Court Takes a Common Sense Approach to Rule 30(b)(6) Depositions

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In his June 24, 2015 “Privilege Points” release, Tom Spahn discusses the application of the privilege to preparing witnesses for 30(b)(6) depositions:

Rule 30(b)(6) of the Federal Rules of Civil Procedure allows corporations' adversaries to insist that the corporation select a spokesman to provide binding testimony about designated topics. These depositions almost inevitably raise privilege and work product issues, because (among other things) lawyers normally gather the necessary facts and educate the corporation's designated deponent.

In VC Management, LLC v. ReliaStar Life Insurance Co., No. 14 CV 1385, 2015 U.S. Dist. LEXIS 51343 (N.D. Ill. Apr. 20, 2015), plaintiff claimed that defendant's Rule 30(b)(6) designee admitted that in preparing for her testimony she relied on emails the defendant withheld as privileged — thus rendering the emails discoverable. The court rejected plaintiff’s argument, which it said "would initiate subject matter waivers each and every time [corporate designees] recalled information, privileged or not, that was discussed in a privileged communication with an attorney, even if other sources supplied the exact same knowledge." Id. at *9. The court acknowledged that the "analysis on this issue might be different" if the designee's "exclusive source of knowledge" was the privileged emails, and "if she had testified about the content of those emails." Id. at *9-10.

Rule 30(b)(6) depositions raise numerous privilege and work product issues, but lawyers' role in preparing such witnesses does not automatically waive the protection otherwise available for communications in which lawyers relay facts to the corporate designee.