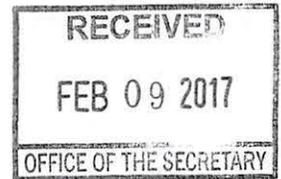


ORIGINAL

**UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION**



ADMINISTRATIVE PROCEEDING
File No. 3-16554

In the Matter of

GRAY FINANCIAL GROUP, INC.
LAURENCE O. GRAY, and
ROBERT C. HUBBARD, IV

DIVISION'S MOTION FOR LEAVE
TO CONTACT FORMER EMPLOYEES
OF GRAY FINANCIAL GROUP, INC.

The Division seeks leave to contact former employees of Gray Financial Group, Inc. ("GFG"), in accordance with the methodology set out by the relevant Georgia Bar guidance. The Division makes this request because of inconsistent communications from counsel and one witness regarding the fact of representation of that witness. Specifically, after the Division listed several former employees of Respondents on correspondence seeking trial subpoenas, the Division was contacted by Respondents' counsel and instructed not to contact those witnesses directly as they were represented by Respondents' counsel. (See Exhibit 1, attached hereto). The Division found out otherwise yesterday morning when Lisa Joe, a former employee of GFG, called the Division from the courthouse stating that she had arrived as required by subpoena only to learn that no trial was going forward. The Division explained that it had not contacted Ms. Joe about the rescheduled trial because Respondents' counsel had represented specifically that he represented her. Ms. Joe confirmed that not only was such not the case, but that she has never heard of Respondents' counsel. (See Exhibit 2, attached hereto).

Formal Advisory Opinion No. 94-3 of the State Bar of Georgia reads as follows:

QUESTION PRESENTED:

May a lawyer properly contact and interview former employees of an organization represented by counsel to obtain information relevant to litigation against the organization?

SUMMARY ANSWER:

A lawyer may properly contact and interview former employees of an organization that is represented by counsel to obtain non-privileged information relevant to litigation against the organization provided that: (1) the lawyer makes full disclosure as to the identity of his/her client; and (2) the former employee consents.

Georgia Bar Formal Advisory Opinion 94-3. Moreover, the full discussion of the Advisory Opinion makes clear that it was meant to prohibit the very conduct at issue here, that is, a blanket claim of representation of witnesses in a position to have valuable information against their former employer:

The question presented involves attempts to obtain information from former employees of an organization represented by counsel and is an aspect of the perennial problem of information control by lawyers engaged in litigation. Lawyers do not want their adversary colleagues to contact and interview employees of their client organization for the purpose of obtaining information that may be used against the organization. But a rule prohibiting such contact without consent of the organization's lawyer gives that lawyer a right of information control, **a right that is easily subject to abuse.**

This policy explains why Standard 47 applies to the employees of organization clients when those employees have the power to bind the organization by what they say or do. Formal Adv. Op. 87-6 (July 1989). **The words of a former employee can provide only information, and those words cannot have a binding effect on the former employer.** Since neither words nor actions of a former employee can bind the organization, the policy relied on in Formal Adv. Op. 87-6 is not applicable to former employees. When the purpose of the rule ends, the rule itself ends. Therefore, a lawyer

may contact and interview the former employees of an organization to obtain non-privileged information to use against that organization in a dispute.

Id (emphasis added)(full Advisory Opinion attached hereto as Exhibit 3). Georgia courts have embraced this principle. *Sanifill of Georgia v. Roberts*, 502 S.E.2d 343, 344 (Ga. App. 1998).¹

Because the relevant Georgia ethics principle allows such contact with former employees, and because the claimed representation status of at least one of the former employees that the Division hoped to interview seems to be inaccurate, the Division asks for an Order from this Court permitting it to contact former employees of GFG and to interview such employees, subject to the following requirements. Consistent with the requirements in the above cited ethics principal, the Division counsel will advise former employees that counsel represents the Division of Enforcement in this proceeding, will determine that said former employee is not represented by Respondents' counsel, and will obtain the person's consent before proceeding with any further communication. Division counsel will not inquire as to otherwise privileged information without further guidance from the Court.

Respectfully submitted this 8th day of February, 2017.

/s/ William P. Hicks

William P. Hicks
Pat Huddleston II
Michael Adler
hicksw@sec.gov

Securities and Exchange Commission
950 East Paces Ferry Road, NE, Suite 900
Atlanta, GA 30326
404.842.7675
404.842.7679 fax

¹ Counsel for the Division and lead counsel for Respondents (Terry Weiss) are members of the Georgia Bar. Moreover, other bar associations have adopted the same principle. *See, e.g., Contact with Former Employee of Adverse Corporate Party*, ABA Formal Op. 91-359 (1991).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served a copy of the DIVISION'S MOTION FOR LEAVE TO CONTACT FORMER EMPLOYEES OF GRAY FINANCIAL GROUP, INC., by electronic mail and by United Parcel Service, only, and addressed as follows:

Secretary Brent J. Fields
Securities and Exchange Commission
100 F. Street, N.E.
Washington, D. C. 20549-1090

Hon. Cameron Elliott
Securities and Exchange Commission
100 F. Street, N.E.
Washington, D. C. 20549-1090

Terry R. Weiss
Greenberg Traurig, LLP
Counsel for Respondents
3333 Piedmont Road, N.E.
Terminus 200 ▪ Suite 2500
Atlanta, Georgia 30305
weisstr@gtlaw.com

This 8th day of February, 2017.

/s/ William P. Hicks
William P. Hicks

Exhibit

1

Huddleston, Pat

From: mcdonaldbr@gtlaw.com on behalf of weisstr@gtlaw.com
Sent: Monday, January 09, 2017 6:14 PM
To: Huddleston, Pat; Hicks, William P.
Cc: SullivanG@gtlaw.com; waycos@gtlaw.com; weisstr@gtlaw.com
Subject: In the Matter of Gray Financial Group, Inc., et al., AP File No. 3-16554

Dear Pat and Bill,

We represent all current and former employees of Gray Financial Group, Inc., including Laurence Gray, Robert Hubbard, Marc Hardy, and Lisa Joe identified on your list of witness subpoenas. Please do not contact any current or former employees of Gray Financial Group, Inc. without contacting us first.

Thank you,

Terry Weiss

Terry R. Weiss
Shareholder
Greenberg Traurig, LLP
3333 Piedmont Road NE | Suite 2500 | Atlanta, GA 30305
Tel 678.553.2603 | Fax 678.553.2604 | Cell [REDACTED]
weisstr@gtlaw.com | www.gtlaw.com
Licensed to practice law in Florida and Georgia



2013 Litigation Department of the Year - Securities Litigation/Georgia
American Lawyer Media/Fulton County Daily Report

If you are not an intended recipient of confidential and privileged information in this email, please delete it, notify us immediately at postmaster@gtlaw.com, and do not use or disseminate such information.

Exhibit

2

Huddleston, Pat

From: Lisa Joe [REDACTED] >
Sent: Tuesday, February 07, 2017 3:42 PM
To: Hart, Andrea P (Contractor)
Cc: Huddleston, Pat; Hicks, William P.; Adler, Michael J.; Loomis, Madison G.; Terry Weiss
Subject: Re: SEC v. Gray Financial Group, Inc.

Hi Andrea,

Thanks for your message. I am unrepresented. I do not know Mr. Weiss, nor does he represent me.

thanks

Lisa Joe

On Feb 7, 2017, at 3:34 PM, Hart, Andrea P (Contractor) <hartand@SEC.gov> wrote:

Dear Ms. Joe:

Thank you for contacting me this morning concerning the start of the trial, referenced above, that was to begin today. I regret that you made a trip to the courthouse today for nothing, but Terry Weiss, the attorney for Gray Financial, represented to us that he represents you, and we therefore expected that he would keep you up to date on the change in the trial dates. We are now set to begin on March 6, continuing into the week of March 13, 2017.

Because Mr. Weiss has represented that he is your attorney, I need a confirmation from you that such is not the case before we can speak further. If you would, please, let me know by reply email whether I understood you correctly this morning when you said that Mr. Weiss does not represent you and that you do not even recognize his name. If such is the case and there is another attorney who represents you, please also give us that name and contact information so that we can arrange a time to speak to you. If you are unrepresented, please also let us know that.

Again, thank you for reaching out.

Best regards,

Andrea P. Hart, RP (Contractor)
Senior Paralegal Specialist
Enforcement Division
U.S. Securities and Exchange Commission
Atlanta Regional Office
950 E. Paces Ferry Road, N.E.,
Suite 900
Atlanta, Georgia 30326-1382

B: 404-842-7600 (Receptionist)

B: 404-842-5736 (Direct)

F: 404-842-7679 (Trial Unit)

E: hartand@sec.gov

This communication and any accompanying documents are confidential and privileged. They are intended for the sole use of the addressee. If you have received this transmission in error, you are advised that any disclosure, copying, distribution, or the taking of any action in reliance upon this communication is strictly prohibited. Moreover, any such disclosure shall not compromise or waive any attorney-client, accountant-client, or other privileges associated with this communication or otherwise. If you have received this communication in error, please contact me at the above email address immediately. Thank you.

Exhibit

3

Formal Advisory Opinion No. 94-3

Ethics & Discipline / Advisory Opinions / Formal Advisory Opinions / Formal Advisory Opinion No. 94-3

State Bar of Georgia**Issued by the Supreme Court of Georgia****On September 9, 1994****Formal Advisory Opinion No. 94-3**For references to Standard of Conduct 47, please see [Rule 4.2](#).This opinion also discusses issues addressed by [Rule 4.3](#).For an explanation regarding the addition of headnotes to the opinion, [click here](#).**QUESTION PRESENTED:**

May a lawyer properly contact and interview former employees of an organization represented by counsel to obtain information relevant to litigation against the organization?

SUMMARY ANSWER:

A lawyer may properly contact and interview former employees of an organization that is represented by counsel to obtain non-privileged information relevant to litigation against the organization provided that: (1) the lawyer makes full disclosure as to the identity of his/her client; and (2) the former employee consents.

OPINION

The question presented involves attempts to obtain information from former employees of an organization represented by counsel and is an aspect of the perennial problem of information control by lawyers engaged in litigation. Lawyers do not want their adversary colleagues to contact and interview employees of their client organization for the purpose of obtaining information that may be used against the organization. But a rule prohibiting such contact without consent of the organization's lawyer gives that lawyer a right of information control, a right that is easily subject to abuse. Therefore, strong policy reasons must support such a rule.

The problem is an outgrowth of the rule that a lawyer shall not communicate about the subject of the representation with a person represented by a lawyer without the prior consent of the lawyer. Standard 47, Ga. Bar Rule 4-102. This rule has been widely adopted, see, e.g., Rule 4.2, ABA MRPC, and is deemed to represent sound policy. Lawyers should not be able to contact and attempt to manipulate the clients of fellow members of the bar, especially when the lawyer's purpose in doing so is to serve his or her own self-interest in disregard of the welfare of the other lawyer's client.

This policy explains why Standard 47 applies to the employees of organization clients when those employees have the power to bind the organization by what they say or do. Formal Adv. Op. 87-6 (July 1989). The words of a former employee can provide only information, and those words cannot have a binding effect on the former employer. Since neither words nor actions of a former employee can bind the organization, the policy relied on in Formal Adv. Op. 87-6 is not applicable to former employees. When the purpose of the rule ends, the rule itself ends. Therefore, a lawyer may contact and interview the former employees of an organization to obtain non-privileged information to use against that organization in a dispute.

That, however, does not conclude the matter. Just as a rule prohibiting such contact would be an example of information control unsupported by any valid policy considerations, so the lawyer's contact and interview without informing the employee of the purpose would be an example of information control in the same category. A former employee may not wish to give information against the former employer, and since he or she is entitled not to do so, it would be unethical to use deceit and false pretenses to deny the former employee his or her right. Consequently, the former employee is entitled to know the identity of the lawyer's client, the reason for the contact, the purpose of the interview and any other information necessary under the circumstances to make the interview not misleading. A refusal of the former employee to grant the interview means only that the lawyer must resort to the normal discovery processes and witness procedures.

It follows, then, that while a lawyer may contact a former employee of an organization for the purposes of an interview, before proceeding with the interview, that lawyer must make full disclosure and obtain the consent of the former employee.

While this opinion has not dealt with the situation in which the organization is not represented by a lawyer, it is well to note two things. First, there is no rule of ethics prohibiting the contact in such a situation; second, even when there is no lawyer representing the organization, the former employee still has a right to know the reason for the contact and the purpose of the interview. Therefore, it would be unethical for a lawyer to attempt to obtain information without full disclosure. In this context as in others, a lawyer's attempt to obtain information under false pretenses or by the use of deceit is unethical.

GO TO Formal Advisory Opinion No. 95-1

[Return to handbook browser.](#)