

Lessons From Uber's Wrong Turn With A Private Investigation

Law360, New York (August 4, 2016, 11:30 AM ET) --

In today's era of social media and the internet, many of us have an insatiable desire for information and a knee jerk reaction when attacked: What dirt can we find out about our adversary?

This often happens in litigation — someone sues you or your company, and your first reaction is to jump on Google or Facebook to get some bad information on the other side. What can we find out about him? What skeletons does she have in her closet? What bad stuff have they done in the past?

However, in litigation the best defense is often *not* a good offense, and gathering irrelevant and potentially harmful information about the other side can backfire.

It is also critical to remember that whether in-house or at a firm, as lawyers, our conduct must be above reproach. That means that even in the heat of battle, you should never forget your ethical obligations and your mandate as an officer of the court to conduct litigation, at all times, within the bounds of the law.

- **Chief Example:** Uber and the latest developments in the antitrust lawsuit, now playing out in a federal court in New York. As discussed below, a recent decision sanctioning Uber should send a message to any litigant who is thinking about doing an investigation into the other side of a pending case.

First, some brief background on the Uber case. In late 2015, Spencer Meyer brought an antitrust suit against Uber in New York, alleging that Uber's smartphone technology — which sets prices for rides based on an algorithm — is in fact an unlawful attempt to fix prices and stifle competition. The case was assigned to Judge Jed Rakoff of the New York Southern District. In April 2016 Judge Rakoff denied Uber's motion to dismiss the case, and the litigation "punches" have been fast and furious since then.

Since then, the company has fought the case very aggressively. As part of that fight, Uber apparently engaged a private investigator to look into the plaintiff, Spencer Meyer, and his lawyers.

This investigation was first brought to the judge's attention in May, when the plaintiff alleged that "Ergo," the investigative firm that Uber had hired, was using aggressive and possibly illegal tactics to investigate the plaintiff and his lawyers. The plaintiff alleges that the investigator lied to third parties, for example, by misrepresenting why he was making inquiries. At one point, the investigator, falsely



Barbara E. Hoey



Hanna Furst

claiming to be a reporter writing an article about up-and-coming labor lawyers, asked to speak with the plaintiff's counsel.

This has made the judge very unhappy. In June, Judge Rakoff first ordered Uber to release discovery to the plaintiff about the investigation, including potentially privileged communications among Uber's in-house counsel on this subject. At that time, the judge stated that he was concerned about potentially criminal conduct by Uber, thus invoking the crime fraud exception to the attorney client privilege:

[T]he court finds that the plaintiff has provided an entirely 'reasonable basis' to suspect the perpetration of a fraud and to suspect that Uber communications furthered such a fraud. The defendant has stated — and Uber has effectively confirmed — that employees of Uber 'initiated an investigation concerning the plaintiff in this case,' and that Ergo was retained by Uber's legal director of security and enforcement ...

The court found that Uber personnel gave "instructions or assignments" to Ergo and "were involved in engaging and instructing Ergo." All of this provides a reasonable factual basis to suspect that a fraud occurred and that Uber's communications may have been in furtherance of it.

Then on July 25, Judge Rakoff ordered Uber and its investigative firm, Ergo, to cease their background investigations and enjoined Uber from using any information found during the investigation in the antitrust proceeding. The court also noted that Uber had agreed to pay the plaintiff "a reasonable (though publicly undisclosed) sum in reimbursement of the plaintiff's attorneys' fees and expenses incurred in conjunction with these matters."

Judge Rakoff, referring to the proceedings before him as a "sad day," was plainly dismayed by the tactics of Uber, and stated that:

...the court cannot help but be troubled by this whole dismal incident. Potential plaintiffs and their counsel need to know that they can sue companies they perceive to be violating the law without having lies told to their friends and colleagues so that their litigation adversaries can identify 'derogatories.' Further, the processes of justice before the court requires parties to conduct themselves in an ethical and responsible manner, and the conduct here fell far short of that standard.

Not knowing the facts in the Uber case, or the merits (or lack thereof) of the antitrust claim, this episode should send some strong reminders to all attorneys (and clients) as to the boundaries of aggressive litigation. Indeed, while Uber may have very strong defenses to the antitrust claim, and may also have had good reasons for undertaking this investigation — it now has incurred the ire of the judge who is overseeing the case. Was it worth it? Only time will tell.

Thus, as you litigate, remember:

- **You as counsel are responsible for your conduct:** Litigators like to be aggressive, but there are limits. Litigation is not a blood sport and we as lawyers cannot adopt a 'win at all costs attitude. Whether in-house or at a law firm, we have an obligation when representing a client to do so within the bounds of the law. Notably, Judge Rakoff did not allow Uber's counsel to "hide" behind the veil of privilege to hide their communications with their client. Once

he became concerned about potential illegal conduct, he abrogated the privilege and counsel's communications had to be revealed to the other side and to the public.

- **You are responsible for the conduct of your agents and contractors:** Lawyers must always remember that you are ultimately responsible for the conduct of your agents and contractors. Whether in house or outside counsel, if you hire a private investigator, you must ensure that the investigator at all times investigates legally and ethically. It was unclear from the orders in the Uber case whether the court ever concluded that Ergo, the private investigator, had done anything unlawful. However, the court clearly believed it was possible that Ergo had misbehaved and faulted Uber and its counsel for that behavior.
- **In litigation, everything you do matters:** When strategizing about the next move in litigation, remember the big picture and the overall goal of winning the case. The idea of getting "dirt" on the plaintiff or an adversary may seem attractive, but does that really advance your position or your client's position? How will this help your client prevail? If you are unsure, then ask yourself why you are spending time looking for this information. You also don't want some mistake with discovery or an investigator to "take over" the case and become a huge distraction.

Uber's private investigation has likely become such a distraction in the litigation, and has definitely cost both sides considerable time and money. It is also questionable what impression the judge now has of Uber and its defenses. Remember, the end game in litigation is winning the case; always keep that goal in mind.

—By Barbara E. Hoey and Hanna Furst, Kelley Drye & Warren LLP

Barbara Hoey is a partner and chairwoman of Kelley Drye's labor and employment practice group in New York. She counsels clients in all areas of employment law and represents them in litigation.

Hannah Furst is an associate in Kelley Drye's New York office and a member of the firm's labor and employment practice group.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.