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 EEOC'S MOTION TO COMPEL DEPONENT WILLIAM WHITE TO ANSWER QUESTIONS REGARDING HIS CONVERSATIONS WITH SIDLEY MANAGEMENT AND FOR COMPLETION OF HIS DEPOSITION

With this motion EEOC seeks an Order compelling Deponent William White, the former financial director of the Defendant law firm Sidley Austin Brown & Wood ("Sidley"), to answer questions regarding his conversations with Sidley management about his October 1999 letter to the Social Security Administration stating that the firm maintained an age-based retirement policy and compelling the completion of White's deposition.

White testified at his deposition that at the time he signed the October 1999 letter, he believed it to be an accurate statement Sidley's retirement policy, but that after conversations with two Sidley partners that took place after this litigation was filed, White developed the view that the letter was not an accurate statement of Sidley's retirement policy. Yet, on the basis of the attorney-client privilege and the work product doctrine, Counsel for White and for Sidley instructed White not to answer the EEOC's questions about what was said during those conversations.

This motion presents the classic example of a Defendant seeking to use the attorney-client and work product privileges to improperly thwart the Plaintiff's discovery into areas that are potentially damaging for the Defendant. The law, however, is clear that the privileges protect against disclosure only where certain very limited criteria are met. Neither the deponent nor the Defendant can establish an entitlement to the privileges here, and they should not be permitted to use them to limit the EEOC's discovery.

Further, because the deponent left the deposition over the EEOC's objection, prior to the completion of the EEOC's examination, and well before the seven-hour limit provided by Fed. R. Civ. P. 30(d)(2), this witness should be made available to the EEOC to allow the EEOC to complete its deposition of him.

For the reasons that follow, EEOC respectfully requests that this Court order deponent White to answer questions regarding his conversations with Sidley management and to appear for the completion of his deposition.

1. On July 26, 2006, William White, the former financial director of the law firm of Sidley & Austin, appeared for his deposition pursuant to a notice sent by the EEOC.

2. White's deposition is of considerable importance to this age discrimination case because White is the signatory of an October 21, 1999 letter to the Social Security Administration on Sidley & Austin stationery stating 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 if reached." Letter from William White to Social Security Administration, October 21, 1999, attached as Exhibit A.

3. White's October 21, 1999 letter was the subject of a June 5, 2006 EEOC motion to disqualify Sidley's counsel in this case from representing White in this action because both

Sidley and Sidley's counsel had previously taken the position that (contrary to White's representation in the letter) Sidley did not maintain an age-based retirement policy. That motion by the EEOC resulted in some published newspaper stories about the case, including a story in The Chicago Tribune.

4. During his deposition, White testified that at the time that he signed the letter in 1999, he believed that the letter was a correct statement of Sidley's policy on retirement. White Transcript at 147, attached as Exhibit B. White stated that he first became aware that according to Sidley the statement about Sidley's age based retirement policy in his October 21, 1999 letter might be inaccurate after a February 2006 phone call to him from Sidley partner Bill Conlon. White Transcript at 153-55, attached as Exhibit C. White also said that based upon what he read in the newspaper, which was the subject of a conversation between him and Sidley partner Ted Miller on the day that the article appeared, he developed the view that the letter was not correct. White Transcript at 147, attached as Exhibit B.

5. White thus testified that he had conversations with two Sidley partners – Bill Conlon, who serves as "legal counsel" to the firm, and Ted Miller, a member of the firm's Management Committee -- about his October 21, 1999 letter stating that the firm maintained an age-based retirement policy and the news articles about the letter. It is these conversations between White and Sidley partners Conlon and Miller that are the subject of EEOC's motion.

6. Acting on the instructions of his counsel and counsel for Sidley, at his deposition White refused to answer questions from the EEOC regarding what he said to Sidley partner Ted Miller about the October 1999 letter and the stories about the letter that appeared in 2006. The following colloquy took place:

EEOC Trial Attorney Hamilton: At the time that the stories appeared in the paper about this letter [the October 1999 letter from White to the Social Security Administration], did you have any conversations with anyone about those newspaper stories or about the letter?

White: I had a conversation with Mr. Bergen who alerted me to the fact that my name was in the newspaper. I had not seen it. My paper wasn't delivered that day or I came into the office earlier than my Tribune. And he suggested that I call Mr. Ted Miller, who was a member of the Management Committee and in charge of litigation, and Mr. Conlon was in Ireland at the time. And I had a conversation with him.

. . . .

EEOC Trial Attorney Hamilton: Did you follow Mr. Bergen's instructions and call Mr. Miller?

White: Yes

EEOC Trial Attorney Hamilton: What did you say to Mr. Miller during that conversation?

Counsel for Sidley Conway: I'm going to object on the grounds of privilege, work product.

. . . .

EEOC Trial Attorney Hamilton: Were you seeking advice from Mr. Miller in his role as a lawyer regarding an issue of legal concern to you?

White: No.

. . . .

EEOC Trial Attorney Hamilton: During that conversation, were you asking Mr. Miller to serve as your attorney?

White: No.

EEOC Trial Attorney Hamilton: Then I reiterate my question. What did you tell Mr. Miller during that conversation?

Counsel for White Mr. Hannafan: Wait. I don't know if Mr. Conway has an objection.

Counsel for Sidley Mr. Conway: I'm going to object on the grounds of work product and privilege. At the time, he was – and again, I mean, I've offered a way to cut through this. I could have a private conversation with him in the hallway. But we were offering legal advice. Mr. Miller was acting as counsel to the firm in connection with this matter. Having a conversation with Mr. White about activities in the scope of his employment I think is privileged. And if I'm not going to have an opportunity to talk to with him and confirm outside your presence that its not privileged, I'm going to instruct him not to answer or." White Deposition Transcript at 181-190, attached as Exhibit D.

7. Acting on the instructions of his counsel and counsel for Sidley, at his deposition White also refused to answer questions about a conversation in February 2006 that he had with Sidley partner Bill Conlon about White's October 1999 letter to the Social Security Administration. White Deposition Transcript at 153-156, attached as Exhibit C, and White Deposition Transcript at 161-65, attached as Exhibit E.

8. Although White stated that he was not seeking Conlon's legal advice during that February 2006 conversation, counsel for Sidley objected on the basis of privilege to having White answer the question from the EEOC "What exactly did you say to Mr. Conlon during the conversation?" Counsel for Sidley asserted that "This was a conversation by a Sidley lawyer who was investigating the case. So its protected by the attorney-client or work product privileges or both. So I'm instructing him not to – or I'm requesting that Mr. Hannafan instruct

him not to answer on that basis. You're entitled to discover the facts. You're asking him questions about the facts, but you're not allowed to discover the communications themselves." White Transcript163-65, attached as Exhibit C.

9. The EEOC has complied with Local R. 12(K) by attempting to resolve our dispute about these conversations during the White deposition. Counsel for Sidley proposed that counsel for Sidley be permitted to question White about these conversations outside the presence of the EEOC. White Transcript at 186, attached as Exhibit E. Particularly given the EEOC's position that counsel for Sidley should not be permitted to represent White because of the conflict of interest between Defendant and White regarding the October 1999 letter, counsel's suggestion that counsel have private communications with White was unacceptable. Counsel for White repeatedly stated that White would not answer the EEOC's questions about these conversations without an order from this Court. See, e.g., White Transcript at 155-56, 165, attached as Exhibits C and E.

10. Neither the attorney-client privilege nor the work product doctrine provides a basis for White's refusal to answer the EEOC's questions about what was said by him or by Sidley partners Bill Conlon or Ted Miller during his conversations with them about his October 21, 1999 letter.

11. The attorney client privilege does not apply because White himself said that he was not seeking legal advice from Bill Conlon or Ted Miller during the conversations at issue. See White Transcript at 187-88, attached as Exhibit F ("EEOC Trial Attorney Hamilton: Were you seeking advice from Mr. Miller in his role as a lawyer regarding an issue of legal concern to you. White: No.") and White Transcript at 163, attached as Exhibit C ("EEOC Trial Attorney Hamilton: Was Mr. Conlon providing you with legal advice or assistance in February of '06? . .

. White: No.") Nor was White working as an employee of Sidley at the time of the conversations. White Transcript at 190, attached as Exhibit F (White testified that at that time of the conversations, he was working as a part-time hourly contract worker). White is not a lawyer, and at the time of the deposition, he had not worked for Sidley on a full-time basis as an employee for over 5 years.

12. As has been noted repeatedly in the case law, the attorney client privilege protects information from disclosure when "1) legal advice of any kind is sought 2) from a professional in his capacity as such, 3) the communications relating to that purpose, 4) made in confidence, 5) by the client, 6) are at his instance permanently protected 7) from disclosure by the himself or the legal advisor, 8) except the protection may be waived." *Bland v. Fiatallis North America, Inc*., 2002 WL 31655213 (N.D. Ill.) (citing *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991)). The most basic of these criteria is not satisfied here because according to his own testimony White was not communicating with either Bill Conlon or Ted Miller to get their legal advice. The fact that Conlon and Miller are attorneys does not render every conversation that they have about this case privileged. Since White was not seeking legal advice, the content of what he told these Sidley partners is not protected by the attorney client privilege.

13. Likewise, the content of any communications from Conlon or Miller to White during these conversations is not protected by the attorney client privilege because that privilege applies to an attorney's communications with a client only where the "communications contain confidential information provided by the client." *Id*. (citing *United States v. DeFazi*, 899 F.2d 626, 635 (7th Cir. 1990)). Since White has already testified that he was not communicating with Conlon or Miller to get their legal advice, any response from Conlon or Miller could not contain confidential information provided by White. Thus, the attorney client privilege provides no basis

for White's refusal to testify during his deposition about what he said to Conlon or Miller and about what they said during their conversations with him regarding the October 21, 1999 letter to the Social Security Administration.

14. The work product doctrine is equally unavailing. It is hornbook law that the work product doctrine is a qualified privilege that protects from disclosure documents and tangible things prepared in anticipation of litigation or trial by or for a party or by or for a party's representative. *See Caremark, Inc. v. Affiliated Computer Services, Inc*., 195 F.R.D. 610-614 (N.D. Ill. 2000). The privilege also covers intangibles, such as interviews, but the privilege does not protect against disclosure of factual information from a witness. *Id*.

15. EEOC's deposition questions to White regarding what White told Conlon or Miller during his conversations with them about the October 21, 1999 letter do not require disclosure of any mental impression or work by Conlon or Miller in anticipation of litigation or trial. The Northern District of Illinois has already said that "[O]pposing counsel may question a witness about what facts the witness discussed in the interview with the lawyer or investigator." *Id*.

16. In order to understand the facts that led to White to change his view regarding the accuracy of the statement about Sidley's retirement policy, the EEOC must be able to question White not only about what White said to Conlon and Miller but also about what Conlon and Miller said to him during their conversations about the letter. Statements by Conlon and Miller to White do not meet the definition of work product.

17. In addition to instructing White not to answer EEOC's questions about his conversations with Sidley partners Conlon and Miller, White's counsel also ended the deposition over EEOC's objection before seven hours of deposition time had elapsed. See White Transcript

at 212-215, attached as Exhibit G. As a result, EEOC did not complete its examination of White and did not use the seven hours provided for under Fed. R. Civ. P. 26(d)(2).

WHEREFORE, EEOC requests that this Court order Deponent William White to answer EEOC's questions regarding the content of his conversations with Sidley partners Bill Conlon and Ted Miller and order him to appear for the completion of his deposition.

September 5, 2006

Respectfully Submitted,

_s/ Deborah Hamilton_____
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CERTIFICATE OF SERVICE

Deborah Hamilton, an attorney, hereby certifies that on September 5, 2006, she caused copies of the foregoing document, to be served electronically, via the court's Electronic Case Filing system, upon counsel to defendant Sidley Austin Brown & Wood, L.L.P. and upon counsel for the witness White via fax.

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