

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CHRISTIE FILANOWSKI AND)
ROBERT FILANOWSKI)
)
Plaintiffs)
)
v.) Civil No. 99-147-B
)
WAL-MART STORES, INC. d/b/a)
SAM'S CLUB)
)
Defendant)

ORDER

On August 30, 1999 the Court ordered Defendant to file a Motion to Compel pursuant to Fed. R .Civ. P. 37(a). At issue is whether documents obtained by Plaintiffs from the American Trial Lawyers Association (ATLA) are work product and therefore privileged from disclosure, and whether various other privileges protect the documents from disclosure to Defendant.¹ For reasons stated below, Defendant's Motion is GRANTED subject to the conditions delineated in this opinion.

¹ In addition to producing the ATLA documents for an *in camera* review, Plaintiff also produced documents obtained from law offices, the Internet and other miscellaneous sources. Plaintiff did not delineated in his brief what privileges he is asserting for those non-ATLA documents. If the parties want to discuss the issue regarding whether Plaintiff must produce the non-ATLA documents it should contact the Court and schedule a telephone conference.

Factual Background

This dispute centers around two requests made in Defendant's First Request for Production of Documents (RPD). In RPD # 1 Defendant asks for "All Wal-Mart documents received from any source in the possession of or under control of the plaintiff or any agent of plaintiff." Later, in RPD #23 Defendant asks for "Any document obtained from any third-party source, including any law firm, any association of lawyers, or any other entity, bearing upon or in any way relating to the claims of the plaintiffs, and in particular the claims that defendant knew or should have known of the allegedly dangerous and hazardous condition on its display shelves." As stated above, Plaintiff objects to producing documents it received from ATLA.

Discussion

A. Work Product

Plaintiff first argues that the work product privilege applies to the requested materials. Whether a request encompasses privileged work product is a question answered by federal law. *Varuzza by Zarrillo v. Bulk Materials, Inc.*, 169 F.R.D. 254, 257 (N.D.N.Y. 1996). Federal Rule of Civil Procedure 26(b)(3) sets forth the test to apply when determining if a request encompasses work product. To be considered work product under the Rule, the request must be for: (1) a document or tangible

thing, (2) which was prepared in anticipation of litigation, and (3) was prepared by a party to the lawsuit, or by a party's representative. *Miller v. Ford Motor Co.*, 184 F.R.D. 581, 582-83 (S.D. W.Va. 1999). If it is determined that the requested materials are work product, the requesting party can only obtain the information by demonstrating that: (1) there is a substantial need for the materials; and (2) the materials could not be obtained without undue hardship. Fed. R. Civ. P. 26(b)(3).

Here, the Court is satisfied that the ATLA documents are not privileged from disclosure under the work product doctrine. The Court comes to this conclusion based on the fact that the documents requested were not prepared by Plaintiff or his representative for *this* litigation. See *Miller*, 184 F.R.D. at 583 (finding that ATLA documents must be produced because they were not prepared in anticipation of the litigation before the court). For this reason, the ATLA documents are not protected from disclosure under the work product doctrine.

B. Attorney-Client Privilege

Plaintiff next contends that the ATLA materials, especially the Inquirers List², is protected by the common-interest rule of the attorney client privilege. Under the common interest rule “attorneys facing a common litigation opponent may exchange privileged communications and attorney work product in order to prepare a common defense without waiving either privilege.” *Schachar v. American Academy of Ophthalmology, Inc.*, 106 F.R.D. 187, 191 (N.D. Ill. 1985). This privilege has been extended to plaintiffs who share information about a similar adversary. *United States v. Under Seal*, 902 F.2d 244, 249 (4th Cir. 1990). The purpose behind the rule is “to protect the free flow of information from [the] client to [the] attorney” when a number of clients share a common interest in the litigation. *Id.* (citing *United States v. Schwimmer*, 892 F.2d 237, 243-44 (2d. Cir. 1989)).

Here, Plaintiff asks the Court to extend the common interest rule to those documents distributed by a clearinghouse, such as ATLA. However, the cases that

² As described by Plaintiff:

The Inquirers List is also included and considered as one of the most valuable categories of information provided as part of the data base compilation of information about ATLA members who previously inquired about the particular type of litigation at issue. Each entry of the list contains the name and contact information of a member inquirer; the name, gender, age, and occupation of the lawyer’s client; the stage of the proceedings; the name of the defendant(s); and a brief abstract of the plaintiff’s injury.

Plaintiff’s Response at p.3.

have applied the rule have applied it when attorneys have a “common litigation opponent”, *Schachar*, 106 F.R.D. at 191, or when information is exchanged between “friendly litigants” with similar interests. *Western Fuels Ass’n, Inc. v. Burlington Northern R.R. Co.*, 102 F.R.D. 201, 203 (D. Wy. 1984). After reviewing the applicable law, the Court is satisfied that the common interest rule should not be applied to ATLA, which merely acts as a repository of information for member attorneys to access. No argument can be made that ATLA is either a “common litigation opponent” or a “friendly litigant” in this matter. Further, the Court highly doubts that by producing this information, the purpose of the attorney-client privilege, namely to permit the free flow of information between the client and his attorney, will be undermined.

C. First Amendment Privilege

Plaintiff next contends that the ATLA documents are privileged from disclosure under the First Amendment. *Wilkinson v. FBI*, 111 F.R.D. 432, 436 (C.D. Cal. 1986). Those cases that have applied the First Amendment associational privilege have done so “only in situations where the discovery request specifically required disclosure of the names of a group’s members or financial disclosures.” *Id.* Further, for the privilege to apply “The litigant must, at least, make some showing that the information sought would impair the group’s associational activities.” *Id.*

Plaintiff argues, in the most general terms, that disclosing those names to Defendant through the Inquirer's List would impair the associational activities of ATLA members. However, he fails to adequately or convincingly explain *how* Defendant's possession of those names would impair ATLA's associational activities. Having failed to make some showing *how* Defendant's possession of the list impairs ATLA's associational activities, especially in light of the recently issued confidentiality order, the Court is satisfied that the privilege does not apply in this case.³

D. Informer's Privilege

Plaintiff next argues that an informer's privilege should be applied to the ATLA materials requested by Defendant. To support his argument Plaintiff cites two cases which applied the privilege because identification of the informers could have resulted in retaliation by the defendant. *Secretary of Labor v. Superior Care, Inc.*, 107 F.R.D. 395, 397 (E.D.N.Y. 1985); *Accord Management Info. Tech., Inc., v. Alyeska Pipeline Serv. Co.*, 151 F.R.D. 478, 482 (D.D.C. 1993). Here, Plaintiff fails to explain, and the Court cannot discern, how producing the requested documents will result in retaliation against ATLA members. The Court is satisfied that the informer's privilege does not apply in this case.

³ The Court is also satisfied that the fact that Plaintiff signed a confidentiality agreement with ATLA does not shield the documents from discovery by Defendant. *Bohannon v. Honda Motor Co., Ltd.*, 127 F.R.D. 536, 540 (D. Kan. 1989).

E. Other Asserted Privilege

Plaintiff next contends that the ATLA materials requested are privileged under state constitutional, statutory, or common law privileges. Plaintiff particularly points out that under M.R. Civ. P. 26 (b) trial preparation materials are clearly protected from discovery. However, whether Maine would protect such documents from disclosure is irrelevant because Fed. R. Civ. P. 26 (b)(3) controls whether materials should be considered work product in federal court. As explained above, the Court is satisfied that the ATLA documents are not work product under the federal rule.

F. Protective Order

Plaintiff also requests the Court to issue a protective order if the Court orders Plaintiff to produce the ATLA documents. Subsequent to Plaintiff's request, the Court issued a Protective Order that covers, among other things, the ATLA documents.

G. Restrictions on Production of the ATLA Documents

Although the documents are not privileged from production, the Court is satisfied after conducting an *in camera* review of the documents, that Defendant may have in his possession copies of some ATLA documents. Therefore, before producing the ATLA documents to Defendant, Plaintiff shall provide to Defendant a list of those documents he received from ATLA. Defendant will identify those

documents it does not have in its possession and may copy those documents at Defendant's expense. Further, any written notes on the documents shall be redacted by Plaintiff.

Conclusion

For reasons stated above, the Court GRANTS Defendant's Motion to Compel with the restrictions indicated above. Plaintiff shall provide a detailed list of those documents received from ATLA within one week from the date of this Order.

SO ORDERED.

Eugene W. Beaulieu
U.S. Magistrate Judge

Dated this 29th day of October, 1999.