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Southern District Civil Practice Roundup

Expert Analysis

Two Decisions Highlight The Perils of Witness Contact

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In recent weeks, Southern District Judges J. Paul Oetken and Paul A. Engelmayer each issued decisions addressing different ethical dimensions of contact between attorneys and witnesses, in one case finding that the proposed contact was impermissible, and in the other finding that counsel's lack of witness contact was problematic. Specifically, Judge Oetken held that the court could not countenance an exception to the "no-contact rule" permitting counsel for a defendant corporation to interview potential witnesses outside the presence of plaintiffs' class counsel, because those witnesses were also members of the plaintiff class. By contrast, Judge Engelmayer castigated plaintiffs' class counsel for not interviewing witnesses quoted as confidential informants in a securities class action complaint, in granting voluntary dismissal of the complaint after it became apparent that a number of those witnesses claimed to have been misquoted or quoted out of context.

'No-Contact Rule'

Judge Oetken's decision was issued in *Jackson v. Bloomberg, L.P.*,[1] a collective action under the Fair Labor Standards Act and class action under the New York Labor Law, alleging that Bloomberg improperly failed to pay overtime to its customer support representatives. After the plaintiff class was certified, counsel for Bloomberg sought and received leave from Magistrate Judge Gabriel W. Gorenstein to interview (outside the presence of plaintiff's counsel) certain individuals who supervised members of the plaintiff class, but who, during the class period, had also worked as customer support representatives and were thus also members of the plaintiff class.

Although Judge Oetken characterized Judge Gorenstein's decision as a "thoughtful order" that balanced the need asserted by Bloomberg against the possible harm to the plaintiffs by imposing "restrictions designed to limit the potential for such harm," Oetken sustained the plaintiffs' objection to Gorenstein's order, finding that the ethical rules did not permit the type of contact sought by counsel for Bloomberg regardless of the restrictions imposed.

Noting some debate as to whether a full attorney-client relationship begins in a class action after class certification or only after the opt-out period expires,[2] Oetken found that at least a limited attorney-client relationship arises between class counsel and members of the class upon class certification, and that Rule 4.2(a) of the New York Rules of Professional Conduct applies to members of a class following class certification. That rule—commonly referred to as the "no-contact rule"—provides that "[i]n representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law."

> Judge Engelmayer castigated plaintiffs' class counsel for not interviewing witnesses quoted as confidential informants in a securities class action complaint.

Oetken quickly concluded that the contact sought by Bloomberg concerned the "subject of the representation," even though Bloomberg asserted that it sought only to elicit information about the witnesses concerning their experience supervising members of the plaintiff class. He focused the remainder of his opinion on whether the contact sought is, or could be, "authorized by law."

Noting little guidance on whether and when a court should permit contact with a represented party as an exception to Rule 4.2, Judge Oetken turned to the history of Rule 4.2 for guidance. He observed that the Model Rule on which the New York Rule is based included an additional phrase—permitting an exception to the no-contact rule when "authorized by law *or a court order*." The Model Rule also contained commentary advising that a lawyer could seek a court order when "uncertain whether a communication with a represented person is permissible" or "in exceptional circumstances," "for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury."[3]

Oetken concluded that New York's failure to adopt the "or a court order" language and the related commentary did not, without more, indicate that the New York rulemakers intended to foreclose the possibility of a court-ordered exception to the no-contact rule, but he expressed concern that "the rule's purposes could be defeated if courts permit contact with represented parties too broadly… [in] the absence of clear limitations on the scope of permissible court-ordered contact."[4]

Reasoning that such orders are appropriate only in "exceptional circumstances" such as the "exigent situation" involving risk of injury cited in the ABA Model Rule commentary, Oetken held that Bloomberg had identified no such danger in support of its application. He noted in addition, that particularly with respect to class members who were current employees of Bloomberg, the requested contact could be coercive. Judge Oetken observed that "Bloomberg's desire for convenience and confidentiality in the preparation of its defense" are "interests that are common, if not universal."[5] He concluded that "[t]he exception to the no-contact rule for communications authorized by a court order cannot be extended here to encompass Bloomberg's request. Consequently if Bloomberg wishes to elicit information from class members, it must do so through depositions or other discovery."[6]

Witness Statements

At the other end of the spectrum, although in an entirely different context, Judge Engelmayer issued

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what was in effect a lengthy advisory opinion in In re Millennial Media, Inc. Securities Litigation,7 admonishing plaintiffs' class counsel for insufficient witness contact, by failing to confirm witness statements made to investigators before including them in a complaint and failing to advise the witnesses of how their statements would be used. He issued that decision after plaintiffs voluntarily withdrew their securities class action complaint, in the wake of claims by several confidential witnesses (CWs) that they had been misquoted in the complaint and requests that their statements not be used.

Plaintiffs initially disclosed to the court, in connection with an application to file a supplemental amended complaint, that one of the CWs quoted in that pleading had informed them that he did not wish to be quoted in the complaint. Engelmayer granted the motion to file a supplemental pleading removing references to that CW, but also ordered (1) that an attorney with knowledge file an affidavit, attaching all correspondence with the CW and other relevant documents, explaining how the CW's statements came to be included in the complaint, and (2) that the CW file an affidavit providing his version of the relevant events.

The resulting submissions revealed that the CW had been contacted only once, by telephone, by an investigator for one of the plaintiffs' firms; that no lawyer had spoken to him prior to filing the complaint; and that he had not been told in advance that he would be quoted in the complaint. Unsolicited submissions by counsel for the defendant corporation recounted conversations with three other individuals who defense counsel believed were quoted as other CWs in the complaint, and who similarly objected to being quoted and disavowed statements attributed to them.[8]

Expressing concern that plaintiffs' counsel had inaccurately attributed statements to the CWs in the complaint, and that they had treated the CWs unfairly by not notifying them that they would be quoted in the complaint and might not remain anonymous, Judge Engelmayer ordered additional submissions from and relating to the remaining CWs to ascertain how those witnesses came to be included in the complaint, what they were told about how their statements would be used and the risk that their identities might be disclosed, and whether they confirmed the statements attributed to them.

The second wave of submissions revealed that prior to filing the complaint, only one of the 11 CWs cited in the complaint had been interviewed by an attorney. The 10 remaining CWs had been interviewed telephonically by investigators working for the plaintiffs' firms. The investigators had prepared reports of those conversations on which the plaintiffs' attorneys drew in drafting the complaint. The CWs had not been told they might be quoted in a pleading or designated as CWs, and the one individual who specifically inquired was told that he or she would not be identified by name. Several of the CWs asked to be removed from the complaint, and three CWs (in addition to the first complaining CW), noted inaccuracies in the quotes attributed to them.[9]

Although he did not impose sanctions, Judge Engelmayer observed—in very strong terms—that the practices of the plaintiffs' firms were problematic for two reasons. First, he found that the failure to have an attorney verify the accuracy of the investigators' reports created "significant potential for inaccuracy."[10] Engelmayer recounted in detail the statements of the first complaining CW, who spoke by phone to an investigator after drinking at a happy hour and who thought he was giving background information to the investigator and that his statements would not be used for any other purpose. The CW repudiated the statements he made, explaining that for several of them, he lacked personal knowledge or had been exaggerating, and disclaiming one statement by explaining it "[m]ust have been the beers talking."[11] Other CWs did not recall making statements attributed to them, or took issue with the manner in which their statements were characterized.

Engelmayer concluded that "[v]iewed in combination, the inaccuracies reported by [the] CWs… significantly undermine the integrity of the [complaint]." He went on to observe that "[t]he deficiencies reported by the CWs here are pervasive. And they run a gamut: They infect statements of major as well as minor importance, and they involve statements that witnesses denied making, statements that were made but which the [complaint] presented out of context, and statements of knowledge or opinion for which the witnesses lacked a factual basis."[12]

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Noting that these deficiencies could have been avoided if counsel had sought to confirm the CW statements before including them in a pleading, Engelmayer reasoned that "[p]erhaps counsel feared that, confronted with such statements, the witness might repudiate, or unhelpfully modify or contextualize, the investigator's account of his earlier statements. Perhaps counsel were pleased with the pungent sound-bites that the investigator reported…." Cautioning that such concerns are not a basis to refrain from checking factual accuracy, he admonished that "[a] quest for ignorance when preparing a federal-court Complaint diminishes counsel and ill behooves the litigation process." He concluded that "[t]he practices revealed by this case, in which plaintiffs' counsel makes literally no attempt to confirm the quotes of a witness on whom counsel proposes to rely in a public filing, sits at best uneasily alongside Federal Rule of Civil Procedure 11."[13]

Second, Engelmayer found that the practice of naming CWs without their foreknowledge raised issues of fairness to those individuals, particularly in light of the risk that such witnesses will be revealed by name where a case survives a motion to dismiss and proceeds to discovery.[14]

Engelmayer recognized that the Private Securities Litigation Reform Act's heightened pleading standards create temptations for plaintiff's counsel to rely on CWs, and he acknowledged that there is no ethical rule requiring that a witness be notified before he or she is quoted, or advised that his or her identity might be disclosed, even if initially designated as a CW. He concluded that the issue is therefore "predominantly, not one of law. It is one of basic decency."[15] He went on to express that "[t]he Court, the public, and above all such witnesses have the right to expect better of counsel…. They have a right to expect counsel to consider thoughtfully, for each person who submits to an interview, whether the consequences of potentially outing that person are justified—genuinely justified—by counsel's duty of zealous representation of their clients."[16]

Conclusion

These two decisions highlight the complicated issues that counsel face in interviewing witnesses in a litigation context. As tempting as it often is for counsel to push to gather all of the facts quickly and without the strictures of the deposition process, there is also the need for great care and careful planning to avoid running afoul of ethical strictures, Rule 11 and judicial expectations of appropriate attorney conduct.

1. 2015 WL 1822695 (S.D.N.Y. April 22, 2015).
2. Id. at *5 (citing *Dodona I v. Goldman, Sachs & Co.*, 300 F.R.D. 182, 187 (S.D.N.Y. 2014) and cases cited therein for the proposition a full attorney-client relationship begins upon certification of a class, and ABA Formal Op. 07-445 (2007) for the proposition that such a relationship does not begin until the time for opting out by a class member has expired).
3. Id. at *3 (quoting ABA Model Rule Prof'l Conduct 4.2 & cmt. 6. (2011) (emphasis supplied by Judge Oetken).
4. Id. at * 4.
5. Id.
6. Id. at *5.
7. 2015 WL 3443918 (S.D.N.Y. May 29, 2015).
8. Id. at *2.
9. Id. at **3-4.
10. Id. at *5.
11. Id. at *7.
12. Id. at **7-8.
13. Id. at *8.
14. Id. at * 12.
15. Id. at * 10.
16. Id.

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