

IN THE HOT SEAT: IN-HOUSE COUNSEL AS WITNESSES

Eric D. Madden

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REID | COLLINS | TSAI LLP

“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.”

- *Hickman v. Taylor*, 329 U.S. 495, 517 (1947)
(Jackson, J., concurring)

Overview



- How might in-house counsel become a witness?
- What are the risks of in-house counsel serving as a witness?
 - Lawyer-witness rule
 - Confidential information
 - Privileged information
- What if in-house counsel is served with a deposition notice or subpoena?

Becoming a Witness



When may a witness be deposed and provide admissible testimony?

- To be deposed, a witness must have non-privileged information relevant to any claims or defenses under FRCP 26(b)(1).
- To provide admissible testimony, a witness must have “personal knowledge” under FRE 602, and the testimony must be relevant under FRE 401.

Witness Scenarios

- Played role in event or transaction
 - Advised management about event/transaction
 - Engaged in negotiations regarding event/transaction
 - Drafted legal documents regarding event/transaction
- Played role after event or transaction, but before commencement of litigation
 - Conducted internal investigation after event/transaction
 - Advised management after event/transaction
- Played role in litigation over event or transaction
 - Gathered and produced responsive documents
 - Verified interrogatory responses
 - Served as corporate representative at deposition, hearing, or trial

Witness Scenarios



The company may request testimony from in-house counsel.

Or opposing counsel may request testimony from in-house counsel.



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