UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4428/December 9, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-16554

In the Matter of GRAY FINANCIAL GROUP, INC., LAURENCE O. GRAY, and ROBERT C. HUBBARD, IV	ORDER GRANTING IN PART MOTION TO QUASH

On November 16, 2016, Respondents requested the issuance of a subpoena to nonparties Seward & Kissel, LLP, and two of its attorneys, Robert Van Grover, and Alexandra Segal (collectively, Seward & Kissel), which I signed. On November 28, 2016, Seward & Kissel submitted a motion to quash or modify the subpoena (Motion). Respondents filed an opposition (Opp'n), and the Division filed a response (Response). The motion is now ripe.

The order instituting this proceeding (OIP) alleges that between 2012 and 2013 Respondents recommended and sold investments in GrayCo Alternative Partners II, LP, a proprietary fund of funds, to four Georgia public pension clients. *See* OIP at 2. The OIP further alleges, among other misconduct, that the investments did not comply with Georgia state law, and that Respondents knew, should have known, or were reckless in not knowing of the lack of compliance. *See id*. Respondents assert reliance on advice of counsel as a defense, specifically, reliance on advice from the firm Seward & Kissel. *See* Answer at 5; Opp'n at 7. To bolster the defense, Respondents requested a subpoena demanding nineteen categories of documents from Seward & Kissel.

Seward & Kissel contend that the subpoena is unreasonable, oppressive, and unduly burdensome. *See* Motion at 5; 17 C.F.R. § 201.232(e)(2) (hearing officer may quash a subpoena if compliance would be unreasonable, oppressive, or unduly burdensome). They present a number of arguments, many of which are meritorious. However, two counterpoints, one by Respondents and one by the Division, weigh against granting Seward & Kissel's motion in its entirety.

Respondents argue that they are presumptively entitled to their entire client file and it must be produced. *See* Opp'n at 6-7 (citing *Swift, Currie, McGhee & Hiers v. Henry*, 581 S.E.2d 37, 40 (Ga. 2003)). This is the majority view. *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn L.L.P.*, 689 N.E.2d 879, 881 (N.Y. 1997) ("A majority of courts and State legal

ethics advisory bodies considering a client's access to the attorney's file in a represented matter, upon termination of the attorney-client relationship, where no claim for unpaid legal fees is outstanding, presumptively accord the client full access to the entire attorney's file on a represented matter with narrow exceptions."). Additionally, Respondents have a pending malpractice action against Seward & Kissel in United States District Court, so it is merely a matter of time before the client file will have to be produced in discovery. *See* Opp'n at 9 & Ex. 1.

However, I do not find the rest of Respondents' assertions meritorious. The client file alone should contain every document Respondents might need from Seward & Kissel to mount a reliance on advice of counsel defense, namely, the disclosures Respondents made to counsel and the legal advice Respondents received from counsel. Most requested documents which may not normally be in a client file, including legal research (request 3), document retention policies (request 11), law licenses and continuing legal education documentation (requests 12 and 13), documents pertaining to the supervision of all legal services provided by attorney Alexandra Segal (request 14), and malpractice insurance documents (request 16), have no clear relevance to such a defense; those requests appear to be much more relevant to the pending malpractice suit. And many highly relevant documents, especially opinion letters, have presumably been in Respondents' possession all along.

The Division notes that its investigative subpoena to Seward & Kissel was "coextensive with the privilege waiver" agreed to by Respondents, and that it furnished all produced documents to Respondents. Response at 2 & n.1. A reliance on advice of counsel defense is impermissible unless Respondents waive attorney-client privilege, because the privilege "cannot at once be used as a shield and a sword." *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991). It would unfairly surprise the Division if Respondents obtain documents from Seward & Kissel that exceed the scope of the privilege waiver and that are therefore not part of the investigative file, and then seek to admit those documents in evidence at the hearing.

Nonetheless, Respondents appear to be entitled to their client file, and previously unproduced documents in that file may be helpful in preparing their defense (for example, by refreshing recollection), even if Respondents do not intend to offer those documents in evidence. I will therefore order Seward & Kissel to produce Respondents' client file (request 4) and quash the remainder of the subpoena as overbroad and unreasonable. I note that Respondents' request for its client file is quite broad, as it includes "all memoranda, notes, research, billing statements, correspondence, attorney work product, and/or other documents, for all [Gray Financial] matters." Subpoena at 4. To the extent the request includes documents beyond the scope of what is required to be disclosed under *Sage Realty*, Seward & Kissel need not produce it. *See Sage Realty Corp.*, 689 N.E.2d at 883 (detailing exceptions to a client's entitlement to the client file). I will not order that Respondents forward the entire client file to the Division, but I will entertain a motion in limine by the Division if Respondents seek to introduce documentary evidence in support of their reliance on advice of counsel defense that goes beyond what Seward & Kissel produced to the Division.

If, after reviewing the client file, Respondents believe they need additional information to pursue their advice of counsel defense, they may submit a specific and narrowly tailored subpoena for additional documents.

It is therefore ORDERED that third party Seward & Kissel's motion to quash Respondents' subpoena is GRANTED IN PART, in that the subpoena is quashed except as to request 4, which seeks all client files and contents thereof. Seward & Kissel need not produce documents already produced to Respondents or to the Division.

It is further ORDERED that Seward & Kissel shall produce responsive documents no later than December 23, 2016.

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Cameron Elliot
Administrative Law Judge