Courts Address "Discovery about Discovery": Part I

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In his November 26, 2014 “Privilege Points” release, Tom Spahn discusses discovery preparation and the privilege:

Plaintiffs sometimes try to generate a litigation "side show" by challenging corporate defendants' steps in preparing their discovery responses. Courts' reactions to such efforts highlight disagreements about the work product doctrine's application in that context.

In Estate of Jaquez v. City of New York, No. 10 Civ. 2881 (KBF), 2014 U.S. Dist. LEXIS 148717 (S.D.N.Y. Oct. 10, 2014), Judge Forrest addressed plaintiff's effort to learn what deposition transcripts a defense witness had reviewed before testifying. The court acknowledged that a lawyer's "general selection of materials to be covered during a preparation session are [sic] usually protected from an omnibus request for disclosure." Id. at *4. However, the court held that the plaintiff could ask a witness whether his or her recollection "was refreshed by a specific document shown during the preparation — and to identify such a document." Id. at *5. The court then added another more subtle principle — holding that a defense lawyer who had "shared the substance" of another witness's testimony with a deponent could not avoid disclosure under this refreshment rule "simply by reading or summarizing it to the witness instead of having the witness read it him or herself." Id. at *8. As the court bluntly put it "in for a penny, in for a pound." Id.

If a lawyer preparing a witness simply discusses historical facts (without attributing them to another deposition witness), it is difficult to imagine how this process would work. Next week's Privilege Point addresses two other decisions issued just a few days later, also focusing on what could be called "discovery about discovery."