

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

AVERY OUTDOORS LLC, f/k/a)	
BANDED FINANCE LLC,)	
)	
Plaintiff,)	
)	
v.)	
)	No. 16-cv-2229-SHL-tmp
)	
OUTDOORS ACQUISITION CO., LLC,)	
)	
Defendant.)	

ORDER DENYING OAC'S MOTION FOR A PROTECTIVE ORDER AND GRANTING
BANDED'S MOTION TO COMPEL

Before the court by order of reference are Defendant Outdoor Acquisition Co., LLC's ("OAC") Motion for a Protective Order to Prevent Discovery of Privileged Information Relative to Plaintiff's First Request for Production of Documents (ECF No. 48), and Plaintiff Avery Outdoors LLC f/k/a Banded LLC's ("Banded") Motion to Compel Full Production of Unredacted Documents (ECF No. 49). Both of these motions relate to legal billing records that OAC produced, in redacted form, in response to Banded's First Request for Production of Documents. (See ECF No. 48-1.) OAC contends it was entitled to redact the billing records to shield information protected by the attorney-client privilege and work product doctrine. Banded asserts that OAC must produce the unredacted records because the records do not contain information protected by the attorney-client privilege

or work product doctrine, or alternatively, that any such protection has been waived.

I. BACKGROUND

The factual history of this case is somewhat complex. Stated very briefly, Banded alleges counts of breach of contract, economic duress, and unjust enrichment against OAC relating to the payoff of a promissory note originally executed by Avery Outdoors, Inc. ("Avery") in favor of SunTrust Bank, and subsequently acquired by OAC.¹ Banded alleges that in calculating the amount required to fully pay off the promissory note, OAC demanded to be paid for certain legal fees it incurred, in violation of the terms of the note. (See ECF No. 1-2.)

In its first request for production of documents, Banded sought "invoices, statements, contracts, time records, bills, billing summaries, charts, billing entries, description of services, engagement agreements, flat fee agreements, emails, letters, and/or any other Documents evidencing, summarizing, itemizing, supporting, defining, and/or justifying" seven categories of "legal and other" fees incurred by OAC between April 2, 2015 and May 8, 2015. (See ECF No. 48-1.) OAC's responsive production included billing records from the law

¹Banded purchased certain assets of Avery on July 21, 2015. (See ECF No. 1-2 at 6.)

firms of McDermott Will & Emery LLP ("McDermott"), and Burr & Forman LLP ("Burr"). The McDermott and Burr billing records produced by OAC contain numerous redactions, mostly of the descriptions of various tasks and services for which the relevant law firm billed its time.

OAC justified its redaction of the McDermott and Burr billing records on the grounds that the redacted portions are protected by the attorney-client privilege and/or the work product doctrine. Banded objected to the redactions. OAC subsequently filed a motion for a protective order, and Banded filed a motion to compel.²

On September 20, 2016, the undersigned magistrate judge directed OAC to submit both the redacted and unredacted versions of the McDermott and Burr billing records for *in camera* inspection in order to allow the court to determine whether OAC must produce the records (in whole or in part) in unredacted form. (ECF No. 57.) OAC submitted the billing records to the undersigned magistrate judge on September 27, 2016. (See ECF No. 61.)

²The factual and procedural background of these motions are detailed further in the order of the undersigned magistrate judge (ECF No. 57) directing OAC to submit the McDermott and Burr records for *in camera* inspection.

II. ANALYSIS

Federal Rule of Civil Procedure 26(b)(1), as amended in 2015, provides that

[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). Under Federal Rule of Civil Procedure 26(c)(1), "[a] party or any person from whom discovery is sought may move for a protective order The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

Fed. R. Civ. P. 26(c)(1).

Federal Rule of Civil Procedure 34(a)(1)(A) allows a party to "serve on any other party a request within the scope of Rule 26(b) . . . to produce . . . any designated documents or electronically stored information." Fed. R. Civ. P. 34(a)(1)(A). Under Federal Rule of Civil Procedure 37(a)(3)(B)(iv), if a party "fails to produce documents . . . as requested under Rule 34," the requesting party "may move for an order compelling [] production." Fed. R. Civ. P. 37(a)(3)(B)(iv).

OAC does not contest the relevance of the McDermott and Burr billing records to Banded's claims, nor does OAC contend

that discovery of the unredacted records would be disproportionate to the needs of the case. Instead, OAC argues that the redacted portions of the records are not discoverable because they contain information that is protected by the attorney-client privilege and/or work product doctrine.³ Banded contends that the redacted information is not privileged or protected by the work product doctrine, or alternatively, that any privilege or protection has been waived. Accordingly, Banded argues, OAC's production of redacted versions of the McDermott and Burr billing records amounts to a failure to respond to Banded's request for production, and the court should order production of the unredacted records. See Fed. R. Civ. P. 37(a)(4) ("[A]n evasive or incomplete disclosure . . . must be treated as a failure to disclose.").

A. Attorney-Client Privilege and Work Product Doctrine

A federal court refers to state law to resolve issues of attorney-client privilege relating to state law claims. See Fed. R. Evid. 501. All of the claims in this case are state law claims, and neither party appears to contest the applicability

³Although OAC did not provide Banded with privilege logs (as required by Federal Rule of Civil Procedure 26(b)(5)(A)) when it initially produced the redacted billing records on August 3, it later produced such privilege logs. The privilege logs document well over 100 redacted entries in the McDermott and Burr records. For nine of the entries, OAC asserted attorney-client privilege as the only basis for redaction. As to the remainder of the redacted entries, OAC asserted both the attorney-client privilege and work product doctrine.

of Tennessee law to those claims. The court thus looks to the Tennessee law of attorney-client privilege, although "the courts of Tennessee are often guided by state and federal common law when fashioning the contours of the attorney-client privilege." See Royal Surplus Lines Ins. v. Sofamor Danek Grp., 190 F.R.D. 463, 484 (W.D. Tenn. 1999). Because the work product doctrine is a federal procedural rule, it applies to the state law claims in this case. See In re Professionals Direct Ins. Co., 578 F.3d 432, 438 (6th Cir. 2009).

1. Attorney-Client Privilege

"By statute and common law, Tennessee recognizes an evidentiary privilege that protects the confidentiality of attorney-client communications." State v. Buford, 216 S.W.3d 323, 326 (Tenn. 2007). Tennessee Code Annotated § 23-3-105 provides that:

No attorney, solicitor or counselor shall be permitted, in giving testimony against a client or person who consulted the attorney, solicitor or counselor professionally, to disclose any communication made to the attorney, solicitor or counselor as such by such person during the pendency of the suit, before or afterward, to the person's injury.

Tenn. Code Ann. § 23-3-105. Although § 23-3-105 refers to communications made to an attorney by a client, communications made by an attorney to a client are privileged to the extent those communications are based upon a client's confidential

communication or would reveal the nature of a confidential communication if disclosed. Buford, 216 S.W.3d at 326 (citing Bryan v. State, 848 S.W.2d 72, 80 (Tenn. Crim. App. 1992)). Tennessee's codification of the privilege embodies common law principles, and the purpose of the privilege is to encourage "full and frank communication between attorney and client by sheltering these communications from disclosure." Culbertson v. Culbertson, 393 S.W.3d 678, 684 (Tenn. Ct. App. 2012) (internal citations omitted); see also Bryan, 848 S.W.2d at 79 ("[T]he purpose of the privilege is to shelter the confidences a client shares with his or her attorney when seeking legal advice, in the interest of protecting a relationship that is a mainstay of our system of justice.").

"The [attorney-client] privilege is not absolute nor does it encompass all communications between the client and the attorney." Bryan, 848 S.W.2d at 80. The party asserting the privilege bears the burden of showing that the purported privileged communications "were made in the confidence of the attorney-client relationship." Id. The party asserting the privilege must establish that:

- (1) the asserted holder of the privilege is or sought to become a client;
- (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer;
- (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the

presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Royal Surplus Line, 190 F.R.D. at 468-69; see also Boyd v. Comdata Network, Inc., 88 S.W.3d 203, 213 (Tenn. Ct. App. 2002) (“The communications must involve the subject matter of the representation and must be made with the intention that they will be kept confidential.”).

The inquiry into whether particular communications are covered by the attorney-client privilege is “necessarily question, topic and case specific.” Bryan, 848 S.W.2d at 80. Given that the attorney-client privilege “creates an inherent tension with society's need for full and complete disclosure of all relevant evidence during implementation of the judicial process . . . the privilege is to be narrowly construed.” In re Grand Jury Investigation No. 83-2-35, 723 F.2d 447, 451 (6th Cir. 1983).

“Typically, the attorney-client privilege does not extend to billing records and expense reports.” Chaudhry v. Gallerizzo, 174 F.3d 394, 402 (4th Cir. 1999). More specifically, “the identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected

from disclosure by the attorney-client privilege.” Clarke v. Am. Commerce Nat. Bank, 974 F.2d 127, 129 (9th Cir. 1992); see Humphreys, Hutcheson & Moseley v. Donovan, 755 F.2d 1211, 1219 (6th Cir. 1985) (“In general, the fact of legal consultation or employment, clients' identities, attorney's fees, and the scope and nature of employment are not deemed privileged.”); cf. Corbis Corp. v. Starr, 719 F. Supp. 2d 843, 846 n.4 (N.D. Ohio 2010) (remarking that “statements regarding generally what counsel did for a specific period of time (i.e., ‘prepared summary judgment reply’) are not privileged or work product”). As the Fourth Circuit has noted, this type of information is not privileged because it “ordinarily reveals no confidential professional communications between attorney and client.” In re Grand Jury Subpoena, 204 F.3d 516, 520 (4th Cir. 2000).

While legal billing records are generally not privileged, such records may be covered by the privilege to the extent they reveal litigation strategy, a client’s motive in seeking representation, or the specific, rather than the general, nature of the legal services the attorney rendered. Clarke, 974 F.2d at 129; see Chaudhry, 174 F.3d at 403 (“The legal bills revealed the identity of the federal statutes researched. Since the records would divulge confidential information regarding legal advice, they constitute privileged communications.”); Evenflo Co. v. Hantec Agents Ltd., No. 3:05-CV-346, 2006 WL 2945440, at

*4 (S.D. Ohio Oct. 13, 2006) ("In this case, the invoices reveal the specific nature of the services provided. They are, therefore, privileged documents.").

2. Work Product Doctrine

The work product doctrine "generally protects from disclosure documents prepared by or for an attorney in anticipation of litigation." Kumar v. Hilton Hotels Corp., No. 08-2689 D/P, 2009 WL 1683479, at *1 (W.D. Tenn. June 16, 2009) (quoting Reg'l Airport Auth. of Louisville v. LFG, LLC, 460 F.3d 697, 713 (6th Cir. 2006)). Federal Rule of Civil Procedure 26(b)(3) provides that, "[o]rdinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative." Fed. R. Civ. P. 26(b)(3)(A). The purpose of the work product doctrine is to allow an attorney "to assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference . . . to promote justice and to protect [his] clients' interests." In re Powerhouse Licensing, LLC, 441 F.3d 467, 473 (6th Cir. 2006) (quoting Hickman v. Taylor, 329 U.S. 495, 510 (1947)) (alterations in original).

As with the attorney-client privilege, the party claiming the protection of the work product doctrine bears the burden of

establishing that the doctrine applies. The Sixth Circuit has established a sequential analysis for determining whether the work product doctrine applies to a particular document:

First, the court must determine whether the document is 'otherwise discoverable under subdivision (b)(1),' that is, that the document is relevant and not privileged. Second, the party seeking to invoke the work product doctrine must show that the information was (1) prepared in anticipation of litigation or for trial and (2) prepared by that party or its representative . . . Third, if such a showing is made, the burden shifts to the party seeking disclosure of the document to show (1) that the party has a substantial need for the information and (2) that the party is unable to obtain the substantial equivalent of the materials without undue hardship. Finally, even if the party seeking the document shows substantial need and undue hardship, the objecting party may avoid discovery by showing that the document contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the party concerning the litigation

Kumar, 2009 WL 1683479, at *1 (citing Toledo Edison Co. v. G A Techs., Inc., 847 F.2d 335, 339-40 (6th Cir. 1988)).

B. The McDermott and Burr Records

As an initial matter, given the alleged privileged nature of the redacted portions of the billing records, the court will refrain from disclosing any of the contents of those redactions in discussing the billing records. On August 5, 2016, OAC produced eighty-five pages of documents in response to Banded's first request for the production of documents. That production included twenty-five pages of billing records from McDermott and

thirty-two pages of billing records from Burr.⁴ The McDermott and Burr billing records are formatted slightly differently, but both sets of records consist largely of billing entries that list the date, name or initials of an attorney, amount of time billed, and a description of the work or tasks performed.⁵

All of the redactions in the McDermott and Burr records appear in the description section of various billing entries. The privilege logs produced by OAC indicate that over 100 entries were redacted - nine on the basis of attorney-client privilege alone and the rest on the basis of both the attorney-client privilege and work product doctrine.

1. The McDermott and Burr Records are Not Protected by the Attorney-Client Privilege or the Work Product Doctrine

After carefully inspecting and comparing the unredacted and redacted billing records *in camera*, the court finds that the records are not shielded by either the attorney-client privilege

⁴The documents OAC produced were labeled Bates Nos. OAC000001-OAC000085. The McDermott records were labeled Bates Nos. OAC000001-OAC000025, and the Burr records were labeled OAC000026-OAC000058. OAC later produced a revised redacted version of the McDermott records, labeled Revised OAC000001-Revised OAC000025. There were no redactions made to documents OAC000059-OAC000085. Thus, the court only reviewed documents Revised OAC000001-Revised OAC000025 and OAC000026-OAC000058.

⁵Because OAC did not individually identify each entry in the billing records, and in order to avoid disclosing the contents of the redacted descriptions, the court will cite to individual billing entries in the following format: (Bates No., Date, Attorney, Number of Hours).

or work product doctrine. While detailed descriptions in legal billing records that reveal litigation strategy, legal advice, or the specific nature of the legal work performed may be protected by the attorney-client privilege, billing records that describe the legal services in more general terms are not privileged. The redacted descriptions in the McDermott and Burr records fall into the latter category. The descriptions of the tasks the McDermott and Burr lawyers performed are drafted in the manner in which billing records are often drafted, that is, fairly general in nature and without much detail. The court finds that the redacted descriptions are not so specific as to reveal the contents of confidential communications between lawyer and client regarding legal advice.

Moreover, because the privilege only applies to communications that were intended to be and in fact remain confidential, the redacted descriptions must be considered in light of what has already known to all the parties involved. In light of the present suit between Banded and OAC, the parties are well aware that OAC acquired the rights to a promissory note issued by Avery, which, due to Avery's default and related bankruptcy, was the subject of a receivership action in Tennessee state court. Banded's claims against OAC center on the negotiations between Avery, Banded, OAC, and the receiver regarding the payoff and subsequent release from the promissory

note. The McDermott and Burr billing records reveal nothing more than the fact that McDermott and Burr performed legal work related to the foregoing matters. (See, e.g., Revised OAC000003, 03/19/15, J. Kapp, 2.00; Revised OAC000003, 03/20/15, J. Kapp, 0.50; Revised OAC000004, 03/22/15, J. Kapp, 1.00; Revised OAC000004, 03/24/15, J. Kapp, 2.00; Revised OAC000008, 04/20/15, B. Zucker, 0.75; OAC000029, 04/13/15, ECT 0.20; OAC000042, 05/07/15, ECT, 0.40.) In light of the parties' knowledge of the issues raised in the state court action and the general nature of the descriptions of the work performed, OAC has not met shown that producing the redacted portions of the billing records would reveal confidential communications regarding legal advice between lawyer and client. For similar reasons, the redacted portions of the billing records do not constitute opinion work product. The descriptions do not reveal confidential legal strategy or conclusions beyond the presumed strategy of every lawyer to competently represent his or her client, and achieve the best possible result for the client in the matters for which the lawyer was hired.⁶ (See, e.g., Revised OAC000004, 03/24/15, B. Gruemmer, 0.50; OAC000028, 04/08/15, RCG, 1.50; OAC000043, 05/14/15, RCG, 1.00.)

⁶Because the court finds that the redacted portions of the billing records do not contain opinion work product, it does not address Banded's argument that the billing records were not prepared in anticipation of litigation.

2. Any Privilege That Might Have Applied to the Redacted Portions of the McDermott and Burr Records was Waived

Assuming, *arguendo*, that the redacted portions of the billing records did contain material protected by the attorney-client privilege or work product doctrine, any such protection would be waived in light of the information OAC elected not to redact. The contested portions of the records span fifty-eight pages and contain several hundred billing entries. Over 100 entries are redacted to some extent, but a large number of entries are unredacted. Upon careful review of the records in both redacted and unredacted form, the court finds that many of OAC's redactions are the same or substantially similar to descriptions that OAC left unredacted. (See, e.g., Revised OAC000003-04, 03/21/15, S. McCann, 2.00; Revised OAC000004, 03/21/15, G. Houhanisin, 1.00; Revised OAC000004, 03/21/15, S. McCann, 0.50; Revised OAC000010, 04/27/15, S. McCann, 0.25; Revised OAC000010-11, 04/28/15, W. Hutchens, 0.25; Revised OAC000011, 04/29/15, S. McCann, 2.00; Revised OAC000011, 05/01/15, S. McCann, 1.50; Revised OAC000016, 05/01/16, W. Hutchens, 2.00; see also Revised OAC000010, 04/28/15, G. Houhanisin, 0.50; Revised OAC000011, 04/29/15, G. Houhanisin, 0.50; Revised OAC000018, 05/21/15, S. McCann, 1.00; see also Revised OAC000017, 05/05/15, S. McCann, 2.00; see also OAC000028, 04/09/15, RCG, 1.30; OAC000028, 04/09, ECT, 1.40; OAC000029,

04/10/15, ECT, 0.20; see also OAC000030, 04/14/15, ECT, 0.40; OAC000030, 04/15/15, ECT, 0.50.) If a given entry was redacted because it purportedly contained privileged communications or would reveal legal strategy, failure to redact numerous materially similar entries would waive any privilege that might have existed. Accordingly, OAC cannot claim any protection that might otherwise have applied to the redacted portions of the records.⁷

The court emphasizes that its order addresses only whether OAC must produce the unredacted billing records in response to Banded's discovery request, and does not address any issues relating to how or to what extent the records may be used elsewhere in the discovery process or at trial. The billing records are not privileged, and are relevant to Banded's claims. OAC must produce them in unredacted form.

III. CONCLUSION

For the foregoing reasons, the court finds that the redacted portions of the McDermott and Burr records are not protected by the attorney-client privilege or work product doctrine. Even if these records did contain information that might otherwise be protected, such protection would be waived in light of the information which OAC chose not to redact. OAC's

⁷Accordingly, the court does not address Banded's additional waiver arguments.

motion for a protective order (ECF No. 48) is therefore DENIED, and Banded's motion to compel (ECF No. 49) is GRANTED. OAC is directed to produce the unredacted McDermott and Burr records by no later than December 7, 2016. All other relief, including the request for attorney's fees, is denied.

IT IS SO ORDERED.

s/ Tu M. Pham
TU M. PHAM
United States Magistrate Judge

November 30, 2016
Date