

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

UNITED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

v.

SIDLEY AUSTIN BROWN & WOOD LLP,

Defendant.

Case No. 05 C 0208

Judge James Zagel

**PLAINTIFF EEOC'S MOTION TO COMPEL DISCLOSURE OF
LEGAL ADVICE RENDERED TO THE FIRM BY A FORMER PARTNER**

Plaintiff United States Equal Employment Opportunity Commission ("EEOC") respectfully moves this Court, pursuant to Rule 37(d) of the Federal Rules of Civil Procedure, for an order: (1) finding that Defendant Sidley Austin, LLP ("Sidley") has waived the attorney-client privilege with respect to legal advice provided to Sidley by one of its former partners ("Former Partner")¹; and (2) directing Sidley to respond to discovery requests pertaining to legal advice rendered to Sidley by the Former Partner.

In support of this motion, the EEOC states as follows:

1. In an interrogatory response, Sidley has stated that one of the reasons it demoted the Former Partner is that members of Sidley's Management Committee were dissatisfied with legal advice the Former Partner rendered to the firm. See Supplemental Amended Exhibit D to

¹ The Former Partner whose legal advice to Sidley is the subject of this motion is identified by name in Exhibit 1 to this motion, which will be filed only under seal, as it contains Confidential Information governed by the Amended Protective Order entered on June 20, 2006.

Defendant Sidley Austin Brown & Wood LLP's Response to EEOC's First Set of Interrogatories, attached as Exhibit 2, at 28.²

2. Subsequently, Sidley confirmed that the legal advice at issue was advice provided by the Former Partner to the firm and not to clients of the firm. See October 2, 2006 Letter from Defendant's Counsel Maile H. Solis-Szukala to Plaintiff's Counsel Laurie S. Elkin, attached as Exhibit 3.³ Sidley also stated that it considered the legal advice at issue to be protected by the attorney-client privilege. See id.

3. At his deposition on December 14, 2006, Frank Battle, a member of Sidley's Management Committee from the late 1980's until 1998, testified that the Former Partner provided legal advice to the firm's Management Committee from time to time. See Transcript of Deposition of Frank Battle, Jr., at pp. 17, 47-48, attached as Exhibit 4.⁴ Battle testified further that at some point the Management Committee came to the conclusion that advice rendered to it by the Former Partner was flawed. See id. at 49-50. According to Battle, the flawed advice to the firm included a legal memorandum from the Former Partner. See id. at 181, 215-216.

4. The EEOC requested that Sidley supplement its responses to previously issued requests for documents and interrogatories by providing: (1) a copy of the memorandum that was authored by the Former Partner and referenced in Battle's testimony; (2) copies of any other written legal advice by the Former Partner that the firm or members of its Management Committee were dissatisfied with; and (3) a description of the substance of all legal advice from the Former Partner, the quality of which the firm was dissatisfied with. See January 5, 2007 Letter from Plaintiff's

² Exhibit 2 will be filed only under seal, as it contains Confidential Information governed by the Amended Protective Order entered on June 20, 2006.

³ Exhibit 3 will be filed only under seal, as it contains Confidential Information governed by the Amended Protective Order entered on June 20, 2006.

⁴ Exhibit 4 will be filed only under seal, as it contains Confidential Information governed by the Amended Protective Order entered on June 20, 2006.

Counsel Laurie S. Elkin and Justin Mulaire to Defendant's Counsel Gary Elden, attached as Exhibit 5.⁵

4. Sidley refused to provide the requested documents and information pertaining to the Former Partner's legal advice, contending that the advice provided to the defendant by the Former Partner was protected by the attorney-client privilege.⁶

5. "[T]he attorney-client privilege is generally waived when the client asserts claims or defenses that put his attorney's advice at issue in the litigation." Garcia v. Zenith Electronics Corp., 58 F.3d 1171, 1175 n.1 (7th Cir. 1995). "The advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney-client communication." Rhone-Poulenc Rorer, Inc. v. Home Indemnity Co., 32 F.3d 851 (3d Cir. 1994) (cited with approval in Garcia, 58 F.3d at 1175 n.1).

6. Sidley has placed the advice it received from the Former Partner squarely at issue in this action. It has elected to defend the action by describing the legal advice it has received from the Former Partner, by characterizing it as unsatisfactory to the firm, and by asserting that the allegedly unsatisfactory legal advice motivated the firm's decision to strip the Former Partner of partnership status. Sidley is relying, on the one hand, on the Management Committee's evaluation of the substance of the Former Partner's legal advice as an explanation for his demotion, and relying on the privilege, on the other hand, to forestall any discovery about that

⁵ Exhibit 5 will be filed only under seal, as it contains Confidential Information governed by the Amended Protective Order entered on June 20, 2006.

⁶ Pursuant to Local Rule 37.2, the EEOC further states that its counsel consulted with counsel to Defendant by telephone on January 18, 2007, at approximately 1:00pm, in an attempt to resolve this dispute. Participating in this conference were Plaintiff's counsel Laurie Elkin and Justin Mulaire and Defendant's counsel Michael Conway and Maile Solis-Szukala. During this conference, counsel to Defendant suggested that further discussion of the dispute might be useful if the EEOC were to agree to a stipulation concerning the scope of any privilege waiver by Defendant. As the Plaintiff presently knows little or nothing about any of the advice the Former Partner has rendered to Defendant, the Plaintiff is not in a position to evaluate — much less agree to narrow — the scope of any waiver that has occurred. Therefore, the parties are unable to reach a negotiated resolution of this dispute. Counsel to the parties had also conferred about the applicability of the privilege to the Former Partner's advice to the firm previously, on October 10, 2006, at approximately 10:30 a.m., by telephone.

advice. This is classic sword-and-shield use of the attorney-client privilege and it is impermissible.

7. Wherefore, as it has placed the substance of the Former Partner's legal advice to the firm at issue in this litigation, Sidley should be deemed to have waived the attorney-client privilege with respect to advice rendered to it by the Former Partner, and Sidley should be directed to respond to discovery requests pertaining to that legal advice.

January 23, 2007

Respectfully Submitted,

s/ Justin Mulaire
Deborah Hamilton
Laurie Elkin
Justin Mulaire, Trial Attorneys
U.S. Equal Employment Opportunity Commission
Chicago District Office
500 West Madison Street, Suite 2800
Chicago, Illinois 60661
312-353-7722