

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

HEALTHCARE ADVOCATES, INC.,	:	Civil Action No. 2:05-cv-03524-RK
	:	
Plaintiff,	:	
	:	Hon. Robert F. Kelly
v.	:	
	:	
HARDING, EARLEY, FOLLMER &	:	
FRAILEY; JOHN F.A. EARLEY, III,	:	
CHARLES L. RIDDLE, FRANK J. BONINI,	:	
JR., KIMBERLY TITUS, and JOHN DOES	:	
1-5,	:	
	:	
Defendants.	:	

**PLAINTIFF HEALTHCARE ADVOCATES MOTION
TO COMPEL DOCUMENT PRODUCTION**

Plaintiff Healthcare Advocates, Inc. (“Healthcare Advocates”), through its attorneys, hereby moves this Court to Order Defendant Harding, Earley, Follmer & Frailey (“Harding, Earley”) to comply with Document Production Request No. 14 which seeks the production of the contents of computer hard drives from computers used by employees of the firm to access pages from the www.healthcareadvocates.com web site through the Internet Archive Wayback Machine. In support thereof, Plaintiff avers:

1. On June 5, 2006, Harding, Earley responded to Healthcare Advocates’ First Set of Requests for Documents and Things. Exhibit A. In response to Document Production Request No. 14 which seeks “[t]he hard drives of any and all computers through which [Harding, Earley] accessed the Internet web sites www.healthcareadvocates.com and www.archive.org,” Harding,

Earley objected to production of such documents on a variety of bases, including attorney-client and work product privilege.

2. During a telephone conversation with counsel for Harding, Earley on July 26, 2006, counsel confirmed that Healthcare Advocates is entitled to such documents and that his sole concern in objecting to this document production request was attorney-client and work product privilege.

3. During this conversation, counsel for Harding, Earley proposed producing only relevant and non-privileged computer files generated or altered during the time period July 6, 2003 through July 15, 2003 that relate to the underlying action, i.e. the original lawsuit before Your Honor styled Healthcare Advocates, Inc. v. Health Advocate, Inc., et al., Civil Action No. 03-3764.

4. I rejected that proposal as inadequate. I proposed jointly retaining a neutral computer forensic expert to create copies of these computer files and to allow Harding, Earley to review all this material for relevance and privileged content before any such material is produced to Healthcare Advocates. Counsel for Harding, Earley advised that he would consider and respond to this proposal. Exhibit B.

5. On August 1, 2006; August 4, 2006; August 7, 2006; and August 10, 2006, I unsuccessfully sought from counsel for Harding, Earley a response to my proposal. Exhibits B – E.

6. On August 11, 2006, counsel for Harding, Earley proposed limiting production to all relevant and non-privileged computer files generated during the period June 1, 2003 through July 18, 2003. Exhibit F. This proposal likewise was inadequate.

7. On August 14, 2006, counsel for Harding, Earley and I discussed limiting the burden of privilege review and production by allowing the computer forensic expert to conduct a search of all the computer files for certain relevant key words such that only documents containing these key words would be reviewed for relevance and privilege as part of the production process rather than every single computer file on the hard drives.

8. On August 16, 2006 and August 17, 2006, I forwarded counsel for Harding, Earley a list of proposed key words to be used by his computer forensic expert to conduct this screening search to gauge the approximate number of computer files containing these keywords. Exhibits G and H.

9. On August 23, 2006, I inquired of counsel for Harding, Earley about the results of the key word searches by his computer forensic expert. I expressed my understanding that the key word searching obviated the privilege issues, leaving undue burden as the sole outstanding objection. Exhibit I. Counsel for Harding, Earley never disputed the accuracy of this understanding.

10. On August 31, 2006, counsel for Harding, Earley received the results of the key word searching by his computer forensic expert for the unspecified "time period in question" which apparently yielded 179 computer files. Counsel offered to provide a chart showing the total number of computer files identified for each of the key words searched by his computer forensic expert, but neglected to do so. Exhibit J. Counsel apparently directed his client to conduct a relevance and privilege review only of these 179 computer files.

11. On September 6, 2006, counsel for Harding, Earley advised that his client still had not completed the relevance and privilege review, but that most, if not all of these 179 computer files were either irrelevant or privileged or both. Exhibit K.

12. On September 18, 2006, I advised counsel for Harding, Earley that regardless of the 179 files identified by his computer forensic expert for the unspecified limited period of time, I had repeatedly asked for and continued to await copies of all relevant and non-privileged computer files identified by his computer forensic expert through the key word searching. Exhibit L.

13. On September 19, 2006 and September 21, 2006, I continued to unsuccessfully seek from counsel for Harding, Earley copies of all relevant and non-privileged computer files identified by his computer forensic expert through the key word searching. Exhibit M and N.

14. On September 26, 2006, counsel for Harding, Earley provided only what appears to be an unintelligible privilege log for 13 apparently privileged computer files covering the period from July 3, 2003 through July 18, 2003. It appears from an accompanying cover letter, that these 13 computer files were the only relevant files of the 179 files identified by Harding, Earley's computer forensic expert back on August 31, 2003. Counsel for Harding, Earley also provided a chart that appears to identify total numbers of files on three of the firm's computer hard drives containing each of the key words searched. Exhibit O.

15. Today I had a telephone conversation with counsel for Harding, Earley to inquire whether the material produced yesterday would be the only material produced in response to Document Production Request No. 14. Counsel answered in the affirmative.

16. Today is the deadline imposed by the Court for fact discovery.

17. Harding, Earley's production in response to Document Production Request No. 14 is woefully inadequate. In the interest of limiting the burden of compliance upon Harding, Earley, Healthcare Advocates would be willing to compromise and accept in full satisfaction of Document Production Request No. 14 all relevant and non-privileged documents (as well as a

proper privilege log) for all computer files that contain only the key words “healthcareadvocates” (as in www.healthcareadvocates.com), “Flynn” (as in Kevin Flynn, president of Healthcare Advocates), and “archive.org.”

WHEREFORE, Plaintiff Healthcare Advocates moves this Court to enter an Order directing Defendant Harding, Early to produce in response to Document Production Request No. 14 all relevant and non-privileged documents and a privilege log for all computer files previously identified by Harding, Earley’s computer forensic expert on the firm’s computer hard drives submitted for analysis and review that contain the key words “healthcareadvocates,” “Flynn” and “archive.org.”

Dated: September 27, 2006

By: /s/ Scott S. Christie
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ORDER

Upon consideration of Plaintiff Healthcare Advocates’ motion for an Order directing Defendant Harding, Earley, Follmer & Frailey to comply with Document Production Request No. 14; and for good cause shown;

IT IS on this ____ day of September, 2006

ORDERED that Defendant Harding, Early, Follmer & Frailey produce in response to Document Production Request No. 14 all relevant and non-privileged documents and a privilege log for all computer files previously identified by its computer forensic expert on the firm’s computer hard drives submitted for analysis and review that contain the key words “healthcareadvocates,” “Flynn” and “archive.org.”

HONORABLE ROBERT F. KELLY
Senior United States District Judge