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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, )  
 )  
Defendant. )  
\_\_\_\_\_ )

Civil No. 05 cv 0208  
Judge Zagel  
Magistrate Ashman

NOTICE OF FILING

**FILED**

J.N AUG 18 2005

MICHAEL W. DOBBINS  
CLERK, U.S. DISTRICT COURT

TO: Gary M. Elden  
Lynn H. Murray  
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PLEASE TAKE NOTICE THAT on Thursday, August 18, 2005., EEOC filed EEOC'S  
SUBMISSION REGARDING PROCEDURE FOR OBJECTING TO PRODUCTION OF  
PERSONNEL FILES with the United States District Court for the Northern District of Illinois  
Eastern Division at 219 South Dearborn, Chicago, Illinois, 60604.

By: Laurie S. Elkin  
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**EEOC'S SUBMISSION REGARDING PROCEDURE  
FOR OBJECTING TO PRODUCTION OF PERSONNEL FILES**

In its Response to the Equal Employment Opportunity Commission's ("EEOC") Motion to Compel and For Entry of a Protective Order, Defendant Sidley Austin Brown & Wood ("Sidley") expressed its desire to notify "individuals whose personnel files and performance reviews might be disclosed to provide them with an opportunity to object" to production.<sup>1</sup> At the August 11, 2005 hearing on EEOC's motion, the Court articulated a proposed procedure for individuals to bring to the Court any objections they have to the production of their personnel files. *See Report of Proceedings Before The Honorable James B. Zagel, August 11, 2005 2:00 p.m.*, at p. 13, lines 18 through 21, attached hereto. The Court invited the parties to submit their comments on such procedure. EEOC continues to object to any procedure whereby individuals can oppose the production of their personnel files.<sup>2</sup> However, if such a procedure is

<sup>1</sup> Sidley proposed an opportunity for individuals to object only with respect to personnel files and performance reviews and not with respect to any other category of documents.

<sup>2</sup> EEOC reiterates and stands upon its arguments opposing any objection procedure set forth in its Reply Memorandum in Support of its Motion to Compel and for Entry of a Protective

implemented, EEOC has suggestions to ensure that the procedure is as fair and as impartial as possible.

EEOC proposes that the consent and objection procedure be as follows:

- Individuals be notified by joint letter from EEOC and Defendant that production of their personnel files has been requested;
- The joint letter inform the individuals that their personnel files, when produced, will be subject to a protective order;
- The joint letter inform the individuals that they may object to production of their personnel files and that any objections must be made within fourteen days of receipt of the letter and in accord with the requirements listed below;
- The individual objecting be required to appear personally in Court to state his or her objection under oath;<sup>3</sup>
- Neither Sidley nor the attorneys representing Sidley in this action be permitted to represent any objecting individual;
- Neither Sidley nor the attorneys representing Sidley in this action be permitted to counsel or discuss the production of personnel files or any objections thereto with any of the individuals whose files have been requested;
- In advance of the hearing on any objection, the material being objected to be produced for attorneys eyes only to allow the parties to express their views to the Court on the merits of the objection(s); and
- If the Court excludes any material from production, the subject matter of the material cannot later be used by Sidley in support of any of its defenses to this action.

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Order. As EEOC stated in the brief, it is not aware of any court allowing class members to object to production of their personnel files. EEOC does not believe that a special objection procedure should be created based on the "nature of the individuals" involved. See Report of Proceedings Before The Honorable James B. Zagel, August 11, 2005, 2:00 p.m., in this matter, at p. 24, line 5, attached hereto.

<sup>3</sup> The personal appearance of individuals not a resident of this jurisdiction may be excused for good cause shown.

Respectfully submitted,

Laurie S. Elkin

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

EQUAL EMPLOYMENT )  
OPPORTUNITY COMMISSION, )  
 )  
Plaintiff, )  
 )  
vs. ) No. 2005 C 208  
 )  
SIDLEY AUSTIN BROWN & ) Chicago, Illinois  
WOOD, LLP, ) Thursday, August 11, 2005  
 ) 2:00 o'clock p.m.  
Defendant. ) Room 2503

REPORT OF PROCEEDINGS  
BEFORE THE HONORABLE JAMES B. ZAGEL

APPEARANCES:

For the Plaintiff: EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION  
500 West Madison Street  
Suite 2800  
Chicago, Illinois 60661  
BY: MS. DEBORAH LOIS HAMILTON  
MS. LAURIE S. ELKIN  
MR. JOHN C. HENDRICKSON

For the Defendant: GRIPPO & ELDEN, LLC  
227 West Monroe Street  
Suite 3600  
Chicago, Illinois 60606  
BY: MR. GREG C. JONES  
MS. LYNN H. MURRAY

Court Reporter: MR. ANTHONY W. LISANTI  
United States Courthouse  
219 South Dearborn Street  
Chicago, Illinois 60604  
(312) 939-2092

1 THE CLERK: 2005 C 208. EEOC versus Sidley  
2 Austin Brown.

3 MS. HAMILTON: Good afternoon, your Honor.  
4 Deborah Hamilton, Laurie Elkin and John Hendrickson on  
5 behalf of the EEOC.

6 MS. MURRAY: Lynn Murray and Greg Jones on  
7 behalf of Sidley & Austin.

8 THE COURT: I have read all of the papers  
9 before me and, which is unusual, I have read a couple of  
10 them more than once.

11 The first question I have is a certain  
12 amount of information was supposed to be submitted to  
13 the EEOC under the attorneys' eyes only rule. Has that  
14 been done?

15 MS. MURRAY: Yes.

16 THE COURT: When was it done?

17 MS. MURRAY: I believe the Monday after our  
18 hearing. I believe it was seventy-five hundred pages.

19 THE COURT: Have you at least taken a brief  
20 look at it?

21 MS. HAMILTON: We have had a chance to look at  
22 it.

23 THE COURT: That's good, because then you might  
24 be able to express an opinion as to what exactly their  
25 records are and what use you might want to make of it --

1 which might be helpful.

2 MS. HAMILTON: I think the records that are  
3 most in dispute in our brief and were actually not the  
4 records that were provided to us for the most part. We  
5 did receive some performance data, but certainly none of  
6 the personnel files. So with regard to the performance  
7 data that we received, not surprisingly, the defendants  
8 are continuing to assert that the people who were  
9 terminated were terminated because they failed to meet  
10 certain firm standards with regard to billings, hours,  
11 type of work. To that extent, the defendants are  
12 relying on that type of performance information. I  
13 think it simply confirms the position that we have taken  
14 in our briefing, which is that if defendants are going  
15 to rely on that then we need to be able to share that  
16 information with our class members and with our  
17 witnesses in order to develop our own defense and our  
18 own response to that performance.

19 THE COURT: Am I to properly infer from what  
20 you just said that one of the principal reasons, if not  
21 the reason, for this discovery -- the principal reason,  
22 it could be the only reason. The principal reason for  
23 this discovery is to put yourself in a position where  
24 you can appropriately meet what you anticipate the  
25 defense is going to be?

1 MS. HAMILTON: Yes.

2 THE COURT: So this is not primarily offensive  
3 discovery from your point of view; it is primarily your  
4 concern about what their defense might be -- assuming  
5 that all of the threshold issues go your way?

6 MS. HAMILTON: We have the ultimate burden of  
7 proof. So in order to show that their reasons are  
8 pretext.

9 THE COURT: Still, they have to raise the  
10 defense first.

11 MS. HAMILTON: Right.

12 MS. ELKIN: I think it is both, your Honor, for  
13 offensive and defensive reasons. Certainly there may be  
14 information, and we expect that there is information, in  
15 what we have requested that would show that the class  
16 members were terminated or downgraded because of their  
17 age.

18 The defendant has already raised or  
19 asserted that the reason wasn't age; it was performance.  
20 So certainly we see that the information is relevant to  
21 offensively proving that it was age and showing that  
22 defensively it was not performance.

23 MS. HAMILTON: If I could also add, we do  
24 anticipate the coverage of these individuals is going to  
25 be an issue. So certainly a lot of information with



1 regard to how performance was evaluated, how  
2 compensation decisions were made and which individuals  
3 played roles in those decisions. That will come in as  
4 part of our affirmative duty to show that these  
5 individuals are, indeed, employees.

6 THE COURT: Now that, of course, pretty much  
7 takes care of your use of the documents. We then reach  
8 the other issue which is -- showing to other people.

9 Now you would show it to other potential  
10 class members, I take it, for two reasons. One, there  
11 might be some things about it, procedures and structures  
12 that you would like to have explained to you, which they  
13 know about because they are insiders.

14 MS. ELKIN: Sure.

15 THE COURT: Then the other thing is, if you are  
16 dealing with evaluations, the evaluators and a variety  
17 of other things, you would like to have some insight  
18 into what kind of people these are, how consistent this  
19 has been over a period of time. In other words, both  
20 knowledge of who is who, what their hats and practices  
21 might have been, plus a general understanding of what  
22 all this stuff means -- assuming it is exactly what the  
23 defendants represent it to be.

24 MS. ELKIN: Certainly those are among the  
25 reasons, your Honor, that we want to be able to discuss

1 those with our people.

2 THE COURT: Now who might the other deponents  
3 be?

4 MS. HAMILTON: In addition to the thirty-two  
5 class members, we would anticipate talking to practice  
6 group heads. And then perhaps also to people who worked  
7 in the same practice groups on similar projects. We  
8 would also anticipate showing the data to individuals  
9 who we may identify as comparators. We haven't yet gone  
10 through all of this analysis necessary to pick out those  
11 individuals, but we are starting to do so.

12 Then we also expect that we will be  
13 talking to the members of the management and executive  
14 committee. I think that this is less of an issue  
15 because the defendant would agree that those individuals  
16 have seen the data before. But with regard to the  
17 practice group heads, other members of the practice  
18 groups and comparators, and then our thirty-two. I  
19 think we don't agree about what information those  
20 individuals can be shown.

21 MS. ELKIN: I think, your Honor, without being  
22 able to show or discuss that information with the  
23 thirty-two as well as other witnesses, it will be  
24 virtually impossible for us, or indeed for any plaintiff  
25 in an employment discrimination case, to develop the

1 proof necessary. I think that the defendant's concern  
2 about privacy interests are properly protected by virtue  
3 of the protective order itself, which the thirty-two and  
4 any witnesses would be bound by.

5 THE COURT: Having heard what they said?

6 MS. MURRAY: Your Honor, at a practical level  
7 of who can see what, under let's say Sidley's proposed  
8 protective order. Under Sidley's proposed protective  
9 order, people see things before they can see it. That  
10 basically takes care of the management committee and the  
11 executive committee.

12 We said in our surreply brief that the  
13 practice group heads have seen most of the information  
14 and we don't have a problem with them seeing this  
15 information. We have made an offer to respond to the  
16 specific EEOC, sort of called the co-work argument, that  
17 people need to be able to identify comparators by  
18 saying, if you want to show people billing and client  
19 hours that surround the alleged adverse employment  
20 decision, and are within that practice group, which we  
21 find it hard to believe that anyone outside of the  
22 practice group would be called a comparative group, then  
23 you should be able to do that. We have offered to do  
24 that.

25 What we have tried to do, if there are

1 real specific problems raised, we tried to address that  
2 by coming to the compromise table.

3 Sidley is going to be releasing its  
4 strategic plans, all of its compensation information for  
5 hundreds of partners. We don't think that that  
6 information should be shared with people that the EEOC  
7 deems class members or deponents.

8 THE COURT: And the strategic information is  
9 what?

10 MS. MURRAY: The strategic information, it  
11 doesn't tend to come in the strategic plan. At least  
12 Sidley doesn't do a yearly strategic plan. Most of them  
13 come in memos talking about the vision in the future.  
14 Those kinds of documents, to be shown to a Schiff Hardin  
15 partner, who is currently working at Schiff Hardin -- I  
16 can name a number of law firms around the City and  
17 country where some of these thirty-two are working -- it  
18 is a problem.

19 The compensation information, your Honor,  
20 is different. It is a privacy issue for these  
21 individuals to have their compensation information shown  
22 to the people.

23 THE COURT: In looking at these documents --  
24 leaving aside the obvious issues having to do with  
25 certain data, which you are perfectly free to redact

1 because they don't need it. The so-called identity  
2 theft issues, the social security numbers, things of  
3 this sort, I don't think that is a big issue.

4 The compensation data seems to me to be an  
5 inescapable part of the case. There is absolutely no  
6 question that they are entitled to it, and their  
7 position is, of course, they are entitled to it, but  
8 they can't show it around broadly.

9 The problem with that is the desire to  
10 keep it confidential, in my view and in the law -- in  
11 the few cases that have dealt with this -- does not  
12 carry the kind of weight of confidentiality that some of  
13 the other things do; particularly in comparison with the  
14 claim that is made here. Part of this, the reason is,  
15 that there are other firms that adopt completely  
16 different policies. There are law firms of a size, I  
17 believe, comparable to Sidley who as soon as you become  
18 a partner you know what everybody makes, under all  
19 circumstances. And there is no question Sidley is  
20 entitled to have a different policy. There is a lot of  
21 merit to having a different policy. But I believe, with  
22 nondisclosure agreements on the part of those who see  
23 them, that there is adequate protection.

24 One of the reasons there is adequate  
25 protection is that suppose you have some terribly

1 disaffected person, no longer at Sidley. They decide to  
2 violate obligations and tell the entire world, this is  
3 what this guy is earning, this is what that guy is  
4 earning. Sidley is still in a position to say, no.  
5 Prove it. Since one of the things that I will insist  
6 upon is they don't walk out from these examinations with  
7 copies of any of this stuff, I think Sidley can probably  
8 survive that; particularly since I am operating on the  
9 assumption that the vast majority of persons who examine  
10 these will abide by their agreement which they have to  
11 sign, that they are not going to reveal it to anybody.

12 Basically, what I am going to order -- we  
13 will talk about the specific language. I am telling you  
14 now what my basic parameters are. Then there are a  
15 couple of things you may want to discuss amongst  
16 yourselves after I tell you this before we go into  
17 formal orders.

18 The compensation data, the individual  
19 ratings of people. How it comes to be seen that one  
20 lawyer is more valuable than another lawyer -- at least  
21 in the past year or two years, or however it is. I  
22 think they are entitled to show the people, under the  
23 conditions that I mentioned, which is a protective order  
24 signed by them and under conditions which make it clear  
25 that the data cannot be copied, and copies and materials

1 cannot be taken from the EEOC office.

2           What strikes me as the more difficult  
3 problem is the problem of the extent that you have  
4 strategic plans in the future. Because it occurs to me  
5 that one of the defenses in this case is going to be --  
6 no, we didn't do it because they are older. We didn't  
7 do it because they are on a strict performance basis.  
8 Because if you look at the last five years they are as  
9 good as anybody else. We did it because they are not a  
10 good fit for the future and we are looking for the  
11 future, and this is neutral ground. For that reason, I  
12 had assume you wanted to take a look at where this  
13 defense might possibly wind up, so that is why you would  
14 want to have the strategic plans.

15           My inclination with respect to strategic  
16 plans is to keep the "attorneys' eyes only" on it at  
17 least in the initial stages. Partly because I am not  
18 too sure that Sidley will decide to make this defense,  
19 with respect to anybody possibly who is a member of the  
20 class. Even though I understand that one of the reasons  
21 you might think so is because of Sidley's public  
22 comments as to why they did what they did. Because they  
23 said what they did because they said this is forward-  
24 looking. So you might actually want to know what their  
25 eyes were on when they said that this was forward-

1 looking and a better future for the firm.

2 I would like to let a little go by. I  
3 would like to see how the protective provisions I put in  
4 place, with respect to everything else, are working. If  
5 they seem to be working, then, of course, it would raise  
6 my degree of confidence.

7 Moreover, in many cases, if you have the  
8 strategic plans, without revealing precisely what they  
9 are, or even hinting at what precisely they are, you are  
10 perfectly capable of presenting questions to the  
11 witnesses that said -- if, for example, Sidley wanted to  
12 do more -- I don't know if they do this any more --  
13 interest rate swaps. That was a big thing many, many  
14 years ago. If Sidley decided that the future of the law  
15 is interest rate swaps, does this make sense to you. As  
16 long as you conceal it with various other alternatives,  
17 it doesn't give it away. So I think you are not  
18 disabled by this.

19 MS. HAMILTON: Just one point of clarification.

20 Could we show the strategic plans to the  
21 individuals who seen them before?

22 THE COURT: You can show anything to anybody  
23 who's seen it before, which is also another thing I  
24 think will render this less difficult for you to deal  
25 with. The core data evaluation -- compensation, that



1 stuff, you could have.

2           With respect to the issue of persons who  
3 might possibly object, I agree that if I order the  
4 production of this data, and I order that disclosure be  
5 made, that the odds of liability are vanishingly small.  
6 But in the world in which I live I do not see  
7 vanishingly small odds of liability deterring all  
8 lawsuits. They seem to come with some degree of  
9 regularity. Now were this not the EEOC you might say  
10 something like -- okay, we will indemnify the defense's  
11 costs for the two suits that might possibly be brought.  
12 But the Government doesn't do that and I am not asking  
13 you to do that. But I think that it would be worthwhile  
14 -- and this is what I have under consideration to  
15 express your views on this as well; this is not a final  
16 ruling -- having a notice sent, which if you wish to be  
17 sent jointly, which says to everybody -- this is what  
18 the Judge has ordered. And if you have an individual  
19 personal objection to this, because of what is in your  
20 file, you have fourteen days to bring it before this  
21 Court.

22           The advantage of this is that if, for  
23 example, there is something lurking in there, because  
24 all Sidley can do is to talk about the theoretical  
25 possibility that this might have on you. But they may

1 not understand, and we all here may not understand, that  
2 the view from the ground, from the person absolutely at  
3 the lowest point of this particular perspective, might  
4 be different. There might be things that they would  
5 want to say, they want to get out of the record, they  
6 don't want this specific type of data, or they have some  
7 good reason, although I can't imagine what, for  
8 objecting generally. I think they ought to be given a  
9 chance with a very short deadline of doing so. It is a  
10 much shorter deadline than I would ordinarily impose,  
11 but we are dealing with legally sophisticated persons  
12 here. I want whatever objections that are made to be  
13 made here so we don't wind up with satellite litigation  
14 elsewhere. Then I will regard all complaints as  
15 foreclosed and I will enter an appropriate bar order  
16 against members of the putative class -- not exactly in  
17 the ordinary context of a bar order, but I believe I can  
18 enter one.

19 MS. MURRAY: Logistically, your Honor, the  
20 people who we would send that letter to would be thirty-  
21 two people. The class might be broader than that.

22 THE COURT: I am assuming that the class is  
23 broader than that. How broad can it be? How many  
24 people can we be talking about? Can we be talking about  
25 more than two thousand people?

1 MS. MURRAY: No.

2 THE COURT: Here that is a tiny little class --  
3 tiny. My assumption was a number under a thousand, but  
4 I might be wrong.

5 MS. MURRAY: Probably true.

6 THE COURT: What?

7 MS. MURRAY: Probably true, your Honor, under a  
8 thousand.

9 THE COURT: That was my basic view.

10 Now, I have suggested this and the way I  
11 have suggested this to you, with all of these kind of  
12 tentative phrases, because this seems to me as if it is  
13 a good idea. I am willing to be told by all of you that  
14 it is really a terrible idea and this is why it is a  
15 terrible idea. But what you generally have in these  
16 papers is an attack on the principle -- should they be  
17 permitted to object or not object. I think it would be  
18 more helpful to me if you spoke to the question of --  
19 well, Judge, we appreciate the fact that you will decide  
20 these questions, that once decided it is the end of any  
21 potential liability for Sidley. It decides what is fair  
22 game for absolutely everybody and might, in the long  
23 run, be fair for people who have an individual kind of  
24 objection that we have not thought of before. And even  
25 fair for those who might give a general objection which

1 Sidley hasn't adequately voiced.

2 It is all good for those reasons, but it  
3 is a practical nightmare for X, Y and Z. So you can  
4 feel free to give me a short submission as to why that  
5 is or is not the case, along with suggestions for how it  
6 can be done in a more effective way; recognizing that  
7 your answer may be it can't be done. We will see. That  
8 basically is my thinking about what I have seen here.

9 I also, with respect to -- and it should  
10 be clear -- with respect to the issue of objections. It  
11 is the intent of the Court to resolve objections in a  
12 very speedy fashion. I don't want this to drag on.  
13 Also, you will have to deal yourselves with the  
14 sensitive number issues; because you might want to make  
15 a list. I have no way of knowing how Sidley keeps its  
16 records. For all I know, Sidley has got records for  
17 social security, telephone numbers, perhaps bank numbers  
18 for wire transfers, all of which have to be redacted.

19 MS. ELKIN: Children's names --

20 THE COURT: Right, children's names, all of  
21 that stuff. I don't think you will have difficulty  
22 compiling a list. But you will do a better job  
23 compiling a list because I have no idea what these  
24 records look like. You will do, too, so you can speak  
25 to that.

1 MS. ELKIN: Your Honor, can I ask for a point of  
2 clarification? You indicated compensation data,  
3 performance data would be information that we could not  
4 share, not only with the thirty-two, but also in  
5 deposition. Then you carved out the strategic plan  
6 information. From what I understand, there are no  
7 strategic plans, per se, if I understood you --

8 MS. MURRAY: I think the way we have addressed  
9 that in the protective order, your Honor, and I can't  
10 remember the exact language. The strategic plans are  
11 business goals.

12 MS. ELKIN: Is that intertwined? I don't know  
13 if it is, if it is intertwined with the other  
14 information --

15 THE COURT: We don't know. But basically I  
16 view this as an issue in which the first phase is  
17 something on which you basically need a lot of insiders  
18 to tell you exactly what the actual record means. There  
19 is a huge amount of data. Lots of evaluations, lots of  
20 compensation decisions, lots of numbers, and lots of  
21 people you want to talk to about -- does this make sense  
22 to you, why would they do this, etcetera - etcetera. I  
23 think that is relatively easy. You may find disparities  
24 there that will give the EEOC a lot of heart, or you may  
25 not find them then Sidley will come dancing into Court.

1 But if you don't get anywhere with that, or you think  
2 that you want more and you run into a situation where  
3 everything looks really fine, but all of a sudden you  
4 have a bunch of people who are gone and you can't see  
5 any reason in the performance data for it. So you say  
6 -- well, it must be age. You look at the grid of the  
7 ages of people this happened to. That is the point in  
8 time where Sidley is likely to say -- no, in that sense,  
9 yes. But Sidley then is going to be different from  
10 Sidley in a year from now. These people didn't fit into  
11 our future. We did it because we are changing or we are  
12 evolving. I anticipate something like that happening  
13 because that is sort of what Sidley said is happening.

14 When you get to that point you can  
15 basically talk about the goals, I think, without  
16 revealing the mechanics of the goals and how they are  
17 going to get there. Because they may not have written a  
18 strategic plan, but somewhere somebody was thinking --  
19 to use my interest rate swaps analogy. The wave of the  
20 future is interest rate swaps, to get from where we are  
21 today, doing practically none of them, to dominating the  
22 international market in interest swaps, these are the  
23 steps we have to take, which a lot of people don't call  
24 strategic planning because strategic planning is our  
25 goal. It is more in the range of tactical planning.

1 That kind of stuff, I think, is the second phase. That  
2 is why I am willing to put that off for a while because  
3 I don't think you are going to get to it for a while.  
4 By the time you get to it, you will be able to come in  
5 and say -- well, we have showed absolutely devastatingly  
6 -- devastatingly unfair compensation packages that  
7 Sidley has been doing for years and years and years,  
8 which the world will rise up in anger over and it hasn't  
9 leaked out, ergo you don't have to worry about your  
10 strategic plans. Not only that, if you get to strategy  
11 and tactics and long-term plans, you may very well be  
12 able to respond in a way which says -- okay, we are not  
13 going to show it to the partner who left and went to  
14 Kirkland. You can have more focused kinds of discovery.  
15 You can maybe satisfy yourselves and also satisfy  
16 Sidley. If you can't, then I will just decide one way  
17 or the other. But it is worth having it tried, since  
18 what I believe the order in which you are going to do  
19 things, my ruling, when it is embodied in text fairly  
20 soon, after your submissions, will allow you to proceed  
21 in the same way you proceeded if I had agreed completely  
22 with you the EEOC, or in fact completely with Sidley.  
23 That is my thinking.

24 MR. HENDRICKSON: Your Honor, one  
25 clarification. When you say "compensation data", I am

1 assuming you are using that as a term of art to say, not  
2 just what these people drew each year --

3 THE COURT: No, I am not.

4 MR. HENDRICKSON: But how many hours they  
5 billed?

6 THE COURT: The entire --

7 MR. HENDRICKSON: The whole ball of wax, as it  
8 all related to their monetary issues?

9 THE COURT: What you did and how you got paid  
10 for it.

11 MR. HENDRICKSON: The second thing is, your  
12 notice and consent/objection procedure, I guess it  
13 ultimately makes a difference whether or not you foresee  
14 acting on an objection in such a way that information  
15 would be denied to the EEOC.

16 THE COURT: The truth is, it could happen, it  
17 could happen. What I am saying is, I am willing to  
18 consider the fact -- I am willing to consider a result  
19 which says, the EEOC cannot share this with anyone. The  
20 proposition that the EEOC itself cannot look at this, I  
21 would say there is like one chance in a billion that I  
22 would reach that ruling.

23 MR. HENDRICKSON: That is important to us. To  
24 us, that is an important distinction.

25 MS. MURRAY: Your Honor, we have two questions.



1 The disclosure to class members and deponents. The  
2 deponents, at least we know who those people are and  
3 presumably will be present when it is disclosed to them.  
4 The class members, right now we have thirty-two people  
5 identified. Is it going to be a situation where the  
6 compensation data, for example, can be disclosed to  
7 really any former Sidley partner? Or can we, for this  
8 phase one, limit it to a situation where it is disclosed  
9 to these thirty-two people? They discuss comparative  
10 groups, if there is a broad disclosure that the EEOC  
11 would like to make to more people they can identify more  
12 people as class members.

13 THE COURT: No, it didn't mean to do that. I  
14 didn't mean to do that. In that sense, which is  
15 something I thought you might say, I am clearly siding  
16 with the EEOC on that one. That is to say, they have a  
17 broad group. They are not limited to the class members.  
18 They can have outsiders, which is the only reason why I  
19 went into the long disposition on stuff that matters  
20 strategically. It is because that I anticipate they  
21 will be showing this to a large number of people outside  
22 of the thirty-two. I have operated on that premise.

23 MS. MURRAY: A point having to do with the  
24 Illinois statute that we cited in our briefs. The  
25 Illinois statute, one part of it relates to disclosure,

1 our consent. The other one said, before we can produce  
2 a personnel file we have to take everything that is more  
3 than four years old out of the personnel file except  
4 where we have been ordered to produce the documents by  
5 Court order. Do we take your Honor to be ordering us to  
6 produce?

7 THE COURT: Believe me, an unequivocal Court  
8 order. I will trust you to put the appropriate language  
9 in.

10 MS. ELKIN: Order they be produced?

11 MS. MURRAY: More than four years back, if the  
12 events were in '99 and it is 2005 --

13 THE COURT: Right, right. It will be  
14 unequivocal.

15 MS. MURRAY: Your Honor, that leads me to two  
16 issues. You may or may not want to address this today.  
17 The filing under seal issue, and some relatively minor  
18 points on confidential information and the definition of  
19 confidential information.

20 THE COURT: Those things I don't need to talk  
21 to you about. I will just issue something on that  
22 point.

23 MS. HAMILTON: With regard to the submission  
24 that you are giving us permission to do about the  
25 noticed consent objection procedure, I think the EEOC

1 certainly continues to have grave concern about that  
2 type of procedure because it does seem to be singling  
3 out this group for very different treatment from what  
4 has been accorded to numerous groups of employees  
5 routinely in our litigation.

6 THE COURT: Is that the famous "no new rights  
7 doctrine"?

8 MS. HAMILTON: It is not the "no new rights",  
9 but I think we have recognized that employees do have a  
10 privacy interest here. That interest is usually  
11 resolved by agreeing to a protective order where the  
12 information will be confidential.

13 THE COURT: I understand that. The truth is,  
14 this is not the ordinary mind run EEOC case. And maybe  
15 even in the mind running EEOC case, the only reason we  
16 haven't had a big issue about this is not too many  
17 people complain. But this is not the standard care.  
18 This is a case in which we are dealing with a legally  
19 sophisticated class of people who under ordinary  
20 circumstances are perfectly capable of protecting  
21 themselves and don't need the Government. And they may  
22 have, and be able to articulate in ways that the  
23 ordinary employee represented by the EEOC is not. They  
24 may be able to represent to me objections and concerns  
25 that would not otherwise come to light. So to put it

1 this way, to the extent that there hasn't been a lot of  
2 litigation about the objection to turning all of this  
3 stuff over to the EEOC on privacy grounds, this would be  
4 an appropriate case to consider them because of the  
5 nature of the individuals. I am telling you in the  
6 beginning, which you should have sensed by now, I don't  
7 believe there is going to be a lot of valid objections.  
8 But I don't want to foreclose something that I don't  
9 know about from a group of people who have the interest  
10 and the ability to articulate their concerns -- concerns  
11 which the EEOC may never have apprehended because you  
12 are not in their position. Issues that are not of  
13 particular concern to Sidley because they have different  
14 issues.

15 MS. ELKIN: Your Honor, when would you like the  
16 submission?

17 THE COURT: I would like it soon, like a week.

18 MR. HENDRICKSON: Your Honor, if I could just  
19 very briefly. Our concern does relate to the point you  
20 just raised, comparing this case to other cases.  
21 Obviously you can anticipate that you have got something  
22 from the EEOC saying this is a terrible idea. I think  
23 one of the key reasons it is a terrible idea is it  
24 proposes to treat witness testimony or documents, let's  
25 call it witness stuff, in a way, insofar as I am aware

1 of, I have never seen in any other kind of EEOC case,  
2 even against outfits like Morgan Stanley or others.  
3 This is an entirely new ball of wax. Indeed, I am not  
4 aware of hearing of such a process in any civil case  
5 where a potential witness can come in and say -- well, I  
6 have got these interests that I think the Court ought  
7 not to let one of the parties have the documents out of  
8 my file. I think it sounds to me like --

9 THE COURT: Stop - stop.

10 MR. HENDRICKSON: Yes, sir.

11 THE COURT: It is an equally good argument in  
12 this context to say, there never should have been an  
13 EEOC. Because before it existed these kinds of actions  
14 didn't exist. The truth of the matter is this may be  
15 one of those submerged issues that nobody has paid  
16 attention to and even ought to pay attention to.

17 The truth is, if you look at the most  
18 recent congressional legislation you are beginning to  
19 see a series of statutes, not related to this, dealing  
20 with witness rights. It is something which we have  
21 never saw in the law. Last year, Congress passed a  
22 series of statutes having to do with the rights of  
23 witnesses in criminal cases -- not only did they say it  
24 is the rights of witnesses, the witnesses are entitled  
25 to have lawyers state their position and the appeal over

1 the objection of both the prosecution and defense  
2 counsel. So if you want me to tell you that I think  
3 this is a particularly good idea or a bad idea, I am not  
4 going to tell you. But what I am going to tell you is  
5 the fact that it wasn't done before is an argument that,  
6 generally speaking, sort of lost its charm in the United  
7 States, particularly in the Supreme Court, somewhere in  
8 the mid-1950s. We haven't moved much backwards since  
9 then. So it is worth talking about. Your argument to  
10 stop it at the threshold I think, is misguided. And, in  
11 all honesty, might be as bad a principle for you, for  
12 the EEOC in the long run if adopted, as my going ahead  
13 and actually finding that these people have some rights.  
14 So it is worthy of consideration. If you want to take a  
15 look at witness rights legislation throughout the United  
16 States and how relatively recent it is, it might help  
17 you.

18 MR. HENDRICKSON: We will respond. I just want  
19 to raise one other point with your Honor. That is, you  
20 referred to Sidley might want to argue at some time that  
21 these people were terminated, not this reason or that  
22 reason, but because they didn't fit in with the future  
23 of the firm, or the firm of the future, or the image of  
24 the firm, or language to that effect. We have not heard  
25 or seen that yet. I just wanted to note on the record.

1 We may see it in the future, but we will point out that  
2 we have received from Sidley written statements of the  
3 reasons that all of the thirty-one people were expelled  
4 from the partnership, and to my recollection -- I have  
5 read all of them carefully -- that line of reasoning  
6 does not appear with respect to any of the thirty-one.

7 THE COURT: If that is the case, then it is  
8 going to make my job easier. The reason it is going to  
9 make my job easier is that there will be less discovery  
10 of strategic documents. So it is fine with me because  
11 that is basically something you need to cope with a  
12 possible defense. If they are not going to raise the  
13 defense, then there is a whole bunch of things you are  
14 not going to have to spend a lot of time poring over.

15 Thanks.

16 MS. ELKIN: Thank you, your Honor.

17 MS. HAMILTON: Thank you.

18 MS. MURRAY: Your Honor, on the eighteenth,  
19 then, we should submit?

20 THE COURT: Yes. We will set a date shortly  
21 after that, either for ruling or for some further oral  
22 argument.

23 Thanks.

24 MS. ELKIN: Thank you, your Honor.

25 MR. HENDRICKSON: Thank you, your Honor.

I certify that the foregoing is a correct transcript of the original shorthand notes of proceedings in the above-entitled matter.

\_\_\_\_\_  
Anthony W. Lisanti  
Official Court Reporter

\_\_\_\_\_  
Date



**CERTIFICATE OF SERVICE**

Laurie S. Elkin, an attorney, hereby certifies that she caused a copy of the foregoing EEOC'S SUBMISSION REGARDING PROCEDURE FOR OBJECTING TO PRODUCTION OF PERSONNEL FILES to be faxed and mailed, postage pre-paid, on August 18, 2005, to counsel of record at the following address:

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