

Discovery: It's not just for clients

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Attorneys are often involved in assisting clients with production of documents in response to discovery requests. Less often, but with increasing frequency, attorneys themselves are subject to discovery requests, whether those discovery requests relate to actions involving their clients or to actions against the attorneys themselves. In either case, a subpoenaed law firm must be prepared to systematically evaluate and produce responsive and unprotected documents in its possession. This is the first of a series of three articles regarding law firms' document management. This article describes potential document production obligations; the second will explain the rules involving responses to electronic document requests; and the third will outline suggested record retention policies.

Attorney-Client Privilege and the Work-Product Doctrine

When an attorney is subpoenaed to produce documents relating to any client, the attorney may well be able to assert the attorney-client privilege or work product protections provided by case law and statute.² However, not every document in a client file is guaranteed protection from discovery by either the attorney-client privilege or the work-product doctrine. Under certain circumstances, a law firm may be required to produce to an opposing party hard-copy documents in a client file, as well as e-mails, networked files, or other electronically stored documents that are responsive to a subpoena and not protected by the attorney-client privilege or work-product doctrine.

When considering whether any given document is protected by the attorney-client privilege, Georgia courts "approach the matter by confining the attorney-client privilege to its narrowest permissible limits under the statute of its creation."³ While the privilege may attach to any communication between a client and its attorney, not every document that a client gives to an attorney is protected the attorney-client privilege. An otherwise unprivileged document does not become privileged by the client's passing that document

on to its attorney;⁴ in response to an appropriate document request, the attorney must provide any such document within its physical or electronic possession.

Furthermore, a client is entitled to waive the privilege with regard to any document (if the privilege stems only from that client's communication with the attorney), thereby subjecting such a document to discovery; unfortunately, the privilege may also be waived, and therefore subject to discovery, if the client or attorney unintentionally provides the document to a third party. The rampant use of e-mail adds a danger to the waiver doctrine. Attorney-client privilege is waived with regard to an e-mail or attachment that is copied to someone other than the client, attorney, or other party within the privilege, such as an expert. If a law firm withholds an e-mail or e-mail attachment based on attorney-client privilege, not recalling that the e-mail was copied to a non-privileged third party, that firm leaves itself open to potentially grievous sanctions for failing to comply with a subpoena's demand for the document.⁵

Communications with a corporate client provide an additional opportunity for non-privileged communications. For an employee's communication with an attorney to be protected by the attorney-client privilege, the communication must meet a five-part test: (1) the communication must be made for the purpose of securing legal advice; (2) the employee making the communication must do so at the direction of its corporate superior [or else be in a sufficiently senior position to consult with the attorney on behalf of the company]; (3) the superior must have made the request so that the company could obtain legal advice; (4) the subject matter of the communication must be within the scope of the employee's corporate duties; and (5) the communication must not be disseminated beyond those persons who, because of the corporate structure, need to know its contents.⁶ Any communication with a corporate employee that does not meet this five-prong test is not protected by the attorney-client privilege.

The work-product doctrine protects any document, hard-copy or electronic, that a law firm prepares in anticipation of litigation or to provide a client with legal advice. Excluded from the doctrine are documents created to provide business advice or for any other purpose other than the provision of legal advice.⁷ Furthermore, even a document within the protection of the work-product doctrine must be produced if subpoenaed upon a showing that "the party seeking discovery has substantial need of the

documents in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.”⁸

When the Law Firm is the Client

Like any other business entity, a law firm itself can become a party to a lawsuit. In a difficult economic environment brimming with celebrated cases of corporate fraud and an increased readiness for employees to sue their employers, law firms are finding themselves more frequently the target of plaintiffs seeking a deep pocket. When a firm is a defendant, it faces the same document production obligations that any of the firm's clients normally faces, and a firm's hard-copy and electronic document-heavy business can find itself with a broad array of documents to sort through in seeking to respond to a subpoena.

The fact that law firms can expect to be increasingly brought in as defendants when their clients are alleged to have perpetrated some wrongdoing is illustrated by the recent Enron litigation.⁹ Plaintiffs sued not only Enron, but also accountants, financial institutions, and Vinson & Elkins LLP, which represented Enron with regard to public securities filings. In response to Vinson & Elkins's motion to dismiss, the court ruled that plaintiffs' allegations that the law firm prepared Enron's Securities and Exchange Commission filings and made other public statements with allegedly knowing or reckless misrepresentations were sufficient to hold Vinson & Elkins as a defendant in the case, subject to appropriate discovery.¹⁰

Employment disputes are perhaps the most common source of lawsuit involvement for law firms. Harassed associates and staff do not hesitate to file gender discrimination lawsuits, which place law firms in the position of compensating aggrieved employees for individual partners' improprieties.¹¹ Law firms are also vulnerable to claims of age discrimination,¹² racial discrimination,¹³ violation of the Family and Medical Leave Act,¹⁴ and religious discrimination¹⁵ from employees who are relatively knowledgeable about their many legal entitlements and the methods of seeking their enforcement.

Law firms can also be sued for actions they take in their interaction with the community. Public comments about former employees or partners may give rise to

claims of defamation, interference with contract, and interference with business relations, for example, as with the recent Stamford, Connecticut, case of *Jensen v. Pillsbury Winthrop*.¹⁶ Former partner Jensen sued Pillsbury for \$45 million in compensatory damages, alleging he was obliged to withdraw from partnership in Latham & Watkins and suffered a substantial impairment in his future employability because of Pillsbury's September 4, 2002, press statement accusing him of sexual harassment and declining productivity.¹⁷

A bellwether case against products liability lawyers was brought by G-I Holdings, the successor to an asbestos manufacturing company, against three law firms responsible for the bulk of class-action asbestos cases.¹⁸ In a case that could spawn immense hard-copy and electronic document production obligations by the law firms, G-I Holdings alleged that the firms committed tort and RICO violations stemming from actions the firms took in prosecuting asbestos class actions, including meeting with asbestos companies and demanding that they withdraw support from the Fairness in Asbestos Compensation Act then pending in Congress or face financial ruin. Thus far, the court has ordered that G-I Holdings is entitled to depose key witnesses on whose affidavits defendant law firms rely in support of a summary judgment motion. Further discovery is stayed until the court rules on the motion.

In Conclusion

There are endless opportunities for law firms to be confronted with document production obligations. Whether those obligations arise from a third-party subpoena based on a lawsuit involving a client or a potentially more burdensome event of a lawsuit against the firm itself, the production may be complicated by the complexity of a document-laden file or extensive electronic documents held on disks, hard drives, network systems, back-up tapes, or various other media. To minimize the cost and hardship of document production as well as sanctions for noncompliance with valid discovery requests, it behooves attorneys to adopt a system of hard copy and electronic document management that enable relatively swift and easy production of responsive and unprotected documents whenever the duty to produce may arise. An added benefit of any such efforts is that the firm will then be in an advantaged position in guiding clients (not

only in litigation, but in the clients' general course of business) through their myriad document production and recordkeeping duties.

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² See O.C.G.A. §§ 24-9-24, -25 (attorney-client privilege), § 9-11-26 (work product protection).

³ *Ostroff v. Coyner*, 369 S.E.2d 298 (Ga. App. 1988), quoting *Atlantic Coast Line R. Co. v. Daugherty*, 141 S.E.2d 112 (Ga. App. 1965)

⁴ *Id.*

⁵ See Securities and Exchange Commission Press Release No. 2002-93 (June 25, 2002) (Gardere Wynne Sewell LLP, a Dallas law firm, agreed to pay \$1.2 million for failing to produce certain court-ordered records in a pending Securities and Exchange Commission lawsuit against one of the firm's former clients).

⁶ See *Marriott Corp. v. Am. Acad. Of Psychotherapists, Inc.*, 277 S.E.2d 785, 791-92 (Ga. App. 1981) (finding that in that case there was no evidence that prongs (2) or (3) were met with regard to a particular memorandum).

⁷ See *Henry v. Swift*, 563 S.E.2d 899, 902 (Ga. App. 2002).

⁸ O.C.G.A. § 9-11-12(b)(3).

⁹ See Dec. 20, 2002 Order from the ongoing case of *In re Enron Corp. Securities Litigation*, No. MDL-1446 (S.D. Tex.).

¹⁰ *Id.* At 73-98, 297-300. See also *Arizona Law Firm Pays \$21 Million, Denies Role in Baptist Foundation Collapse* 34 Sec. Reg. & Law Rep. 20, May 20, 2002, at 802 (Phoenix law firm of Jennings, Strouss & Salmon agreed to pay \$21 million to settle possible claims over its legal representation of the now-bankrupt Baptist Foundation of Arizona).

¹¹ See *Sier v. Jacobs, Persinger & Parker*, 714 N.Y.2d 283 (N.Y. App. Div. 2000) (non-jury trial award of \$250,000 for emotional distress of harassed first-year associate reduced to \$200,000 on appeal, with punitive damages award of \$50,000 upheld), *Baird v. Boies, Schiller & Flexner*, 219 F. Supp. 2d 510 (S.D.N.Y. 2002) (\$75,000 settlement with two associates for alleged placement on "non-partnership track", followed by court-ordered costs and attorneys' fees in excess of more than \$60,000), *Jury Awards \$95,000 to Female Associate Who Claimed Harassment by Firm Partner*, 8 Empl. Discrim. Rep. 20 (BNA), May 4, 1997 ("A federal district court jury has returned a \$95,000 verdict for a female lawyer who claimed that she was sexually harassed and discriminated against by a male partner in a Monterey, Calif., law firm.").

¹² See *EEOC v. Sidley Austin Brown & Wood*, ___ F.3d ___, 2002 WL 31387525, No. 02-1605 (7th Cir. 2002) (holding that EEOC allegations are sufficient to require Sidley to comply with portion of subpoena concerning document relating to demoted partners' former status as "employees").

¹³ See *Chatman v. Skadden, Arps, Slate, Meagher & Flom*, 1994 WL 478591 (N.D. Ill. 1994) (denying summary judgment motion against African-American word processing operator who alleged denial of various promotions and transfers in violation of Civil Rights Act Title VII and § 1981).

¹⁴ See *Haffner v. Bran Cave LLP*, 6 Wage & Hour Cas. 2d (BNA) 639 (S.D.N.Y. 2000) (permitting former associate to proceed with claim that firm fired him in violation of Family and Medical Leave Act for taking medical leave after marriage breakup); *Stewart v. Paul, Hastings, Janofsky & Walker, LLP*, 201 F. Supp. 2d 291 (S.D.N.Y. 2002) (granting motion to stay lawsuit for alleged Family and Medical Leave Act pending arbitration).

¹⁵ See *EEOC Sues Law Firm, Security Company for Workers who Wore Head Coverings*, 11 Empl. Discrim. Rep. 14 (BNA) Oct 17, 1998 (reporting on EEOC suit against Mayer, Brown & Platt for allegedly discriminating against workers who wore head coverings as a tenet of their religious belief).

¹⁶ No. CV-02-01919660S (Conn. Jud. Branch).

¹⁷ *Anthony Lin, Ex-Pillsbury Winthrop Partner Sues Firm for \$45 Million*, N.Y. Law J. Oct. 9, 2002 (summarizing allegations of Jensen's complaint).

¹⁸ *G-I Holdings, Inc. v. Baron & Budd*, 2002 WL 31251702 (S.D.N.Y. 2002).