"That's [Not] Privileged": A Corporation's Duty to Prepare a 30(b)(6) Witness Includes Sharing Knowledge of Legal Counsel

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When a company is noticed for a deposition, it has a duty to prepare its witnesses to fully and unevasively answer questions about the designated subject matters. Companies may not realize, though, that the preparation must include not only facts known to the company, but also facts known uniquely by the company's attorney. These facts, even if discovered solely through the company's attorney's efforts, are discoverable and are not protected by the work product doctrine.

Often, corporate witnesses (and sometimes even legal counsel) believe that any discussions with attorneys regarding the deposition topics are off-limits. But, no matter how much time a corporate witness spends preparing, by looking at documents, talking with other employees, reading deposition transcripts, and seeking information from third parties, the witness will, most likely, also meet with the company's attorneys to prepare. To the extent the attorneys convey any *facts* to the witness that are relevant to the deposition topics, those facts are discoverable and are not protected by either the attorney-client privilege *or* the work product doctrine. (Of course, the attorney's mental impressions, opinions, and strategy may remain protected.) And, though it happens all the time, it is improper for the defending attorney to instruct the corporate witness to not answer questions about those facts on the ground of privilege.

The notion that *facts* conveyed to a corporate designee through counsel are discoverable and not protected by any privilege should be uncontroversial enough. In the 30(b)(6) context, however, counsel may actually have an *affirmative* duty to educate the witness with facts the attorney knows so that those facts can be revealed in the deposition. If the company's attorney knows something factual that is relevant to a noticed topic that others at the corporation do not know (and thus cannot prepare the witness on), then the corporation's counsel must inform the witness of those facts for the purposes of testifying. This holds true even where the facts the lawyer obtained are the result of her own independent investigation and inquiry—what some practitioners may consider to be their protected, investigative work product.

Thus, in preparing a Rule 30(b)(6) corporate deponent, both counsel and the company should be mindful of what facts the attorney may know that need to be imparted so that the witness is thoroughly prepared. Counsel should also caution the witness to stay on the path of concrete facts so that she does not inadvertently cross over into counsel's mental impressions and strategy. Where that line needs to be drawn should be a part of any preparation session.

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