

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

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,)	
)	
)	
Plaintiff,)	
)	Case No. 05 cv 0208
v.)	
)	Judge James Zagel
SIDLEY AUSTIN BROWN & WOOD LLP,)	Magistrate Judge Ashman
)	
Defendant.)	
)	

**PLAINTIFF’S MEMORANDUM IN SUPPORT OF EEOC’S
MOTION TO DISQUALIFY DEFENDANT’S COUNSEL FROM
REPRESENTING ONE NON-PARTY WITNESS**

One of the Equal Employment Opportunity Commission’s (“EEOC”) principal allegations in this action brought under the federal Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (“ADEA”) — at the very heart of the case — is that Defendant Sidley Austin, LLP (“Sidley”), for years unlawfully maintained an age-based retirement policy. Sidley contends that it has never had any such age-based retirement policy applicable to attorneys designated as “partners” of the firm. Sidley’s contention is flatly contradicted by a 1999 letter to the United States Social Security Administration (“SSA”), on Sidley’s own letterhead and signed by William B. White (“White”), then Sidley’s Financial Director.

Both counsel to Sidley and a member of Sidley’s Management Committee have now adopted the position that White’s letter is “wrong” or “untrue.” Moreover, Sidley has, in responding to requests to admit, denied that the letter’s statement of policy was true. Nevertheless, the same counsel to Sidley that has described White’s representation to the SSA as

wrong (and whose client, Sidley, has alleged that the representation is untrue) has announced that it intends to serve as counsel to White.

Counsel to Sidley should be disqualified from representing White, as its representation of him is materially limited, in violation of Local Rule 83.51.7(b), both by counsel's obligation to zealously represent Sidley and by counsel's position that White — the proposed "client" — made a false representation to the SSA.

I. Background

On October 21, 1999, White, then Sidley's Financial Director, wrote to the United States Social Security Administration on Sidley & Austin letterhead, representing that "it is the general policy of Sidley & Austin not to permit a partner of the firm to continue as a partner commencing the first of the year following the year age 65 is reached." See Letter from William B. White to Social Security Administration ("Social Security letter"), attached as Exhibit A to Plaintiff EEOC's Motion to Disqualify Defendant's Counsel From Representing One Non-Party Witness ("Motion to Disqualify"). White is now retired. See Transcript of Deposition of Virginia L. Aronson ("Aronson Transcript"), p.200, attached as Exhibit B to Plaintiff's Motion to Disqualify.

During the deposition of Sidley Management Committee member Virginia L. Aronson, one of the attorneys representing Sidley, Gary M. Elden, of Grippo & Elden, LLC, interrupted questioning — before EEOC counsel John Hendrickson asked any direct questions about the Social Security letter — and announced on the record, in effect testifying, "The Social Security letter is wrong.... The letter is wrong." Aronson Transcript, p.192. Following attorney Elden's "testimony," EEOC's counsel then asked the witness about White's letter. Not surprisingly, Aronson's testimony was consistent with Elden's: "I have no idea why [White] wrote this letter.

It is untrue.” Id. at 195. According to Aronson, no one at Sidley authorized White to make the representation contained in the Social Security letter. Id. at 199. Additionally, in response to the EEOC’s Second Request for Admissions, Sidley denied the representation contained in the Social Security letter. See Exhibit C to Plaintiff’s Motion to Disqualify, p.2. In the same response, Sidley stated further that White sent the Social Security letter at the request of a Sidley partner, but that “Mr. White did not seek or obtain the approval of Sidley’s Management or Executive Committee [sic] to send this letter.” Id.

On April 20, 2006, the EEOC requested that Sidley provide White’s last known address and phone number. On April 26, 2006, counsel to Sidley wrote to advise the EEOC that “we will be representing ... [Mr.] White, so please direct to us any inquiries you may have, including with regard to the scheduling of depositions.” See Letter from Maile H. Solis-Szukala to EEOC Trial Attorney Laurie Elkin, attached as Exhibit D to Plaintiff’s Motion to Disqualify.

II. Local Rule 83.51.7(b) and Material Limitation of Representation

Local Rule 83.51.7(b) provides:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after disclosure.

Local Rule 83.51.7(b) of the United States District Court, Northern District of Illinois.

Local Rule 83.51.7(b) is based on ABA Model Code of Professional Responsibility Disciplinary Rule 5-105(B), Coburn v. DaimlerChrysler Services North America, 289 F.Supp.2d 960, 965 (N.D.Ill. 2003), which is designed to prohibit a lawyer from representing a client when

the lawyer's loyalty to the client or professional judgment would be impaired. In particular, Local Rule 83.51.7(b) applies "when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests." Local Rule 83.51.7 Committee Comment; see also Smith v. Bravo, 2000 WL 1051855, *2 (N.D.Ill.); Guillen v. City of Chicago, 956 F.Supp 1416, 1426 (N.D.Ill. 1997). Under the rule, "[t]he critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." Local Rule 83.51.7 Committee Comment; Coburn, 289 F.Supp.2d at 965; Smith, 2000 WL 1051855 at *2.¹

Client consent, alone, does not release a lawyer from the constraints of this rule. Even if a client consents to representation by a lawyer whose representation is materially limited, such representation is still prohibited "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances," since "the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent." Local Rule 83.51.7 Committee Comment. In short, the rule requires that a lawyer's belief that representation will not be adversely affected be objectively reasonable. See Local Rule 83.51.7(b)(1).

¹ In this respect, Local Rule 83.51.7(b) differs from Local Rule 83.51.7(a), which applies only when a lawyer's representation of one client would be directly adverse to the lawyer's representation of another client. Local Rule 83.51.7 Committee Comment; see Guillen, 956 F.Supp at 1426. Local Rule 83.51.7(b), under which this motion is brought, applies even in the absence of such direct adversity. Local Rule 83.51.7 Committee Comment; Guillen, 956 F.Supp.2d at 1421 (noting that identical predecessor to Rule 83.51.7(b) "applies when representation *may* be materially limited by other responsibilities of the attorney" (emphasis in original)).

When an ethical rule such as Local Rule 83.51.7(b) has been violated, the court must determine whether disqualification is an appropriate remedy. Guillen, 956 F.Supp.2d at 1421. Although it is a drastic remedy, Schiessle v. Stephens, 717 F.2d 417, 420 (7th Cir. 1983), disqualification, “[w]hen appropriate, ... protects the attorney-client relationship by ensuring that clients receive the undivided loyalty of their counsel,” Guillen, 956 F.Supp.2d at 1421.

III. Representation of White by Sidley’s Counsel is Prohibited by Local Rule 83.51.7(b)

One of the principal EEOC claims at the heart of this lawsuit is that until 1999, it was Sidley’s policy to require lawyers to leave partnership status at age 65. That is, that Sidley maintained an age-based retirement policy in violation of the ADEA. The Social Security letter, signed by White, Sidley’s Financial Director, directly and unequivocally supports that claim and may expose Sidley to considerable liability.

Because the Social Security letter is an unquestionably authentic document, it is on Sidley letterhead, came from Sidley’s offices, and was sent to an agency of the federal government over the signature of an individual apparently acting within the scope of his authority as an agent of Sidley, it is an extraordinarily probative piece of evidence and potentially fatal to certain of Sidley’s defenses in this action.

Thus, in order to exculpate itself, Sidley has an exceedingly strong interest in demonstrating that White made a false representation to the SSA. As Aronson’s deposition testimony and Sidley’s responses to requests to admit make clear, Sidley indeed vigorously disputes the veracity of White’s representation. Consistent with its obligation to zealously represent Sidley’s interest on this point, Sidley’s counsel, too, has pronounced White’s letter to be wrong.

That Sidley's counsel interrupted questioning of a key Sidley witness to declare that White's letter was wrong — even before the witness was questioned about White's letter — illustrates the enormous importance Sidley and its counsel place on discrediting White. An attorney with any loyalty at all to White, much less undivided loyalty, would have no occasion to make such a pronouncement in such an extraordinary fashion.

While it is the EEOC's view that White accurately represented Sidley policy in the Social Security letter, Sidley's view is clearly otherwise. If Sidley is correct, then White made a false representation to an agency of the federal government, and may have enhanced Sidley's exposure to liability in this action or otherwise. Under those circumstances, White has a considerable interest in receiving independent, professional legal advice about what liability, if any, he might face (and to whom) if Sidley's view of the Social Security letter is indeed accurate. In addition, White will be called upon to testify about the Social Security letter in this case, and, if he did indeed make a false representation to a government agency, he may require legal advice about the possible legal consequences of his testimony in response to the questions put to him.

Given Sidley's importance as a client, it is unrealistic to think that Sidley's interests would not color its counsel's advice to White. Moreover, it is in the EEOC's interest — and in the interest of the administration of justice — to ensure that White's testimony is not distorted or affected in any way by Sidley's interest in defending this action.

Given the questions raised for White under Sidley's view of the Social Security letter, Sidley's counsel cannot simultaneously provide undivided loyalty to both Sidley and White. Indeed, counsel to Sidley has already committed itself to the position that White's letter was wrong, that his representation was untrue. Whether or not White has consented to representation

by Sidney's counsel,² a disinterested lawyer would conclude that White should not agree to such representation, under the circumstances. Sidney's counsel's responsibilities to Sidney materially limit its ability to represent White, in violation of Local Rule 83.51.7(b).

In light of the unavoidably divided loyalty that would result from any representation of White by Sidney's counsel in connection with this case, the necessary and appropriate remedy for this violation of Local Rule 83.51.7(b) is disqualification.

However, if the Court determines that disqualification is not appropriate, then the EEOC respectfully requests that Sidney's counsel be directed to file, by a date certain, a certification that counsel has complied with Local Rule 83.51.7(c). Specifically, counsel should be directed to certify that counsel has explained "the implications of the common representation and the advantages and risks involved," Local Rule 83.51.7(c), to Sidney, White, members of Sidney's Management and Executive Committees, and any other persons Sidney's counsel represents in connection with this action.

June 5, 2006

Respectfully Submitted,

s/ Justin Mulaire
John C. Hendrickson, Regional Attorney
Gregory Gochanour, Supervisory Trial Attorney
Deborah Hamilton
Laurie Elkin
Justin Mulaire, Trial Attorneys
U.S. Equal Employment Opportunity Commission
500 West Madison Street, Suite 2800
Chicago, Illinois 60661
312-353-7722

² The EEOC does not know whether White has consented to representation by Sidney's counsel or what disclosure, if any, might have preceded any such consent.