UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

-against-

KELLEY DRYE & WARREN LLP,

Defendant.

MEMORANDUM & ORDER

10 Civ. 655 (LTS)(MHD)

MICHAEL H. DOLINGER
UNITED STATES MAGISTRATE JUDGE:

Plaintiff Equal Employment Opportunity Commission ("EEOC") recently produced to defendant Kelley Drye & Warren, LLP ("the law firm") a memorandum authored by charging party Eugene D'Ablemont and addressed to two law firm partners. The law firm objected to the EEOC's possession of the document (including six exhibits) because, in its view, the memorandum and most of the exhibits were protected by two versions of the attorney-client privilege. Specifically, defendant contends that the memorandum is covered by a privilege between the law firm and its in-house counsel and that some of the exhibits are covered by a privilege between the law firm and some of its clients. (Letter to the Court from Bettina B. Plevan, Esq. (Dec. 28, 2010) ("Dec. 28 Plevan Letter"); Letter to the Court from Bettina B. Plevan, Esq. (Jan. 14, 2011)). The EEOC

has conceded that some of the exhibits may be covered by the latter form of privilege but opposes the application of the privilege to the memorandum itself. (Letter to the Court from Jeffrey Burstein, Esq. (Jan. 6, 2011) ("Burstein Letter")).

On the present record, defendant has adequately demonstrated that the memorandum at issue is covered by the attorney-client privilege, which encompasses inter alia communications between the client and an attorney (in this case, respectively, the law firm itself, represented by its Executive Committee ("EC")), and the law firm's in-house counsel, Steven P. Caley, Esq.) for the purpose of facilitating the rendition of legal services by the attorney. See, e.g., In re County of Erie, 473 F.3d 413, 418 (2d Cir. 2007) ("The attorney-client privilege protects confidential communications between client and counsel made for the purpose of obtaining or providing legal assistance."); United States v. Rowe, 96 F.3d 1294, 1296-97 (9th Cir. 1996) (finding that attorney-client privilege applies to confidential communications made within the context of an internal investigation within a law firm); United States v. Constr. Prods. Research, 73 F.3d 464, 473 (2d Cir. 1996) ("To invoke the attorney-client privilege, a party must demonstrate that there was . . . a [confidential] communication between client and counsel . . . made for the purpose of obtaining or providing legal

advice.") (citing Fisher v. United States, 425 U.S. 391, 403 (1976)); Hertzog, Calamari & Gleason v. Prudential Ins. Co. of America, 850 F.Supp. 255, 255 (S.D.N.Y. 1994) (confidential communications with in-house attorneys are privileged "if the individual in question is acting as an attorney, rather than as a participant in the underlying events.") (citing cases); see also Dec. 28 Plevan Letter at 1-3, Ex. A. For the facts we draw upon the submitted declarations of Messrs. D'Ablemont and Caley (Declaration of Eugene D'Ablemont, Esq., Jan. 5, 2010[1]; Declaration of Steven P. Caley, Esq., Jan. 14, 2011) and our in camera review of the memorandum and exhibits. (Dec. 28 Plevan Letter at Ex. A).

Mr. Caley, acting as in-house counsel, was apparently consulted by the EC to address an ethical issue involving a possible conflict of interest in Mr. D'Ablemont's representation of a client in one set of cases. It also appears that the EC reached a decision on the basis of Mr. Caley's advice. When that decision was communicated to Mr. D'Ablemont by Mr. Caley and Jim Carr, a member of the EC, he responded by preparing a memorandum which is now the principal subject of controversy. The memorandum, addressed both to Mr. Caley and Mr. Carr, and sent as well to four other

[1] The dating of Mr. D'Ablemont's declaration plainly reflects a typographical error.

members of the EC, offered a factual summary and analysis that disagreed with the initial conclusion of the EC and was plainly intended to persuade Mr. Caley and the EC that a different conclusion was warranted. Eventually, we are told, the EC adopted a proposal made in the course of Mr. D'Ablemont's memorandum, which led to a reversal of its initial decision.

On the face of the record, the memorandum reflects a communication by Mr. D'Ablemont, as a firm partner or employee, addressed to the law firm's in-house counsel and to the decision-makers for the law firm in which he offers a factual summary and legal analysis that he plainly was asking both the in-house counsel and the law firm (through its EC) to adopt. Although Mr. Caley's declaration does not provide a particularly detailed account of the pertinent events, it is sufficient, when read in conjunction with Mr. D'Ablemont's declaration and the memorandum itself, to permit the inference (1) that the back-and-forth between Caley and the EC (on one side) and Mr. D'Ablemont (on the other) involved communications intended by both the EC and Mr. D'Ablemont to elicit a legal opinion from Mr. Caley and (2) that Mr. D'Ablemont's memorandum was seeking to persuade Mr. Caley and the law firm decision-makers to adopt an analysis and decision consistent with Mr. D'Ablemont's position. This suffices to bring the memorandum

within the scope of the privilege.

In seeking to avoid this result, the EEOC suggests that the memorandum should be characterized as simply an intra-firm communication, with no significance attached to the role of Mr. Caley as the in-house counsel of the law firm. This is not persuasive. Mr. Caley appears to have had a pre-assigned role as legal advisor to the law firm and to have played that role in this instance.[2] Moreover, to the extent that the EEOC may be understood to suggest that Mr. D'Ablemont, in communicating with Mr. Caley and the EC, was not playing the role of a client, again the argument is wide of the mark. Mr. D'Ablemont was a part of the firm, whatever his title, either as part of management or as an employee. When an entity is represented by counsel, that attorney's communications with personnel affiliated with that entity -- be they management or

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[2] At one point the EEOC suggests that because the memorandum did not list Caley as in-house counsel, the communication to him was not intended to seek his input as counsel. (Burstein Letter at 3). The identifier placed by Mr. D'Ablemont in the memorandum next to each addressee is of little or no moment. Functionally Mr. Caley was involved in the process because of his role as counsel. Moreover, as Mr. D'Ablemont notes, he addressed the memorandum to Mr. Caley because Caley had been one of two partners (the other was a member of the EC) who had previously met with him to inform him of the law firm's initial decision on the conflict issue. Mr. Caley was not a member of the EC and presumably was the bearer of the firm's initial tidings to Mr. D'Ablemont because of his role as in-house counsel.

employees -- are covered by the privilege if the communications related to the attorney's performance of his counseling function for the entity. See, e.g., United States v. Upjohn Co., 449 U.S. 383, 391-97 (1981). When Caley communicated with D'Ablemont in the first instance and D'Ablemont then responded, by his memorandum, to question the initial decision of the firm and propose an alternative factual narrative and conclusion to justify a change of position, that communication too fell within the ambit of the privilege.

With this conclusion, we turn now to the specific application of the law firm, which seeks a ruling upholding its proposed redactions to the memorandum and exhibits. We had suggested some time ago that tailored redactions be considered as a means of ensuring that any privileged materials be protected, but the parties were unable to agree on the appropriate scope of the redactions, a disagreement that seems to have been premised on their differing views as to the applicability or inapplicability of the privilege to the memorandum. In the current posture, we have received the law firm's proposed form of redaction (Dec. 28 Plevan Letter at Ex. B), but not any version from the EEOC.

Based on our conclusion about the applicability of the

privilege to the memorandum, we see no basis to reject the law firm's proposal for redacting the memorandum. Although the EEOC complains that the redactions would eviscerate the utility of the memorandum as evidence -- perhaps rendering it incomprehensible -- this objection fails insofar as we conclude that the document is privileged. The potential relevance of an otherwise privileged document does not affect its status as a protected communication.[3]

As for the exhibits, the law firm proposes minor, and for the most part uncontroversial, redactions. We are not clear as to whether the EEOC objects to all of them -- although from their letter brief we assume so -- but in any event we view them all as proper with the exception of a series of redactions on pages EEOC000838-39, the grounds for which are not explained or self-evident. As to those, if defendant wishes to proffer an explanation, it may do so within three business days. In the

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[3] The parties dispute the probative value of the memorandum as evidence of retaliation. In view of the absolute nature of the federal version of the privilege, that disagreement is immaterial since probative weight does not itself affect the applicability of the attorney-client privilege. In any event, we note that in view of the law firm's reported volte face on the conflict issue, we are left with no basis for inferring that the document demonstrates an instance of retaliatory behavior, and the accompanying exhibits still further reflect that the attorneys involved in decision-making appeared to have had bona fide grounds for disagreement on the underlying conflict issue.

absence of a satisfactory explanation, we decline to uphold those redactions.

Finally, we note that our ruling as to the privileged status of the memorandum is premised on a limited evidentiary record. If plaintiff develops additional facts -- presumably through discovery -- that put the controversy in a different light, it will be free to revisit the issue with the court.

CONCLUSION

For the reasons noted, defendant's application for a protective order is granted to the extent noted. The EEOC is to return to Mr. D'Ablemont the unredacted memorandum and exhibits and the law firm is to supply to the EEOC an appropriately redacted set of the same documents.

Dated: New York, New York
January 19, 2011

MICHAEL H. DOLINGER
UNITED STATES MAGISTRATE JUDGE

Copies of the foregoing Memorandum and Order have been mailed today to:

Jeffrey Burstein, Esq.
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