IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MARVIN H. SCHIFF, ESQ.	)	**CASE NO. CV 09 701734**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	
	)	
BLAKE A. DICKSON, ESQ., *et al.*	)	**JOURNAL ENTRY**
	)	
Defendants.	)	

John P. O'Donnell, J.:

The plaintiff on May 14, 2010, filed a motion to compel discovery responses that was opposed by the defendants. On June 11 the court ordered that documents that are responsive to certain of the plaintiff's requests for production,[1] but that the defendants claim are privileged, be produced for an *in camera* inspection. Those documents have been produced[2] and inspected by the court and this entry follows.

STATEMENT OF THE FACTS

Plaintiff Marvin Schiff and defendant Blake Dickson used to be law partners in a firm known as Schiff & Dickson, LLC. Schiff left the firm in early 2005 and it eventually became known as Dickson & Campbell, L.L.C.[3] In connection with Schiff's departure, the parties negotiated a redemption agreement that was signed on February 4, 2005.

Because there were pending contingent-fee matters, the redemption agreement provides that the lead attorney will calculate the percentage of the total fee that was earned through February 4, 2005, and that amount is shared equally. In calculating the percentage earned before

[1] Specifically Request Nos. 8, 16, 19, and 20.
[2] The files are on two compact discs which have been placed under seal by the court to become part of the record on appeal.
[3] If Dickson's letterhead is any guide, it is now known as The Dickson Firm.

the breakup the lead attorney must use "reasonable and good faith judgment" and consider the "totality of the circumstances." The agreement also addresses the procedure to be followed if one of the parties "questions or disputes the amount of any payment" made. In that event, the parties "shall make reasonable best efforts to resolve the dispute." If those efforts fail, the agreement requires a non-binding mediation and, if there is still no resolution, a non-binding arbitration. In the event of a timely arbitration appeal, the contract allows the dispute to be litigated in this court.

Among the cases that remained with Dickson were those of 13 plaintiffs with personal injury claims arising from their exposure to diacetyl at a ConAgra microwave popcorn manufacturing plant in central Ohio. Those cases eventually settled and, on October 6, 2006, Dickson made distributions to Schiff of what Dickson calculated to be Schiff's share of the fees. Schiff disputed that calculation and eventually filed this lawsuit.

In discovery, by his request for production of documents number 19, Schiff seeks copies of the complete files[4] related to each of the 13 plaintiffs. Dickson objects to producing those documents. His objections are based primarily on claims of attorney-client privilege and attorney-work product privilege.[5] Because privileges were asserted, the court ordered Dickson to produce the records *in camera* for inspection by the court before deciding whether to order production of the files.

Schiff's first obstacle to seeing the files is relevance. Rule 26(B) of the Ohio Rules of Civil Procedure provides that discovery may be had of only that which is relevant to the pending action. If the client files are not relevant they are not discoverable regardless of whether they are privileged. In the pending action, Schiff claims that Dickson incorrectly calculated the division

[4] Schiff also asked for different categories of documents in Request Nos. 8, 16, and 20, but Dickson has advised the court that the documents responsive to those requests are in the complete files sought by No. 19.
[5] Defendants' 6/1/2010 brief in opposition, pgs. 6-7.

of the contingent fees. The redemption agreement does not require a particular formula to use in calculating the parties' respective shares of a fee; it requires only that the attorney calculating the amount must use reasonable and good faith judgment considering the totality of the circumstances.[6] The amount to be shared is based upon the percentage of "the total fee that was earned" through February 4, 2005. The case files are evidence of what work was done and when. Therefore, the court finds that the evidence sought by Schiff is relevant to the extent the documents were created before October 6, 2006, the date Dickson calculated the shared percentage of fees.

Schiff's second hurdle is Dickson's work-product privilege claim. As to the work-product doctrine, the Eighth District Court of Appeals has recently observed:

> The work-product doctrine, which is set forth under Civ.R. 26(B)(3), provides a qualified privilege that protects an attorney's mental processes in preparation of litigation. *Squire, Sanders & Dempsey, L.L.P.*, 127 Ohio St.3d at ¶55. "The purpose of the work-product doctrine is 'to prevent an attorney from taking undue advantage of his adversary's industry or efforts.' Civ.R. 26(A)(2)." *Boone*, 91 Ohio St.3d at 210, fn.2.
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> The work-product doctrine encompasses materials prepared in anticipation of litigation or for trial, and allows for the discovery of work product "only upon a showing of good cause therefor." Civ.R. 26(B)(3). "[A]ttorney work product, including but not limited to mental impressions, theories, and legal conclusions, may be discovered upon a showing of good cause if it is directly at issue in the case, the need for the information is compelling, and the evidence cannot be obtained elsewhere." *Squire, Sanders & Dempsey, L.L.P.*, 127 Ohio St.3d at ¶60.[7]

If Schiff can show good cause for discovery of any work product in the client files he still must get over the third hurdle of the attorney-client privilege to get full access to the files. The Ohio Supreme Court has concisely summarized the attorney-client privilege as follows:

> The attorney-client privilege is one of the oldest recognized privileges for confidential communications. *Swidler & Berlin v. United States* (1998), 524 U.S. 399, 403, 118 S.Ct. 2081, 141 L.Ed.2d 379. As we explained in *State ex rel.*

[6] Redemption Agreement, Section 9.E.
[7] *Sutton v. Stevens Painton Corp.*, 2011-Ohio-841, Cuy. App. No. 95143, ¶25-26.

> *Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d, 990, " 'Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves the public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.' *Upjohn Co. v. United States* (1981), 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584; *Cargotec, Inc. v. Westchester Fire Ins. Co.*, 155 Ohio App.3d 653, 2003-Ohio-7257, 802 N.E.2d 732, ¶7. '[B]y protecting client communications designed to obtain legal advice or assistance, the client will be more candid and will disclose all relevant information to his attorney, even potentially damaging and embarrassing facts.' (Footnote omitted.) 1 Rice, Attorney-Client Privilege in the United States (2d Ed.1999) 14-15, Section 2.3." *Leslie*, at ¶20.
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> Evid.R. 501 provides that "[t]he privilege of a witness, person, state or political subdivision thereof shall be governed by statute enacted by the General Assembly or by principles of common law as interpreted by the courts of this state in the light of reason and experience." Thus, "[i]n Ohio, the attorney-client privilege is governed by statute, R.C. 2317.02(A), and in cases that are not addressed in R.C. 2317.02(A), by common law." *Leslie*, 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 990, ¶18.
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> In *Jackson v. Greger*, 110 Ohio St.3d 488, 2006-Ohio-4968, 854 N.E.2d 487, the court stated, "R.C. 2317.02(A) provides a testimonial privilege – i.e., it prevents an attorney from testifying concerning communications made to the attorney by a client or the attorney's advice to a client. A testimonial privilege applies not only to prohibit testimony at trial, but also to protect the sought-after communications during the discovery process." Id. at ¶7, fn. 1.[8]

The court has examined all of the client files with these standards in mind. The contents of the files can be divided into several broad categories of documents. The first is medical records. Plaintiff's counsel orally advised the court at a November 8, 2010 pre-trial conference that medical records need not be produced, hence they are not at issue. A second category is documents created before February 4, 2005. Neither privilege applies to those documents since Schiff was an attorney for the clients until then. The third category is ConAgra personnel files for each client. These records are relevant. If Dickson reviewed them in detail then their size, if

[8] *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St. 3d 161, 2010-Ohio-4469, ¶16-18.

not necessarily content, may be indicative of the effort and time expended to examine them. The personnel files are not protected by the work-product privilege because although they were obtained in furtherance of the personal injury litigation they do not include counsel's mental impressions or strategies. The personnel files are not subject to the attorney-client privilege since they are not confidential communications to counsel; in fact, they appear to have been produced to opposing counsel in the personal injury case.

The next category of documents in the client files is miscellaneous correspondence and papers relating to gathering the medical and other records. These include authorizations to release medical records, invoices for copying records, letters from Dickson's office assistant asking providers for records, and some other miscellaneous documents. These parts of the files are not work product and the great majority of them are not attorney-client communications but, like the personnel files, they may be useful to Schiff in ascertaining how much time Dickson spent on the cases.

Other records found in the files are communications with opposing counsel in the personal injury lawsuit, including written discovery. The correspondence with opposing counsel and the discovery are relevant and are not protected by either of the claimed privileges.

The lion's share of the thousands of documents reviewed by the court falls within the categories described above. This leaves various other contents of the files, including: miscellaneous handwritten notes; settlement agreements; and miscellaneous attorney-client communications by letter, e-mail or phone.

Most of these items are arguably attorney work-product, but good cause exists for their production. They are the only source of objective information on the work that was done on a file. Without that information Schiff would have to rely on Dickson's good faith in figuring the

shared percentage. But by including a payment dispute resolution process in the redemption agreement, the parties expressly anticipated that the lead attorney's good faith in calculating a shared percentage might be questioned, and they implicitly intended that this information would be discoverable. If it is not, the disputing party is left to guess about the amount of effort put into a given file before and after the lawyers split, and the paying party's decision is practically unassailable, making the four-step dispute resolution process meaningless. Moreover, the result that the work-product privilege exists to prevent – one attorney taking advantage of his opposing counsel's mental processes and strategies – isn't implicated here. Evidence of Dickson's effort in general, not his specific strategies and their reasons, is what interests Schiff.

The next step in deciding if these documents in the files are privileged is to establish whether they are communications from a client or the attorney's advice to a client. The burden of showing that documents are privileged rests upon the party asserting the privilege.[9]

Dickson has claimed a blanket privilege: that every document in every file is a communication made to the attorney by a client or the attorney's advice to a client. That claim is unsupportable on its face. For example, the cases began when Schiff was still part of the firm and was one of the lawyers representing the clients. Dickson cannot seriously maintain that portions of the case files created while Schiff was still an attorney actively handling the cases should be kept from him on the basis of attorney-client privilege. Additionally, and as noted above, many of the documents are simply not attorney-client communications.

As for any documents that do fall within the ambit of privileged communications, they may still be disclosed if an exception to the privilege applies. Among the recognized exceptions is the self-protection exception. That doctrine allows an attorney to reveal otherwise protected

[9] *Lemley v. Kaiser* (1983), 6 Ohio St.3d 258, 263-264.

confidences when necessary to protect his own interest.[10] The exception most often arises where an attorney sues to collect an unpaid fee or where an attorney is sued for malpractice. This case does not present either of those situations. However, it is this exception that frees Dickson to use evidence from the case files to defend against Schiff's claims, and to prosecute his counterclaims, at an eventual arbitration or trial of the substantive claims in this case. Indeed, Dickson's percentage certificates of October 6, 2006, were drafted, at least in part, in reliance on the case file documents. Those certificates describe only in passing the work done while Schiff was part of the firm, but summarize in detail all of the work on each case after Schiff left. How is it fair to deny Schiff access to the very evidence Dickson may use to defeat Schiff's claims? The attorney-client privilege cannot at once be used as a shield and a sword.[11]

Moreover, the privilege exists to aid in the administration of justice and must yield in circumstances where justice so requires.[12] To do justice, courts should avoid knee-jerk reactions to claims of attorney-client privilege. All 13 diacetyl plaintiffs were clients of Schiff. Schiff was the lawyer who personally met them at the beginning of their cases. After he left the firm his interests did not become adverse to his clients' interests or, for that matter, Dickson's; both lawyers no doubt hoped for a maximum settlement or verdict. And although he was no longer counsel on the cases, his status after February 4, 2005 was akin to referring counsel in any other personal injury case who stands on the sidelines during litigation but shares the fee at the end. There is no reason to believe, under the idiosyncratic circumstances of this case, that the personal injury plaintiffs' full and frank communications with Dickson and co-counsel would have been in any way discouraged if they thought Schiff might eventually see their files. For all of these

[10] *Squire, Sanders, supra* at ¶34.
[11] *Id.*, ¶41.
[12] *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 661.

reasons, Dickson's objections to the production of the case files on the blanket claim of attorney-client privilege are not justified.

Finally, Dickson separately claims that confidentiality agreements that were part of the settlements would be violated if he is compelled to "produce copies of his client files."[13] But the releases provide, at section 8, that the plaintiffs "and their attorneys" shall not disclose "the total amount of the settlement" – not the plaintiffs' entire files – "to anyone." Dickson disclosed the settlements to Schiff in the percentage certificates. That he did so without reservation is evidence that he must have considered Schiff to be one of the attorneys allowed to know the settlement. Not only that, but the releases allow disclosure if ordered by "a court of competent jurisdiction." Therefore, the defendants will not be protected from producing the files on the basis of the confidentiality provisions in the personal injury plaintiffs' releases.

CONCLUSION

Having considered the plaintiff's motion to compel, the defendants' brief in opposition, the applicable law, and its *in camera* review of the client files, the court orders the defendants to produce to the plaintiff, no later than April 11, 2011,[14] copies of the two compact discs produced to the court on September 29, 2010, with the following exceptions: all medical records and any documents created after October 6, 2006.

IT IS SO ORDERED:

_____ Date: _____

JUDGE JOHN P. O'DONNELL

[13] Br. in opp., p. 8.

[14] The defendants are entitled to thirty days to file an interlocutory appeal. See *Smalley v. Friedman, Domiano & Smith Co., L.P.A.*, 2004-Ohio-2351, Cuyahoga App. No. 83636, ¶ 17, and Rule 4 of the Ohio Rules of Appellate Procedure.

SERVICE

A copy of this Journal Entry was sent by e-mail, this 7th day of March, 2011, to the following:

Thomas A. Barni, Esq.
tbarni@dhplaw.com

Renee S. Pienta, Esq.
rpienta@dhplaw.com
Attorneys for Plaintiff

Blake A. Dickson, Esq.
BlakeDickson@TheDicksonFirm.com
Attorney for Defendants

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JUDGE JOHN P. O'DONNELL