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IN THE HOT SEAT: IN-HOUSE COUNSEL AS WITNESSES

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> *"Every lawyer dislikes to take the witness stand and will do so only for grave reasons. This is partly because it is not his role; he is almost invariably a poor witness. . . . He regrets it; the profession discourages it."*
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> - *Hickman v. Taylor*, 329 U.S. 495, 517 (1947) (Jackson, J., concurring)

I. Introduction

Parties to litigation are increasingly seeking testimony from attorneys, including in-house counsel.[1] Sometimes clients want their in-house counsel to testify with helpful facts or to otherwise buttress their case. Other times, opposing counsel attempt to subpoena testimony from in-house counsel as part of a larger litigation strategy. Either way, the use of in-house counsel as a witness presents significant ethical and legal risks, including the risk of jeopardizing attorney-client privilege and work-product protections. Counsel should therefore carefully consider the related risks and take appropriate steps to mitigate those risks when presented with a subpoena or other request for such testimony.

II. How Might In-House Counsel Become a Witness?

As an initial matter, it is helpful to review when a witness may be deposed and when a witness may provide admissible testimony. To be deposed, a witness must have nonprivileged information that is relevant to any claims or defenses in the case under Federal Rule of Civil Procedure 26(b)(1).[2] And the threshold for relevance in the discovery context is "low."[3] To provide admissible testimony, a witness must have "personal knowledge of the matter" under Federal Rule of Evidence 602, and the witness's testimony must be relevant under Federal Rule of Evidence 401, which means "it has the tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action."

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[1] *See Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986) ("[I]t appears that the practice of taking the deposition of opposing counsel has become an increasingly popular vehicle of discovery."); *United States v. Philip Morris, Inc.*, 209 F.R.D. 13, 17 (D.D.C. 2002) (describing the practice of deposing counsel as "a troubling and real-world discovery problem").

[2] *See Shane v. Polaris Indus., Inc.*, No. 3:15-CV-1209-B, 2016 WL 7395362, at *3 (N.D. Tex. May 16, 2016) (explaining that parties may depose any witness with nonprivileged information relevant to the case); *see also* FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense.").

[3] *See, e.g.*, *Shane*, 2016 WL 7395362, at *3 (quoting *Mfrs. Collection Co. v. Precision Airmotive, LLC*, No. 3:12-CV-853-L, 2014 WL 2095367, at *1 (N.D. Tex. May 20, 2014)).

In-house counsel may have relevant, nonprivileged information and personal knowledge regarding a particular matter—and therefore be a potential witness—in a variety of ways. First, in-counsel may have played some role in the original event or transaction that is the subject of litigation. For example, in-house counsel may have witnessed the underlying event or transaction, advised management regarding the event or transaction, engaged in negotiations regarding the event or transaction, or drafted legal documents regarding the event or transaction.[4] Second, in-house counsel may have played some role after the original event or transaction, but before the commencement of litigation. In-house counsel, for instance, may have conducted an internal investigation regarding the original event or transaction.[5] Third, counsel may have played a role in litigation over the original event or transaction. In-house counsel may have signed the proof of claim, verified interrogatory responses, managed the preservation and production of relevant documents, or served as the corporate representative at a deposition, hearing, or trial.[6] In sum, in-house counsel may become a potential witness in many ways.

Testimony from in-house counsel may be sought by different parties—and for different reasons. The company may request this testimony based on the belief that its in-house counsel is best situated to support its case. After all, in-house counsel, which is typically managing and overseeing the litigation, probably knows the underlying facts as well as the disputed legal issues arising from those facts. The company may therefore view in-house counsel as its most knowledgeable and savvy witness. The opposing party, in turn, may see in-house counsel as a proverbial gold mine of information related to the case, thereby prompting a request to depose counsel. Such a request may also be motivated by

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[4] *See, e.g., Garza v. New Breed Logistics, Inc.*, No. 4:11-CV-161-Y, 2011 WL 13154074, at *5-6 (N.D. Tex. Nov. 16, 2011) (authorizing deposition of general counsel involved in decision to terminate plaintiff's employment); *Phillip Morris*, 209 F.R.D. at 18 (authorizing deposition of in-house counsel regarding "non-privileged, pre-litigation factual matters," such as corporate conduct, marketing strategies, and research and development); *see also McKinney/Pearl Restaurant Partners, LP v. Metropolitan Life Ins. Co.*, No. 3:14-cv-2498-B, 2016 WL 3033544, at *6 (granting motion to quash deposition of counsel involved in prior lease negotiations).

[5] *See, e.g., Sand Storage, LLC v. Trican Well Service, LP*, No. 2:13-CV-303, 2015 WL 1527608, at *4 (S.D. Tex. Apr. 2, 2015) (ordering limited deposition of in-house counsel regarding sources of factual information contained in a notice-of-default letter); *PHL Variable Ins. Co. v. 2008 Christa Joseph Irrevocable Trust Midas Life Settlements LLC*, No. 10-CV-03001, 2012 WL 12896244, at *4 (D. Minn. Sept. 21, 2012) (granting motion to quash deposition of in-house counsel relating to internal investigation, but authorizing deposition of outside counsel regarding "factual information about the investigation").

[6] *See, e.g., Stevens v. Corelogic, Inc.*, No. 14CV1158 BAS (JLB), 2015 WL 8492501, at *4 (S.D. Cal. Dec. 10, 2015) (authorizing deposition of in-house counsel related to his verification of interrogatory responses); *Adler v. Wallace Computer Servs., Inc.*, 202 F.R.D. 666, 674 (N.D. Ga. 2001) (compelling deposition of in-house counsel designated as a Rule 30(b)(6) representative).

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