

1 **WO**

2  
3  
4  
5  
6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

8  
9 Interstate Fire & Casualty Company, Inc.,  
an Illinois corporation,

No. CV 09-01405-PHX-NVW

10 Plaintiff and Counterdefendant,

**ORDER**

11 vs.

12 The Roman Catholic Church of the Diocese  
13 of Phoenix, a corporation sole, by and  
14 through Bishop Thomas J. Olmsted, his  
predecessors and successors,

15 Defendants and Counterclaimants.

16  
17 Before the Court is Plaintiff Interstate Fire and Casualty Company's ("Interstate  
18 Fire") Motion to Compel Production of Witness Interviews and Timelines (Doc. 115).  
19 Interstate Fire requests production of informal discovery taken by Defendant ("the  
20 Diocese") in defending the underlying *Takata* and *Cesolini* cases, including summaries of  
21 twenty-five witness interviews and two timelines. Interstate Fire claims these documents  
22 are discoverable because they are relevant to the Diocese's knowledge of whether  
23 offending priests would abuse other minors, which, as this Court held in its February 8,  
24 2011 order (Doc. 58), is a central issue to this litigation and to determining whether the  
25 Diocese's claims are covered by Interstate Fire's policy. Interstate Fire requests the  
26 factual portions of the interview summaries, and is amenable to the documents being  
27 redacted for counsel's strategy, theories, and assessments. The Diocese objects to the  
28 production of the requested documents on the basis that they are protected as work

1 product.

2 Interstate Fire claims it is entitled to production of the witness interview  
3 summaries and timelines under four theories. First, Interstate Fire argues that it has a  
4 contractual right under the insurance policy to examine the Diocese's "books or records  
5 so far as they relate to coverage." (Doc. 115 at 2.) Second, Interstate Fire claims that  
6 even if the requested discovery constitutes work product, Interstate Fire and the Diocese  
7 share the "common interest" of defeating, settling, or minimizing the claims in the  
8 underlying litigation, and are accordingly entitled to access the interview summaries and  
9 timelines. Third, Interstate Fire claims that it is entitled to the requested discovery  
10 because the Diocese's claim for indemnification for its attorney's fees puts its services  
11 for such fees "at issue," thus overcoming the work product protection. Finally, Plaintiff  
12 claims that it has shown a substantial need for the interview summaries under Fed. R.  
13 Civ. P. 26(b)(3) because of the witnesses' unavailability, uncooperativeness, and their  
14 faded recollection of the events.


15 The first three theories proffered by Interstate Fire do not entitle it to the requested  
16 discovery. The provision in the insurance contract for the review of books and records  
17 does not overcome the work product protection in this instance; the requested materials  
18 do not fall clearly within the scope of the Diocese's "books and records" such that the  
19 Diocese could be said to have waived the work product protection by signing the  
20 insurance contract. Further, because the materials are not being requested in the course  
21 of any duty to defend the Diocese against the underlying claims, the "common interest"  
22 doctrine does not provide a basis for compelling the requested discovery. Finally, the  
23 Diocese's request for attorney's fees has not put its services "at issue" so as to defeat the  
24 work product protection.

25 However, the Court finds that Interstate Fire is entitled to the requested discovery  
26 under Fed. R. Civ. P. 26(b)(3). Fed. R. Civ. P. 26(b)(3)(A)(ii) provides that otherwise  
27 protected documents may be discoverable where the party seeking to compel production  
28 "shows that it has substantial need for the materials to prepare its case and cannot,

1 without undue hardship, obtain their substantial equivalent by other means.” Interstate  
2 Fire claims that the subjects of the interviews have been non-responsive to contact, are  
3 difficult to locate, would be “inherently hostile” due to the nature of the underlying  
4 claims, and would accordingly be unwilling to provide the same information that was  
5 given in their earlier interviews. Further, Interstate Fire notes that the witnesses’  
6 memories were likely better at the time the interviews were conducted, approximately  
7 five years ago, than their memories would be now. The Court agrees. Many of the  
8 witnesses, due to potential self-incrimination, imprisonment for the crimes at issue, and  
9 the sensitive nature of the claims at issue, would likely be hostile to Interstate Fire and  
10 thus uncooperative, as indicated by the lack of response to Interstate Fire’s attempt to  
11 contact Fr. Giandelone and other witnesses related to the *Cesolini* matter. This hostility,  
12 coupled with the passage of time since the interviews were conducted, is sufficient to  
13 warrant compelling the requested discovery under Fed. R. Civ. P. 26(b)(3). Accordingly,  
14 the Court will grant Interstate Fire’s motion (Doc. 115) and order the Diocese to produce  
15 the requested documents. In order to ensure that the documents are sufficiently redacted  
16 to protect the Diocese’s work product, the Diocese shall submit the documents to the  
17 Court for review with their proposed redactions.

18 IT IS THEREFORE ORDERED that Plaintiff’s Motion to Compel Production of  
19 Witness Interviews and Timelines (Doc. 115) is granted. Defendant shall produce the  
20 witness interview summaries and timelines, with Defendant’s proposed redactions, to the  
21 Court by February 8, 2012.

22 Dated this 19th day of January, 2012.

23  
24   
25 \_\_\_\_\_  
26 Neil V. Wake  
27 United States District Judge  
28