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SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

A Lawyer's Privacy Interest—Real or Illusory?

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In 1997, the New York Court of Appeals decided *Sage Realty v. Proskauer Rose Goetz & Mendelsohn*,[1] recognizing a narrow category of documents within an attorney's files as to which the law firm, rather than the client has a privacy interest and to which the client does not have a right of access. Although the limits of that protection have been infrequently tested and its scope is not well-defined, attorneys in New York have come to rely on *Sage Realty* for the notion that certain internal law firm documents are generally protected from disclosure. A recent decision by Southern District Judge Paul G. Gardephe in *Gruss v. Zwirn* rejects the notion that this "law office" protection extends to an attorney's witness interview notes and serves as a reminder that the zone of protection for a lawyer's own records carved out by *Sage Realty* is a narrow one.

'Sage Realty'

Sage Realty involved a claim by Sage Realty against its former attorneys, asserting that the law firm had improperly withheld documents from the file the client had directed be turned over to successor counsel. The firm had represented Sage Realty in connection with extensive real estate financing transactions. In response to Sage Realty's request that its file be turned over to new counsel, the firm declined to provide certain internal documents, such as "drafts, internal memoranda, mark-ups, research and other internal documents containing the opinions, reflections and thought processes of counsel," asserting that such documents were the law firm's property.[2]

The Court of Appeals rejected that position, holding that a client that has fully paid for its lawyer's services has a presumptive right of access to its attorney's (or former attorney's) entire file. In support of this right of presumptive access, the court emphasized that the client had paid for the creation of the file, the attorney was in a fiduciary relationship to the client, and the client was not well situated to identify what particular documents the client might need from the file.

The court nonetheless acknowledged that lawyers must "'be able to set down their thoughts privately in order to assure effective and appropriate representation'" and that this "'warrants keeping [certain] documents secret from the client involved.'"[3] Such documents may include "documents containing a[n]… attorney's… assessment of the client, or tentative preliminary impressions of the legal or factual issues presented in the representation, recorded primarily for the purpose of giving internal direction to facilitate performance of the legal services entailed in that representation." The court reasoned that keeping such documents private would actually help the attorney represent the client, and that "[s]uch documents presumably are unlikely to be of any significant usefulness to the client or to a successor attorney."[4]

Sage Realty concerned the relative rights of access and control over law firm documents in a dispute between client and law firm, but the concept that certain documents in a client's file belong to the firm and are beyond a client's reach also has application in the context of discovery requests directed to the client. There, the question is whether documents in the firm's possession are outside the "possession, custody and control" of the client, such that they need not be produced to a third party. The issue is particularly acute when the client has waived any work product protection that might otherwise apply to the documents in the law firm's files, as was the case in *Gruss v. Zwirn*.

'Gruss v. Zwirn'

Gruss involved a claim for defamation against certain hedge funds (the Zwirn entities) and their CEO and managing partner, by their former CFO, Perry Gruss. After discovering certain accounting irregularities, the Zwirn entities hired counsel, including Gibson Dunn & Crutcher, to conduct an internal investigation. Counsel interviewed employees of the Zwirn entities and, ultimately, the investigation placed blame on Gruss, who resigned.

'Gruss' serves as a reminder that the zone of protection for a lawyer's own records carved out by 'Sage Realty' is a narrow one.

In 2007, Gibson Dunn made presentations to the Securities and Exchange Commission concerning the results of the internal investigation. The presentations included PowerPoint slides that summarized statements from 21 witness interviews. The presentations were voluntary and were subject to a confidentiality agreement providing for non-waiver of attorney-client privilege and work product protection. After the presentations, the Zwirn entities disclosed the internal investigation results to their investors. The disclosure to investors blamed Gruss for the issues that had been uncovered and absolved the CEO of responsibility. Gruss sued, asserting that the disclosures to investors were false, defamatory, and incomplete.

In discovery, defendants produced the PowerPoint presentations, but they rejected Gruss'

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demand that they produce, among other things, Gibson Dunn associates' underlying interview notes, claiming that such documents were privileged and constituted protected work product. Gruss moved to compel and his motion was referred to Magistrate Judge Michael H. Dolinger. Dolinger held that voluntary disclosure of summaries of interviews to the SEC constituted a waiver, as against the SEC, of any privilege applicable to information necessary to confirm the disclosures, such as the underlying notes.[5] However, Dolinger held that Gibson Dunn's PowerPoint presentation to the SEC did not waive the attorney-client privilege or work product protection as to third parties, in light of the confidentiality agreement pursuant to which the Zwirn entities had provided information to the SEC.[6]

Gruss objected to Dolinger's ruling, pressing for production of the factual portions of the underlying witness interview notes.[7] Gardephe reversed, finding that production to the SEC waived the attorney-client privilege and work product protection, notwithstanding the confidentiality agreement,[8] and that the waiver applied "not only as to the materials provided, but also as to the underlying source materials."[9] Gardephe directed defendants to produce the attorneys' witness interview notes for the court's in camera inspection to permit the court to determine which portions would be produced to Gruss.[10]

In response to Gardephe's decision, however, Gibson Dunn filed papers on its own behalf asserting that, under *Sage Realty*, "'the interview notes constitute the firm's preliminary, internal work product and are, thus, protected from disclosure by the firm's own distinct privacy interest.'"[11] Gardephe then addressed the question whether, under *Sage Realty*, Gibson Dunn had an interest in its notes distinct from its former client's interest that had not been waived by the presentation to the SEC.

In an attempt to fit within the Sage Realty exception, Gibson Dunn emphasized that the attorney notes Gruss sought were "internal" because they had never been shared with the Zwirn entities. In support of this position, Gibson Dunn relied upon two Southern District cases—*In re Refco Sec. Litig.*[12] and *Lippe v. Bairnco*[13]—that had permitted counsel to withhold documents from former clients under *Sage Realty*. In *Refco*, counsel was permitted to withhold an internal email that, after in camera review, was found only to reflect "internal conversations among law firm partners setting forth their 'preliminary impressions of the legal or factual issues presented in the representation.'"[14]

Lippe applied *Sage Realty* more expansively, permitting counsel to withhold, among other things, "attorney research notes;… internal research memoranda prepared by junior lawyers for senior lawyers; [and] a draft outline of research issues[.]"[15] The Lippe court concluded that these documents fell "precisely within the category of internal documents created to assist senior…lawyers in formulating their advice to the client."

Gardephe rejected Gibson Dunn's efforts to fit its interview notes within this framework, finding that "notes made to record what a witness said during an interview are not the type of documents [the Sage Realty] exception contemplates. Such notes are not 'internal' to a law firm and are not 'recorded primarily for the purpose of giving internal direction to facilitate performance of the legal services entailed in that representation.'"[16]

> Judge Gardephe found that "notes made to record what a witness said during an interview are not… 'internal' to a law firm and are not 'recorded primarily for the purpose of giving internal direction to facilitate performance of the legal services entailed in that representation.'"

In support, he quoted the U.S. Court of Appeals for the Second Circuit's opinion in *In re John Doe Corp.*, which held, with respect to attorney notes at issue in that case, that they merely "recite[d] in a paraphrased, abbreviated form, statements by Employee A relating to events" relevant to the case, and that, "[t]o the extent that the statements imply the attorney's questions from which inferences might be drawn as to his thinking, those inferences… in no way reveal anything worthy of the description 'legal theory.'"[17]

Finally, Gardephe emphasized that *Sage Realty* limited client access only to files that are unlikely to be useful to the client. Appearing to equate usefulness with relevance, Gardephe held that the interview notes "are directly relevant to the issue of whether Defendants accurately reported that witnesses blamed Gruss for the financial irregularities, and thus are integral to the Zwirn parties' defense."[18] Gardephe therefore ruled that *Sage Realty* provided no basis upon which Gibson Dunn could withhold the interview notes from its former clients and, thus, that such documents were within the Zwirn entities' control and had to be produced.[19]

Conclusion

Although Gardephe rebuffed Gibson Dunn's efforts to bring its interview notes within the protection offered by *Sage Realty*, that protection, although narrow, remains meaningful and important—perhaps even more so than when it was articulated by the New York Court of Appeals in 1997. In this day and age, where so much internal law firm communication occurs through email, conversations that formerly took place in person or over the telephone are now reduced to writing and stored, perhaps indefinitely, on law firm servers.

The distinction Gardephe drew between the email at issue in *Refco* and the attorney notes in *Gruss* suggests that a client will have access to its attorney's factual investigation of a case, but that informal and internal email communication among the client's lawyers will remain squarely within *Sage Realty's* traditional, if narrow, zone of protection.

1. 91 N.Y.2d 30, 666 N.Y.S.2d 985 (1997).
2. 91 N.Y.2d at 33, 666 N.Y.S.2d at 986 (internal quotation marks omitted).
3. 91 N.Y.2d at 37, 666 N.Y.S.2d at 989 (quoting Restatement (Third) of Law Governing Lawyers [Proposed Final Draft No. 1, 1996] §58, cmt. c). This language is now found at Restatement (Third) of Law Governing Lawyers §46, cmt. c (2000).
4. 91 N.Y.2d at 38, 666 N.Y.S.2d at 989.
5. *Gruss v. Zwirn*, 276 F.R.D. 115 (2011) (Gruss I).
6. 276 F.R.D. at 141 (citing *In re Steinhardt Partners*, 9 F.3d 230 (2d Cir. 1993)).
7. *Gruss* expressly disavowed any desire to compel production of opinion work product. *Gruss v. Zwirn*, 2013 WL 3481350, at *4 (S.D.N.Y. July 10, 2013) (*Gruss II*).
8. Id. at *8.
9. Id. at *12 (citing *In re Kidder Peabody Securities Litigation*, 168 F.R.D. 459 (S.D.N.Y. 1996)). See also Jonathan Sack, Selective Waiver In The Second Circuit—Is It Dead, Or Just Dying?, The Insider Blog (Dec. 11, 2013, 12:15 P.M.), http://www.forbes.com/sites/insider/2013/12/11/selective-waiver-in-the-second-circuit-is-it-dead-or-just-dying/.
10. Id. at *13.
11. *Gruss v. Zwirn*, 296 F.R.D. 224, 228 (2013) (*Gruss III*) (quoting Gibson Dunn's submission).
12. *In re Refco Sec. Litig.*, 759 F.Supp.2d 342 (S.D.N.Y. 2011) (Rakoff, J.).
13. *Lippe v. Bairnco*, 1998 WL 901741 (S.D.N.Y. Dec. 28, 1998) (Chin, J.).
14. 759 F.Supp.2d at 346 (quoting *Sage Realty*). The issue of internal emails among attorneys that came up in *Refco* is particularly notable, as *Sage Realty* dealt with a client file created in the mid-1990s, before email had become common. The Committee on Professional and Judicial Ethics of the New York City Bar Association has addressed this issue, noting that lawyers often "use email to conduct informal conversations" with colleagues that once might have been conducted over the phone or in person. The committee concluded that such internal emails giving direction concerning tasks to be performed or providing preliminary analysis would not have to be disclosed to a client. ABCNY Formal Op. 2008-1.
15. 1998 WL 901741, at *1-2.
16. 296 F.R.D. at 229 (quoting *Sage Realty*).
17. 675 F.2d 482, 493 (2d Cir. 1982). In *John Doe Corp.*, however, unlike in *Gruss v. Zwirn*, the notes had already been reviewed in camera. Moreover, because one of the witnesses had only a hazy recollection of the relevant facts and the others had asserted a Fifth Amendment privilege, the Second Circuit had concluded that the notes at issue "may be the only available evidence." Id., at 492 and n. 10.
18. 296 F.R.D. at 230.
19. Notably, however, plaintiff did not seek, and Judge Gardephe did not require, production of attorneys' opinions and mental processes. The notes therefore will be produced for in camera inspection to allow the court to determine what portions must be produced.