

IN PRAISE OF THE TESTIFYING WITNESS



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Little can make or break the outcome of a corporate dispute as much as the participation in legal proceedings of an informed, credible witness providing on-the-record testimony in the form of an affidavit or, should the case advance to trial, testimony in court. Whether or not a testifying witness can be identified is often one of the first and most critical requests lawyers pose to investigative firms. Yet, as every investigator faced with such a request knows, convincing someone to testify on-the-record can be mired in challenges both expected and unforeseen.

This is especially pertinent in those instances when a corporate dispute relates to matters of political sensitivity - and political sensitivity is almost always a factor in disputes stemming from developing economies, such as those of Eastern Europe

or the wider Middle East, irrespective of where the disputes are litigated.

Political risk is often used to describe the risk faced by businesses or investors operating in developing economies. Yet, a very similar type of risk is also faced by testifying witnesses considering participation in corporate disputes. As a result, both the suitability of a testifying witness and the potential motivations for such participation are typically matters of great complexity; the two considerations are often inextricably linked, since the motivation of a potential testifying witness directly bears upon their suitability.

One of the issues that could complicate the participation of a potential witness comes down, in basic terms, to money: payment of expenses, whether travel-related or otherwise, is relatively routine; providing a testifying witness with a more generalized compensation plan can add complexity and controversy to their potential involvement. Some jurisdictions prohibit the participation of paid witnesses outright, while in other

jurisdictions payment to a witness would be preclusive, or at the least limiting, of value attributable to any such testimony.



Ultimately, whether the use of paid testimony is possible - so long, for example, as the fact of payment is explicitly disclosed and the amount of compensation not contingent on outcome - will be decided upon by the legal team when the specific legal framework of a given jurisdiction is taken into consideration. However, these same concerns must also be taken into consideration by investigative firms, which are often in the position of identifying and, as per industry jargon, "recruiting," potential witnesses.

Some costs can be difficult to quantify or anticipate. For example, these could be costs related to security considerations during or following participation in legal proceedings, the possibility of permanent relocation, loss of potential income resulting from testimony that is to be provided, and so on. These are all substantive issues that would be taken into consideration by a witness contemplating testimony. Yet, they are not as simple to quantify as, for example, hourly or daily billing rates to compensate for time spent or rudimentary expenses incurred, as would be the case for a professional expert witness.

Returning to questions of political risk and sensitivity, one region that has tended to occupy an outside role in international corporate disputes, and where questions of a political nature relating to potential testifying witnesses are and will remain crucial, is Russia and the former Soviet states. Russian businesses are unlikely to be able to litigate in Western legal venues in the immediate future as a result of Russia's invasion of Ukraine.

However, corporate disputes in Western legal venues stemming from investments into or involving Russian businesses are likely to remain prominent, and it will be interesting to see whether formerly Russia-based individuals will begin to play a larger role as potential witnesses.

That the sizeable emigration of high net-worth individuals and white-collar professionals from Russia over the last year can also be viewed as a pool of potential testifying witnesses to ongoing or future corporate disputes is no longer in question. Nor is the probability that such individuals are more likely to consider becoming testifying witnesses in disputes occurring outside of Russia than had they chosen to remain in Russia, given current geopolitical circumstances. In any event, their ongoing, and likely continued, residence outside of Russia also raises the possibility of discovery mechanisms that would not be otherwise available, such as, for example, potential discovery under Section 1782 in the United States.



The current political circumstances in Russia also draw attention to the potential role of testifying witnesses in relation to matters much more rudimentary in nature than politically sensitive testimony. In general terms, testifying witnesses can serve as a deciding factor in providing necessary context to legal and investigative teams. For example, this is often the case in proving fraud that would not be otherwise identifiable as such through third-party analysis, or even documentary evidence, alone.

However, Russia has now passed various legislative measures restricting or entirely blocking certain types of corporate information disclosures – ostensibly with the intent of complicating, and thus countering, the imposition of sanctions by Western governments – which were previously accessible with the click of a button. This means that witnesses may be increasingly needed to testify to such questions as corporate ownership or relationships between corporate parties. In other words, the kind of information that was once generally publicly available.

Finally, the role of potential testifying witnesses also serves as a general reminder of the value of face-to-face meetings, which have become so much less frequent during the last several years of Covid-19 related travel restrictions. These restrictions have, in some parts of the world, only been lifted over the last six months.

Face-to-face meetings remain crucial in identifying testifying witnesses, assessing their potential value and building the rapport typically required to ensure their cooperation.

Just like the prevalence of iPads and e-books never did end the market for paper books, the plethora of open-source intelligence and the now-commonplace practice of video conferencing are unlikely to eliminate the need for testifying witnesses – and the face-to-face meetings that go hand in hand.

