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ETHICAL ISSUES IN THE USE OF PRIVATE INVESTIGATORS AND CONFIDENTIAL WITNESSES

As confidential witness ("CW") allegations have become a mainstay of securities class action litigation, ethical and other issues related to communications with potential CWs have proliferated. Ethical rules, including rules related to communications with adverse parties and third parties, govern both with whom an attorney may communicate, as well as certain substantive aspects of those communications. To avoid potential disciplinary action or litigation sanctions, lawyers for both plaintiffs and defendants should review their jurisdiction's rules before contacting a potential CW or hiring a private investigator to do so.

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Securities class action plaintiffs have responded to the heightened pleading standards imposed by the Private Securities Litigation Reform Act ("Reform Act") with increasing reliance on allegations from confidential witnesses ("CWs") — often current or former employees of a corporation who might supply facts sufficient for plaintiffs to overcome a motion to dismiss.[1] The script is well-rehearsed.[2] Plaintiffs first seek to identify potential CWs (often through a private investigator using social media).[3] Upon identifying potential CWs, plaintiffs' counsel or their investigator will contact those CWs to seek information that can be used in a complaint. Defendants may seek to counter plaintiffs'

[1] The circuit courts of appeals disagree about how much weight should be given to CW allegations. *Compare Cal. Pub. Emps.' Ret. Sys.* v. *Chubb Corp.*, 394 F.3d 126, 147 (3d Cir. 2004) ("[S]o long as plaintiffs supply sufficient facts to support their allegations, there is no reason to inflict the obligation of naming confidential sources."), *and Novak* v. *Kasaks*, 216 F.3d 300, 314 (2d Cir. 2000) ("[T]here is no requirement that [a CW] be named, provided they are described in the complaint with sufficient particularity to support the probability that a person in the position occupied by the source would possess the information alleged."), *with City of Livonia Emps.' Ret. Sys. & Loc. 295/Loc. 851* v. *Boeing Co.*, 711 F.3d 754, 759 (7th Cir. 2013) ("[U]nnamed confidential sources of damaging information require a heavy discount."), *and Ind. Elec. Workers' Pension Tr. Fund IBEW* v. *Shaw Grp., Inc.*, 537 F.3d 527, 535 (5th Cir. 2008) ("[C]ourts must discount allegations from confidential sources.").

[2] *E.g.*, Sharon Nelles & Hillary Huber, *Pleading Securities Fraud Claims: The Good, The Bad, and The Ugly*, 45 Loy. U. Chi. L.J. 653 (2014); Paul C. Gluckow & David B. Edwards, *Recent Trends Regarding the Use of Confidential Witnesses in Securities Litigation*, 45 Review of Sec. & Commodities Reg. 141 (2012).

[3] Leigh Handelman Smollar, *The Importance of Conducting Thorough Investigations of Confidential Witnesses in Securities Fraud Litigation*, 46 Loy. U. Chi. L.J. 503, 504-05 (2015).

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