THE STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY

TRUST DOCKET
7TH CIRCUIT COURT
PROBATE DIVISION

IN RE: MONGAN REVOCABLE TRUST OF 2004

316-2014-EQ-00844

ESTATE OF ANN H. MONGAN

316-2014-ET-00236

ESTATE OF PHILIP B. MONGAN

316-2014-ET-00693

ORDERS

These matters were transferred to the Trust Docket pursuant to Administrative Order 2016-0018-TD (August 31, 2016). The Court held a status conference on September 20, 2016 to address the status of the case and discuss possible adjustments to outstanding scheduling orders.[1] Attending the hearing were: Attorney Benjamin T. Siracusa Hillman, Esq. on behalf of Petitioners Mary Ellen Wenners Morse and Douglas Wenners; Attorney Wilfred L. Sanders, Jr., Esq. on behalf of Petitioner Judith Wenners;

[1] The Court notes for the record that two substantive pleadings remained undecided upon transfer to the Trust Docket, namely: (1) *Motion for Reconsideration* (Index #127) of Judge Quigley's order denying a fully assented-to *Motion to Continue Trial* (Index ##125-126); and (2) the Petitioners' *Motion to Compel Production of File, to Permit Deposition by Oral Examination of Attorney William Amann, Esq, Attorney William Craig, Esq., and Abby Dawson, CPA, and in the Alternative, to Preclude Respondent from Asserting a Reliance of Counsel Defense at Trial.* Index #121. Judge Quigley heard argument on both motions during a non-evidentiary hearing on August 17, 2016. Although this Court did not entertain extensive argument on both motions, by agreement of the parties, it will decide them. The Court's consideration includes not only review of all briefing, some filed after August 17, 2016, but also review of the audio of the August hearing before Judge Quigley.

and Attorney Ronald J. Caron, Esq. and Attorney Jonathan M. Eck, Esq. and their client, Respondent Robert Mongan. Attorney Christine S. Anderson, successor trustee of the Mongan Family Revocable Trust of 2004 (the "Mongan Trust"), was not present.

The Court also briefly discussed consideration of certain outstanding motions, including: the Petitioners' *Motion to Compel Production of File, to Permit Deposition by Oral Examination of Attorney William Amann, Esq, Attorney William Craig, Esq., and Abby Dawson, CPA, and in the Alternative, to Preclude Respondent from Asserting a Reliance of Counsel Defense at Trial*, see Index #121; and objections, responses; and proposed orders submitted thereto, see Index ## 122, 124, 132, 133, and the Respondent's *Motion for Reconsideration* (Index #127) of Judge Quigley's order denying a fully assented-to *Motion to Continue Trial*. See Index ##125-126. After consideration of the discussion at the September 20th hearing, the pleadings in the file, and audio recordings of the pertinent hearings held before Judge Quigley, the Court enters the following **ORDERS**:

- The Respondent's *Motion for Reconsideration re: Motion to Continue Trial* (Index #127) is **GRANTED**. The trial scheduled on the Petitioners' *Petition for Surcharge of Former Trustee, Robert P. Mongan*, Index #99, currently scheduled for December 5 -7 & 12-13, 2016, is **CONTINUED** to **January 17-20 & 23, 2017**. Other scheduling orders previously issued by the Probate Division, see Index #120, are amended as set forth infra.
- The Petitioners' *Motion to Compel Production of File, to Permit Deposition by Oral Examination of Attorney William Amann, Esq, Attorney William Craig, Esq., and Abby Dawson, CPA, and in the Alternative, to Preclude Respondent from*

Asserting a Reliance of Counsel Defense at Trial, see Index #121, is **GRANTED IN PART**.

The Court determines that the Respondent, by asserting an advice of counsel defense, see RSA 564-B:8-816(a)(27), to his alleged responsibility for deficiencies in the accountings filed with the Court[2] and alleged associated increased costs to the Petitioners, has put the nature of advice given by counsel, and any specialists hired by them, at issue. See, generally, In re Keeper of the Records (Grand Jury Subpoena Addressed to XYZ Corporation), 348 F.3d 16, 24 (1ST Cir. 2003). As such, he is deemed to have waived both the attorney-client privilege and work product privileges *to the extent that any communications or documents pertain to the process of compiling and presenting the accountings and ordered production of financial records*. See, e.g., id. ("once a litigant chooses to put privileged communications at issue, only the revelation of all related exchanges will allow the truth-seeking process to function unimpeded").

- The Respondent is **ORDERED** to produce for in camera review, within **seven days of the date of this Order**, certain privileged documents whose production remains in dispute, listed in the privilege log provided to the Petitioners, see Petitioners' *Proposed Order*, Exh. A (Index #132), not previously disclosed to them as set forth infra. After review of those documents, the Court will determine which ones must be disclosed as they contain communications pertaining to the process of compiling and presenting the accountings and ordered production of financial records.

[2] As found by Judge Quigley. See generally, Order dated August 31, 2015 at 5-6 (Quigley, J.)(Index #82).

- The Petitioners are **DIRECTED** that they may proceed with depositions of Attorney Amann, Esq, Attorney William Craig, Esq., and Abby Dawson, CPA,[3] and may inquire into normally privileged communications concerning the *process of compiling and presenting the accountings and ordered production of financial records* as set forth infra.
- The Respondent is **ORDERED** to produce for in camera review, **within seven days of the date of this Order,** certain billing records in an un-redacted form, see Petitioners' *Proposed Order*, Exh. B (Index #132), previously disclosed to the Petitioners with redactions. After review of those records, the Court will determine which entries must be disclosed in un-redacted form because those billing entries pertain to either the process of compiling and presenting the accountings and ordered production of financial records or a determination of whether Robert Mongan should be subject to surcharge for representation associated with the defense of certain trust amendments.

I. Brief Background

The Court recites the following undisputed facts and procedural history for background purposes only. This recitation is not intended to act as factual findings by the Court. To the extent disputes exist, the Court will note them as appropriate. The Court does, however, incorporate by reference findings made by Judge Quigley in this

[3] During the hearing before Judge Quigley on August 17, 2016, and in later pleadings, see Index #132 counsel for Petitioners Mary Ellen Wenners Morse and Douglas Wenners indicated that they may seek to expand the request to include the deposition of an "Attorney Lombardi." The Court will not address that request at this time as it does not have sufficient information before it to properly consider whether the scope of allowed depositions extends to Attorney Lombardi and thus deems the issue not properly before it. Notably, the Petitioners' *Motion*, see Index #121, and later *Proposed Order*, see Index #132, makes no mention of Attorney Lombardi. Paradoxically, however, the Respondent's *Proposed Order* includes the grant of leave to depose him. See id. at ¶5. The Court is confident that to the extent Attorney Lombardi's deposition is necessary, counsel for the parties will be able to determine the contours of that deposition without court intervention on the basis of its rulings today.

matter, including, but not limited to, facts found by her in an Order dated August 31, 2015, see Index #82, concerning five accountings filed with the Probate Division on June 12, 2015.

The Petitioners, Douglas Wenners, Mary Ellen Wenners, and Judith Wenners sought invalidation of two amendments to the Mongan Trust, see Index #1, executed by one of the two Grantors, Ann H. Mongan, following the death of her husband and Co-Grantor, Philip H. Mongan. The original trust terms left the bulk of the trust assets to the Grantor's two children, Robert Mongan and Judith Wenners, along with certain specific distributions to grandchildren and great grandchildren, including Petitioners Douglas and Mary Ellen Wenners.

Respondent Robert Mongan was named as trustee of the Mongan Trust in February 2011. Later that year, Grantor Philip Mongan died. An amendment (the second) was executed in February 2012 giving real estate assets previously granted to Judith to Robert and his wife, Maria Mongan, and investment assets to Robert. Maria Mongan replaced Judith's son Douglas Wenners as successor trustee. A third amendment executed in August 2012 granted all real estate assets to either Robert, Robert and Maria, or their daughter, Katherine. Specific cash bequests were eliminated, and instead those distributees were granted a percentage of the residue. Ann Mongan died on November 24, 2013.

In their thirty-three page *Petition for Construction and Interpretation of Trust; in the Alternative, for a Decree Setting Aside Purported Amendments and/or Imposing a Constructive Trust; For an Order Compelling the Trustee to Inform and Report Under RSA 564-B:8-813(b),(d), To Render an Accounting, and to Produce Records For*

Inspection; and for Certain Temporary Relief (the "Equity Petition"), see Index #1, the Petitioners alleged or sought: (1) a decree that the second and third amendments are "a nullity" as they were executed by only one of the Grantors after the other had died; (2) a decree that the second and third amendments are ineffective as the product of undue influence; (3) a decree that the second and third amendments are ineffective as Ann Mongan lacked the capacity to execute them; and (4) that Ann, by executing the amendments, breached a contract with Philip. The Petitioners also sought accountings and the trust records from Robert.

In November 2014, Judge Quigley granted partial summary judgment to the Petitioners, see Index #38, invalidating the second and third amendments on the basis that under the terms of the Mongan Trust, both Grantors are required to execute any amendments. See Index # 38; Index ## 19, 20, 27, 29, 36 (pleadings). The Respondent filed a Rule 7 appeal to the Supreme Court. Index #46. The appeal was denied without prejudice on February 25, 2015. Index #53. The Supreme Court denied the appeal on the basis that the orders appealed were not final judgments and thus the Rule 7 appeal was an improper interlocutory appeal. Id. The Supreme Court's order noted that the appeal was dismissed "without prejudice to raising the issues in a subsequent appeal either upon conclusion of the entire case . . . or by a properly filed interlocutory appeal . . . ." Id.[4]

[4] Counsel for the Respondent indicated at the hearing and in his pleadings that he is strongly considering an interlocutory appeal from Judge Quigley's order. See *Answer and Cross-Petition* at 10, n. 2 (Index #106); see generally, Sup. Ct. R. 8. He has not presented the Court with an interlocutory appeal statement, see Sup. Ct. R. 8(1), and the Court makes no comment on its willingness or unwillingness to sign a currently theoretical pleading, but does note that it has now been almost eight (8) months since the Supreme Court denied Mr. Mongan's appeal.

In addition to the substantive merits of the validity of the trust amendments, the accuracy of trust accountings and access to financial records were vigorously litigated. Robert Mongan was first ordered to produce accountings in September 2014. See Index #26. Those accounting(s) were disallowed after objection and a hearing in February 2015. See Order dated March 30, 2015 (Index #57). Five amended accountings were subsequently filed with the Court in June 2015; see Index ##71-75,[5] to which the Petitioners objected. See Index #78.

Petitioners also filed a *Motion for Removal and Replacement of Trustee* in January 2015, in part based upon deficiencies in the accountings and alleged difficulties in obtaining financial information and accountings. See Index #47. After a hearing in July, 2015, Robert Mongan was removed as trustee in August 2015 upon a conclusion that he was unsuitable to remain as trustee. See RSA 464:9. His removal was, in part, based on a finding that he had been unwilling, or had failed, to properly administer the trust. See RSA 564-B:7-706. The Court found that he was "reluctant," or demonstrated "recalcitrance . . . to produce information to the petitioners and to produce accounts for the court." See Order dated August 31, 2015 at 5 (Index #82). In addition, the Court observed that: (1) it discovered, after more than eighteen months of litigation, previously undisclosed bank accounts; and (2) "regular co-mingling" of estate and trust assets. Id. at 6. It specifically did not, however, "find that Robert Mongan has committed a serious breach of trust given that any steps taken by the trustee since the death of the grantors could be reversed." Id. at 7. Robert Mongan was replaced with Attorney Christine Anderson on November 6, 2015. See Index #92.

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[5] The Fifth Accounting, see Index #75, and a *Trustee's Statement Upon Filing Accountings*, see Index #70, were not signed by Robert Mongan. See also *Deposition of Robert P. Mongan* at 59-60 (May 17, 2016)(Index #124)

On February 8, 2016, the Petitioners filed a *Petition for Surcharge of Former Trustee, Robert P. Mongan*. Index #99 ("*Petition for Surcharge*"). The Petitioners allege that after receipt of bank records, they have discovered "significant misappropriation and misspending of funds by Robert Mongan." Id. at ¶16. They assert four separate claims, for a total sought surcharge of approximately $700,000.[6] The first three claims generally assert that monies were transferred, sometimes through multiple accounts, from trust accounts to Robert's personal accounts. The final claim seeks surcharge for accountant's and attorney's fees to defend this litigation and to "resist the obligation to account" and turn over financial records. See id.

The Respondent denied the claims, and filed an *Answer and Cross-Petition*. Index #106. He claims that it was the Petitioners who acted in bad faith in making allegations of misconduct concerning the trust amendments, refusal to cooperate with respect to the accountings, and in seeking surcharge. Id. at 10. In his *Cross-Petition*, he also asserted, under the heading "And In Further Answer in Cross Petition for Relief," see Index #106, that he acted, in his individual and fiduciary capacities, "in a reasonable and prudent fashion," id. ¶41, and:

> At all times relevant to this action, Respondent has acted in accordance of advice of counsel in searching for, accounting for and producing such documents as are reasonably necessary and requisite to the preparation and display of accounts as to the assets and income of the Trusts and of the Estates.

Id. ¶42.

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[6] Although the *Petition for Surcharge* requests that the Court order Robert to repay the Trust a total of $212,966, see id. Prayer B, at the hearing on September 20th counsel for Petitioners Mary Ellen and Douglas represented that it also seeks the Petitioners' legal fees totaling over $388,000. The Court observes that at the same hearing, it was represented to the Court, and undisputed by the parties, that the total assets in the Mongan Trust total approximately $1,500,000.

In his deposition, see *Deposition of Robert P. Mongan* (May 17, 2016)(Index # 124), Robert further indicated in certain responses that when serving as trustee, he "acted honestly and did the right thing." Id. at 16. Although he stated that he hadn't "placed any fault" concerning Judge Quigley's order disallowing his five accounts, "I was relying upon people that I hired that I thought—I haven't heard of probate division Rule 108, so I had to be in compliance." Id. at 48. When asked if he was "relying upon your counsel to accurately, fully, and completely prepare this accounting," Robert replied "I believe I was. I hired them for that specific purpose." See also id. at 48-49 (he relied on "either Bill Craig or Bill Amann"). He also stated that while he was not casting blame, "[s]omeone didn't do it properly" and agreed that "[i]t's either Abby Dawson or the lawyers." Id. at 49. He also opined that he "gave [Mr. Amann] everything" he had concerning "materials related to the trust or the expenses incurred on behalf of [his] parents . . . ." Id. at 50.

With respect to the *Trustee's Statement Upon Filing Accountings*, see Index #70, Robert Mongan stated that he did not sign it, and that he "relied on [his counsel] for legal help, legal work, legal assistance. This document, I'm assuming, comes under the original trustee's accounting, but, again, I didn't sign it. So it just seems kind of strange that other documents I signed, but this one I didn't so I don't have an answer." Id. at 63.[7] He later, in discussing other financial documents, stated "I didn't sign these, so I don't claim any responsibility for these documents. They appear, from reading the early page, to be prepared by another person, and I think today is the first time I've ever seen these documents." Id. at 99.

[7] He also later indicated that because he did not recall signing this document, "I would say I didn't review it prior to filing." Id. at 66.

The matter was transferred to the Trust Docket on August 31, 2016. See Index #131. Just prior to transfer, Judge Quigley, on August 17, 2016, held a hearing to consider two issues decided by this Court today. See Index #128. First, at the August 17th hearing, counsel orally sought reconsideration of Judge Quigley's order denying a fully assented-to *Motion to Continue Trial* (Index ##125-126). Trial was, at that time, calendared for December 5, 6, 7, 12, 13 and the Respondent, Robert Mongan, sought a continuance until after January 9, 2017. The continuance was requested because Ronald Caron, counsel for Respondent Robert Mongan, has another trial scheduled for December 14, 15, and 21, and stated that he could not fully prepare for this trial with back-to-back trials. Judge Quigley denied the *Motion,* on the basis that there have been a number of continuances already and the trial dates were initially agreed-to by all parties. Also, Judge Quigley was unable to schedule trials in January. After the hearing, counsel formerly filed a *Motion for Reconsideration* (Index #127) that had not been ruled upon at the time of transfer to the Trust Docket. At a status conference held on September 20, 2016, this Court indicated that it would give further consideration to briefly continuing the trial.

Also before the Court for consideration is a series of pleadings concerning discovery of the files of Robert's former attorneys and accountants hired by them, and to compel a deposition of two of his former attorneys, William Amann and William Craig, and the accountant, Abby Dawson, allegedly hired to assist with production of the accountings. See Index ##121, 122, 124, 132, 134; see also Order dated August 17, 2016 (Index #128). At the heart of these pleadings are both: (1) whether Robert, by allegedly asserting an advice of counsel defense, waived the attorney-client and work

product privileges; and (2) if there was a waiver, how broadly must the Court order disclosure of documents and allow questions at deposition.

II. *Motion to Reconsider Denial of Continuance*

As discussed supra, the *Motion to Reconsider re: Motion to Continue Trial*, see Index #127, remained outstanding when this matter was transferred to the Trust Docket. After the hearing on September 20th, and as the Court was conducting its review of the issues raised by the *Motion to Compel*, it determined that, while it does not take issue with Judge Quigley's order or its rationale, see Index #126, it was most prudent to reconsider the denial of the sought continuance because: (1) the Trust Docket's calendar would allow for scheduling of trial dates in January; and (2) because of its decision to grant in part the *Motion to Compel*, see infra, fairness considerations dictate a short continuance of the hearing on the *Petition for Surcharge*.

As such, the Court now **ENTERS** the following **AMENDED SCHEDULING ORDERS** of those granted by Judge Quigley on May 26, 2016. See Index #120.

A. **Hearing on the Merits** - A five-day (25 hours) trial on the merits will be held on January **17-20 & 23, 2017** beginning each day at **9:00 a.m.** at the **6th Circuit – District Division - Concord, 32 Clinton Street, Concord, N.H.**

B. **Expert witnesses**- The petitioner shall complete expert disclosures, including submission of expert reports on or before **November 17, 2016.** The respondent shall complete expert disclosures, including submission of expert reports on or before **December 19, 2016.**

C. **Discovery** – All pre-trial discovery and depositions to be completed **on or before December 19, 2016.**

D. **Witness List Exchange** - To simplify and facilitate the presentation of evidence on the merits, the parties are ordered to exchange lists, identifying by name and address all witnesses whose testimony will be presented at trial, **no later than December 19, 2016**. Each list shall contain a brief summarized offer of the nature of the testimony to be elicited or evidence to be produced through each witness listed.

E. **Exhibits Exchange** - To further simplify and expedite the final hearing, the parties are ordered to exchange copies of all exhibits expected to be offered, excepting those reserved for rebuttal, **prior to January 6, 2017**. Those documents agreed to be admitted as full exhibits are to be so marked **by January 13, 2017** in cooperation with the Clerk's office. If there be any objection by a party to the introduction of a document as a full exhibit, it shall be marked for identification purposes only.

The parties are instructed that those exhibits stipulated, as well as those that are marked for identification only, shall be presented at the commencement of trial in four sets of binders (one each for the official record, witnesses, the judge and the staff attorney) containing organized documentation based on the nature of its content (e.g., medical reports; emails, letters, memo or other forms of correspondence; legal instruments, etc.), labeled for ease of identification and access during the course of questioning of a witness. The parties are further requested to make reasonable efforts to avoid duplication of exhibits, such that the same exhibit is not presented more than once.

F. Pretrial Conference - A pretrial conference is scheduled for **December 13, 2016, at 9:00 a.m.** at the **6th Circuit – District Division - Concord, 32 Clinton Street, Concord, N.H.**, unless the parties file, **at least seven (7) days prior to the pretrial,** an assented-to motion to cancel the pretrial on assertions that: (a) there are no open issues; (b) the case is prepared for trial; and (c) the time previously allotted for presentation of the entire case is needed, less than the time will be adequate, or more time will be needed. If less time than previously allotted will be needed, or what has been previously allotted will be insufficient, then a good faith representation shall be made with respect to how much less, or more, time will be reasonably required. Regardless of whether a pretrial conference is held, pretrial statements must be filed **at least five (5) days before** the scheduled date, in accordance with Circuit Court-Probate Division Rule 62.

G. Record – If the parties arrange wish to engage an approved court stenographer, they must arrange with the Clerk's office at least **sixty (60) days** prior to trial for the private hire of an approved stenographer. The parties are reminded that even if they hire a court approved stenographer, the digital recording made by the Probate Division constitutes the official record. See Circuit Court - Probate Division Rule 78-A.

H. Memoranda of Law and Findings of Fact – All memoranda of law and reasonable requests for findings of fact and rulings of law the parties wish to file shall be filed with the Court **no later than January 17, 2016.** Failure to file the

requests by that date will be deemed a waiver of the right of that party to receive written grant or denial of any requests later submitted.

III. *Motion to Compel* and *Proposed Orders*

The *Motion to Compel* is related primarily to two issues presented by the *Petition for Surcharge*, namely surcharge for attorney's fees incurred by the Petitions' counsel related to the *Accountings*, see Index # 82 (Order dated 8/31/15), and ordered production of financial documents, and whether Respondent's counsel fees to defend the underlying petition seeking to invalidate the second and third amendment to the Trust should be paid by the Mongan Trust. The Court will briefly recite arguments made by the parties in multiple pleadings filed with the Court, however, in so doing, it notes that since the *Motion to Compel* was filed in June 2016, there have been disclosures made by the Respondent and production of a privilege log. See Index # 132, Exh. A; see also Order dated August 17, 2016 (Index #128). At the hearing before this Court, it became apparent that, of late, the parties have been cooperating with respect to document production. As such, its ruling today is based primarily on the proposed orders submitted by the parties on September 7, 2016, see Index ##132, 133, as it discerns that these pleadings reflect the most current state of the scope of disputed document production (and access to attorney/accountant depositions) grounded in claims of work product and attorney client privileges.

A. Procedural Background

The Petitioners, on June 16, 2016, filed a *Motion to Compel Production of File, to Permit Deposition by Oral Examination of Attorney William Amann, Esq, Attorney William Craig, Esq., and Abby Dawson, CPA, and in the Alternative, to Preclude*

Respondent from Asserting a Reliance of Counsel Defense at Trial, see Index 121, in which they asserted that the "advice of counsel" defense is the "central plank" in the Respondent's defense in both his answer to the *Petition for Surcharge* and in his responses at deposition, where he claimed to have little substantive knowledge of the quality of a June 2015 account found inadequate by Judge Quigley. See id. at 3-5. They claim that Robert Mongan's alleged shift of responsibility to his lawyers' and accountant's acts to waive the attorney-client privilege because this defense "places at issue the subject matter of the privileged communications." Id. They also claimed, citing a 2015 Superior Court order, that Robert implicitly waived the privilege because principles of fairness require disclosure of usually protected attorney-client communications so that the opposing party can test the accuracy of Robert's claim that he acted in good faith and depended on counsel to advise him on the filing of the accounts in question.

The Petitioners also assert that the scope of the waiver is broad, "[b]ecause a litigant cannot use the attorney-client privilege as both a sword and shield," and Robert's reliance on the advice of counsel is extensive. Thus "the waiver must extend beyond specific communications at issue to cover the entire subject matter of the advice." *Motion to Compel* at ¶¶ 15-16 (Index #121). They seek "any and all" documents reflecting communications between Robert and any employees of his former law firm and accounting firms. See id. at ¶25. Finally, they seek an order allowing depositions of two of Robert's former attorneys and an accountant. Id. at ¶27.

Robert filed an *Objection*, see Index #122, asserting[8] that the "at issue waiver doctrine" does not apply because Robert did not assert such reliance as a "complete defense," but rather as a "mitigating circumstance." Id. at ¶7. He also claimed that the Petitioners must show that Robert "actually relied on privileged advice from counsel," and that the waiver is only applicable where the client has disclosed or described an attorney-client communication. See id. at ¶8. Robert also claimed that the Petitioners have not identified any issue that *requires* disclosure of any privileged communications. He asserted that "the following lines of inquiry can be answered by an attorney without waiving any privilege: (1) the absence of communication with a client; (2) the general service provided to the client; and (3) documents and information given to the attorney for purposes of preparing litigation documents." Id. at 5-9.

Finally, Robert asserted that the work product doctrine, see Cir. Ct. Prob. Div. R. 35(b)(2), protects all the attorney files sought to be compelled from disclosure. He stated that the work product privilege applies more broadly because it protects documents prepared in anticipation of litigation and therefore "[a]lthough only confidential communications between the attorney and client are protected by the attorney-client privilege, the work product doctrine may encompass any document prepared in anticipation of litigation by or for an attorney." *Objection* at 9 (Index #122). He suggested, however, that the parties be granted time to confer and that the Court

[8]He first asserts that the Petitioner's *Motion to Compel* was "untethered to any underlying discovery requests" and they have not "articulated particular discovery requests they seek to enforce" and should be summarily denied. Id. at 1-2. The Court disagrees as the Petitioners demonstrated that certain discovery requests were in fact made and any ripeness objection was likely waived. See *Reply* at ¶¶2-4 (Index #124). Robert Mongan appears to have conceded this point as his proposed Order, see Index #133, does not rest on this argument.

not immediately rule on this *Motion to Compel* so that the parties can work out an agreement as to discovery.

In their *Reply*, see Index #124, the Petitioners contended that because Robert had not yet produced a privilege log, he cannot object to the Petitioners' broad request for discovery. Finally, they again claimed that because Robert has asserted an advice of counsel defense, he has broadly waived any claim of privilege. They also claimed that disclosure of the former attorney's billing records is necessary to determine whether: (1) the trust benefitted from counsel's advice or if it benefitted only Robert personally; or, (2) to prove or disprove Robert's alleged reliance on advice of counsel concerning preparation and submission of the accountings. Finally, they offer that Robert should have a choice: either disclose documents and allow depositions or abandon the advice of counsel defense. Id.

Judge Quigley held a hearing on these motions on August 17th.[9] She issued an interim Order, see Index #128, directing Robert to produce a privilege log to the Petitioners, see Index #132, Exh. A, and both parties to submit proposed orders. See Index #132 (Petitioners), #133 (Robert).

The Petitioners' proposed order is rather broad; it orders production of all documents held by, and the deposition of, CPA Dawson. With respect to Robert's former attorneys, William Amann and William Craig, it orders disclosure of all documents not listed in the fifteen page privilege log. With respect to the privilege log, see Exh. A, the Petitioners have marked entries either with a "Y", meaning it must be disclosed, or an "N", meaning it doesn't need to be disclosed now, but disclosure may

[9] The Court has obtained a copy of the tape of that hearing and reviewed it in preparing to issue this Order.

be sought in the future. Of the ninety-four separate entries, the Petitioners seek disclosure of approximately forty-seven of them. The Petitioners' proposed order also directs further disclosure of redacted billing records, see Exh. B, specifically, that approximately twenty-seven entries must be fully disclosed. They offer an alternative order in which the forty-seven documents and twenty seven redacted billing entries be submitted to the Court for in camera review.

Robert Mongan's *Proposed Order* is not unexpectedly narrower. See Index #133. It would hold that Robert has not asserted an advice of counsel defense, and has not, in a "wholesale" manner, waived the attorney client or work product privileges. Id. at ¶3. Notably, Robert's pleadings note that a privilege log has been provided to the Petitioners and hard copies of other documents have been made available. It urges the Court to rule that it: "will leave it to counsel to determine if further pleadings are necessary on the issue of producing documents described in the Privilege Log and/or providing to Petitioners' counsel the said billing statements unredacted (in whole or in part), or in the alternative, if resolution can be reached by counsel." Id. at ¶4. It allows for a limited deposition of Attorneys Amann, Craig, and Lombardi. Id. at ¶5.

B. Applicable Law

Resolution of the issues raised in the *Motion to Compel* requires this Court to consider general principles of surcharge and discovery, the nature of both the attorney-client privilege and work-product privilege, possible waivers of those privileges, and the permissible scope of deposition testimony and document production if a privilege is deemed waived. Finally, because the Petitioners contend that the Respondent's alleged waiver arises from assertion of an "advice of counsel defense," the Court will

briefly address that doctrine as it exists pursuant to the New Hampshire Trust Code. See RSA 564-B.

The Court begins by briefly engaging in a discussion of the remedy sought by the Petitioners as it impacts determination of whether certain documents must be produced and deposition testimony ordered. Surcharge is a unique equitable remedy, "imposed when a trustee fails to exercise the requisite standard of care and the trust suffers thereby." In re Guardianship of Dorson, 156 N.H. 382, 386 (2007)(quotations omitted). A surcharge "is imposed to compensate beneficiaries for loss caused by the fiduciary's want of due care," id. (quotations omitted), and courts have broad discretion to fashion a remedy that appropriately protects the trust, compensates beneficiaries for losses caused by fiduciary breach, and, in some cases, acts prophylactically to discourage trustees from taking action that will harm beneficiaries. Id. at 386-87. As such, the remedial tools available to courts of equity are numerous and are designed to put beneficiaries "in the position [they] would have been if no breach of fiduciary duty had been committed." Id. at 387 (quotations omitted).

In a similar vein, the Court also has broad discretion to *relieve* a trustee from surcharge. Notably,

> [i]n determining whether and to what extent to grant a trustee relief from surcharge, it would be appropriate for the court to consider all circumstances of the breach and of the trustee, such as: what is reasonable to expect of the particular trustee; the sincerity of the trustee's efforts to understand and perform the responsibilities in question; and whether the trustee reasonably relied on guidance from legal or other advisers, including whether the trustee was aware of the availability (in an appropriate situation) of court instruction, and, if so, the reasons for the trustee's decision not to seek instruction.

RESTATEMENT (THIRD) OF TRUSTS § 95(d) (2012)(citations omitted). Consequently, the determination of the proper surcharge, and by extension, the applicability of defenses to a surcharge, is particularly dependent on the unique facts of each case. Cf. In re Guardianship of Dorson, 156 N.H. at 386.

The pleadings also concern permissible discovery. Circuit Court – Probate Division Rule 35(b) governs the scope of permissible discovery. It provides in pertinent part:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the Party seeking discovery or to the claim or defense of any other Party . . . . It is not ground for objection that the information sought shall be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Cir. Ct. Prob. Div. R. 35(b)(1). This Court, however, is empowered to limit discovery "[u]pon Motion by a Party or by the Person from whom discovery is sought, and for good cause shown, the Court may make any order which justice requires to protect a Party or Person from annoyance, embarrassment, oppression, or undue burden or expense." Cir. Ct. Prob. Div. R. 35(c).

Under the common law, this Court has broad discretion to determine discovery matters. See generally, In re Juvenile 2002–209, 149 N.H. 559, 561 (2003). "The power of the judiciary to control its own proceedings, the conduct of participants, the actions of officers of the court and the environment of the court is absolutely necessary for a court to function effectively and do its job of administering justice." Sabinson v. Trustees of Dartmouth College, 160 N.H. 452, 461 (2010)(quotations omitted). "A

decree granting specific relief is not a matter of right, but rests in the sound discretion of the trial court according to the circumstances of the case." RAL Automotive Group, Inc. v. Edwards, 151 N.H. 497, 499 (2004) (quotations omitted).

In general, New Hampshire law favors liberal discovery because "in civil actions [it] has been regarded in this jurisdiction as a proper procedural aid for the parties to prepare their case." McDuffey v. Boston & M.R.R., 102 N.H. 179, 181-82 (1959). It assists in the efficient and fair disposition of matters before the court by avoiding surprise and "permitting both court and counsel to have an intelligent grasp of the issues to be litigated and knowledge of the facts underlying them." Id. at 181. Therefore, there is a long history of broad and liberal application of discovery rules. N.H. Ball Bearings, Inc. v. Jackson, 158 N.H. 421, 429 (2009).

Robert Mongan asserts that certain documents are protected from disclosure by either the attorney-client privilege, see N.H. R. Ev. 502, or work product privilege. See Probate Division Rule 35(b)(2); see *Proposed Order* Exh. A (privilege log)(Index #132). "These two grounds for denial of pre-trial discovery have different purposes and characteristics. The purpose of the attorney-client privilege is to encourage full disclosure of information between an attorney and his client by guarantying the inviolability of their confidential communications." Riddle Spring Realty Co. v. State, 107 N.H. 271, 274 (1966). The purpose of the work product privilege, on the other hand, is "for the protection accorded the work product of a lawyer . . . to preserve our adversary system of litigation by assuring an attorney that his private files shall, except in unusual circumstances (good cause or necessity), remain free from encroachments by his adversary." Id. As such, the Respondent's "waiver of the attorney-client

privilege does not necessarily mean that the protection afforded by the work product doctrine is also breached." In re Grand Jury, 106 F.R.D. 255, 257 (D.N.H. 1985).

With regard to the attorney-client privilege, it is well-established that "[t]he common law rule that confidential communications between a client and an attorney are privileged and protected from inquiry is recognized and enforced in this jurisdiction." Hampton Police Ass'n, Inc. v. Town of Hampton, 162 N.H. 7, 15 (2011) (quotations omitted). "Although the attorney-client privilege may be the most venerable of the privileges for confidential communications, its accoutrements are not the most clearly delineated." In re Keeper of the Records (Grand Jury Subpoena Addressed to XYZ Corporation), 348 F.3d 16, 19 (1st Cir. 2003). New Hampshire Rule of Evidence 502(b) establishes the standard evidentiary privilege, namely: "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . . ." See generally, Professional Fire Fighters of N.H. v. The N.H. Local Government Center, 163 N.H. 613, 615 (2012). "Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser unless the protection is waived by the client or his legal representatives." Id. (quotations omitted). "A communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." State v. Stickney, 148 N.H. 232, 235 (2002); N.H. R. Ev. 502(a)(5).

The "work product doctrine" is "a qualified privilege for certain materials prepared by an attorney acting for his client in anticipation of litigation." State v. Chagnon, 139 N.H. 671, 673 (1995). The doctrine protects an attorney's "mental processes . . . . [for example] his mental impressions, conclusions opinions or legal theories." Chagnon, 139 N.H. at 674. (quotations omitted). In addition,

> [t]he work product doctrine applies only to documents a party has assembled and not to facts learned from those documents. For example, the doctrine does not protect factual information that a lawyer obtains when investigating a case; the work product concept furnishes no shield against discovery, by interrogatories or by deposition, of the facts that the adverse party's lawyer has learned, or the persons from whom he or she has learned such facts, or the existence or nonexistence of documents, even though the documents themselves may not be subject to discovery.

23 AM. JUR. 2D DEPOSITIONS AND DISCOVERY § 44 (2014). The work product doctrine does not protect "a report that merely analyzes facts and renders an opinion as to what occurred without reflecting or discussing the theories, mental impressions, or litigation plans" of counsel. State v. Drewry, 139 N.H. 678, 682 (1995).

The party asserting an evidentiary privilege has burden of demonstrating the facts essential to support determination that a privilege or doctrine exists. See State v. Gordon, 141 N.H. 703, 705 (1997)(attorney-client privilege). Similarly, as in the case of attorney-client privilege, the burden of establishing that the information sought constitutes an attorney work product is on the party asserting such a claim. See e.g. State ex rel. U.S. Fidelity and Guar. Co. v. Canady, 460 S.E.2d 677, 684 (W.Va. 1995) ("the burden of establishing the attorney-client privilege or the work product exception, in all their elements, always rests upon the person asserting it"). With respect to the attorney-client privilege, the party asserting it also holds the burden of demonstrating

that the privilege has not been waived. In re Keeper of the Records (Grand Jury Subpoena Addressed to XYZ Corporation), 348 F.3d at 21-22; see, e.g., McKee v. PetSmart, Inc., 71 F. Supp.3d 439, 441 (D. Del. 2014). However, where a party seeks to invade the "the mental processes of the attorney" the "burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order." In re Grand Jury, 106 F.R.D. at 257; cf. Aranson v. Schroeder, 140 N.H. 359, 370-71 (1995)(burden on party to demonstrate need); Bennett v. ITT Hartford Group, Inc.,150 N.H. 753, 761 (2004) (same).

In the matter presently before the Court, the Petitioners assert that any claim of attorney-client privilege was waived by Robert Mongan's alleged assertion of an "advice of counsel" defense. Courts recognize three types of waiver of the attorney-client privilege: (1) third party disclosure; (2) express waivers; and (3) implied waivers. In re Keeper of the Records (Grand Jury Subpoena Addressed to XYZ Corporation), 348 F.3d at 21-22. The "paradigmatic example" of an implied or at-issue waiver arises from assertion of the advice of counsel defense. See id. at 24. New Hampshire recognizes a narrow at-issue waiver of the attorney-client privilege where "the privilege-holder injects the privileged material itself into the case, such that the information is actually required for resolution of the issue." Bennett, 150 N.H. at 761; Aranson, 140 N.H. at 370. Generally,

> a party can waive the attorney client privilege by asserting claims or defenses that put his or her attorney's advice in issue in the litigation. For example, . . . [a] defendant may . . . waive the privilege by asserting reliance on the advice of counsel as an affirmative defense. . . . In these cases, the client has made the decision and taken the affirmative step in the litigation to place the advice of the attorney in issue. Courts have found that by placing the advice in issue, the

> client has opened to examination facts relating to that advice. Advice is not in issue merely because it is relevant, and does not necessarily become in issue merely because the attorney's advice might affect the client's state of mind in a relevant manner. The advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication.

Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851, 863 (3d Cir. 1994)(citations omitted); see also Nitinol Med. Techs., v. AGA Med. Corp., 135 F. Supp.2d 212, 217 (D. Mass. 2000)(at-issue waiver through "deliberate injection" of advice of counsel)(quotation omitted). Courts, however, have been cautioned to be careful in concluding there has been an at-issue waiver. In re Keeper of the Records (Grand Jury Subpoena Addressed to XYZ Corporation), 348 F.3d at 23; In re County of Erie, 546 F.3d 222, 228 (2nd Cir. 2008).

Robert Mongan suggests that raising the advice of counsel defense in this matter does not result in waiver of the attorney-client privilege because it is not a complete defense, but instead a "mitigating circumstance." See *Objection* ¶7 (index #122); relying on Buford v. Holladay, 133 F.R.D. 487, 496 (S.D. Miss. 1990); RESTATEMENT (THIRD) OF TRUSTS §77.[10] However,

> [c]ourts have found waiver by implication when a client testifies concerning portions of the attorney-client communication, when a client places the attorney-client relationship directly at issue, and when a client asserts reliance on an attorney's advice as an element of a claim or defense. The key to a finding of implied waiver in the third instance is some showing by the party arguing for a waiver that the opposing party relies on the privileged communication as a claim or defense or as an element of a

[10] Indeed, the Buford opinion recognized that although "advice of counsel does not constitute a true defense . . . and cannot result in a waiver of any privileges . . .[however] because the advice of counsel is one factual circumstance that may be considered . . .as an element [of a defense, [it] can result in a waiver of privileges . . . ." Id. at 496.

> claim or defense. The assertion of an 'advice-of-counsel' defense has been properly described as a "'quintessential example' of an implied waiver of the privilege.

In re County of Erie, 546 F.3d at 228 (quotations, citations and ellipses omitted & emphasis added); see also, Rhone-Poulenc Rorer Inc., 32 F.3d at 863 (advice of counsel at issue where client "attempts to prove that . . . defense by disclosing or describing an attorney client communication"). Therefore if the privileged communication placed at-issue is either as an element of an advice of counsel defense or is disclosed to demonstrate lack of culpability because of such reliance, an implied waiver arises.

Squarely at issue in this case is also the *scope* of the alleged at-issue waiver, if one is found. "While it is generally accepted that conduct can serve to waive the attorney-client privilege by implication, the case law does not offer much assistance as to how broadly such implied waivers sweep." In re Keeper of the Records (Grand Jury Subpoena Addressed to XYZ Corporation), 348 F.3d at 22-23. The New Hampshire Supreme Court has recognized that "[i]n the attorney-client . . . realm[], an implied waiver does not waive the privilege for all confidential communications between the attorney and client . . . waiver is only partial. It extends not to all information given in the course of [representation], but only to what is relevant to the plaintiff's claim." Desclos v. S. New Hampshire Med. Ctr., 153 N.H. 607, 615 (2006)(citations and quotations omitted). While "[i]t is beyond question that the deliberate injection of the advice of counsel into a case waives the attorney-client privilege . . . waiver of the attorney-client privilege as to one issue does not serve as a waiver of the privilege as to all issues." Nitinol Med. Techs., v. AGA Med. Corp., 135 F. Supp.2d at 217 (quotations, citations,

ellipses, and brackets omitted). Instead, an at-issue waiver only extends to those communications related to the client's use of counsel's advice as a shield. Cf. id. (attorney-client privilege waived "with respect to communications relating to the subject matter of the opinion given by counsel"); Buford, 133 F.R.D. at 496 (limited waiver can exist to extent privileged information is relevant to element of defense). Indeed, because the scope of the waiver is tailored to the nature of the claim or defense, courts "may require an *in camera* review." Desclos, 153 N.H. at 615.

Although a few federal courts have implied that an advice of counsel at-issue waiver can result in a waiver of the work product privilege, Buford, 133 F.R.D. at 496, the New Hampshire Supreme Court has indicated a different methodology by bifurcating the analysis of waiver of each privilege. Namely that once the work product privilege is properly asserted, the burden of demonstrating "a substantial need for the requested materials, and that it could not without undue hardship obtain the materials by other means" is on the party seeking the protected material. Bennett, 150 N.H. at 761-62; Aranson, 140 N.H. at 370-71.

The Petitioners also seek the depositions of Attorneys Craig and Amann and CPA Dawson. See *Proposed Order* at ¶9 (Index #132). Depositions of opposing counsel may be ordered where: "(1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and *non-privileged*; and (3) the information is crucial to the preparation of the case." See Shelton v. Am. Motors Corp., 805 F.3d 1323, 1327 (8th Cir. 1986)(emphasis added).

Finally, determination of whether there has been a waiver of the attorney-client and work product privileges requires consideration of whether Robert Mongan has, in

fact, posited an "advice of counsel defense" to the *Petition for Surcharge*. As noted supra, Robert contended in his pleadings and at the conference before Judge Quigley, that he has not asserted that defense, rather, he only relied on counsel to tell him what documents he must forward to them. The advice of counsel defense applicable of trustees is found in RSA 564-B:8-816(a)(27). As a subsection of a statute entitled "Specific Powers of Trustee," it authorizes a trustee to: "employ persons, including attorneys, [and] auditors, even if they are associated with the trustee, to advise or assist the trustee in the performance of the trustee's administrative duties and to act without independent investigation upon their recommendations . . . ." RSA 564-B:8-816(a)(27). Courts determine the meaning of a statute by analyzing its plain meaning. Landry v. Landry, 154 N.H. 785, 787 (2007). The language of a statute, however, "should not be read in isolation; rather, all parts of a statutory act must be construed together. [Courts] construe statutes so as to effectuate their evident purpose and to avoid an interpretation that would lead to an absurd or unjust result." State v. Bulcroft, 166 N.H. 612, 614 (2014)(quotations and citations omitted). A plain reading of the statute confirms that a trustee is empowered to: (1) employ the assistance legal counsel; and (2) use that assistance without the burden of independently investigating the advice. Courts should construe statutes "with an eye towards avoiding absurd results," O'Brien v. O'Brien, 141 N.H. 435, 436 (1996), and as such, it would be absurd to allow trustees to follow legal advice, but still hold them broadly liable for bad advice.

The Court's inquiry, however, does not end with the conclusion that RSA 564-B:8-816(a)(27) allows trustees some protection from liability. Although the statute does not explicitly address the nature of the liability shield afforded trustees who "act without

independent investigation" under 564-B:8-816(a)(27), it is axiomatic that courts discern the contours of the Uniform Trust Code through the common law. See RSA 564-B:1-106 ("The common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or another statute of this state"). Indeed, it is well-recognized that engagement of counsel is often dictated by a trustee's duty to act prudently when managing a trust, cf. RSA 564-B:8-804, and "a trustee's reliance on the advice of financial, legal, and other advisers is a significant factor in determining whether the trustee's conduct was prudent." RESTATEMENT (THIRD) OF TRUSTS § 93, comment c (2012).

As a general rule, fiduciaries who, in the exercise prudence, hire counsel are not charged with liability for reliance on that advice. See Estate of Stetson, 345 A.2d 679, 688 (Pa. 1975)(collecting cases); see generally, Dodge v. Stickney, 62 N.H. 330, 337 (1882). The immunity afforded trustees is not unlimited, however, as:

> [r]eliance on relevant professional advice does not afford a complete defense to allegations of breach of trust, for that protection should not apply, for example, if the trustee acted unreasonably in following the advice or in procuring it, as might be the case in shopping for advice to support a desired course of conduct. If, however, a trustee has selected an adviser prudently and in good faith, has provided the adviser with relevant information, and has relied on plausible advice on a matter within the adviser's competence, this conduct provides significant evidence of the prudence of the trustee's action or inaction in the matter at issue.

RESTATEMENT (THIRD) OF TRUSTS § 93, comment c (2012); see also id. §§ 77; Estate of Heller, 401 N.W. 2d 602, 609-610 (Iowa Ct. App. 1986). When deciding whether to impose a surcharge for acts committed with advice of counsel, it is appropriate therefore

to evaluate "all circumstances of the breach and of the trustee, such as: what is reasonable to expect of the particular trustee; the sincerity of the trustee's efforts to understand and perform the responsibilities in question; and whether the trustee reasonably relied on guidance from legal or other advisers . . . ." RESTATEMENT (THIRD) OF TRUSTS § 95, comment d (2012). Certainly, trustees may not avail themselves of the defense if they engage in "supine inaction" or "gross inattention" to their duties and blindly follow advice of counsel. Laramore v. Laramore, 64 So.2d 662, 668 (1952); see Estate of Barbara Rosenthal, 189 So.2d 507, 509 (Fla. Ct. App. 1966).

C. Analysis

Determination of whether there has been a waiver of the attorney-client privilege begins with a determination of whether Robert Mongan raised an "advice of counsel" defense, and if so, whether he has put that advice at-issue such that he has waived the attorney-client privilege. As set forth supra, pursuant to the New Hampshire Trust Code and applicable common law, courts determine whether to relieve a trustee from surcharge based upon the specific circumstances of the alleged breach by the trustee, see Guardianship of Dorson, 156 N.H. at 386, including, inter alia, his or her "sincerity" in understanding and performing his or her duties, see RESTATEMENT (THIRD) OF TRUSTS § 95, comment (d) (2012), whether he or she has employed counsel, see RSA 564-B:8-816(a)(27), and "relied on plausible advice on a matter within the advisor's competence." RESTATEMENT (THIRD) OF TRUSTS §93, comment c (2012).

In this instance, the Court concludes that with respect to the production of financial information ordered by the Court, see Index #26, and content and production of the five accountings, see Index ##71-71, Robert Mongan has asserted an "advice of

counsel defense".[11] It grounds this conclusion in Robert Mongan's cumulative assertions[12] in his both his *Answer*, where he alleged that he "acted in accordance of advice of counsel in searching for, accounting for, and producing such documents are reasonably necessary and requisite to the preparation and display of accounts" id. ¶42, and deposition testimony where he, inter alia, that he "relied on people that [he] hired" to make sure his accountings were in compliance with Probate Division Rule 108, see *Deposition of Robert P. Mongan* at 48 (May 17, 2016)(Index # 124), and agreed that he had relied on legal counsel hired for the "specific purpose" to prepare complete accountings. Id. at 48-49. He also stated that "[s]omeone" did not prepare the accountings properly, and that "someone" was "either Abby Dawson or the lawyers." Id. at 49-50.

After concluding that the advice of counsel defense has been raised, it must determine whether Robert Mongan's assertion of it justifies waiver of the attorney-client privilege. As noted infra, assertion of this defense has been described as the "quintessential example of an implied waiver." In re County of Erie, 546 F.3d at 228; see also, In re Keeper of the Records (Grand Jury Subpoena Addressed to XYZ Corporation), 348 F.3d at 24 (assertion of advice of counsel defense is "paradigmatic example" of at-issue waiver). Here, his discussions with, and reliance on, the advice of counsel has been squarely injected into his defense to surcharges sought by the Petitioners for the flawed content of the accountings submitted to the Court. See, e.g.,

[11] Although the Court concludes today that he has asserted this defense, it is conceivable that he could choose to withdraw it and not be deemed to have waived the attorney-client privilege. See Desclos, 153 N.H. at 612.

[12] Had Robert's sole assertion of reliance on advice of counsel been paragraph 42 of his *Answer*, the Court may have been inclined to agree with him that any advice of counsel defense was limited to producing documents as instructed by his former counsel. However, that *answer*, along with broader claims made in the deposition leads the Court to conclude that he has put at issue advice of counsel more broadly.

Aranson, 140 N.H. at 370. In addition, given that analysis of a trustee's potential liability for surcharge requires a court to "consider all circumstances of the breach and of the trustee," RESTATEMENT (THIRD) OF TRUSTS §95(d)(2012), and his potential ability, under the Code, to reasonably rely on advice given by lawyers and accountants, RSA 364-B:8-816(a)(27), any information concerning the extent of his reliance on counsel (or accountant's hired by counsel) in procuring financial documents and drafting of the accountings is required to resolve the question of whether he is liable to them for surcharge. Aranson, 140 N.H. at 370. Consequently, the Court concludes that Robert Mongan, by raising an advice of counsel defense, has affected at least a partial waiver of the attorney-client privilege. Cf. Desclos, 153 N.H. at 615.

This does not mean, however, that his waiver of the attorney-client privilege is complete. Indeed, the scope of waiver will be narrowly applied and extends only to "communications relating to the subject matter of the opinion given by counsel." Nitinol Med. Techs., 135 F. Supp.2d at 218. Here, the Court discerns that Robert Mongan has injected counsel's (and accountant's) advice as to: (1) procurement of financial documents related to the trust; (2) the drafting and submission of the accountings;[13] and (3) the *Trustee's Statement Upon Filing Accountings*, see Index #70 and as such, any disputed documents in the privilege log pertaining to these matters should be disclosed. It is unable at this time, however, based solely on the privilege log, to confidently rule that each individual document contains communications waived by assertion of the advice of counsel defense. As such, it **ORDERS** Robert Mongan to produce to the Court for in camera review copies those documents in the privilege log appended to the

[13] Including both the original "accountings," see Order dated March 30, 2015 (Index #57), and the five amended ones filed in June 2015. See Index ##71-75.

Petitioner's *Proposed Order* that have been identified with a "Y" as those sought for disclosure on the basis that the attorney-client privilege only, see *Proposed Order* Exh. A (Index #132), has been waived within **seven days of the date of this Order.**[14]

As noted supra, Robert Mongan has also asserted that some documents are subject to protection under the work product privilege.[15] See *Proposed Order* Exh. A (Index #132). Of the forty-seven disputed documents, the work product privilege is asserted as to fifteen of them. Whether these documents must be produced, however, depends upon whether there is a substantial need for them in determining the issue of surcharge and if the information in these documents could be obtained by other means. Bennett, Inc., 150 N.H. at 761-62. At this juncture, the Court cannot make this determination on the basis of the privilege log alone, and as such, **ORDERS** Robert Mongan to produce copies of those fifteen disputed documents in which a work product privilege has been asserted and the Petitioners seek disclosure, see *Proposed Order* Exh. A (Index #132), for in camera review by the Court within **seven days of the date of this Order**.

The *Motion to Compel* also seeks deposition testimony from Attorneys Amann and Craig and the accountant hired to draft the accountings, Abby Dawson. In their *Proposed Orders*, see Index ##132-133, both parties suggest that these depositions be taken. See Index #132 at ¶¶4, 9; Index #133 ¶¶5-6, 7. The scope of these proposed depositions is dissimilar, with the Petitioners seeking little limit on the subject matter

[14] As set forth infra, the Court will address separately those documents that are subject to the claim of work product privilege. The Court believes that of the forty-seven documents sought to be disclosed, thirty-two are subject to a claim of attorney-client privilege only. See *Proposed Order* Exh. A (Index #132).

[15] The Court recognizes that the work product privilege may be asserted by both the client and attorney, however, there has been no intervention by Robert Mongan's former attorneys asserting that privilege and for its purposes today the Court assumes they would assert the same privileges as have been pressed by Robert Mongan.

allowed, while the Respondents seek very specific limitations on the subject matter of the depositions. See id.

The Court will allow limited deposition testimony to be taken from Craig, Amann, and Dawson to the extent questions posed concern communications deemed waived, see supra, by Robert Mongan's assertion of the "advice of counsel" defense raised as a shield to surcharge for costs and expenses pertaining to drafting and filing of the accountings and the financial information he provided to his attorneys and accountants. See Shelton, 805 F.3d at 1327 (information inquired or must be relevant and non-privileged). These depositions are necessary to allow for inquiry into the extent and/or reasonableness of Robert Mongan's reliance on counsel and whether surcharge is appropriate. Id. As to whether these depositions are "crucial," the Court discerns that in the absence of them, id., the Petitioners would be mostly left with Robert Mongan's paint of the events surrounding production and preparation of the financial documents and accountings. As such, the *Motion to Compel*, (Index #121) as it related to depositions is **GRANTED IN PART**. The Petitioners may proceed to take depositions of Attorneys Craig and Amann and Abby Dawson and make inquiries of communications that would otherwise be privileged as set forth supra. The Court expects that experienced counsel will be able to follow the parameters of this order and not have to request court intervention in resolving objections to deposition questions.

With respect to the billing records, the Respondents have produced redacted versions of invoices from the Craig Deachman & Amann beginning in May 2013 through October 2015. See *Proposed Order* Exh. B (Index #132). The Petitioners seek disclosure of the redacted descriptions in twenty-seven entries "that relate to the

production and display of accountings or the production of records to petitioners." See id. at ¶8.[16] As set forth supra, an "at issue" waiver has been affected by Robert's Mongan's assertion of an "advice of counsel" defense. However, to make any meaningful determination whether such redacted entries pertain to the production of the accountings and/or other financial records, or whether Robert Mongan should be subject to surcharge for representation associated with the defense of certain trust amendments, the Court must undertake an in camera review of the twenty-seven redacted entries. As such, the Court **ORDERS** Robert Mongan to produce an un-redacted set of billing records for the Court's review within **seven (7) days** of the clerk's notice of this order.

IV. Conclusion

As set forth supra, trial on the *Petition for Surcharge* and certain discovery deadlines have been continued. The Respondent has narrowly waived the attorney-client and work product privileges to the extent any documents or deposition testimony may be taken associated with his asserted advice of counsel defense. He thus is directed to produce documents identified as contested in the privilege log filed with the Court for in camera review, unredacted copies of certain Craig Deachman & Amann, and the Petitioners may conduct the depositions within the limits set forth supra.

[16]An issue also arises over whether the redacted potions pertain to the defense of the trust amendments. To extent that J. Quigley's order has not been the subject of an interlocutory appeal, the Court will proceed on the basis that the amendments were ineffective. It makes no determination, as it should not, on the possibility of surcharge for fees associated with defense of those amendments, as that must be determined after trial on the *Petition for Surcharge* pursuant to the standards set forth infra. See generally, Restatement (Third) of Trusts § 93, comment c (2012). To the extent that Robert Mongan intends to argue that the fees incurred by Attorneys Craig and Amann, were reasonably incurred in defense of what he believed were proper amendments, he has inserted the issue into the litigation, and the Court finds there is an at-issue waiver of the attorney-client privilege.

The Court has been impressed by what appears to be an increase in cooperation between the parties in recent months, however, and it offers as a gentle reminder the time-honored directive that: "[t]he immovable object resistance to discovery with intermediate appeal to this court does not advance the law of discovery. Discovery is a two-way street and ordinarily will be best accomplished by direct exchange between counsel with only occasional resort to the Trial Court." Humphreys Corp. v. Margo Lyn, Inc., 109 N.H. 498, 500 (1969). The Court is confident that the parties will continue to endeavor to reach non-judicial resolution of such matters.

Finally, as discussed during the status conference, the duration of this matter and the expense of conducting it appears unusual for the value of the assets at issue. A five-day trial and potential appeal of the order on summary judgment and eventual post-trial orders of this Court will only increase both the time and expense. The parties are reminded that if in the coming months they choose to engage in court sponsored mediation, (available to them at no charge), they are to contact Denise B. Pearl, Court Monitor/Court Assistant Assigned to the Trust Docket, who can assist with scheduling the mediation. A list of Trust Docket mediators is attached to this Order for informational purposes only as scheduling must be accomplished through Ms. Pearl.

SO ORDERED

Dated: 10/21/2016

David D. King, Judge