

STATE OF MAINE
CUMBERLAND, SS.

BUSINESS AND CONSUMER COURT
LOCATION: PORTLAND
DOCKET NO. BCD-CV-17-11

PAMELA W. GLEICHMAN and)
KARL NORBERG, individually and as)
Trustee of the SCARCELLI-NORBERG)
HOLDINGS TRUST,)
)
Plaintiffs,)
)
v.)
)
ROSA SCARCELLI,)
STANFORD MANAGEMENT, LLC,)
ACADIA MAINTENANCE, LLC,)
PRESERVATION HOLDINGS, LLC, and)
NORMAN, HANSON & DETROY, LLC)
)
Defendant.)
)

**ORDER ON PLAINTIFFS’
MOTION TO COMPEL PRODUCTION**

Presently before the court is Plaintiffs Pamela W. Gleichman and Karl Norberg’s motion to compel production of attorney’s fees invoices submitted to and paid by Defendant Stanford Management, LLC.

I. Background

Plaintiffs Gleichman and Norberg, in his individual capacity and as trustee of the Scarcelli-Norberg Holdings Trust (the “SNH Turst”), have brought a complaint asserting more than twenty counts against Defendants Rosa Scarcelli, Stanford Management, LLC (“Stanford”), Acadia Maintenance, LLC, Preservation Holdings, LLC, and the law firm Norman, Hanson & DeTroy, LLC. (*See generally* 2d V. Am. Compl.) Generally speaking, the complaint arises out of an ongoing dispute between Plaintiffs and Scarcelli over the management of and the use funds from several closely-held entities. *Id.*

Plaintiffs sought production of attorney's fee invoices from two firms, Defendant Norman, Hanson & DeTroy, LLC and Bernstein Law Firm, LLC located in Chicago, that were paid by Stanford. (Pls. Mot. Compel 1.) According to Plaintiffs, Scarcelli has refused to produce the invoices, claiming attorney-client privilege. (*Id.*) Following a Rule 26(g), the court entered an order instructing Plaintiffs to submit a written motion setting forth its arguments and Defendants to submit their opposition. Pursuant to the court's instructions, Plaintiffs submitted their motion to compel on June 5, 2017. Defendants filed their opposition on June 19, 2017. No reply was filed.

Plaintiffs contend that Scarcelli, as the Manager of Stanford, has for several years impermissibly intermingled her personal legal bills with Stanford's legal bills and has used Stanford's funds to pay her personal legal expenses. (*Id.*) Defendants disclosed the amounts of legal fees paid by Stanford, but refused to produce the invoices. (*Id.* at 2-3.) Plaintiffs expect Scarcelli will claim to not know what the bills were for or that the invoices were for "corporate matters." (*Id.* at 3-4.) Plaintiffs contend that the actual invoices are necessary to confronting such responses. (*Id.* at 4.) Plaintiffs argue the attorney's fees invoices are not protected by the attorney-client privilege for several reasons: (1) attorney billing records are generally not privileged communications; (2) Plaintiffs are entitled to review the invoices as minority owners of Stanford; (3) only Scarcelli is asserting the privilege and the invoices are not confidential communications between Scarcelli and her attorney; (4) the invoices are not protected under the "fiduciary-duty exception"; and (5) any privilege has been waived. (*Id.* 5-8.) Defendants contend that the attorney's fees invoices are protected by both the attorney-client privilege and the attorney work-product doctrine, that "fiduciary-duty exception" is not applicable under Maine law, and that there has been no waiver of the privilege. (*Id.* at 3-9.)

II. Standard of Review

“Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action,…” M.R. Civ. P. 26(b)(1). If an opposing party fails to respond to a discovery request, the discovering party may move for any order compelling the opposing party to respond. M.R. Civ. P. 37(a)(2). If the court denies the motion in whole or in part, the court may issue protective orders to shield the party from whom discovery is sought from any undue burden or expense. M.R. Civ. P. 26(c), 37(a)(2).

Under Maine Rule of Evidence 502, a client has the privilege to refuse disclosure of and prevent their attorney from disclosing the contents of any confidential communication between the client or the client’s representative and the client’s attorney or the attorney’s representative. M.R. Evid. 502(b). Regarding legal entities, an officer, manager, trustee, or other agent authorized to act on behalf of a legal entity in legal matters or in obtaining an attorney’s service may claim the privilege on behalf of the entity. M.R. Evid. 502(c)(1)(D). The party asserting the privilege has the initial burden of demonstrating its applicability. *Harris Mgmt. v. Coulombe*, 2016 ME 166, ¶ 24, 151 A.3d 7. A communication is “confidential” and protected by the privilege if it is (1) made to facilitate the rendition of legal services to the client, and (2) not intended to be disclosed to any third party other than those to whom the client revealed the information in the process of obtaining professional legal services. M.R. Evid. 502(a)(5); *see Fiber Materials, Inc. v. Subilia*, 2009 ME 71, ¶ 11 n.1, 974 A.2d 918.

The attorney-client privilege is subject to several exceptions enumerated in Rule 502: (1) the crime-fraud exception, (2) claims through the same deceased client, (3) breach of duty by an attorney or client, (4) documents attested by an attorney, (5) joint clients, and (6) public officers and agencies. M.R. Evid. 502(d). The opposing party bears the burden of demonstrating the

applicability of any exception to the privilege. *Harris Mgmt.*, 2016 ME 166, ¶ 24, 151 A.3d 7. The attorney-client privileged may also be waived if a person entitled to assert the privilege “voluntarily discloses or consents to the disclosure of any significant part of the privileged matter.” M.R. Evid. 510(a). “A privilege is waived when a ‘significant part’ or ‘key element’ of the privileged communication has been disclosed by the party claiming entitlement to the privilege.” *Jensen v. S.D. Warren Co.*, 2009 ME 35, ¶ 31, 968 A.2d 528 (internal citation omitted).

Attorney work product is also protected from disclosure under Maine Rule of Civil Procedure 26. 2 Harvey, *Maine Civil Practice* § 26:6 at 639-40 (3d ed. 2011). “[A] party may obtain discovery of “documents and tangible things ... prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative” only upon a showing that (1) the party seeking discovery has a “substantial need” for the materials in the preparation of the their case and (2) the party is unable to obtain the “substantial equivalent of the materials by other means” without “undue hardship.” M.R. Civ. P. 26(b)(3). Generally, in order to be protected by the work-product doctrine, a document must be “created because of the party’s subjective anticipation of future litigation.” *Springfield Terminal Ry. Co. v. Dept. of Transp.*, 2000 ME 126, ¶ 16, 754 A.2d 353. The anticipation of litigation must also be “objectively reasonable.” *Id.* Thus, the opposing party must show “that the documents were prepared principally or exclusively to assist in anticipated or ongoing litigation.” *Id.* ¶ 17. A document prepared in the regular course of business may also be prepared in anticipation of litigation, when it is party’s business “to prepare for litigation.” *Harriman v. Maddocks*, 518 A.2d 1027, 1034 (Me. 1986). In ordering discovery of attorney work product, “the court shall

protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” M.R. Civ. P. 26(b)(3).

III. Discussion

A. Attorney Billing Records May Contain Confidential Communications

As an initial matter, “fees paid for legal work and the general nature of legal work performed do not constitute a ‘confidential communication’ and are, therefore, outside the privilege.” *United States v. Osborn*, 409 F. Supp. 406, 411 (D. Or. 1975) (citations omitted). However, “descriptions of services performed by an attorney necessarily intrude upon the area of confidential communication when they become more specific than the general responses, such as ‘litigation’, ‘drafting of documents’, or ‘tax advice’,...” *Id.* Thus, the invoices sought by Plaintiffs or portions thereof may be protected by the privilege if they contain descriptions of the legal services rendered that reveal confidential communications. *See also In re Crescent Beach Inn*, 37 B.R. 894, 896 & n.1 (Bankr. D. Me. 1984).

B. Plaintiffs are not Entitled to the Invoices as Minority Members of Stanford

At various times in their motion, Plaintiffs appear to suggest that either they together or Gleichman individually are the minority members of Stanford. The Stanford Management, LLC Amended and Restated Operating Agreement (the “Operating Agreement”) expressly names Scarcelli as the 51% member and Gunnar Falk as trustee of SNH Trust as the 49% member of Stanford. (Defs. Ex. A § 2.8 & Ex. A.) According to Plaintiffs’ verified complaint, Norberg became the sole trustee of the SNH Trust in 2009. (V. 2d Am. Compl. ¶¶ 5-6.) Gleichman is the lifetime beneficiary of the SNH Trust. (*Id.* ¶ 5.) Thus, neither Gleichman nor Norberg in his individual capacity are minority members of Stanford. Only Norberg in his capacity as trustee of the SNH Trust is the 49% member of Stanford. Although the Operating Agreement permits

members to request and obtain true and full information regarding the state of the business, its financial condition, and other information that is just and reasonable, the Operating Agreement expressly states, “The Manager shall have the **absolute discretion to withhold any information from a Member** ... that the Manager deems to be in the nature of trade secrets or confidential information, the disclosure of which would not be in the best interest of the Company.” (Defs. Ex. A § 5.6) (emphasis supplied). Thus, the Operating Agreement grants Scarcelli as manager of Stanford the absolute discretion to withhold the attorney’s fees invoices from Norberg and the SNH Trust, so the Court rejects Plaintiffs’ argument that they are entitled to the documents because they are minority shareholders.

C. The “Fiduciary-Duty Exception” to the Attorney-Client Privilege

The “fiduciary-duty exception” to the attorney-client privilege advocated by Plaintiffs is not among the recognized exceptions enumerated in Rule 502. *See* M.R. Evid. 502(d). Plaintiffs have not cited, and the court is not aware of, any Maine case law recognizing a “fiduciary-duty exception” to the attorney-client privilege. (Pls. Mot. Compel 6-7.) The court declines to adopt a new exception to the attorney-client privilege not expressly enumerated in the Maine Rules of Evidence.

D. The Client Asserting the Privilege

Only the client may assert the attorney-client privilege. M.R. Evid. 502(b). Neither parties have been perfectly clear about who is asserting the attorney-client privilege and whether they are asserting the privilege for all or some the attorney’s fees invoices sought. In their motion, Plaintiffs contend that only Scarcelli’s personal attorney has asserted the privilege on her behalf. (*Id.* at 4-5.) Plaintiffs argue that Scarcelli cannot assert the privilege because the invoices sought are not communications between Scarcelli and her attorneys; they are simply

bills paid by Stanford. (*Id.* at 5-6.) However, this contention is contradicted by Plaintiffs' assertion that all or some of the invoices are Scarcelli's personal legal bills. (*Id.* at 1-2.) As discussed above, attorney fee's invoices may be protected by the privilege if they contain descriptions of confidential communications. Thus, Scarcelli may be entitled to assert the attorney-client privilege with regard to any personal legal bills that contain descriptions of confidential communications.¹

Moreover, it appears that Stanford has also asserted the attorney-client privilege. The Operating Agreement permits Scarcelli, as the sole manager, to exercise all powers of Stanford. (Defs. Ex A § 5.1(a).) As discussed above, a manager authorized to act on behalf of a legal entity may claim the attorney-client privilege for the entity. M.R. Evid. 502(c)(1)(D). Therefore, Scarcelli in her capacity as manager may assert the privilege for Stanford. Defendants' opposition was filed on behalf of Defendants Scarcelli, Stanford, and Preservation Holdings, LLC by Scarcelli and Preservation Holding's attorneys.² (Defs. Opp'n Mot. Compel 1.) The motion was co-signed on behalf of Stanford's separate counsel. (*Id.* at 11.) Therefore, Stanford has sufficiently asserted the attorney-client privilege with regard to any of its attorney fee's invoices that contain descriptions of confidential communications between Stanford and its attorney. Stanford cannot assert the privilege for any of Scarcelli's personal legal bills as it was likely not the client in those communications.

¹ Whether Scarcelli has waived the privilege by submitting her personal attorney's fees invoices to Stanford is discussed below.

² It is not clear to the court why Preservation Holdings has joined Defendants' opposition. Plaintiffs' motion to compel makes no mention of Preservation Holdings and does not seek to compel the production of any documents from Preservation Holdings. (Pls. Mot. Compel 1.) Plaintiffs seek to compel only invoices paid by Stanford. (*Id.*) Defendants assert in a footnote that Plaintiffs also are seeking documents from Preservation Holdings that are protected by the attorney-client privilege. (Defs. Opp'n Mot. Compel 1.) Defendants provide no support for this assertion and do not address Preservation Holdings further. The court declines to address Preservation Holdings' claim of privilege.

E. Waiver of the Privilege

As noted above, a client waives the privilege if he or she “voluntarily discloses or consents to the disclosure of any significant part of the privileged matter.” M.R. Evid. 510(a). Plaintiffs contend that Scarcelli waived any privilege when she intermingled her legal bills with Stanford’s legal bills. (Pls. Mot. Compel 8-9.) In their opposition, Defendants point out that Scarcelli is entitled to indemnification for any acts performed within the scope of her authority as manager of Stanford under the Operating Agreement. (Defs. Opp’n Mot. Compel 8); (*see* Defs. Ex. A § 5.5(b).) Though unclear, it appears Defendants are suggesting that Scarcelli submitted her personal legal bills to Stanford for payment under this indemnification provision. If Scarcelli has submitted her personal attorney fee’s invoices to Stanford, then Scarcelli may have waived the attorney-client privilege by voluntarily disclosing the contents of confidential communication with her personal attorney to Stanford. On the other hand, if the invoices submitted to Stanford describe confidential communications by Scarcelli in her role as manager, the privilege may not have been waived as to those communications. However, neither party has provided the court with sufficient evidence to make such a determination.³

F. Defendants have not met their Burden

As discussed above, the party asserting the privilege has the burden of demonstrating its applicability. *Harris Mgmt.*, 2016 ME 166, ¶ 24, 151 A.3d 7. Based on the record presently before the court, Defendants Scarcelli and/or Stanford have not met that burden. In their opposition, Defendants simply assert that invoices sought Plaintiffs “contain detailed descriptions of conversations and email communications between attorneys and Ms. Scarcelli regarding legal advice and reveal the specific topics or issues discussed. The invoices go far

³ There is no suggestion that Stanford has waived its privilege by disclosing any of its attorney fee’s invoices to a third-party.

beyond describing the general nature of the work performed by the attorneys.” (Defs. Opp’n Mot. Compel 4.) Defendant further assert that, even if the invoices contain some non-privileged information, the non-privileged information is minimal and would not justify the undue and expensive burden of redacting the invoices. (*Id.* at 5 n.3.) Defendants also assert that invoice are separately protected by the work-product doctrine because they “contain specific details about the research and development of legal theories, opinions, and strategies for the client.” (*Id.* ¶ 10.)

Defendants have not provided the court with any affidavits, a privilege log, or other supporting evidence. The court cannot deny Plaintiffs’ motion based solely Defendants’ unsupported assertions in its opposition memorandum. Based on the present record, the court is unable to determine whether the documents contain information protected by either the attorney-client privilege or the work-product doctrine, whether any such privilege has been waived under the circumstances, and whether redaction of privileged information would be an undue burden. Therefore, the court shall require Defendants to produce the attorney’s fees invoices for *in camera* review so that the court may be able to make such determinations. They must produce any document to which they assert a privilege and indicate which privilege, or both, they are asserting as to it.

IV. Conclusion

Defendants shall submit for *in camera* review the attorney’s fee invoices from Norman, Hanson & DeTroy, LLC and the Bernstein Law Firm, LLC that were paid by Stanford Management, LLC that Defendants assert are protected by the attorney-client-privilege and/or work-product doctrine.

