

Latham Goes Global for Witness Testimony in Case for ‘Fully Distributed’ Freelance Platform Client

By Ross Todd

November 30, 2023

One of the advantages of working at a shop such as **Latham & Watkins** is that when you face a seemingly novel issue you can send out an email to nearly the entire department of 1,000-plus litigators and expect some helpful input.

“Almost invariably, no matter the question, you get some response,” says Latham partner **Kevin McDonough**.

But that wasn’t the case when McDonough and associate **Megan Behrman** sent out such an email regarding their quest to take testimony from witnesses abroad in a civil case they were handling in Nevada state court for freelance platform Toptal.

The nature of Toptal’s business—connecting businesses with freelance software engineers, designers, finance experts and project managers purported to be in the top 3% of their fields—meant that its employees were never tied to a particular location. They were “fully distributed” in company lingo. And the nature of the allegations—that certain Toptal employees were being improperly solicited to join a competitor co-founded by tech investor Denis Grosz and that certain holders of convertible notes were working together to drive an outcome that would benefit them but hurt the company—meant that some of the folks who would likely have useful information were well beyond the subpoena power of the Nevada court.

But after McDonough and Behrman reached out to their colleagues about taking testimony from a



Courtesy photos

Kevin McDonough, left, and Megan Behrman, right, of Latham & Watkins.

potential witness in Portugal, the responses didn’t exactly flow in.

“It was like crickets,” McDonough said. “No one had done it, which was kind of a scary moment not to get any response.”

But McDonough and Behrman did not let the lack of responses dissuade them from going after testimony they thought would be useful. Discovery they had already received in the Nevada case pointed them to potential noteholder witnesses in Lagos, Portugal, and Capetown, South Africa, and employees in Palanga, Lithuania, Malaga, Spain and Toronto, Canada. (Toronto-aside, it’s worth noting the coastal resort-town nature of the Toptal workforce and noteholders. Go ahead. Google those places. Being a top-notch freelancer or tech investor has its perks, it seems.)

“We like to have things very carefully planned out. How are we going to do this? Who’s done it before? What’s the precedent? What’s the process like?” McDonough said. “And we just didn’t have that here.”

What McDonough and Behrman did have was the Hague Convention, which allowed them to file motions with the Nevada court asking for letters of request, or letters rogatory. The letters amounted to non-binding requests to the ministries of justice in each of the countries where Toptal was seeking testimony, essentially saying the Nevada court agreed that there was a resident there who had information relevant to the case.

Those letters put the ball in the foreign courts to decide whether to proceed and how. Would the lawyers ask any questions, or would the judge? How long would the questioning go on? Could documents be used in questioning? All those things were to a certain extent up in the air depending on the judge where the request ultimately landed.

On top of that uncertainty, Behrman pointed out that each venue’s requirement for what should accompany such requests varied. Whereas in Portugal and Lithuania, the request need only outline the potential topics for questioning, in Spain the Latham lawyers had to lay out the questions to be asked.

Since they anticipated a potential fight over whether the proposed questions would need to be disclosed to the opposition, the Latham lawyers held off on making the request from the Spanish court until last. “There’s really no higher work product than a list of questions that you’re planning to ask a witness,” Behrman said. They ultimately succeeded in convincing the judges in Nevada and Spain to review the questions *in camera* rather than make them public prior to testimony.

Remarkably, the Latham lawyers succeeded in getting access to witnesses in all five venues. They spent a week in Portugal where a local counsel asked questions in Portuguese, which were translated into English for the English-speaking witnesses and then back again, all in front of a judge in a courtroom who

had to take breaks to attend to the rest of the court calendar. (Having packed for a two-day trip that got extended to six days, the trip involved an emergency trip to the mall for wardrobe reinforcements.)

McDonough described the courtroom in Lithuania where the duo spent a day alongside local counsel taking testimony: Imagine “a traffic court in a U.S. beach town and it would be like half the size of that.” In Malaga, Spain, Behrman got to work in court for two days alongside lawyers from Latham’s Madrid office. In Toronto, things proceeded in a conference room much more in line with the style of a U.S. deposition.

Behrman and McDonough say that although some of the testimony they gathered as part of the globe-trotting effort had to be read into the record with associates from either side playing the role of the questioner and the witness, it was effective in building on their themes in Toptal’s case. Ultimately jurors in the Nevada court this month sided with Toptal, awarding the company more than \$16 million in damages, including \$15 million in punitive damages against competitor Mechanism Ventures.

“It can be a little overwhelming to file these requests and to work with counsel in other countries to try to get testimony that’s so commonplace in the U.S., but it is possible,” Behrman said.

McDonough said that having good local counsel was essential to success. He added that when working through a translator the challenge of making sure you’re asking the questions in the right way is heightened “tenfold,” as is making sure you’re getting the answers you need. But he said one other key consideration is figuring out when you have enough information from domestic discovery to make a request abroad without waiting too long. He estimated it took about eight-to-12 months from the time of the initial request before getting to take testimony in any of these particular examples. “I think that’s where the really important lawyering happens on the U.S. side is finding that that perfect time [when you] have enough information to go take testimony from this person and [you] have enough time to do it,” he said.