate that using investigators or others who are working in tandem with attorneys will not diminish the ethical obligations owed by the particular interviewer to the witness.² In other words, it is arguably prohibited for an

²For a discussion of the various ethical obligations imposed on attorneys in the context of the representation of a client, including an insurer, *see* Sections VI and VII below.

attorney to engage a private investigator for the purpose of conducting an interview which the attorney is ethically prohibited from conducting.³ Those authorities indicate that the same ethical obligations exist, regardless of whether an attorney, or someone acting on behalf of an attorney, is conducting the interview.⁴

C. APPROPRIATE ROLES FOR THE INSURER'S INVESTIGATORS

An insurer's investigative team may include claims professionals, investigators, accountants or other financial experts, and legal counsel. Depending upon the facts of a particular case, all of those categories of professionals could be necessary. Each specialist may have distinct and important role to play in the course of the investigation.

For example, when interviews of the financial or accounting professionals of an insured are necessary, the accountants or financial experts on an investigative team may be wise choices of interviewers, since they will be sure to understand the technical information which the witnesses may be able to explain and communicate. Where lower level employees, who may be unfamiliar with the legal process or investigations in general, are involved, sometimes investigators might be good alternatives to conduct interviews. Where executives, in-house counsel, and other higher level representatives are involved, it may be wise to use legal counsel to conduct interviews. With sophisticated officers and employees, the most skilled questioners and the persons with the most knowledge of the intricacies of coverage issues may be the best choices as interviewers.

Depending upon the investigation, it may be advisable to use the same one or two persons to conduct all of the interviews, so that the approach used is consistent, and so that the information obtained will be weighed and evaluated by the same person or small group of individuals. In general, however, if a large investigative team is used on a particular claim, making the highest and best use of each of the members should be an important goal for the insurer.

V. Interviews of Current Employees

One category of individuals which will likely be a subject of the interview process includes the current employees of the insured submitting the fidelity bond claim. Those current employees, from the top officers or directors, to the risk management department, to any persons with knowledge of the facts relevant to the

³For example, Rule 8.4 of the Model Rules of Professional Conduct provides that "A lawyer shall not: . . . induce another to engage in conduct, or give assistance to another's conduct, when the lawyer knows that the conduct will violate these Rules." MODEL RULES OF PROF'L CONDUCT R. 8.4.

⁴MODEL RULES OF PROF'L CONDUCT R. 8.4; *Miano v. AC&R Advert., Inc.*, 148 F.R.D. 68, 81-83 (S.D.N.Y. 1993); *see also Monsanto Co. v. Aetna Cas. & Sur. Co.*, 593 A.2d 1013, 1016 (Del. 1990).

claim, will be important witnesses for various aspects of the investigation. Due to the involvement of and proximity of the employees to others involved in the claim, current employees are likely to be one of the most prolific sources of information.

Because this category of important witnesses will, by definition, be persons who are current employees of the insured, it will be important and very likely absolutely necessary to coordinate with the insured in order to contact those individuals and to interview those individuals. The insured will likely expect (and often will demand) that the insured be the intermediary for arranging all contacts with current employees. Because the individuals will be under the current direction and control of the insured, the insured should voluntarily provide its full cooperation to the insurer in order to secure the necessary interviews with those persons. The insurer should expect that cooperation, as a condition of the bond itself.

Although there is an argument in some jurisdictions that an attorney for one party might be permitted, under the ethics rules, to contact certain types or categories of employees of the other party, that approach is not advisable, especially since the employees who will likely be interviewed will be those with higher levels of responsibility and knowledge of the insured.⁵ Interviews of current employees should be coordinated through the insured, and should be conducted with the consent of the insured.

A. THE INSURED'S DUTY TO COOPERATE AND PROVIDE INFORMATION

Using the insured as a source of information and as a way to contact current employees should assist the insurer in locating individuals and scheduling interviews. Assisting the insurer, or at least cooperating fully with the insurer's investigation, is an absolute requirement placed upon the insured in the context of any bond claim, as spelled out in the applicable form policies.

For example, the standard form Financial Institution Bond⁶ imposes an absolute duty to cooperate upon the insured during the investigation of the claim by the insurer, in the following provisions:

(d) Upon the Underwriter's request and at reasonable times and places designated by the Underwriter the Insured shall

⁵See MODEL RULES OF PROF'L CONDUCT R. 4.2. For a complete discussion of Rule 4.2, and particularly its application to former employees of an adverse party, see Section VI of this article.

⁶FINANCIAL INSTITUTION BOND, Standard Form No. 24 (revised 1986) [hereinafter FINANCIAL INSTITUTION BOND] *reprinted in* STANDARD FORMS OF THE SURETY ASSOCIATION OF AMERICA [hereinafter Standard Forms].

- (1) submit to examination by the Underwriter and subscribe to the same under oath; and
- (2) produce for the Underwriter's examination all pertinent records; and
- (3) cooperate with the Underwriter in all matters pertaining to the loss.⁷

The standard Crime General Provisions of the Commercial Crime Policy⁸ impose similar obligations, including the following:

Duties in the Event of Loss: After you discover a loss or a situation that may result in loss of, or loss from damage to, Covered Property you must:

- a. Notify us as soon as possible.
- b. Submit to examination under oath at our request and give us a signed statement of your answers.
- c. Give us a detailed, sworn proof of loss within 120 days.
- d. Cooperate with us in the investigation and settlement of any claim.⁹

These duties of cooperation are important ones, which appear to have been widely recognized by the parties to the bond. Insurers should expect a willingness to cooperate and to assist, as spelled out in the applicable bond language.

The cooperation clause and the general provisions requiring the insured to submit to an examination and to provide information which are quoted above do not appear to have been widely litigated in the context of the fidelity bond and commercial crime policy.¹⁰ However, the proper interpretation of the cooperation clause should

⁷*Id.* at Section 7(d).

⁸COMMERCIAL CRIME POLICY, ISO Form (Revised 1986) [hereinafter COMMERCIAL CRIME POLICY], *reprinted in* MILLER'S STANDARD INSURANCE POLICIES ANNOTATED (Legal Research Systems, Inc. 1995).

⁹*Id.* at General Provisions.

¹⁰*See Mercedes Benz of N. Am., Inc. v. Hartford Accident & Indem. Co.*, 974 F.2d 1342, 1992 WL 207892, *3 (9th Cir. 1992) (unpublished disposition) (implicitly recognizing that the cooperation

be that it constitutes a condition precedent to coverage, and that an insured can waive its rights under the applicable bond through a material breach of that condition. The Ninth Circuit has apparently given precisely that interpretation to the cooperation clause in the context of the bond language.¹¹

Courts have consistently enforced cooperation clauses as conditions precedent in the context of liability and fire policies.¹² Similar cooperation provisions have also been enforced in environmental and director's and officer's insurance policies.¹³ If a duty to cooperate becomes an issue with a particular insured, references to these types of cases should be helpful. Their general holdings would appear to support an insurer's position that an insured's failure to cooperate is a material breach of the bond, which results in a waiver of the insured's rights under the bond. It will be necessary to investigate each jurisdiction's law on that subject, however, including the subject of whether prejudice to the insurer is required.

A good example of how the cooperation clause should be applied appears in a case involving a property policy, *Tran v. State Farm Fire & Casualty Co.*¹⁴ In *Tran*, the insured made a claim for loss of property and income as a result of an alleged burglary. The insurer requested a complete inventory from the insured, with supporting documentation to establish the value of the items on the inventory. The insured did not provide the requested information and initially refused to appear for an interview. The insurer broadened its investigation to determine whether a fraudulent claim had been submitted. The insured did not produce the additional business or personal financial records requested in the scope of that broader investigation, and in a later interview declined to answer any questions regarding those subjects.

The insurer denied coverage, and the insured filed a declaratory judgment action in state court in Washington. In the eventual appeal, the Supreme Court of Washington held that the insured forfeited coverage by failing to cooperate with the insurer during the course of the investigation.¹⁵ The court found that the information

clause in a fidelity bond is a condition precedent to coverage).

¹¹*Id.*

¹²*Powell v. U.S.F.&G.*, 88 F.3d 271, 273 (4th Cir. 1996); *Purvis v. State Farm Fire & Cas. Co.*, 901 F.2d 944, 946 (11th Cir.), *cert. denied*, 498 U.S. 899 (1990); *Tillman v. Great Am. Indem. Co. of New York*, 207 F.2d 588, 592 (7th Cir. 1953); *Allstate v. Madan*, 889 F. Supp. 374, 379 (C.D. Cal. 1995); *Pisa v. Underwriters at Lloyd's London*, 787 F. Supp. 283, 286 (D. R.I.), *aff'd*, 966 F.2d 1440 (1st Cir. 1992).

¹³*EDO Corp. v. Newark Ins. Co.*, 145 F.R.D. 18, 24 (D. Conn. 1992); *First Fidelity Bancorp v. Nat'l Union Fire Ins. Co.*, No. 90.9D-1866, 1992 WL 55742 (E.D. Penn. Mar. 13, 1992); *Waste Mgt., Inc. v. Int'l Surplus Lines Ins. Co.*, 579 N.E.2d 322, 327 (Ill. 1991).

¹⁴961 P.2d 358 (Wash. 1998).

¹⁵*Id.* at 363-65.

sought by the insurer was material to its investigation, and that the insured's failure to cooperate was prejudicial to the insurer, thereby obviating coverage.¹⁶

As a result of these conditions precedent, the insured's cooperation in the process of the fidelity bond investigation should be expected. In the event that the insured is unwilling to cooperate, then these provisions, and their legal significance, should be raised with the insured. If the insured is still unwilling to cooperate with the efforts of the insurer, then the real motives behind the actions warrant further investigation.

Moreover, if the insured's failure to cooperate continues, an insurer may be forced to institute a declaratory judgment action in the proper court in order to determine the rights of the respective parties. Where the insured's refusal to cooperate completely frustrates the insurer's ability to conduct a proper investigation, denial of the claim may be warranted, and a legal proceeding may be required in order to finally determine the rights of the parties.

B. THE INSURED'S OBLIGATION TO SUBMIT TO A SWORN EXAMINATION

As an integral part of the duty to cooperate, and as set forth in the policy language quoted above, the standard form financial institution bond and commercial crime policy both impose a duty upon the insured to submit to a sworn statement, if requested by the insurer.¹⁷ Therefore, upon a request by the insurer, the insured must provide one or more authorized representatives to testify under oath regarding the subject matter of the claim.

In the context of other types of insurance policies, the refusal of an insured to submit to a sworn examination has been held to constitute a material breach of the policy which negates coverage.¹⁸ Moreover, an insured's refusal to answer all relevant questions during a sworn interview, or the insured's claim of having no recollection of relevant information, when it does, constitutes a refusal to submit to an interview and a breach of the condition precedent of the policy.¹⁹ Therefore, evasive answers and a failure to cooperate during the examination should be treated as a failure to submit to the required examination.²⁰

¹⁶*Id.* at 365-67.

¹⁷FINANCIAL INSTITUTION BOND, Section 7(d); COMMERCIAL CRIME POLICY, General Provision (B).

¹⁸*Wood v. Allstate Ins. Co.*, 21 F.3d 741, 746 (7th Cir. 1994); *U.S.F.&G. v. Wigginton*, 964 F.2d 487, 491 (5th Cir. 1992); *Rosenthal v. Prudential Property & Cas. Co.*, 928 F.2d 493, 395 (2nd Cir. 1991); *Pervis v. State Farm Fire & Cas. Co.*, 901 F.2d 944, 947 (11th Cir.), *cert. denied*, 498 U.S. 899 (1990); *Allstate Indem. Co. v. Fifer*, 47 F. Supp. 2d 913, 197 (W.D. Tenn. 1998).

¹⁹*Wood v. Allstate*, 21 F.3d at 746.

²⁰*Id.*

An examination of the insured and the methods used to obtain the testimony of the entity could be treated similarly to a corporate representative deposition, under the Federal Rules of Civil Procedure or similar state procedural rules. By way of example, Rule 30(b)(6) of the Federal Rules of Civil Procedure, provides as follows regarding the sworn testimony of an entity, in the form of a deposition:

A party may in the party's notice and in an subpoena name as the deponent a public or private corporation . . . and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. . . The persons so designated shall testify as to matters known or reasonably available to the organization. . . .²¹

An insurer and investigator might use this model as a way to specify a list of subjects upon which testimony is requested, and might request that the insured designate representatives to provide such testimony. Providing the insured with some warning about the scope of the sworn statement will permit the insured to be prepared to testify fully about all of the relevant subjects. Absent the use of this type of notice and request, the insured's designated representative may not be capable of answering all of the relevant questions.

Of course, the use of the sworn statement may be only one small part of the insurer's investigation, or may not be used at all. An insurer may prefer to conduct informal interviews of not only the key officers or directors of an insured, but also informal interviews of the various employees with knowledge of relevant facts. It may be that the insurer does not demand a sworn statement at all in the course of a particular investigation. It may be that the insurer requests a sworn statement only after conducting many informal interviews, as a way of formalizing the insured's testimony and claim. A case-by-case analysis will be necessary to determine whether a sworn statement is necessary in the context of any given claim.

C. THE CONTEXT AND LOCATION OF INTERVIEWS

Depending upon who the witness is, there may be some strategic issues to consider in the scheduling of the current employee interviews. For example, interviews in the office of the insured may be beneficial, due to the availability and proximity of other witnesses and relevant documents. However, conducting the

²¹FED. R. CIV. PROC. 30(b)(6).

interviews in the offices of the insured may make some witnesses less willing to fully disclose information, because of the proximity of other workers or management.

Employees who are witnesses to wrongdoing by fellow employees may be in fear for their own jobs and may be reluctant to disclose what they know in order to protect themselves. For those employees, it will be important to emphasize to them how critical it is for them to make a full disclosure of all relevant facts. An interview site other than the company premises may be preferable in those situations. Similarly, where confidentiality is important, it may be preferable to conduct witness interviews of current employees, which are bound to generate a certain amount of discussion among other employees if conducted on the office premises, at another location.

D. THE INSURED'S PRESENCE IN THE INTERVIEWS

During the interviews of current employees, the insured may insist upon being present, in order to witness the questioning by the insurer. While the insured's presence may not intimidate a witness or affect the testimony given in some circumstances, it could create a difficult situation in others. Once again, an employee who fears for his or her job may not be as likely to disclose relevant knowledge in the presence of his or her own supervisor, or, even worse, the president of the company.

Additionally, the investigators should be cognizant of possible witness preparation, or even coaching, which may occur between the insured (or its legal counsel or risk management representatives) and the employee/witness. Once again, the presence of the insured during the interview may have some impact when such coaching has occurred. Full disclosure from the witness will always be the goal for the insurer, regardless of the impact of the information. Obtaining the most information possible is the best way to be certain that the adjustment of the claim is conducted in the most complete and equitable fashion.

Because of the nature of the witness' current employment, it may not be realistic to expect to be able to insist that the insured not be present during the interviews of its employees. The insured/employer may claim to be providing legal representation to the witness/employee, for example. However, it certainly is possible to insist that the insured's presence not be intrusive or adversely impact the interview. Therefore, the insurer should require the insured to limit the number of representatives it has present during the interview. The insurer may also request to conduct the interviews in the most conducive environment to obtaining cooperation from the witness. The insurer may also request that the insured not interrupt the questioning in any way, not coach the witness during the interview, and not forbid the witness from answering relevant questions.

Of course, it never hurts to ask for the opportunity to question the witness outside of the presence of any other representatives of the insured. The insured may

agree to allow that questioning to occur, depending upon the facts of and relationships of the parties in the particular case.

E. THE INSURED'S ABILITY TO FORCE A CURRENT EMPLOYEE TO SUBMIT TO AN EXAMINATION

Although the relevant policy language requires the insured, which in the context of the bond would mean the relevant corporate entity or institution, to cooperate and to submit to a sworn examination, upon request, there may be more practical questions involved in that situation, such as whether the institution can force its own employees (either current or former) to cooperate and to submit to an examination. Short of imposing a penalty such as firing a current employee, it is not clear that the employer can always require testimony, even from a current employee. The employer may have even less control over a former employee. It may fall to the insurer to convince such witnesses to cooperate in the investigation and to agree to an interview, because it may be in the best interest of the witness to do so.

During the course of an investigation, neither an employer nor the insurer will have any subpoena or equivalent power over particular individuals in order to require sworn testimony, or even informal testimony. Therefore, the interviews of individuals which are conducted will likely be voluntary exercises. During the investigation stage, there may be certain limitations over the ability to require persons to testify, especially since they may be the subject of an accusation of wrongdoing. One important consideration in this context is the Fifth Amendment privilege available to certain persons.

1. Fifth Amendment Considerations

Employees, especially including any accused wrongdoers, may be reluctant to be interviewed or to give any sworn statements during the investigation process, due to the threat of or the existence of parallel criminal proceedings which involve the subject matter of the claim. In such cases, witnesses and accused wrongdoers may refuse to cooperate or give any testimony, based upon the protection against self incrimination provided by the Fifth Amendment to the United States Constitution, or similar state laws.

The Fifth Amendment of the United States Constitution provides, in relevant part, that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”²² That privilege against self incrimination applies to all individuals.²³ The Fifth Amendment privilege may be invoked in the context of a civil proceeding.²⁴

²²U.S. CONST., amend. V.

²³*Miranda v. State of Arizona*, 384 U.S. 436, 460-61 (1965).

²⁴*Industrial Indem. Co. v. Niebling*, 844 F. Supp. 1374, 1380 (D. Ariz. 1994).

However, there may be some limitations to that right, since a defendant in a civil action can invoke the Fifth Amendment privilege only if he or she faces criminal charges or the threat of criminal charges.²⁵ Once there is no threat of criminal charges, or once the individual has received immunity from prosecution, the privilege can no longer be asserted in a civil proceeding.²⁶

There do not appear to be any legal rights available to an employer or a former employer which can be used in order to force an individual to give an interview or sworn statement, in the context of the investigation, when the individual indicates his or her desire to assert the Fifth Amendment privilege. Similarly, it does not appear that the insurer can force a witness to abdicate his or her Fifth Amendment rights, when properly invoked by the individual.

The practical effect of the assertion of the Fifth Amendment privilege by a witness during the investigation stage is that the insurer will be denied access to full information, and therefore denied access to a full investigation. Obviously, if the witness who refuses to testify is the person in the best position to provide a full description of the relevant facts, then the insurer will be at a significant disadvantage in its efforts to uncover the truth and to understand all of the facts which were involved in the loss. When the insured makes certain allegations, which appear to be supported by circumstantial or documentary evidence, but the primary witness refuses to testify, then the insurer will have a very difficult time in either confirming or disproving the allegations of the insured.

In such cases, it will likely be necessary to try to identify as many other potential witnesses as possible to attempt to piece together the testimony or proof required to either prove or disprove the insured's claims. Where the key witness will not confirm or deny the allegations of an insured, obtaining as much evidence as possible from other sources will be required. The use of circumstantial evidence may also be necessary. Finally, the insurer may need to follow up with the accused individual, in particular, to discuss how important the person's testimony and information may be to properly evaluating the claim. The accused wrongdoer will likely have a great interest in the outcome of the claim, especially if the outcome of the claim will have an impact upon pending criminal matters, or even the imposition of civil penalties upon the person. In some cases, such as a complex loan loss case, the accused employee's testimony, and the evidence that he or she can provide, may determine whether the loss which has been sustained by an insured is a covered loss, or no loss as a result of wrongdoing at all.

²⁵Carroll by Carroll v. Price, 545 N.Y.S.2d 966, 975 (1989); Tona, Inc. v. Evans, 590 A.2d 873, 877 (R.I. 1991).

²⁶*Id.*

Where an accused employee denies any wrongdoing, it may be in the best interest of that individual to provide exculpatory evidence about his or her conduct in the course of the bond investigation. Obviously, if an insurer determines that certain conduct is dishonest and that a covered loss did occur, that determination could have some negative impact upon the outcome in other pending matters.

2. The Impact of the Fifth Amendment Privilege on the Cooperation Clause

A very interesting question arises when a current employee of the insured invokes his or her Fifth Amendment privileges. Does the invocation of that privilege constitute a breach of the cooperation clause by the insured? In large part, the answer to that question may depend upon the particular person who invokes the privilege. If the key officers who are current employees of the insured invoke the privilege, and the insured refuses to provide any other witnesses to testify, it appears that the insured's actions would violate the cooperation clause. However, if the insured provides representatives to testify and to be interviewed, but a lower level employee who is accused of colluding with a wrongdoing employee invokes the Fifth Amendment, the answer may be less clear. After all, even though the employee might be a current employee and agent of the insured, that insured cannot force the individual to waive important individual rights, such as a Fifth Amendment privilege. In addition, if the person who refuses to be interviewed is the accused wrongdoer, who is also a former employee of the insured, it does not appear that such a person's refusal to cooperate could be imputed to the insured, since no agency relationship would exist any longer.

In the context of other types of insurance policies, the courts have concluded that the invocation of the Fifth Amendment privilege by an insured constitutes a breach of the cooperation clause and results in a waiver of the insured's rights under the policy.²⁷ It is important to note, however, that those decisions involved individuals who were insureds, and therefore the failure of those individuals to cooperate and to provide relevant testimony was clear and was fairly imputed against the individual insured.²⁸

Once again, the way in which this rule might be applied to an entity which is an insured is less clear. It would appear to be appropriate to argue, however, that the invocation of the Fifth Amendment privilege by a current employee, whose actions would be legally imputed to the insured, and who occupied a position such that the

²⁷See, e.g., *Powell v. U.S.F.&G.*, 88 F.3d at 273; *U.S.F.&G. v. Wigginton*, 964 F.2d at 491; *Pervis v. State Farm*, 901 F.2d at 946; *Harary v. Allstate Ins. Co.*, 988 F. Supp. 93, 103 (E.D.N.Y. 1997); *Aetna Cas. & Sur. Co. v. State Farm Mut. Auto. Ins. Co.*, 771 F. Supp. 704, 707 (W.D. Pa. 1991); *Allstate Ins. Co. v. Longwell*, 735 F. Supp. 1187, 1193 (S.D.N.Y. 1990); *Mello v. Hingham Mut. Fire Ins. Co.*, 656 N.E.2d 1247, 1250 (Mass. 1995).

²⁸*Id.*

person had access to important information about the claim, should be deemed to be the invocation by the insured, and therefore a breach of the cooperation clause, especially if the invocation of the privilege interferes with the investigation of the insured. It does not appear that any courts have directly addressed this issue.

Obviously, when a key witness or the key witness invokes the Fifth Amendment privilege, the insurer's ability to conduct a thorough investigation will be compromised and prejudiced. That prejudice would result as a direct result of an agent or representative of the insured. Arguably, that conduct should be imputed to the insured.

3. The Evidentiary Impact of the Fifth Amendment Privilege in Litigation

If the bond claim is not resolved following the initial investigation, and the claim results in litigation, the assertion of a Fifth Amendment privilege will have various additional effects upon the insurer. In the course of a civil trial over coverage, the assertion of the Fifth Amendment privilege by a witness may directly impact the evidence admitted on the question of coverage, as well as the inferences which may be permitted to be drawn by a jury regarding testimonial evidence.

It is well accepted that, in the context of a criminal trial, a jury cannot draw an adverse inference from the fact that an accused invokes his or her Fifth Amendment right not to testify.²⁹ In other words, the jury cannot infer guilt of the defendant as a result of his or her own refusal to testify.³⁰ However, that rule regarding adverse inferences does not apply equally to civil proceedings, where the trial of a fidelity bond claim or commercial crime policy claim would occur.

In the context of a fidelity bond investigation, including any civil cases or civil litigation related to a bond claim, the issues regarding the Fifth Amendment differ. If the accused or relevant witness is the subject of a criminal investigation or proceeding, or the threat for such criminal proceedings exists, he or she may invoke the Fifth Amendment privilege, even in the context of an interview or a civil proceeding. However, the effect of claiming that privilege is completely different in a civil case than a criminal case.

In various circumstances, the fact finder in a civil case may draw an adverse inference from the fact that a witness refuses to testify, based upon the Fifth Amendment privilege. For example, a jury may draw an adverse inference against a party when that party refuses to testify in response to probative evidence offered

²⁹Griffin v. California, 380 U.S. 609, 612-13 (1965).

³⁰*Id.*

against it.³¹ Thus, where an accused employee is a defendant in a fidelity bond case, his or her refusal to testify can be the basis of an adverse inference against that employee in the case. There appears to be little controversy over the use of an adverse inference against the party who invoked the privilege himself or herself.

Some courts have permitted an adverse inference to be drawn against a party to a civil case in broader circumstances as well. However, there is some dispute about what inferences may be drawn when the person who refuses to testify is a witness in a case, but not the party against whom the adverse inference might be drawn. The issue of whether a civil jury can draw an adverse inference against a party, based upon a non-party's refusal to testify, is not always clear, and appears to be decided on a case-by-case basis.³² A careful study of the cases in this context is required in order to determine what rules might apply and under what circumstances.

a. The Relationship Requirement for Adverse Inferences. In some circumstances, the courts have required the existence of a formal relationship, such as an agency relationship or employee/employer relationship, between the witness who invokes the privilege against self-incrimination and the party against whom an inference would be permitted to be drawn, in order for an adverse inference to in fact be permitted in a case.³³ Those authorities reason that permitting an adverse inference against a party (who does not invoke the privilege itself) can occur only if the witness who invokes the privilege is somehow related to the party.

Still other courts have expanded the principle of the adverse inference, finding more general relationships in order to support the use of an adverse inference. In *Ralph Hegman Co. v. Transamerica Insurance Co.*,³⁴ the court permitted the plaintiff to introduce into evidence in a civil trial the fact that an accused employee invoked the Fifth Amendment.³⁵ That evidence was permitted to be introduced against an insurer which was sued, because the court specifically found that the fidelity insurer, through the policy in question, assumed responsibility for the employee's improper acts.³⁶ The court concluded that such a relationship constituted a "special" relationship which would support the drawing of an adverse inference against the insurer.³⁷

³¹Baxter v. Palmigiano, 425 U.S. 308, 320-21 (1976).

³²FDIC v. Fid. & Deposit Co. of Md., 45 F.3d 969, 977 (5th Cir. 1995); *see also* Cerr Gordo Charity v. Fireman's Fund Am. Life Ins., 819 F.2d 1471, 1481 (8th Cir. 1987); RAD Services, Inc. v. Aetna Cas. & Sur. Co., 808 F.2d 271, 274-75 (3rd Cir. 1986); Kontos v. Kontos, 968 F. Supp. 400, 407-08 (S.D. Ind. 1997).

³³ FDIC v. Fid. & Deposit Co. of Md., 45 F.3d at 978 (citing *Cerr Gordo Charity*, 819 F.2d at 1481; *RAD Services*, 808 F.2d at 274-79; and *Brink's Inc. v. City of New York*, 717 F.2d 700, 707-10 (2nd Cir. 1983)); *Kontos*, 968 F. Supp. at 408.

³⁴198 N.W.2d 555 (Minn. 1972).

³⁵*Id.* at 558.

³⁶*Id.*

³⁷*Id.*

Obviously, those types of inferences can have a significant impact on a jury's findings in the coverage dispute. What the court permitted, in essence, was for the jury to draw an adverse inference against the insurer, based upon the accused employee's refusal to testify. In practice, that means that the jury was able to assume that the employee did commit some wrongdoing, and that the jury was permitted to hold that against the insurer. Obviously, that type of inference would provide a jury with an evidentiary basis to find that a covered claim existed in the context of an employee dishonesty case.

b. The Broader View of Adverse Inferences. In *FDIC v. Fidelity & Deposit Co. of Maryland*,³⁸ the Fifth Circuit expanded the principle even further, holding that an insured would be permitted to introduce evidence against an insurer that a non-employee and non-party (who was accused of colluding with a wrongdoing employee) had invoked the Fifth Amendment.³⁹ The inference was permitted in the context of an employee dishonesty loan loss claim on a fidelity bond, where individuals who were accused of colluding with the allegedly dishonest bank officer refused to testify. The court noted that the decision to permit any person's invocation of the Fifth Amendment into evidence is within the sole discretion of the court.⁴⁰ The court also determined that there was no constitutional bar to admitting the evidence of a non-party's invocation of the privilege against a party, but that the question was solely an evidentiary one.⁴¹

After reviewing the applicable federal evidentiary rules, the court concluded that the alleged colluding person's invocation of the privilege was relevant to the issues of the case, and that the probative value of the evidence was not outweighed by the danger of unfair prejudice.⁴² Although F&D argued that it would be improper to permit an adverse inference to be drawn against it by admitting into evidence the privilege invoked by a non-party who had no special relationship to F&D, the court refused to adopt a categorical bar on such evidence, and held that a case-by-case determination would be required.⁴³

In general, the court did not require any finding of a special relationship between the non-employee and the insurer in order for the inference to be drawn against F&D.⁴⁴ The court also concluded that evidence related to the invocation of a Fifth Amendment privilege is admissible against an insurer if it is relevant and not otherwise prohibited by the rules of evidence, because the evidence that a non-party invoked the Fifth Amendment and refused to testify could lead a jury to conclude that

³⁸45 F.3d 969 (5th Cir. 1995).

³⁹*Id.* at 978.

⁴⁰*Id.* at 977.

⁴¹*Id.*

⁴²*Id.* at 978.

⁴³*Id.*

⁴⁴*Id.*

the witness who allegedly colluded with the wrongdoer asserted the privilege to avoid disclosing the collusion.⁴⁵

This case illustrates how devastating the invocation of the Fifth Amendment by an accused employee or accused colluding party can be to the insurer's defense. The Fifth Circuit's holding permits a jury to draw an adverse inference from a non-party's refusal to testify, thus permitting the jury to assume that the wrongdoing which was alleged did in fact occur, and therefore that a covered loss may exist. While this conclusion reached by the court is a questionable one, it serves as an important reminder about how significant the impact of a privilege can be in the context of an investigation and any later litigation.

4. Interests of the Insurer in the Context of the Fifth Amendment

These various authorities illustrate how important the insurer's interest in the testimony of various employees or former employees can be. If the accused wrongdoer refuses to testify or be interviewed, based upon a Fifth Amendment privilege, the insurer's investigation and adjustment of the claim can be significantly impacted. In those cases, the insurer may be forced to adjust the claim on the basis of incomplete information, and perhaps circumstantial evidence. Obviously, those circumstances are not the ideal ones for a claim investigation.

In almost every circumstance, it will be to the advantage of the insurer to secure an interview and as much information as possible from the accused and from all other important witnesses. Absent that cooperation, the insurer will be forced to conduct its analysis of the claim and draw conclusions without the benefit of full and complete information. In addition, the insurer may be subject to adverse inferences from the silence of various witnesses in the event litigation results. Those adverse inferences, whether justified or not, could have potentially devastating effects upon an insurer in a coverage case.

VI. Interviews of Former Employees

In addition to current employees of the insured, the insurer will likely include in its investigative plan a list of former employees, including specifically some alleged wrongdoing employees, to interview. Those former employees may also provide the insurer with a wealth of information about the claim in question, the alleged loss, and the operations of the insured, especially if the former employee is alleged to have caused the loss to occur.

⁴⁵*Id.*

In most jurisdictions, the investigating party would likely assume that a right to contact a former employee of the insured would automatically exist. In most states, *ex parte* interviews of former employees of the insured would probably be presumed to be proper. However, that subject is the source of some amount of controversy in certain states, based upon the rules of professional conduct, as adopted in those particular states. A careful study of each state's rules of professional conduct appears to be required, therefore.

The subject of when legal counsel, or their designees, may have contact with the former employees of a corporate opposing party has received a good deal of attention in recent years, due to the ethical issues which are set forth in Rule 4.2 of the Model Rules of Professional Conduct, and which has been adopted in various forms by the various states. While the articles and commentaries which have been written on this subject have not focused on the insurance context, in particular, an interesting question exists about the potential application of each state's own version of Rule 4.2 to a bond investigation. Rule 4.2 of the Model Rules of Professional Conduct, the American Bar Association's interpretation of Model Rule 4.2, and the various states' interpretation of their own local rules of professional conduct are discussed below.

A. THE SCOPE OF LIMITATIONS IMPOSED BY THE MODEL RULES OF PROFESSIONAL CONDUCT

Rule 4.2 of the Model Rules of Professional Conduct provides as follows:

Rule 4.2 Communication with Persons Represented by Counsel

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.⁴⁶

Rule 4.2 is a rule of ethical behavior designed to govern the conduct of the legal profession.⁴⁷ The courts have opined that the purpose of this rule is to prevent attorneys from taking unfair advantage of lay persons or witnesses who are not represented by counsel.⁴⁸ The scope of this rule and its prohibitions against contacts

⁴⁶MODEL RULES OF PROF'L CONDUCT R. 4.02 (1983).

⁴⁷Wright v. Group Health Hosp., 691 P.2d 564, 567 (Wash. 1984).

⁴⁸See, e.g., Valassis v. Samelson, 143 F.R.D. 118, 120 (E.D. Mich. 1992) (rule intended to "prevent one party's attorney from exploiting the lack of legal knowledge of a momentarily uncounseled adverse party); see also, Frey v. Dept. of Health & Human Servs., 106 F.R.D. 32, 34

with an adversary are clear in a case where the opposing party is an individual. However, some controversy has developed over the application of this rule when the adverse party is a corporation or other entity.

The official comment to Rule 4.2, which has in and of itself helped to generate some of the controversy over the scope and application of the rule, provides, in relevant part, as follows with respect to entities who are the adversarial party:

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.⁴⁹

This comment has been interpreted to prohibit an attorney for one party from making contact with the employees of another party (1) if the employee in question has management responsibility for the entity; or (2) if the employee's acts could be imputed to the organization or if the employee's statements could constitute an admission of the organization.⁵⁰ While the prohibition set forth in the comment is clear in the case of contacts with a current employee of the adversary, the more difficult question exists in the context of former employees.

Thus, Rule 4.2 and its comment have engendered a certain amount of controversy on the question of whether they prohibit an attorney for one party from contacting a former employee of an adverse party which is a corporation or entity. In particular, the courts have diverged over the question of whether the term "party" in the rule means the same thing as "persons" in the comment. The rule limits

(E.D.N.Y. 1985).

⁴⁹MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. (1983).

⁵⁰*Id.* R. 4.2; *Palmer v. Pioneer Hotel & Casino*, 19 F. Supp. 2d 1157, 1162 (D. Nev. 1998); *Wright v. Group Health Hosp.*, 691 P.2d 564, 570 (Wash. 1984). The cases also focus on the question of whether contacts with all current employees, or only those with management authority or who could bind the employer, are barred. That subject is beyond the scope of the current article, but the reader is urged to explore those decisions if the question becomes relevant in a particular investigation. Most often, because of the duty to cooperate, the insurer will be working through the insured to locate and speak to current employees. In most cases, the insured will expect to receive that courtesy.

contacts with a “party,” while the comment, in the context of trying to define the employees with whom contacts are prohibited, uses the term “persons” instead of “party.”

In 1991, the American Bar Association clarified the specific provisions of this rule, in a formal opinion stating that the prohibition imposed by Rule 4.2 *does not* extend to former employees of the opposing party.⁵¹ The ABA’s opinion specified the following ground rules:

While the Committee recognizes that persuasive policy arguments can be and have been made for extending the ambit of Model Rule 4.2 to cover some former corporate employers [sic], *the fact remains that the text of the Rule does not do so and the [C]omment gives no basis for concluding that such coverage was intended.* Especially where, as here, the effect of the Rule is to inhibit the acquisition of information about one’s case, the Committee is loath, given the text of Model Rule 4.2 and its Comment, to expand its coverage to former employees by means of liberal interpretation.

*Accordingly, it is the opinion of the Committee that a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without violating Model Rule 4.2, communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation’s lawyer.*⁵²

The ABA’s opinion is based upon the plain language of Rule 4.2 and its comment, as well as the committee’s desire not to interfere with the discovery process, especially informal discovery.⁵³ The ABA reaffirmed its position on the interpretation of Rule 4.2 in a 1995 opinion as well.⁵⁴

While the ABA has made its position on the model rule clear, that legal authority is not binding upon the various state courts which may address this issue, because each state court which is faced with a question regarding *ex parte* contacts will be interpreting its own local version of the ethics rules, not specifically the model

⁵¹ABA Comm. On Ethics and Prof. Resp., Formal Op. 91-359, at 6 (Mar. 22, 1991).

⁵²*Id.* at 3 (emphasis added).

⁵³*Id.*

⁵⁴ABA Comm. On Ethics and Prof. Resp., Formal Op. 95-396 (1995).

rules.⁵⁵ Thus, it is important to analyze how the individual state courts have reacted to the 1991 ABA opinion, and how they continue to analyze their own local versions of Model Rule 4.2.

B. THE RANGE OF APPLICATION OF THE MODEL RULES

Prior to the issuance of the 1991 opinion by the ABA, state and federal courts had decided cases applying a diverse set of standards on the subject of whether or not an attorney could contact a former employee of the adversary on an ex parte basis.⁵⁶ Since the 1991 ethics opinion was decided, most courts have followed the ABA's lead in the analysis of the issue, but the courts in some jurisdictions subscribe to the minority view, as discussed in more detail below.

1. The Majority Rule

The majority rule, which adopts the approach articulated by the ABA in its 1991 ethics opinion, is that ex parte contacts with former employees of a corporate adversary are not prohibited by Rule 4.2. The vast majority of state courts which have recently considered the issue follow the ABA's statement of the rule.⁵⁷ For example, in *Aiken v. Business and Industry Health Group*,⁵⁸ a Kansas court reviewed authorities from many different states in order to conclude that its version of Rule 4.2 did not prohibit ex parte contacts with former employees of an organizational party.⁵⁹ The court determined that the term "party," as used in the rule, means a party to the litigation, but that term does not include former employees of the corporate party.⁶⁰

⁵⁵See *Lang v. Superior Court*, 826 P.2d 1228, 1233 (1992).

⁵⁶See, e.g., *Fair Automotive Repair, Inc. v. Car-X Serv. Sys., Inc.*, 471 N.E.2d 554, 560 (Ill. Ct. App. 1984) (applying a control group test); *Wright v. Group Health Hosp.*, 691 P.2d 564, 570 (Wash. 1984) (applying the management and authority test); *Morrison v. Brandeis Univ.*, 125 F.R.D. 14, 18 (D. Mass. 1989) (applying a case-by-case balancing test).

⁵⁷See, e.g., *Ramada Franchise Systems, Inc. v. Tresprop, Ltd.*, 75 F. Supp. 2d 1205, 1209 (D. Kan. 1999); *Palmer v. Pioneer Hotel & Casino*, 19 F. Supp. 2d 1157, 1167 (D. Nev. 1998); *Sharpe v. Leonard Stulman Enterprises Ltd. P'ship*, 12 F. Supp. 2d 502, 507-08 (D. Md. 1998); *Orlowski v. Dominick's Finer Foods*, 937 F. Supp. 723, 728 (N.D. Ill. 1996); *Aiken v. Business & Indus. Health Group, Inc.*, 885 F. Supp. 1474, 1478 (D. Kan. 1995); *Cram v. Lamson & Sessions Co.*, 148 F.R.D. 259, 265 (S.D. Iowa 1993); *Brown v. St. Joseph County*, 148 F.R.D. 246, 252 (N.D. Ind. 1993); *Valassis v. Samelson*, 143 F.R.D. 118, 123 (E.D. Mich. 1992); *In re Domestic Air Transportation Antitrust Litigation*, 141 F.R.D. 556, 561 (N.D. Ga. 1992); *Dubois v. Gradco Systems, Inc.*, 136 F.R.D. 341, 344-45 (D. Conn. 1991); *Action Air Freight, Inc. v. Pilot Air Freight Corp.*, 769 F. Supp. 899, 904 (E.D. Pa. 1991), *appeal dismissed*, 961 F.2d 207 (3rd Cir. 1992); *Shearson Lehman Bros., Inc. v. Wasatch Bank*, 139 F.R.D. 412, 418 (D. Utah 1991); *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 628 (S.D.N.Y. 1990); *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 593 A.2d 1013, 1016 (Del. Super. Ct. 1990); *Fulton v. The Honorable Donald Lane*, 829 P.2d 959, 965 (Okla. 1992).

⁵⁸885 F. Supp. 1474 (D. Kan. 1995).

⁵⁹*Id.* at 1475.

⁶⁰*Id.*

The Kansas court affirmed its adoption of the ABA's rule in a 1999 decision, *Ramada Franchise Systems, Inc. v. Tresprop, Ltd.*⁶¹

Similarly, the Florida Supreme Court adopted the ABA's analysis and conclusions in *H.B.A. Management, Inc. v. Schwartz*,⁶² where it held that it would follow the overwhelming majority of jurisdictions and bar ethics committees by concluding that Rule 4.2 does not prohibit one party's attorney from engaging in ex parte communications with the opposing party's former employees.⁶³ The Washington Supreme Court, in *Right by Right v. Group Health Hosp.*,⁶⁴ concluded that Rule 4.2 is not applicable to any former employees of a corporation which is the adversary in a case.⁶⁵

A Maryland court recently joined the ranks of the courts which have adopted the majority rule in its recent decision, *Sharpe v. Leonard Stulman Enterprises Limited Partnership*.⁶⁶ In that case, the court reviewed prior Maryland decisions which had restricted an attorney's ability to conduct interviews with former employees, but held that Maryland's version of Rule 4.2, as well as its accompanying comment, did not prohibit contact with former employees, in their own plain language.⁶⁷ The rationale applied by that Maryland court, as well as the emphasis placed upon the plain language of Rule 4.2, is evident in many other state court decisions as well.

a. The Plain Language and Evidentiary Standards. Most of the courts which have recently interpreted their own state's versions of Rule 4.2 have concluded that the rule does not prohibit contacts with former employees of an adversary based specifically upon the language of the comment to the rule.⁶⁸ Those courts have concluded that the official comment, which limits the definition of the term "party," when referring to an organization, to three categories of individuals, and the fact that a former employee ceases to be an agent of the corporation upon his termination, make it clear that a former employee does not qualify as a "party," within the meaning of the rule.⁶⁹ The fact that a former employee cannot make a statement which can be used as an admission of the former employer appeared to carry great weight in these decisions.⁷⁰

⁶¹78 F. Supp. 2d 1205, 1209 (D. Kan. 1999).

⁶²693 So. 2d 541(Fla. 1997).

⁶³*Id.* at 542.

⁶⁴691 P.2d 564 (Wash. 1984).

⁶⁵*Id.* at 569.

⁶⁶12 F. Supp. 2d 503 (D. Md. 1998).

⁶⁷*Id.* at 507-08.

⁶⁸*See, e.g.,* Valassis v. Samelson, 143 F.R.D. at 123; Action Air Freight, Inc. v. Pilot Air Freight Corp., 769 F. Supp. at 902-04.

⁶⁹*Id.*; Aiken v. Business & Industry Health Group, 885 F. Supp. at 1476.

⁷⁰*Id.*

In *United States v. Beiersdorf-Jobst, Inc.*,⁷¹ the U.S. District Court in Ohio employed an even broader analysis on the subject of Rule 4.2, including in its discussion the subject of rules of evidence and the use of admissions against interest.⁷² In that case, which involved the federal False Claims Act, the defendant filed a motion for a protective order, asking that the government be required to make a list of former employees whom the government wanted to interview available to the defendant, before the government would be permitted to interview those persons. The court refused the defendant's request, relying upon an Ohio Bar Association's ethics committee opinion, as well the ABA opinion 91-359.⁷³

Additionally, the court referred to Rule 801(d)(2)(D) of the Federal Rules of Evidence, which provides that statements made by former employees are not admissions, because they are not made during the existence of the employment relationship.⁷⁴ The court concluded that the rule so holds because statements made after the employment relationship ends could not, by their very nature, have been made within the course and scope of the employment. The court also observed that, as a policy matter, requiring the opposing counsel to be present during an interview of a former employee would "have the inevitable effect of chilling the exchange of information, because former employees would most likely be hesitant about speaking freely in the presence of their former employer's attorney."⁷⁵ Accordingly, the court concluded that no ethics rules prohibited the ex parte contact by the government with the former employees.

b. The Open Discovery Rationale. In addition to the plain meaning analysis and the imputation of liability analysis which have been the subject of many opinions addressing Rule 4.2, some courts have stressed the importance of maintaining an informal discovery process in their decisions which permitted contacts with former employees of an adversary.⁷⁶ Certain courts have emphasized the fact that an absolute prohibition against contacting former employees of an adversary would result in an inability of attorneys to engage in informal discovery and would increase the costs of litigation, because attorneys would be forced to engage in expensive and time-consuming discovery in the context of legal actions.⁷⁷ The courts which employ the majority rule on this subject have also concluded that two of the main reasons for the existence of Rule 4.2, the need to protect confidential information and the desire to

⁷¹980 F. Supp. 257 (N.D. Ohio 1997).

⁷²*Id.* at 261-62.

⁷³*Id.*

⁷⁴*Id.*

⁷⁵*Id.*

⁷⁶*See, e.g.,* Sharpe v. Leonard Stulman, 12 F. Supp. 2d at 507.

⁷⁷*See, e.g.,* Cram v. Lamson & Sessions Co., 148 F.R.D. 259, 261-62 (S.D. Iowa 1993); Polycast Technology v. Uniroyal, 129 F.R.D. at 628; Ahern v. Board of Educ. Of City of Chicago, No. 92 C 4074, 1995 WL 680476, at *1 (N.D. Ill. Nov. 14, 1995).

protect corporations from statements which might impose liability upon them, are not undermined by an ability to contact former employees.⁷⁸

A federal district court in Kansas summarized the discovery and convenience issues in its discussion of Rule 4.2:

The court recognizes that a former employee could possess and reveal information which could potentially result in liability being imposed on an organization. The purpose of Rule 4.2, however, is not to prevent the flow of information, even if damaging to a party to the suit. To enlarge the scope of the rule hampers the broad discovery purposes contained in Federal Rule of Civil Procedure 26. In an era when easing or eliminating the unnecessary burdens and expense of litigation is widely viewed as desirable, this court is loath to create limitations on attorney communications which make the litigation process more difficult while providing little in the way of corresponding benefit.⁷⁹

This well articulated summary provides a good recap of the issues and concerns which have been addressed in many of the opinions regarding Rule 4.2.

Similarly, a Maryland court emphasized that the important purposes which Rule 4.2 does serve should not unduly restrict other important ethical and professional obligations of an attorney, including specifically the duty to investigate factual claims and to develop evidentiary foundations for those claims.⁸⁰ That court concluded that it would be overly restrictive, time-consuming, and costly to insist that all investigations involving former employees require the presence or consent of the opposing counsel, and that counsel should be permitted to pursue information without resorting to costly formal discovery.⁸¹

2. The Minority View

It does not appear that all state courts are in accord with the interpretation of Rule 4.2, however. A federal court for the Eastern District of Missouri, for instance, found that Missouri follows the minority rule, which forbids contact with all former employees, even non-management employees.⁸² Interestingly, another court in the

⁷⁸*Polycast Technology v. Uniroyal*, 129 F.R.D. at 626.

⁷⁹*Aiken v. Business & Industry Health Group*, 885 F. Supp. at 1479.

⁸⁰*Sharpe v. Leonard Stulman*, 12 F. Supp. 2d at 507.

⁸¹*Id.*

⁸²*O'Keefe v. McDonnell Douglas Corp.*, No. 4:93CV-02188, slip op. at 3 (E.D. Mo. Mar. 10, 1997).

same federal district held that Rule 4.2 does not prohibit such contact.⁸³ The court in the latter case determined that the state's informal ethics opinions to the contrary were non-binding upon it.⁸⁴

Courts in other states have also appeared to follow the minority view, holding that contact with former employees is prohibited under various circumstances. In *In re Prudential Insurance Co. of America Sales Practices Litigation*,⁸⁵ a New Jersey court concluded that contact with both current and former employees who were responsible for management of the case or the matters at issue was barred.⁸⁶ In *Public Service Electric & Gas Co. v. Associated Electric & Gas Ins. Services, Ltd.*,⁸⁷ a 1990 decision which predates the ABA's opinion regarding Rule 4.2, another New Jersey court reached a similar conclusion.⁸⁸ In that case, the court broadly applied Rule 4.2, concluding that it prohibited any informal contacts with all present and former employees.⁸⁹ That case has been widely criticized, however, and may no longer have any precedential value, since the New Jersey courts apparently focus now on a revised standard which analyzes the information obtained by and status of an individual while he was an employee.⁹⁰

While the New Jersey courts deny that they apply a "bright line" test, they apparently still prohibit many or most contacts with former employees, especially if the individual in question was a member of a "control group," or if the person had any confidential information regarding the employer.⁹¹ Because the standards applied by the various New Jersey courts have been varied and complex, it may be important for a practitioner to carefully study those opinions if an investigation reveals a need to question former employees of a New Jersey company or in a New Jersey matter.

a. The Confidentiality Component of the Minority Rule. Some courts applying a version of the minority rule have restricted access to former employees, based upon arguments of confidentiality or attorney-client privilege. For example, in at least two decisions, Maryland courts have restricted access to former employees if those employees had been privy to confidential or privilege information during their employment.⁹² While some subsequent decisions in Maryland courts have not

⁸³Tipton v. Sonitrol Security Systems, 958 F. Supp. 447, 451 (E.D. Mo. 1996).

⁸⁴*Id.*

⁸⁵911 F. Supp. 148 (D.N.J. 1995).

⁸⁶*Id.* at 153.

⁸⁷745 F. Supp. 1037 (D.N.J. 1990).

⁸⁸*Id.* at 1039.

⁸⁹*Id.*

⁹⁰*See* Andrews v. Goodyear Tire & Rubber Co., 191 F.R.D. 59, 78 (D.N.J. 2000).

⁹¹*Id.*

⁹²Zachair, Ltd. v. Driggs, 965 F. Supp. 741, 753 (D. Md. 1997); Camden v. Maryland, 910 F. Supp. 1115, 1116 (D. Md. 1996).

followed the analysis of these two earlier cases,⁹³ their discussions on the subject of confidentiality are still instructive.

In *Camden v. Maryland*,⁹⁴ the Maryland court concluded that Rule 4.2 would prohibit any contact with former employees when a lawyer knows or should know that the former employee possesses confidential information of the former employer.⁹⁵ The former employee involved in that case was the former special assistant to the president of a university, who was the special contact person in connection with certain ongoing litigation. The assistant received confidential communications, including assessments of the opposing party's claims in the litigation from the outside counsel. The special assistant later revealed that confidential information to the opposing counsel, after he left his position with the university.

The court held that its rule prohibiting contact with persons with confidential client information was applicable to former as well as current employees, and focused not on the individual's status as an employee, but rather on the extent of the confidences shared with that individual.⁹⁶ The court's main concern was the protection of the privileged information which had been disclosed to the former employee, stating that an "organization has no less interest in protecting its confidences when an employee who once shared those confidences leaves the company fold."⁹⁷

In *Zachair, Ltd. v. Driggs*,⁹⁸ a Maryland court also concluded that ex parte communications by an attorney with a former employee with confidential or privileged information was prohibited, in the following discussion:

The concern shared by Rule 4.2 and the attorney-client privilege is that an individual (or entity) who reveals confidences to another individual occupying a position of high responsibility, most often a manager, but here an attorney consulted as such, should enjoy some assurance (at least in the context of on-going litigation) that those confidences cannot be freely

⁹³See *Sharpe v. Leonard Stulman*, 12 F. Supp. 2d at 507; *Plan Comm. v. Driggs*, 217 B.R. 67, 72 (D. Md. 1998); *Davidson Supply Co., Inc. v. P.P.E., Inc.* 986 F. Supp. 956, 959 (D. Md. 1997). In *Davidson Supply*, for example, the court distinguished the earlier Maryland decisions, which focused on the involvement of persons with confidential information, from the situation presented to it, which involved only lower level former employees. *Davidson Supply Co., Inc. v. P.P.E., Inc.*, 986 F. Supp. at 959. The court refused to impose any restrictions on the ability of the adverse party's counsel to contact those lower level employees. *Id.*

⁹⁴910 F. Supp. 1115 (D. Md. 1996).

⁹⁵*Id.* at 1116.

⁹⁶*Id.* at 1121-22.

⁹⁷*Id.* at 1121.

⁹⁸965 F. Supp. 741 (D. Md. 1997).

divulged to third parties unless certain prophylactic measures are in place.⁹⁹

In that case, the court determined that the former general counsel for one party had disclosed to an opposing counsel information which was “undoubtedly confidential and almost certainly violative of the defendants’ attorney-client privilege.”¹⁰⁰

Still other courts have prohibited contact with former employees who had access to privileged or confidential information.¹⁰¹ Certain other decisions have indicated that an attorney must be careful about seeking privileged information from a former employee, because the end of the employment relationship does not indicate an end of the privilege which may attach to some information which the individual has.¹⁰² In a recent Minnesota decision, the court decided to apply what it called a “flexible” approach, which does not absolutely prohibit contacts with former employees, but does prohibit such contacts when permitting the contacts may result in an impairment of the protection of privileged or confidential information in the possession of the former employee.¹⁰³

Both of the Maryland cases discussed above illustrate extreme circumstances, where the focus is the improper disclosure of privileged information, rather than the true purpose of Rule 4.2. The better approach to dealing with privileged information is illustrated by various cases which apply the majority view, but carefully limit any disclosure of privileged information, as discussed in Section E below.

b. The Case-By-Case Test of the Minority Rule. Some decisions appear to limit contact with former employees, under certain special circumstances, as demonstrated in a particular case, but do not necessarily apply a blanket rule to bar contact. For example, a number of courts have concluded that a former employee may not be contacted if the information provided by that former employee would impute liability to the former employer.¹⁰⁴ Certain New Jersey opinions have included

⁹⁹*Id.* at 754.

¹⁰⁰*Id.* at 753.

¹⁰¹*Dillon Cos., Inc. v. Sico Cos.*, Civ. Action No. 92-1512, 1993 WL 492746 (E.D. Pa. Nov. 24, 1993); *Lang v. Superior Court* 826 P.2d 1228, 1233 (Ariz. Ct. App. 1992); *MMR/Wallace Power & Industrial, Inc. v. Thames Associates*, 764 F. Supp. 712, 726-27 (D. Conn. 1991).

¹⁰²*See, e.g., Orlowski v. Dominick's Finer Foods*, 937 F. Supp. at 728; *Jefco Labs, Inc. v. Carroo*, 483 N.E.2d 999, 1002 (Ill. Ct. App. 1985).

¹⁰³*Olson v. Snap Products, Inc.*, 183 F.R.D. 539, 544 (D. Minn. 1998).

¹⁰⁴*Armsey v. Medshares Mgt. Servs., Inc.*, 184 F.R.D. 569, 574 (W.D. Va. 1998), *aff'd*, 141 F.3d 1162 (4th Cir. 1998); *In re Prudential Ins. Co. of America Sales Practices Litigation*, 911 F. Supp. 148, 152-53 (D.N.J. 1995); *Curley v. Cumberland Farms, Inc.*, 134 F.R.D. 77, 90-91 (D.N.J. 1991); *Lang v. Superior Court*, 826 P.2d 1228, 1233 (Ariz. Ct. App. 1992); *Brafuss v. Diversicare Corp. of America*, 656 So. 2d 486, 488 (Fla. App. 1995). Other courts considered this question prior to the ABA's 1991 opinion and reached the conclusion that contacts with former employees were prohibited. *Chancellor v. Boeing Co.*, 678 F. Supp. 250, 253 (D. Kan. 1988); *Amarin Plastics, Inc.*

a bar on ex parte contacts with former employees if those employees were previously members of a “control group” for the employer or if the conduct of the former employee which the employee would disclose, in and of itself, would establish the corporation’s liability in the context of ongoing litigation.¹⁰⁵

In other decisions, the courts have focused on the motives of the opposing party in obtaining the ex parte interview. In *Armsey v. Medshares Management Services, Inc.*,¹⁰⁶ a Virginia court concluded that ex parte contact with former employees would not be permitted, under the specific circumstances of the case, because the information sought from the former employee by the opposing counsel was information which that counsel intended to attempt to impute to the former employer.¹⁰⁷ The court was careful to note, however, that its decision was not a blanket prohibition against ex parte communications, and did not attempt to address any situation where the counsel sought information from a former employee whose actions or statement were not the subject of the litigation.¹⁰⁸

In *Lang v. Superior Court*,¹⁰⁹ the court concluded that Rule 4.2 did not bar ex parte communications with a former employee unless the acts of the former employee gave rise to the underlying litigation, or the former employee had an ongoing relationship with the former employer in connection with the litigation.¹¹⁰ This decision appears to apply an extreme rule, which would prohibit an insurer from directly contacting the alleged defalcating employee in an employee dishonesty claim.

While these courts have apparently not adopted a “bright line” test or absolute prohibition against all contacts with former employees, they do contain some very restrictive rules. Some of these rules make the determination of who can properly be contacted even more difficult. Often, they fail to adequately define such concepts as the “control group” and contain very vague discussions about when actions or statements might be arguably imputed to a former employer. In general, they apply a weaker analysis of Rule 4.2 and its real purpose. Nevertheless, these decisions do exist and do create some questions about possible contacts with former employees.

v. Maryland Cup Corp, 116 F.R.D. 36, 40 (D. Mass. 1987); *Bobele v. Superior Court*, 245 Cal. Rptr. 144, 147 (Cal. Ct. App. 1988). The pre-1991 decisions should be read with extreme caution, because they pre-date the ABA’s opinion regarding Model Rule 4.2. Since that ABA opinion, many courts which previously prohibited contact with former employees have reversed their position on the issue. See, e.g., *Aiken v. Business & Indus. Health Group, Inc.*, 885 F. Supp. 1474, 1478 (D. Kan. 1995).

¹⁰⁵In re Prudential Ins. Co., 911 F. Supp. at 152-53; *Curley v. Cumberland Farms*, 134 F.R.D. at 90-91.

¹⁰⁶184 F.R.D. 569 (W.D. Va. 1998), *aff’d*, 141 F.3d 1162 (4th Cir. 1998).

¹⁰⁷*Id.* at 574.

¹⁰⁸*Id.*

¹⁰⁹826 P.2d 1228 (Ariz. Ct. App. 1992).

¹¹⁰*Id.* at 1233.

C. EX PARTE INTERVIEWS WITH FORMER EMPLOYEES OF THE INSURED

The very large amount of case law interpreting the various states' versions of Rule 4.2 gives the investigating party in a fidelity bond claim or commercial crime policy claim a great deal to consider. First, the number of cases which have been decided on this issue is large. Second, the cases from various jurisdictions apply a number of different standards to determine whether ex parte contacts with former employees are permissible. Most troubling in this context, the same courts from the same jurisdictions do not always apply the same standards from case to case.

The lesson from these cases is to conduct a careful review of the applicable rules and applicable law before making a contact with any former employees of the insured. The investigating party should become well versed with the rules which might arguably apply to the investigation, and which will certainly apply to possible later litigation.

Of course, there are various arguments that the various authorities discussed above do not apply to the context of an insurance claim investigation. First, an insurer might argue that the insurer and insured are not "adversarial" parties during the investigation of a claim. Second, an insurer might argue that the case law which interprets the various versions of Rule 4.2 applies to actual litigation between parties, not an informal proceeding such as an investigation. However, the better practice would be to become familiar with the rules and to determine how they might potentially impact the investigating party's ability to contact former employees. Even if the rules might not arguably apply to an informal investigation, they would apply in the case litigation later developed. Previous contacts with former employees, which might be prohibited by applicable ethics rules, will likely be the subject of dispute in any later litigation.

Rule 4.2 of the Model Rules was clearly intended to limit access to the current employees of an adversary which happens to be a corporation. The rule, when interpreted in that fashion, makes sense and furthers the goals of the ethics rules. When interpreted more broadly, however, the rule actually becomes an impediment to an insurer's ability to conduct a thorough investigation.

The lesson of the opinions which address Rule 4.2 is that the practitioner should become familiar with the local jurisdiction's rules on contacts with former employees before directly contacting any former employees of the insured. Although hard to believe, it appears that some courts might limit an insurer's attorney's right to contact a former employee of the insured during the course of a claim investigation. Taken to the extreme, some of the reasoning in the opinions would prohibit a direct contact with a former employee who is accused of employee dishonesty.

The majority rule with respect to Rule 4.2 is the better reasoned rule, but an insurer should be cautious about complying with all applicable rules and ethics

opinions, or it will risk an ethical complaint and at least the exclusion of any evidence which is obtained through the contact.¹¹¹

D. THE INSURED'S DUTY TO COOPERATE IN THE CONTEXT OF INTERVIEWS WITH FORMER EMPLOYEES

The standard form cooperation clauses of the fidelity bond and commercial crime policy impose a general duty to cooperate upon the insured, without any limitations on the context of that duty. Therefore, the insured has a duty to cooperate in the insurer's attempts to interview former employees, as well as current employees.

Thus, even in jurisdictions where there may arguably be limits upon an insurer's ability to contact a former employee of the insured, the insured should have a duty to cooperate with the insurer to arrange for the interview and facilitate the interview. Although the insured may not have current control over the former employee, that insured should have the obligation to assist the insurer in locating the employee and making contact with the employee. In the alternative, the insured could at least authorize the insurer to initiate the contact with the former employee. However, in no event should the insured block the insurer's access to the former employee or inhibit the insurer's ability to conduct an interview. Such tactics would be a violation of the duty to cooperate. Moreover, those use of those types of tactics by an insured would illustrate a primary weakness of the application of the minority view of Rule 4.2.

Even the ethics rules which might be interpreted to prohibit ex parte communications between an ex employee of the insured and the insurer do not indicate that the insured can prohibit an interview from taking place, if the proper notices are provided. Those ethics opinions should not be used by the insured as a way to interfere with a proper investigation of a claim.

E. LIMITATIONS ON SUBJECT MATTER AND ADVISABLE STATEMENTS AND DISCLOSURES

Certain courts which have permitted interviews with former employees, in the context of Rule 4.2, have discussed the concept that an adverse attorney must carefully comply with all other applicable ethical rules in the process of conducting the interview, including Rules 4.1, 4.3, and 4.4 of the Model Rules of Professional

¹¹¹University Patents, Inc. v. Kligman, 737 F. Supp. 325, 329 (E.D. Pa. 1990); *see also*, Ramada Franchise Systems, Inc. v. Tresprop, Ltd., 75 F. Supp. 2d 1205, 1209 (D. Kan. 1999) (party sought to strike affidavit filed in support of opposing party's motion to summary judgment, on the grounds that the affidavit was allegedly obtained in violation of Rule 4.2).

Conduct, as adopted in a particular state.¹¹² The full text of Model Rules 4.1, 4.3, and 4.4 is set forth in Section VII.

In general, these various rules establish codes of conduct for an attorney in dealing with unrepresented parties, and establish the ground rules for disclosures to interviewees. The general impact of Rules 4.1, 4.3, and 4.4 of the Model Rules of Professional Conduct in the context of the interviews of all witnesses in a bond investigation is discussed in more detail in Section VII of this article.

In the context of complying with Rule 4.1, 4.3, and 4.4, one subject which has been emphasized by several courts is the issue of privilege, and an attorney's obligation not to seek the disclosure of such information from an interviewee. For example, some courts have specifically cautioned that an attorney must be careful about seeking privileged information from a former employee, because the end of the employment relationship does not indicate an end of the privilege which may attach to some information which the individual has.¹¹³ Other courts have even stated that the privilege issue, and the fact that an adverse attorney may not inquire into areas subject to the attorney-client privilege, actually creates a common-sense qualification upon the right to speak to the former employees of an adversary.¹¹⁴

While rejecting the notion that Rule 4.2 applies to former employees, one noted commentator has nevertheless emphasized certain limitations in the questioning of former employees:

Yet it seems clear that some former employees continue to personify the organization even after they have terminated their employment relationship. An example would be a managerial level employee involved in the underlying transaction, who is also conferring with the organization's lawyer in marshalling evidence on its behalf. But the rationale is a different one. This kind of former employee is undoubtedly privy to privileged information, including work product, and an opposing lawyer is not entitled to reap a harvest of such information without a valid

¹¹²*See, e.g.*, *Brown v. St. Joseph County*, 148 F.R.D. at 254-55; *Valassis v. Samelson*, 143 F.R.D. at 124-25; *Shearson Lehman Brothers, Inc. v. Wasatch Bank*, 139 F.R.D. at 418; *Dubois v. Gradco Systems, Inc.*, 136 F.R.D. at 344-45.

¹¹³*Camden v. State of Maryland*, 910 F. Supp. at 1121; *Valassis v. Samelson*, 143 F.R.D. at 124-25; *In re Domestic Air*, 141 F.R.D. at 560; *Dubois v. Gradco Systems, Inc.*, 136 F.R.D. at 344-45; *Jefco Labs, Inc. v. Carroo*, 483 N.E.2d 999, 1002 (Ill. Ct. App. 1985).

¹¹⁴*Palmer v. Pioneer Hotel & Casino*, 19 F. Supp. 2d at 1167.

waiver by the organization, or according to narrow exceptions in the discovery and evidence rules.¹¹⁵

These comments make it clear how careful an attorney must be in the questioning of a former employee with confidential information, and how important it is not to cause the former employee to violate the privilege which survives the termination of the employment relationship. An attempt to obtain privileged information may arguably result in a violation of Rules 4.3 or 4.4 of the Model Rules of Professional Conduct, which prohibits an attorneys from taking advantage of an unrepresented person.¹¹⁶

An implied exception to this limitation is an effort to obtain purely factual information during an interview. As discussed in more detail later, the attorney-client privilege protects only communications, not the underlying facts of a particular matter.¹¹⁷ Therefore, the interviewer should not be limited in his or her ability to explore the relevant facts with the former employee, as long as it is clear that the attorney is not seeking to discovery privileged information.

Additionally, an attorney should be very clear with the witness about the scope of the attorney's representation in the matter, the attorney's interests in the matter, and the information which is sought. If the former employee indicates a desire for the counsel for their former employer to be present during the interview, some authority indicates that the interviewer must honor that request.¹¹⁸

VII. General Ethical Considerations for Witness Interviews

In conducting all witness interviews, whether of current or former employees, third parties, or independent fact witnesses, the interviewing attorney should be careful to follow all applicable rules and limitations, including the applicable ethics rules of the jurisdiction. Since the insurer may have contact with unrepresented witnesses, including former employees of the insured, it must pay particular attention to all local rules which may apply. In addition to the issues present by Model Rule 4.2, it is advisable to be well versed regarding the general ethical standards imposed by Model Rules 4.1, 4.3, and 4.4, as discussed below.

¹¹⁵Geoffrey C. Hazard, Jr., *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT*, at 436-436.1 (1988).

¹¹⁶*See, e.g.,* Shearson Lehman Brothers, Inc. v. Wasatch Bank, 139 F.R.D. at 418.

¹¹⁷*See* U.S. v. Upjohn, 449 U.S. 383, 389 (1981).

¹¹⁸*Morrison v. Brandeis Univ.*, 125 F.R.D. 14, 20 (D. Mass. 1989) (holding that the plaintiff's counsel must honor any request by a former employee of the defendant that the interview be conducted in the present of the corporation counsel).

A. GENERAL ETHICAL RULES

First, the person conducting the interview should be careful to follow all applicable ethical rules in the jurisdiction where the interview occurs. The model rules contain some important points to consider during witness interviews, including rules which make it very clear that the interviewer should be honest with the interviewee and should fully disclose the interests of the interviewer. These model rules have been codified in many states.

For example, Rule 4.1 of the Model Rules of Professional Conduct¹¹⁹ states as follows:

In the course of representing a client a lawyer shall not knowingly:

(a) Make a false statement of material fact or law to a third person; or

(b) Fail to disclose material facts to a third party when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.¹²⁰

The first provision of Rule 4.1 contains a rule which should not be the subject of any debate or discussion whatsoever, in the context of an investigation. An attorney representing an insurer should never make any type of material misrepresentation to a witness, whether a current or former employee, during the interview process. The investigating parties should be as honest and forthcoming as possible during the interviews. If there is information which the insurer is not at liberty to disclose, because of privilege or confidentiality, then that information simply cannot be disclosed. However, any information which is provided should be accurate and not designed to mislead the witness in any way.

In addition, Rule 4.3 of the Model Rules of Professional Conduct states:

Rule 4.3 Dealing with Unrepresented Person

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. When the lawyer knows or reasonably should know that the

¹¹⁹MODEL RULES OF PROF'L CONDUCT (1983).

¹²⁰*Id.* R. 4.1.

unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.¹²¹

The comment to Rule 4.3 expands the explanation for the purpose of the rule:

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.¹²²

Rule 4.3 contains some important concepts as well. When interviewing a witness, the attorney for an insurer should clearly describe his representation and the identity of his client.¹²³ The attorney should not mislead the witness about the attorney's loyalties, and must be clear about his loyalties if he represents an adverse party.¹²⁴ These concepts may be particularly important during witness interviews, since the person who is the subject of the interview may not have the benefit of counsel, and because the person may not be familiar with legal proceedings, or even insurance investigations. The failure to comply with these obligations may result in a violation of Rule 4.3.

Finally, Rule 4.4 of the Model Rules of Professional Conduct provides as follows:

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.¹²⁵

Rule 4.4 makes it clear that harassment or other improper purposes are not appropriate and will not be tolerated. At least one court has concluded that an attorney's efforts to induce a former employee to disclose privileged information belonging to the former employer may violate Rule 4.4.¹²⁶ Once again, the content

¹²¹*Id.* R. 4.3.

¹²²*Id.*, R. 4.3 cmt.

¹²³*In re Domestic Air Transp. Antitrust Litigation*, 141 F.R.D. at 561.

¹²⁴*Dubois v. Gradco Systems, Inc.*, 136 F.R.D. at 347.

¹²⁵MODEL RULES OF PROF'L CONDUCT, R. 4.4.

¹²⁶*Debois v. Gradco Systems, Inc.*, 136 F.R.D. at 347.

of that rule should be universally accepted and honored during any representation of an insurer.

As a whole, these rules make it clear that the interviewer should be very clear and very honest with the witness during the interview. By way of example, certain cases imply a duty upon a lawyer to clearly identify the parties to a dispute and to disclose the fact that the lawyer represents a party which is adverse to the corporation where the potential witness was previously employed.¹²⁷ Proper treatment of all witnesses should be a part of the investigative strategy.

B. RIGHTS OF WITNESSES WITH ADVERSE INTERESTS AND THE USE OF CIVIL WARNINGS

When dealing with certain witnesses, especially those who have been accused of wrongdoing, it is certainly advisable for the interviewer to carefully inform the accused former employee of the identity of the party whom the counsel represents, and to be clear about the scope of that representation and the reasons for the interview.¹²⁸ The rights of the witness should be carefully honored.

When first dealing with the accused wrongdoer, it is also advisable to inquire whether the individual has retained counsel.¹²⁹ Attorneys for an insurer should not continue any ex parte contacts with a witness if that person has hired counsel to represent him or her for matters which might also include the investigation. Communications should be directed through the witness' counsel, or a direct violation of applicable ethics rules will likely result. The insured may well be able to provide information to the insurer on the subject of whether an accused former employee has engaged counsel, as well as the identity of the counsel.

Some courts have appeared to expand the responsibilities of counsel even beyond the standards imposed by the rules of professional conduct. Some have gone so far as to imply that the counsel should give a "Miranda" type of warning to a witness who may become an adversary in future proceedings.¹³⁰ Such "civil Miranda" warnings would include informing the witness that he or she has the right to retain counsel before answering any questions in an interview.¹³¹

¹²⁷*See, e.g.*, In re Domestic Air Transportation Antitrust Litigation, 141 F.R.D. at 561; Debois v. Gradco Systems, Inc., 136 F.R.D. at 347.

¹²⁸*See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 4.1, 4.3, and 4.4.

¹²⁹Upjohn Co. v. Aetna Cas. & Sur. Co., 768 F. Supp. 1186 (W.D. Mich. 1991).

¹³⁰University Patents, Inc. v. Kligman, 737 F. Supp. 325, 328 (E.D. Pa. 1990); Bey v. Village of Arlington Heights, No. 88-C5479, 1989 WL 103387 (N.D. Ill. Aug. 29, 1989).

¹³¹*Id.*

For example, the Pennsylvania court in *University Patents, Inc. v. Kligman*,¹³² discussed a set of rules under which an adverse party's counsel, prior to interviewing a former employee, was required first (1) to disclose his representative capacity to the interviewee; (2) to state his reasons for seeking the interview; (3) to inform the individual of his or her right to refuse to be interviewed; and (4) to inform the person that he or she could have their own counsel present.¹³³ The court noted that the imposition of these rules and restrictions "significantly limited the scope of permissible communications" between the former employee and the adverse party's counsel.¹³⁴

Other courts have seemed to indicate their position that a former employee should be advised that he or she has a choice of whether to respond or not respond to questions in an interview, and that he or she has a right to have their own counsel, or their former employer's counsel, present if they wish.¹³⁵

While the courts which have made these statements about providing civil warnings have done so in a very general fashion, it is not clear that the requirement to give these warnings is widely imposed by the courts. In fact, certain other authorities have refused to impose any such obligation upon the questioning party.¹³⁶

The courts which have referred to a requirement to provide civil warnings appear to misinterpret Rule 4.3 of the Model Rules, which, as set forth above, requires only that counsel not imply that it is disinterested and that counsel make reasonable efforts to correct any misunderstandings about the counsel's role. Because a representative of an insurer does not have any law enforcement authority, and because any interviews which would be conducted in the course of a bond claim investigation would be entirely voluntary, and certainly not in any way a custodial interrogation, none of the constitutional issues which are addressed by actual *Miranda* warnings should be triggered. Nevertheless, it is important to be aware of the state law which exists on the subject of interviews, and to honor the requirements of a particular jurisdiction during witness interviews.

VIII. Privilege Issues

During an insurer's investigation, an insured may refuse to provide certain testimony, and refuse to produce certain documents, based upon a claim of attorney-

¹³²737 F. Supp. 325 (E.D. Pa. 1990).

¹³³*Id.* at 328.

¹³⁴*Id.*

¹³⁵*Bey v. Village of Arlington Heights*, 1989 WL 103387 at *1; *Lizotte v. New York City Health & Hospitals Corp.*, No. 85 Civ. 7548 (WK), 1990 U.S. Dist. LEXIS 2747 (S.D.N.Y. Mar. 13, 1990).

¹³⁶*FSLIC v. Hildenbrand*, Civ. A. No. 89-A535, 1989 WL 107377 (D. Col. Sept. 8, 1989) (FSLIC attorneys not required to warn witness he could become litigant or advise witness of right to counsel).

client privilege or the work product doctrine, as a result of the insured's own investigative process. In many instances, an insured may refuse to produce its attorney/investigator's notes regarding witnesses interviews and refuse to allow the attorney/investigator to answer questions regarding their interviews, based upon claims of privilege. The insured may also refuse to answer questions regarding board meetings, audit reports, bank examinations, and other sensitive subjects, and may refuse to provide copies of documents which reflect those meetings, reports, or examinations.

In the context of these issues, the insurer may have to be prepared to provide a full explanation to the insured on the subject of why the attorney-client privilege does not apply to many aspects of the insured's own investigation, including a full analysis of the privilege itself. The following brief discussion on these subjects may provide some assistance in that situation.¹³⁷

A. NATURE OF THE ATTORNEY-CLIENT PRIVILEGE

First, it is important to understand what the attorney-client privilege does and does not protect, and when it properly applies. The attorney-client privilege is the oldest privilege pertaining to confidential communications recognized under common law, and its purpose is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and the administration of justice."¹³⁸ Because the application of the privilege is contrary to the general rule permitted full discovery of the facts, the privilege must be "strictly confined within the narrowest possible limits consistent with the logic of its principal."¹³⁹

The complex elements of the attorney-client privilege have been stated in many cases across the country, but they are particularly well enunciated in *United States v. United States Shoe Machinery Corp.*,¹⁴⁰ as follows:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as

¹³⁷For a thorough discussion of these issues, see Michael Keeley, *The Attorney-Client Privilege and Work Product Doctrines: The Boundaries of Protected Communications Between Insureds and Insurers*, 33 TORT & INS. L. J. 1169 (1998).

¹³⁸*Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Trammell v. United States*, 445 U.S. 40, 51 (1980).

¹³⁹*NLRB v. Harvy*, 349 F.2d 900, 907 (4th Cir. 1965) (quoting 8 WIGMORE, EVIDENCE § 2292 (McNaughton rev. 1961)).

¹⁴⁰89 F. Supp. 357 (D. Mass. 1950).

a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (I) an opinion of law or (ii) legal services or (iii) assistance in some legal proceedings, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.¹⁴¹

The numerous elements set forth in this opinion demonstrate in themselves why the insured's investigation will not be a subject of the attorney-client privilege. The privilege simply cannot apply, in the vast majority of situations, because the communications which occur in an investigation are often not for the purpose of seeking legal advice, because the factual information which is being obtained is not protected from disclosure, and because the function of the attorneys who are employed by an insured may not be any broader than a purely investigative function. Because each of these subjects may be a source of contention in the context of an insurer's subsequent investigation and attempt to discover relevant information, each of these subjects is discussed in more detail below.

B. WHICH "COMMUNICATIONS" ARE PROTECTED?

First, the information which is in question must have been an actual communication between a client and his lawyer. Communications between a lawyer and a third party, such as a bank regulator, an independent witness, or other individuals, cannot fall within the privilege, because they do not meet the requirements of the "communication" element.

Of course, the question of who is a "client" can become complicated in the context of an insurance dispute. When the client is a corporation or a similar entity, the more difficult question is who, within the company, will qualify as a "client." Of course, the executive officers of the company are considered to be the client, but the mid or lower level employees do not so clearly qualify. The answer to the question of who can qualify as a "client" may depend upon whether the particular jurisdiction in question subscribes to the "control group" theory to determine privilege.

The "control group" test, as applied to the Federal Rules of Evidence and the federal attorney-client privilege, was discussed in the United States Supreme Court decision *Upjohn Co. v. United States*.¹⁴² In that case, the company's accountings, during the audit of a foreign subsidiary, discovered that the subsidiary made payments for the benefit of foreign government officials in order to secure government business.

¹⁴¹*Id.* at 358-59.

¹⁴²449 U.S. 383 (1980).

Outside counsel was hired to assist in the investigation. The attorney prepared a letter and questionnaire which was sent to “all foreign general area managers.” The letter, which was signed by Upjohn’s chairman, indicated that the chairman had requested the general counsel to conduct an investigation in order to determine the magnitude of the payments made.

The questionnaires were later sought by the IRS in the context of a subpoena demanding the production of all files relevant to the investigation. The Sixth Circuit Court of Appeals ruled that the communications with employees who were outside Upjohn’s “control group” (meaning any persons who were not responsible for directing Upjohn’s actions in response to legal advice) were not privileged.¹⁴³ Under the particular facts of the case, the United States Supreme Court disagreed, holding that such a limitation would frustrate the purpose of the privilege by discouraging the communication of relevant information by employee of the client to the attorneys of the client.¹⁴⁴ The United States Supreme Court has refused to develop a bright line test to define the attorney-client privilege in this context, deferring to a case-by-case analysis instead.¹⁴⁵

While this case discusses the application of the “control group” test to the federal privilege, it is important to note that state law will most often be applied in the case of insurance disputes. Not all states follow the “control group” analysis, so it is most important to study the approach of the particular jurisdiction in question. The privilege at issue in any given investigation will be a particular state’s own substantive law, so, once again, a careful study of the applicable law and privileges will be required.

For the purposes of discussion here, we can assume the application of a “control group” analysis in order to determine how potential privileges might apply. Using a strict “control group” test, only those officers and agents of the company who are responsible for directing the company’s actions in response to legal advice qualify as a “client.” Lower level employees may not qualify, and therefore communications with those persons may not be privileged. A careful study of these issues, in light of the circumstances of a particular case, will be required in order to fully analyze a potential privilege or claim of privilege. Most notably, a careful review of the particular jurisdiction’s attorney-client privilege rules and the cases interpreting the privilege will be necessary.

¹⁴³*Id.* at 388.

¹⁴⁴*Id.* at 392.

¹⁴⁵*Id.*

C. THE “FACTS ARE NOT PRIVILEGED” RULE

Perhaps the more important point to make within the context of the attorney-client privilege discussion is that facts cannot be protected from disclosure by the claim of privilege. Because only “communications” are protected, it goes without saying that facts which are uncovered during the insured’s investigation are not protected by the attorney-client privilege. The privilege protects communications between the attorney and client from disclosure, but it does not protect the underlying facts from disclosure. The United States Supreme Court has clearly discussed this distinction and its impact upon a claimed privilege, as follows:

[T]he protection of the privilege extends only to communications and not the facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, “What did you say or writ to the attorney?” but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.¹⁴⁶

Thus, the facts which are discovered during an investigation are not privileged, and should not be sheltered from disclosure to the insurer. Facts are facts. They do not take on a magical characterization just because they may have been uncovered in an investigation which the insured requested that its counsel perform. They do not become protected just because they are included in a report from the attorney to his client. The basic nature of the facts do not change, and they cannot be protected from disclosure through a claim of privilege.

D. NATURE OF AND PRODUCTS FROM AN INVESTIGATION CONDUCTED BY AN ATTORNEY

When the insured uses an attorney to conduct its own investigation of the claim, including the submission of the proof of loss, a common issue which arises is whether the insured’s attorney was hired to provide legal advice, or merely to act as an investigator in order to gather facts. If the use of the attorney was purely for the purpose of an investigation, not advice, then arguably the attorney’s communications with the insured should not be protected by the attorney-client privilege.¹⁴⁷ More importantly, and as discussed above, the factual information discovered by the attorney is not privileged, because facts cannot be cloaked by an argument of

¹⁴⁶449 U.S. at 395.

¹⁴⁷*Dawson v. New York Life Ins. Co.*, 901 F. Supp. 1362, 1367 (N.D. Ill. 1995); *North Am. Mortgage Investors v. First Wisconsin Nat’l Bank*, 69 F.R.D. 9, 11 (E.D. Wis. 1975).

privilege.¹⁴⁸ The scope of the duties of the insured's counsel should be carefully analyzed if privilege issues become a central key.¹⁴⁹

For example, various courts have held that communications in which the client seeks business advice, not legal advice, are not privileged, and that communications made to aid an attorney acting as a business negotiator are not privileged.¹⁵⁰ Other courts have focused on the analysis of the attorney's scope of services, as follows:

Once the attorney-client relationship is established, inquiry will focus upon the nature of the communication or information sought. The relationship itself does not create "[a] cloak of protection [which is] draped around all occurrences and conversations which have any bearing, direct or indirect, upon the relationship of the attorney with his client." The privilege "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege."¹⁵¹

Where the insured disputes its obligation to disclose factual information during interviews, or refuses to provide documents which contain factual information gathered during the insured's own investigation, these issues about privilege should be carefully analyzed. The insurer should highlight the decisions which discuss the concept that facts are not privileged, and the concept that the results of an investigation, even when conducted by an attorney for the insured, are not privileged. One case to cite in this context is *North American Mortgage Investors v. First Wisconsin National Bank*,¹⁵² which illustrates why certain documents prepared by any attorney are not sheltered by a privilege:

The possession of a law degree and admission to the bar is not enough to establish a person as an attorney for purposes of determining whether the attorney-client privilege applies. For the privilege to exist, the lawyer must not only be functioning as an advisor, but

¹⁴⁸*Upjohn Co. v. United States*, 449 U.S. at 395.

¹⁴⁹To the contrary, counsel hired by an insurer, even if used to investigate the claim in question, is hired to provide coverage advice to the insurer. Under those circumstances, the insurer's counsel is acting as an attorney, not merely an investigator, and the privilege should apply to the investigation and analysis of the claim. *See, e.g.,* *Dunn v. State Farm Fire & Cas. Co.* 927 F.2d 869, 875 (5th Cir. 1991); *Aetna Cas. & Sur. Co. v. Superior Court*, 200 Cal. Rptr. 471, 473 (Cal. Ct. App. 1984).

¹⁵⁰*United States v. IBM Corp.* 66 F.R.D. 206, 212-13 (S.D.N.Y. 1974); *United States v. Wilson*, 798 F.2d 509, 513 (1st Cir. 1986).

¹⁵¹*In re Walsh*, 623 F.2d 489, 494 (7th Cir. 1980), *cert. denied*, 449 U.S. 994 (1980).

¹⁵²69 F.R.D. 9 (E.D. Wis. 1975).

the advice given must be predominately legal, as opposed to business, in nature.¹⁵³

Moreover, the issue of an expectation of privacy should also be analyzed in this context. If an insured hires counsel to conduct an investigation, in furtherance of the filing of a bond claim, the insured certainly does not have any expectation of privacy regarding the facts which are discovered. Those facts will themselves make up the fidelity bond claim and will form the basis for the notice and proof of loss. Useful authority for arguing that the products of the attorney's investigation in this context are not privileged includes *Carrier Corp. v. Home Insurance Co.*,¹⁵⁴ where the court's discussion on this subject included the following:

Given the fact that the insured is required to disclose to its insurer relevant information when it makes a claim for coverage under an insurance policy, and given the fact that the insured is required to deal in good faith with its insurers, then insured cannot, in good faith, entertain a reasonable expectation at the time the communication is made that the facts underlying those claims will not be disclosed to its insurer once the claim for coverage is made.¹⁵⁵

Interview notes made by an attorney during the insured's investigation of the claim may be a source of contention between an insurer and an insured. Those notes may be sources of information for the insurer, which will be helpful in the insurer's own investigation and witness interviews. In the context of the considerations discussed above, such notes, as compiled by an attorney acting as an investigator, should not be considered privileged. This argument is especially strong when the notes of the interviews are used as the basis for a proof of loss or similar documents.

This subject was discussed at some length in *Gottlieb v. Wiles*,¹⁵⁶ where a company's attorneys interviewed various employees as a part of an investigation. The notes taken by the attorneys were later used as a basis of a report, which cited to the interview summaries. The report was released, but the interview notes and summaries were not. A court held that there was no expectation of privacy with respect to the supporting materials for the report, because the court found that the communications were not treated as confidential.¹⁵⁷ Additionally, the court found that a party cannot

¹⁵³*Id.* at 11.

¹⁵⁴No. CV-35-23-83, 1992 WL 478585 (Conn. Sup. Ct. Aug. 18, 1992).

¹⁵⁵*Id.* at *3.

¹⁵⁶143 F.R.D. 241 (D. Colo. 1992).

¹⁵⁷*Id.* at 249.

release a document which covers a particular subject matter and then claim that the underlying supporting data is privileged.¹⁵⁸

Once again, the issue of the insured's duty to cooperate should also be considered in this context. A strong argument exists that the insured's claims of privilege, which impede the insurer's investigation and which are not based on strong legal authority, may constitute a breach of the duty to cooperate, as imposed by the various policy language.

E. WORK PRODUCT ARGUMENTS

An insured may similarly argue that information which is sought by an insurer is protected by the work product doctrine. The work product doctrine is a protection which is afforded to materials prepared by an attorney in anticipation of litigation. The genesis of this protection is the United States Supreme Court Case of *Hickman v. Taylor*,¹⁵⁹ where the court concluded that it is essential for an attorney to be work "with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel . . . [or else] much of what is now put down in writing would remain unwritten."¹⁶⁰

For an insured to raise a legitimate claim of the work product protection, it must establish that, while conducting its investigation of the claim, it believed not only that the insurer was going to deny coverage for the loss, but also that it had reason to believe that litigation would result. Thus, in most cases, there will be no basis to support a claim of the work product privilege to shield the information developed in an investigation by the insured.¹⁶¹ The timing of the insured's investigation, and the purpose of the initial investigation, will likely undermine any later claim of work product protection.

IX. General Confidentiality Issues

When the insurer receives notice of a fidelity bond claim or commercial crime policy claim by its insured and undertakes an investigation into the facts of the particular claim, the insurer may have various confidentiality issues to consider. First, the insurer will likely have been provided with a proof of loss and supporting documentation which describe the facts associated with the alleged loss. In addition, the insurer may ask for and receive additional records such as interview notes, bank audit reports, bank examination reports, suspicious activity reports, and other

¹⁵⁸*Id.*

¹⁵⁹329 U.S. 495 (1947).

¹⁶⁰*Id.* at 511.

¹⁶¹*EDO Corp. v. Newark Ins. Co.*, 145 F.R.D. 18, 24 (D. Conn. 1992) (Insured "lacked a reasonable basis to anticipate litigation with the [insurers]" prior to the denial of the claim).

documents. Once the insurer has possession of such records, does the insurer have any obligations of confidentiality, during the course of the witness interviews? What records can be shared with key witnesses? What does the insurer do if the witness refuses to give an interview unless he or she can review the proof of loss and any allegations made against him or her?

These questions present some difficult issues for the insurer, and the insurer will likely be faced with many competing interests. On one hand, the insurer will have an interest in obtaining as much information as possible from the insured, in which case the insured may want assurances of confidentiality. On the other hand, the insurer will need to conduct a thorough investigation of the facts, independent of the information provided by the insured. That investigation may involve verifying the information contained in allegedly “confidential” communications or documents from the insured.

A. CONFIDENTIALITY AND THE PROOF OF LOSS

When a proof of loss is submitted by an insured to an insurer, the insured may assume that document to be a confidential communication of sensitive information. In the case of an employee dishonesty claim, for example, the insured will be making a number of very pointed allegations against an employee (or more likely a former employee) with respect to potentially illegal or fraudulent conduct. It might be extremely difficult for the insurer to conduct a thorough interview with the accused employee without showing the proof of loss, and its specific allegations, to the accused. In those circumstances, what are the insurers options? How can an insurer protect itself against concerns such as retaliatory claims by the accused?

Interestingly, few courts have considered the issue of defamation or retaliatory litigation in the context of a fidelity bond or commercial crime policy claim.¹⁶² Therefore, there may be many questions but few definitive answers in this context.

The real question which an insurer will want answered in this area is if the insurer shows the proof of loss to the accused employee, has it committed any actionable offense. The answer is likely no. By showing the proof of loss to the accused employee only, there would be no “publication” to a third person, which is one of the elements of the tort of defamation.¹⁶³ Additionally, at least a qualified

¹⁶²*See, e.g.*, *Ripps v. Harrington*, 1 So. 2d 899 (Ala. 1941); *Gallagher v. Albert Woodley Co.*, 315 N.Y.S.2d 99 (N.Y. App. 1970); *First State Bank of Corpus Christi v. Ake*, 606 S.W.2d 696 (Tex. Civ. App.—Corpus Christi 1980, *writ ref’d n.r.e.*).

¹⁶³W. PAGE KEETON, ET AL., *PROSSER & KEATON ON THE LAW OF TORTS* § 113 (5th Ed. 1971). However, note a possible exception to this rule, in the compelled self publication doctrine, in which the person being defamed was under a strong compulsion to share the information with others, and therefore the publication to the target satisfies the publication requirement generally. *Starr v. Pearl Vision, Inc.*, 54 F.3d 1548, 1554 (10th Cir. 1995).

privilege should apply to the insurer's action, which was committed in good faith in the course of its investigation.¹⁶⁴ That qualified privilege should protect the insurer, so long as the insurer used the information in the proof of loss in good faith, disclosing only that information which was necessary to investigate the claim.¹⁶⁵

A careful review of applicable state law will be necessary to investigate all of the possible implications of sharing the proof of loss with the accused. Each state's law on defamation and privileges should provide the necessary guidelines for the insurer. A harder question for the insurer to answer in this context may be whether sharing the proof of loss not just with the accused wrongdoer, but with third parties as well, would give rise to any claims against the insurer. In that circumstance, the qualified privilege should also provide some protection, but reference to applicable state law will be necessary to analyze the issue.

B. CONFIDENTIALITY AND BANK RECORDS

Certain bank records which might be disclosed to an insurer during a claim investigation, including audit reports, examination reports from regulators, and suspicious activity reports, are frequently treated as confidential records by the bank disclosing the records. Often, those records are disclosed to the insurer, specifically under an agreement of confidentiality. In those circumstances, the insurer may not be free to use the documents in witness interviews or other parts of the investigation, because certain disclosures could arguably violate the confidentiality arrangements. Before agreeing that such documents are confidential, the insurer should carefully review that legal issue.¹⁶⁶ Caution should be used by the insurer, however, when it has obtained certain records on the condition of confidentiality.

X. Conclusion

Conducting witness interviews is an important part of a thorough investigation into a complex claim under a fidelity bond or commercial crime policy. Many strategic, legal, and ethical considerations must go into the planning and implementation phases of the interviews, however. The practitioner is wise to engage in some advance planning regarding the scope of the interviews and list of witnesses, the location and timing of the interviews, and the way in which the interviews will be conducted and by whom. Preparation is the key to the successful interview, including

¹⁶⁴See *Barakat v. Matts*, 648 N.E.2d 1033, 1040 (Ill. Ct. App. 1995); KEETON, *supra* note 163, at § 115.

¹⁶⁵*Id.*

¹⁶⁶See Micheal Keeley & Sean Duffy, *Investigating the Employee Dishonesty Claim: Interviewing Witnesses, Obtaining Documents, and Other Important Issues*, HANDLING FIDELITY BOND CLAIMS (ABA 1999) for a thorough discussion of the issue of confidentiality and privilege for certain types of bank records.

a good advance understanding of all of the issues and potential issues which should be explored.

In addition, a thorough grasp of the legal issues which might be presented, including specifically issues of Fifth Amendment privileges and attorney-client or work product privileges, will be helpful in advance of the interview process. When such privileges are urged, the insurer should be prepared to discuss them fully and be aware of when they properly apply.

Finally, the overriding ethical issues which are imposed upon attorneys, in every context including a claim investigation, are important ones to consider. The applicable ethical rules of a particular jurisdiction may have some effect upon the way in which an investigation can be conducted, and upon the way the interview should proceed.