Where's the Evidence?

KPMG attorneys got scolded by a California judge for major discovery delays.

Two litigators from Gibson, Dunn & Crutcher got on the wrong side of a California judge last year, thanks in part to a plaintiffs lawyer who has become a nemesis to accounting giant KPMG LLP.

Michael Avenatti, a 35-year-old associate at Greene, Broillet & Wheeler in Santa Monica, represents the plaintiffs in four of about 50 malpractice cases currently pending against KPMG. In his biggest coup to date, he represented Targus Group International, Inc, a computer case-maker based in Orange County, in a $50 million malpractice suit against the auditing firm. (KPMG was Targus's global auditor and business and tax accountant between 1993 and 2001.) In March *The Wall Street Journal* reported that the case settled for $22.5 million.

The case might have been good for Avenatti. The same can't be said for KPMG and its lawyers. After the settlement, Orange County superior court judge Geoffrey Glass lifted sanctions he had previously imposed on KPMG for allegedly withholding documents "in order to gain unfair advantage." In this matter, KPMG was represented by Cheryl Justice and Joseph Busch, both partners in Gibson, Dunn & Crutcher's *continued on page 25*

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Though the Gibson, Dunn attorneys are off-the-hook, details of the discovery charges linger in 200 pages of court transcripts. According to the transcripts, Justice and Busch repeatedly violated court orders, lied about the existence of documents imperative to Targus's litigation, and then refused to produce the documents.

Justice denies any wrongdoing. "We and our client acted properly throughout and produced hundreds of thousands of pages of documents in this case," she said in an interview. "We respectfully disagreed with the judge on a number of rulings and sought extraordinary relief."


MICHAEL AVENATTI

It all started in 2003, when Targus sued KPMG, blaming the firm for failing to discover a three-year embezzlement scheme by the company's chief financial officer that caused $50 million in losses. Former CFO William Lloyd was arrested in 2001, pleaded guilty to wire fraud, and received a 37-month federal prison sentence.

By 2005, Judge Glass had sanctioned KPMG $30,000 for "deliberately or recklessly" withholding documents after its lawyers had been warned "at least twice about gamesmanship." Gibson, Dunn appealed the matter, saying Targus never specifically asked for certain documents. (They dropped the appeal when the case settled.)

Shortly before the case was scheduled to go to trial in September 2005, Avenatti received a previously redacted page that made reference to a KPMG training tape titled "How to Detect and Prevent Financial Statement Fraud." When it surfaced, the tape turned out to be a smoking gun that discredited KPMG's claim that its auditors were not trained to detect fraud—and thus could not be held accountable.

Meanwhile, Busch told Judge Glass that Gibson, Dunn had possessed additional discovery materials for at least six months, but failed to produce them. "I have no excuse for that," Busch said, according to transcripts. Then, on the day of trial, Gibson, Dunn delivered 12,000 pages of discovery—bringing the number of pages released after the cutoff date to 50,000.

Glass debated sanctioning the defendants $3 million to reimburse Targus for 100 days of depositions taken worldwide—depositions that would have to be redone in light of the new information. He said he couldn't believe the Gibson, Dunn attorneys' continuous contentions that they had complied with discovery. If the defendant was sanctioned for each error, Glass said, the order "would be 10,000 pages long."

At one point, the judge added, "I still don't know if KPMG did anything wrong in the audit. All I know is their counsel did terrible things during the course of producing documents in this case."

Busch had no response, though he had previously told the judge that the decision "not to produce" certain documents had been made by the law firm, not the client.

Having settled, KPMG and its attorneys obviously want to put the case behind them. However, while no standing opinion exists to cast doubt on KPMG and Gibson, Dunn's good faith, other litigants targeting KPMG can draw on the transcripts from Judge Glass's hearings, says Laurie Levenson, who teaches at Loyola Law School in Los Angeles. "Frankly, this has tarnished their reputation regardless of a formal sanction," she adds.

Which is exactly what Avenatti is counting on. He has launched a network of lawyers who are suing KPMG in malpractice cases nationwide. "I know more about KPMG than most of their own attorneys," says Avenatti. "It doesn't make sense that other attorneys should start at ground zero."

—Tori Richards