In his November 21, 2012 “Privilege Points” release, Tom Spahn discusses protecting against privilege waiver during depositions:

Not surprisingly, a litigant's deliberate disclosure of privileged communications nearly always triggers a waiver, and often a subject matter waiver. On the other hand, the privilege clearly does not protect the fact of a privileged communication, or the general subject matter of such a communication -- so disclosing those facts does not trigger a waiver.

In the fast-paced deposition setting, it can be difficult for witnesses or their lawyers to carefully draw the line between protected communications and unprotected background facts about those communications. In *K & S Associates, Inc. v. American Association of Physicists in Medicine*, No. 3:09-1108, 2012 U.S. Dist. LEXIS 135715 (M.D. Tenn. Sept. 21, 2012), a deposition witness acknowledged that his company had consulted with a lawyer. The witness then indicated: "And we get answer from the lawyer and says it is conflict of interest." *Id.* at *4. The adversary argued that the deposition witness had waived the privilege covering a related privileged memo, but the court disagreed. The court held that the testimony "fails to reveal the conclusions, legal advice or privileged communication contained in the [withheld] memo or the legal reasoning upon which such communication was based." *Id.* at *7. The court also noted that the witness’s lawyer "objected to questions that called for disclosure of the substance of the [withheld] memo." *Id.*

It would be easy to question the court's conclusion, but most courts give a break to deposition witnesses and their lawyers trying to avoid waiving the privilege during a deposition. Courts are especially forgiving when the witness's lawyer objects to questions calling for the disclosure of privileged communications, and disclaims any intent to rely on any privileged communications or the lawyer's advice.