Commentary

Confidentiality Agreements Are Not A Bar To Informal Witness Interviews

By
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Informal witness interviews serve a vital role in litigation. They permit counsel to learn relevant facts in an informal setting, without the presence of opposite counsel. In securities litigation, they rise to an even more important level because the use of confidential witnesses can verify the existence of wrongdoing and provide information essential to prepare and sustain a complaint. The process, however, may be thwarted by the presence of confidentiality agreements which may, on their face, appear to prohibit the witness from providing relevant information. As discussed below, courts have not allowed these agreements to be used to foreclose the interview, provided counsel acts in a reasonable and responsible manner.

The Importance Of Informal Interviews: Historical Overview

Courts have long recognized the efficacy and importance of informal witness interviews. In *International Business Machines v. Edelstein*, 526 F.2d 37 (2d Cir. 1975), an off-shoot of the government's antitrust action against IBM, the defendants attempted to interview witnesses listed as trial witnesses by the government. The trial court directed "that if any one of you seeks to interview a witness in the absence of opposite counsel, that you do it with a stenographer present and so that it can be available to the Court, for the Court to see it. . . ." (*Id.* at 41). This, of course, prevented counsel from interviewing these witnesses privately. The Second Circuit took the unusual step of granting a writ of mandamus, noting (*Id.* at 41):

> Moreover, interviews in the presence of opposing counsel did not lend themselves to the free and open discussion which IBM sought. Interviews transcribed by court reporters were a most unattractive alternative.
>
> The trial judge apparently looked upon an interview as the taking of a deposition. In fact, there is little relation between them. A lawyer talks to a witness to ascertain what, if any, information the witness may have relevant to his theory of the case, and to explore the witness' knowledge, memory and opinion frequently in light of information counsel may have developed from other sources. This is part of an attorney's so-called work product. It is the common experience of counsel at the trial bar that a potential witness, upon reflection, will often change, modify or expand upon his original statement and that a second or third interview will be productive of greater accuracy.

The Second Circuit added that the rulings below "not only impair the constitutional right to effective assistance of counsel but are contrary to time-honored and decision-honored principles, namely, that counsel for the parties have a right to interview

an adverse party's witnesses (the witnesses willing) in private, without the presence or consent of opposing counsel and without a transcript being made" (*Id.* at 42).

This sentiment was echoed by the New York Court of Appeals in *Neisig v. Team I*, 76 N.Y.2d 363, 558 N.E.2d 1030, 559 N.Y.S.2d 493 (1990). *Neisig* was a personal injury action in which the plaintiff's counsel sought to interview employees of the defendant who witnessed the accident. The crux of the case was whether counsel was prohibited from doing so by the Disciplinary Rules which prohibited communication with a represented "party." In permitting informal interviews of former employees and from present employees other than a limited group whose acts or omissions would bind the corporation or be imputed to it, or who were implementing the advice of counsel,[1] the Court of Appeals, citing to *IBM*, *supra*, noted (76 N.Y.2d at 372, 558 N.E.2d at 1034, 559 N.Y.S.2d at 497):

> Most significantly, the Appellate Division's blanket rule closes off avenues of informal discovery of information that may serve both the litigants and the entire justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes. Foreclosing all direct, informal interviews of employees of the corporate party unnecessarily sacrifices the long-recognized potential value of such sessions. "A lawyer talks to a witness to ascertain what, if any, information the witness may have relevant to his theory of the case, and to explore the witness' knowledge, memory and opinion — frequently in light of information counsel may have developed from other sources. This is part of an attorney's so-called work product." (*International Machs. Corp. v. Edelstein,* 526 F.2d 37, 41 [citing *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451]). Costly formal depositions that may deter litigants with limited resources, or even somewhat less formal and costly interviews attended by adversary counsel, are no substitute for such off-the-record private efforts to learn and assemble, rather than perpetuate, information.

Judicial Hostility To Use Of Confidentiality Agreements To Thwart Discovery

It is not uncommon to find that witnesses otherwise willing to provide valuable information may believe they are unable to do so because they are parties to confidentiality agreements. Such agreements come in many forms, including non-disclosure agreements aimed primarily at protecting trade secrets and business information; termination agreements; or settlements of pending claims or litigations. These agreements may provide for forfeiture of economic benefits and forbid disclosure of their terms or, in extreme cases, even of their existence.

As a general rule, courts have not permitted such agreements to bar discovery or interviews, holding that they are against public policy.[2]

In *Scott v. Nelson*, 697 So. 2d 1300 (Fla. Dist. App. 1997), Dr. Duke Scott had settled a prior litigation. The settlement agreement contained a confidentiality provision and Dr. Scott sought to bar the taking of the deposition of the settling party as witness in a subsequent action against him. The Court rejected the claim, noting that it was "improper to buy the silence of witnesses with a settlement agreement when the facts of one controversy may be relevant to another." *Id.* at 1301. In *Grumman Aerospace Corp. v. Titanium Metals Corp.*, 91 F.R.D. 84, 87-88 (E.D.N.Y. 1981), the Court denied a motion to bar production of a report held by a witness, finding that parties cannot "contract privately for the confidentiality of documents, and foreclose others from obtaining, in the course of litigation, materials that are relevant to their efforts to vindicate a legal position." *Accord Barger v. Garden Way, Inc.,* 231 Ga. App. 723, 499 S.E.2d 737 (1998).

Nestor v. Posner-Gerstenhaber, 857 So. 2d 953 (Fla. Dist. App. 2003), was a will contest involving the probate of the will of Victor Posner. Prior to Posner's death, his employees had signed confidentiality agreements which barred disclosure of essentially all aspects of Posner's private and business affairs "except to the extent required by law." The respondents in the captioned matter had contacted a witness in an attempt to interview him but were prevented from doing so by the confidentiality agreement. In nullifying the agreement and permitting the interview, the Court held (857 So. 2d at 955):

> The petitioners agree that Breen [the witness] can disclose the information the grandchildren seek, but urge that Breen only be allowed to disclose information at a formal deposition or at trial. Contractual confidentiality agreements, however, cannot be used to adversely interfere with the ability of nonparties to pursue discovery in support of their case. *See Smith v. TIB Bank of the Keys*, 687 So.2d 895, 896 (Fla. 3d DCA 1997); *Scott v. Nelson*, 697 So.2d 1300, 1301 (Fla. 1st DCA 1997) ("[S]ettlement agreements which suppress evidence violate the greater public policy."). Informal ex parte interviews with former employees are allowed, *see H.B.A. Mgmt., Inc. v. Estate of Schwartz,* 693 So.2d 541, 544-45 (Fla. 1997), and ex parte interviews with current employees may be allowed as well. *See NAACP v. Florida Dept. of Corrections,* 122 F.Supp.2d 1335, 1341 (M.D.Fla.2000). We thus find no need to make the grandchildren jump through legal hoops to obtain information the petitioners agree may be disclosed.

The Court rejected the proposition that any discovery should be by way of depositions, noting that requiring depositions "would force the grandchildren to undergo unnecessary and costly discovery procedures. . . ." (*Id.*)[3]

Chambers v. Capital Cities/ABC, 159 F.R.D. 441 (S.D.N.Y. 1995), was one of the earlier cases to consider the intersection of confidentiality agreements and former employees of a party providing information either at depositions or in pre-deposition interviews. The Court noted, "Absent possible extraordinary circumstances . . . it is against public policy for parties to agree not to reveal, at least in the limited contexts of depositions or pre-deposition interviews concerning litigation arising under federal law, facts relating to alleged or potential violations of such law." (*Id.* at 444).

The Court added that confidentiality agreements "inherently chill communications relevant to the litigation" (*Id*. at 445). It then fashioned an unusual remedy: it would draw an adverse inference against the defendant unless it acted to permit the interviews. A specific procedure was established: the defendants would have to notify former employees that unfavorable consequences would not flow from their disclosure of information as to specific areas of inquiry related to the litigation; the notice would state that the employees were not required to talk to plaintiff's counsel; and defendant's counsel must be notified of and able to attend any interviews as an observer, but could not "interfere with plaintiff's counsel's interview . . ." (*Id*. at 446).

This last condition, of course, effectively destroyed any protection of the confidentiality of the witnesses and their disclosures. It also failed to consider counsel's right to conduct interviews informally and outside the presence of the adversary, so clearly established by *IBM*. Interestingly, *IBM* was not mentioned in the opinion. *See also, Management Insights, Inc. v. Tricon Global Restaurants, Inc.*, No. 01-1040-MLB, 2001 WL 1325955 (D. Kan. Oct. 24, 2001) (confidentiality agreements between plaintiff and its employees did not preclude interviews of unrepresented former employees, but counsel seeking the interview must advise the former employees "of their right to decline to be privately interviewed."); *Hoffman v. Sbarro, Inc.*, No. 97 Civ. 4484(SS), 1997 WL 736703 (S.D.N.Y. Nov. 26, 1997) (to the extent that non-disclosure agreement signed by Sbarro employees "might be construed as requiring an employee to withhold evidence relevant to litigation designed to enforce federal statutory rights, it is void" (Citing to *Chambers, supra.*); also, *Hoffman* noted that the litigation did not involve the type of "competition-related information" usually protected by a non-disclosure agreement).

Similar attempts to foreclose cooperation with government agencies based on private agreements have been met with judicial disapproval. *See, e.g., Equal Employment Opportunity Commission v. Astra USA, Inc.*, 94 F.3d 738 (1st Cir. 1996) (holding that provisions in agreements with employees who had settled their claims by which the settling employees agreed not to assist others who file charges with the EEOC and not to discuss the incidents giving rise to the claims were "void as against public policy." (*Id.* at 745). *Accord*, *SEC v. Lipson*, No. 97 C 2661, 1997 WL 801712 (N.D. Ill. Oct. 28, 1997).

The Advent Of The PSLRA; A Significant Development: JDS Uniphase

The use of informal interviews has become widespread with the advent of the Private Securities Litigation Reform Act of 1995, 15 U.S.L. §78u – 46(b) ("PSLRA"), which became effective on November 3, 1998. In securities cases, information obtained from confidential witnesses is used to support the adequacy of the claims alleged[4] and at other stages in the litigation. These individuals have legitimate reasons for shielding their identities from disclosure which may result in a variety of adverse consequences: retaliation by employers; reluctance by prospective employers to hire a known informant; and claims of violation of confidentiality agreements.[5] Indeed, many cooperate only after receiving assurances that anonymity will be preserved to the greatest extent possible.

The most significant decision considering this issue in the context of the PSLRA is *In re JDS Uniphase Corp. Securities Litigation*, 238 F. Supp. 2d 1127 (N.D. Cal. 2002).[6] In *JDS*, former employees located by plaintiff's counsel had indicated a willingness to discuss relevant activities but believed they were barred from doing so by confidentiality agreements signed when they were hired or upon departure. Plaintiffs were able to obtain samples of those agreements for presentation to the Court and also provided the Court with examples of the questions they sought to ask in order to demonstrate that confidential information was not being sought.

The Court held that the defendant "cannot use its confidentiality agreements to chill former employees from voluntarily participating in legitimate investigations into alleged wrongdoing by JDSU." (*Id*. at 1137). The Court, however, rejected the procedure adopted in *Chambers* as "unduly cumbersome" (*Id*. at 1138). Instead, the Court ruled "that answering the questions set forth in plaintiff's reply brief and the additional questions requested at the hearing do not violate JDSU's confidentiality agreements." (*Ibid*). The Court also limited use of the information to purposes of the litigation (*Ibid*). The Court added that this procedure "will be far less intimidating to the former employee and far less intrusive to plaintiff's investigation" than requiring identification of the witnesses and attendance by opposite counsel. (*Ibid*).

This formulation has the important virtue of protecting the identity of confidential witnesses.[7] While the *JDS* ruling applied only to former employees, logically it also should extend to current employees not protected by the attorney client privilege or applicable ethical restrictions as to contacting a represented party.

Confidentiality Agreements Will Be Enforced In Appropriate Cases

Not every confidentiality agreement will be cast aside, as there may be legitimate reasons to protect the confidentiality of information. And, some courts have not been as receptive to the request for interviews as was the court in *JDS.* Thus, in *Amari Co., Inc. v. Burgess*, 546 F. Supp. 2d 571 (N.D. Ill. 2008), plaintiffs were unsuccessful in obtaining an injunction to bar defendants from threatening to enforce confidentiality agreements if potential witnesses spoke to plaintiff's counsel. The court held that the witnesses could be subpoenaed, thereby enhancing the court's ability to protect confidential information, and that it could not rule on the issue "without information about a specific former employee/potential witness and the information that individual planned to disclose." (*Id.* at 582.) An additional factor which influenced the Court was the admitted availability of other witnesses who could provide the necessary information.

Sani v. International Game Technology, 434 F. Supp. 2d 913 (D. Nev. 2006) represents an instance where a restrictive covenant was enforced to protect trade secrets. Sani had sued for discrimination and wrongful discharge. He was party to an Invention and Secrecy Agreement with his former employer. Sani learned of an action between his former employer and a third party and volunteered his services as an expert witness, apparently disclosing confidential information. International Game Technology was granted a preliminary injunction to bar further breach of the confidentiality agreement. The Court rejected Sani's argument that his extant confidentiality agreement was unenforceable. As *Sani* demonstrates, care must be taken not to intrude on trade secrets and other confidential information legitimately protected by an agreement.

Indeed, counsel face serious adverse consequences if they overreach. In *MMR/Wallace Power & Industrial, Inc. v. Thames Associates*, 764 F. Supp. 712 (D.

Conn. 1991), defendant's attorneys who had *ex parte* contacts with a former employee of plaintiff (and retained him as a consultant) were disqualified because the former employee was a member of plaintiff's litigation team. *See also Cargill v. Budine*, No. CV-F-07-349-LJO-SMS, 2007 WL 1813762 (E.D. Cal. June 22, 2007).

In re Spectrum Brands, Inc. Securities Litigation, No. 1:05-CV-02494-WSD, 2007 WL 1483633 (N.D. Ga. May 18, 2007), illustrates the pitfall of waiting too long to seek relief and not providing adequate information to the court. There, after having had its initial complaint and an amended complaint dismissed, the plaintiffs moved to limit the scope of confidentiality or severance agreements with present or former employees, alleging that these agreements blocked access to witnesses who otherwise would be able to supply information that was needed to prepare a second amended complaint. Plaintiffs also sought additional time to serve that document.

The court denied relief, noting that the plaintiffs had not provided any details as to the contents of the agreement or even indicated efforts to obtain copies. The court also was concerned that the plaintiffs had not proffered any explanation as to the type of information that would be obtained. Finally, plaintiffs simply had waited too long.

Lessons Learned

The lessons for counsel seeking judicial approval for the conduct of private interviews in the face of confidentiality agreements are clearly demonstrated by the cases:

> Act promptly, so as not to prejudice a claim that the information is needed to oppose a motion to dismiss;
>
> Provide the court with samples of the agreements or an explanation of why that cannot be done;[8]
>
> Detail the scope and necessity of the inquiry so as to demonstrate relevance and reiterate that confidential trade secrets will not be disclosed;
>
> Agree to limit the use of the information to the pending litigation;
>
> Make a showing that the information cannot be otherwise obtained; and
>
> Agree to advise all persons contacted that any interviews are voluntary.

The importance of confidential witness interviews in securities cases is beyond question; those interviews are a time-honored practice in all types of litigation. However, there is no way to compel a witness to provide such an interview if the individual believes he or she is constrained by a confidentiality agreement. In such a situation, the only available remedy is judicial intervention. The steps described above will enhance counsel's ability to obtain the necessary court order, thereby providing access to this information and protecting the identity of the confidential witnesses.

Endnotes

1. Which witnesses may be interviewed without intruding on the attorney client privilege or violating ethical rules of communication with a represented party is beyond the scope of this article.

2. We leave for another day whether access may be foreclosed by either having a party's counsel represent such witnesses directly or supplying them with "outside" counsel paid for by the party. *See Rivera v. Lutheran Medical Center*, 22 Misc. 3d 178, 866 N.Y.S.2d 520 (Sup. Ct. 2008) (disqualifying defense counsel who solicited representations of witnesses not subject to potential liability from representing those individuals).

3. The Court cited to Florida Rule of Civil Procedure which admonished that the rules be construed "to secure the just, speedy, and inexpensive determination of every action." F.R.C.P. 1 is identical, as is New York CPLR 104.

4. The conduct of the informal interview does not violate the PSLRA stay of discovery. *See In re JDS Uniphase Corporation Securities Litigation*, 238 F. Supp. 1127 (N.D. Cal. 2002); *In re Tyco International Ltd.*

Securities Litigation, No. 00-MD-1335-B, 2001 WL 34075721 (D.N.H. Jan. 30, 2001).

5. For a detailed analysis of the balancing of the need for anonymity with disclosure requirements, *see* Wohl, Confidential Information in Private Litigation: Balancing Interests in Anonymity and Disclosure, 12 Fordham Journal of Corporate and Financial Law 551 (2007).

6. The author's firm was lead counsel in that case.

7. Counsel's notes of such interviews are protected by the work product privilege and, to the extent the interviews include alleged class members, the attorney client privilege. *Equal Employment Opportunity Commission v. International Profit Associates., Inc.* 206 F.R.D. 215 (N.D. Ill. 2002).

8. Redaction of names and other identifying information should be utilized, as necessary, to protect confidentiality. ■