

ENDORSED ORDER 002/003

Equal Employment Opportunity Commission v. Kelley Drye & Warren LLP

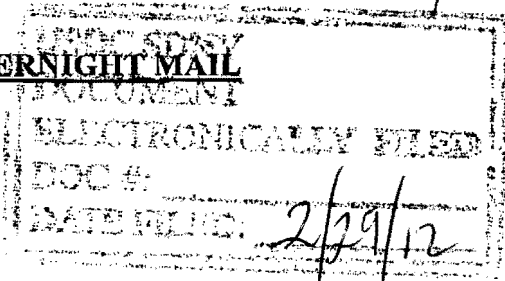
If defendant wishes to pursue return of the document, it has the burden of establishing by competent evidence the facts on which its privilege claim is based.

Proskauer

Proskauer Rose LLP 1685 Broadway New York, NY 10036-3299

M. Plevan 2/29/12

BY FAX AND OVERNIGHT MAIL



February 21, 20112

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FEB 21 2012

Hon. Michael H. Dolinger, U.S.M.J. U.S. District Court, Southern District of New York Daniel Patrick Moynihan United States Courthouse 500 Pearl St. New York, NY 10007-1312

Re: EEOC v. Kelley Drye & Warren LLP, No. 10-CIV-0655 (LTS) (MHD)

Dear Judge Dolinger:

We are counsel to defendant Kelley Drye & Warren LLP ("Kelley Drye") in the above-referenced matter. We write with respect to a dispute concerning the inadvertent production of a privileged document notwithstanding Kelley Drye's best efforts to resolve the issue.

During the deposition of Kelley Drye's Managing Partner, James Kirk, Mr. Burstein marked as an exhibit an e-mail string, inadvertently produced in discovery by Kelley Drye, which included an e-mail from Mr. Kirk to firm Counsel Steven Caley, Firm Chairman John Callagy, and Executive Committee Member Robert Bickford. The e-mail contained a draft of the memorandum Mr. Kirk intended to send to the Firm's Partners, transmitting the proposed amendment to the firm's Partnership Agreement which eliminated the mandatory transition to Life Partnership.

Mr. Kirk's draft e-mail discussed the genesis of the amendment, and made specific reference to the EEOC's actions in this litigation. Given the pendency of this matter, Mr. Kirk's primary purpose was to seek legal advice and guidance with respect to the dissemination of the proposed amendment. There would have been no other reason to send the draft memorandum to Mr. Caley, who is not a member of the Executive Committee. It was not Mr. Kirk's practice routinely to copy Mr. Caley on all issues involving firm policy. Mr. Kirk limited distribution of this e-mail to Messrs. Caley, Callagy, and Bickford, because it was not his intention to share his draft memorandum with a wider audience. Rather he wanted to make sure that the legal advice he sought was kept confidential.

At the deposition we immediately asserted an objection to Mr. Burstein's use of the privileged document and demanded its return or destruction. Mr. Burstein refused. Subsequent to the deposition we wrote to Mr. Burstein demanding return or destruction of the document (and of additional copies of the document in the Kelley Drye Production). We again asserted that the

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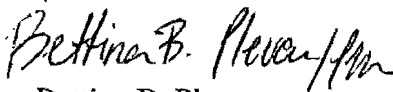
Hon. Michael H. Dolinger, U.S.M.J.
U.S. District Court, Southern District of New York
February 21, 2012.
Page 2

production was inadvertent. Mr. Burstein again refused to return the privileged document (and the copies of the document).¹

In his letter rejecting our demand for return of the document Mr. Burstein acknowledged that privilege attaches to "a communication between client and counsel, made for the purpose of obtaining legal advice that was intended to be and in fact was kept confidential." *In re Grand Jury Proceedings*, 219 F.3d 175, 183 (2d Cir. 2000). As shown above, there can be no question that the document is protected by privilege, was kept confidential, was inadvertently produced, and should accordingly be returned or destroyed. Kelley Drye therefore seeks an Order requiring the immediate return or destruction of all inadvertently produced copies of the document.

In light of the forgoing Kelley Drye respectfully requests a conference to discuss resolution of this dispute.

Respectfully,



Bettina B. Plevan

cc: Jeffrey Burstein, Esq. (By PDF)

¹ While the EEOC challenges Kelley Drye's assertion of privilege, and not whether it is entitled to the return of inadvertently produced privileged documents, Kelley Drye's General Objections set forth in its responses to document demands contemplate the return of inadvertently produced privileged documents, stating "Inadvertent identification or production of any such documents shall not constitute a waiver of any privilege with respect to the subject matter thereof or the information contained therein, and shall not waive Defendant's right to object to the use of any such documents or information during this or any subsequent proceeding or to demand the return of any such documents."

FAX Cover Sheet

Date: February 29, 2012

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Re: EEOC v. Kelley Drye & Warren, LLP.
10 Civ. 655 (LTS) (MHD)

Text of endorsed order enclosed: "If defendant wishes to pursue return of the document, it is to do so by formal motion since it has the burden of establishing by competent evidence the facts on which its privilege claim is based."

From: Magistrate Judge Michael H. Dolinger
United States District Court
Southern District of New York
500 Pearl Street, Room 1670
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This document contains 2 pages, including this cover sheet.