STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
LOCATION: WEST BATH
DOCKET NO. BCD-WB-CV-09-07

NORTHERN MATTRESS COMPANY, ET AL,

Plaintiffs

v.

ORDER ON PLAINTIFFS' MOTION TO ENFORCE SUBPOENA AND FOR CONTEMPT AGAINST DEPONENT

BERNSTEIN SHUR, SAWYER & NELSON, P.A., ET AL,

Defendants

This matter comes before the court on Plaintiffs' Motion to Enforce a Subpoena Duces Tecum served upon Tammy Simpson and for Contempt Against Ms. Simpson for failing to produce the records that were the subject of the subpoena. In her opposition to Plaintiffs' motion, Ms. Simpson also moved to quash the subpoena and to terminate the deposition.

BACKGROUND

Among other things, Plaintiffs' complaint alleges a claim of professional negligence or legal malpractice against Defendants. And, among the facts alleged in the complaint in support of this claim are (i) that Defendants failed to defend Plaintiff Peter Redman from charges of harassment by Tammy Simpson, an employee of Plaintiff Northern Mattress Co., Inc., (ii) that Ms. Simpson had an ulterior motive for making the charges, and (iii) that the charges were false.

Plaintiffs' counsel sought to depose Ms. Simpson, who is not a party in this case. Defendants' counsel informed Plaintiffs' counsel that Ms. Simpson wanted to be subpoenaed for the deposition, and Defendants' counsel offered to facilitate that process. Plaintiffs' counsel delivered the subpoena *duces tecum* and an accompanying check to Defendants' counsel who, in

turn, gave them to Ms. Simpson. At the motion hearing, Ms. Simpson described herself as a college graduate and said she understood the language of the subpoena given to her.

Pursuant to M.R. Civ. P. 45, the subpoena directed Ms. Simpson to produce and permit inspection of "all documents relating to any counseling or therapy of any sort in which you were involved in 2004 including all appointment records, all reports, and notes." *See* Pls.' Mot. at Exh. A. Plaintiffs believed that Ms. Simpson's therapy records contained information relevant to their legal malpractice claim.[1]

Prior to the deposition, Ms. Simpson met with Defendants' counsel. She testified that, although she did not consider him to be her attorney because she could not afford to pay him, she believed that her conversation with him about the deposition and her medical records was confidential. Otherwise, she said, she would not have given copies of the records to him. Nevertheless, she had second thoughts later that same day and contacted Defendants' counsel to instruct him to destroy the copies of her records. Defendants' counsel has confirmed that he complied with this request.[2]

Ms. Simpson's deposition took place, as scheduled, on September 17, 2009, and lasted more than eight hours. However, she did not produce any counseling or therapy records nor did she file a written objection to their production. She also declined to answer any questions by Plaintiffs' counsel about her counseling or therapy sessions. During the course of the deposition, it became clear to Plaintiffs' counsel from Ms. Simpson's testimony that she had previously provided copies of her records to Defendants' counsel on September 14, 2009 and that Defendants' counsel destroyed those copies at her request.

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[1] The records relate to Ms. Simpson's consultations with a licensed clinical social worker, a professional–patient relationship contemplated by Maine Rule of Evidence 503.

[2] The destruction of these records was the subject of earlier motion by Plaintiffs seeking sanctions for the alleged spoliation of evidence, which was denied by the court. *See* Order on Plaintiffs' Motion for Sanctions Against Defendants for Spoliation of Evidence, dated January 22, 2010.

In the pending motion, Plaintiffs assert that Ms. Simpson is in contempt for failing to produce copies of her counseling or therapy records, as required by the subpoena, and for failing to answer any questions at her deposition regarding her counseling or therapy. As a result, Plaintiffs contend that they are entitled to an order requiring Ms. Simpson to give them copies of those records or an order requiring her counselor or therapist to provide such copies.

DISCUSSION

A. Waiver Of Privilege Based On Failure To Object To Subpoena Within 14 Days

M.R. Civ. P. 45(d) provides that, "[w]hen information subject to a subpoena is withheld on a claim that it is *privileged*. . ., the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim." *Id.* (emphasis added). Although there is a split of authority[3] as to whether the assertion of a privilege must be made by formal objection within 14 days pursuant to Rule 45(c)(2)(B) or may be made at the time of compliance – meaning in this case, at the deposition – the United States Court of Appeals for the First Circuit has interpreted the federal rule to permit assertion of the privilege at the time of compliance regardless of whether an objection or motion to quash has previously been filed. *See Winchester Capital Mgmt. Co. v. Manufacturers Hanover Trust Co.*, 144 F.R.D. 170, 175 (D. Mass. 1992). Further, under M.R. Civ. P. 45(f), "[f]ailure by any person *without adequate excuse* to obey a subpoena served upon that person *may* be deemed a contempt of the court in which the action is pending . . .." *Id.* (emphasis added).

[3] See 9 James Wm. Moore et al., *Moore's Federal Practice* § 45.61 (3d ed. 2009) ("The sounder approach . . . [permits] assertion of privilege at the time of compliance, even if no objection to the subpoena . . . was lodged before that time."); *but see* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2464 (3d ed. 2008) ("One problem presented by Rule 45(d)(2)(A) is that it fails to provide any guidance as to when the claim of privilege or work product must be asserted by the person subpoenaed.").

Persuaded by the First Circuit's reasoning and interpretation of Rule 45(d)(2), this court concludes that Ms. Simpson's failure to assert the privilege prior to the date of her deposition did not constitute a waiver of her right to object at the deposition. Given both the sensitive and presumptively privileged nature of the documents[4] at issue here and the fact that there is no record evidence that Ms. Simpson was acting in bad faith when she asserted the privilege at the deposition, the court concludes that her delay in objecting to the subpoena and the documents sought by it until the date of the deposition was not without adequate excuse. Accordingly, the court declines to find that Ms. Simpson's failure to object to the subpoena duces tecum within 14 days after its service upon her constituted a waiver of any privilege or thereby compelled disclosure of her records pursuant to the subpoena.[5]

B. Waver Of Privilege Based On Disclosure of Records to Defendants' Attorney

Central to Plaintiffs' further claim that Ms. Simpson should be compelled to produce her records is the argument that Ms. Simpson waived her right to assert the "mental health professional"–patient privilege when she provided her records to Defendants' counsel. Citing, *inter alia*, M.R. Evid. 510, Plaintiffs argue that, because Defendants' counsel did not represent Ms. Simpson when she provided him with a copy of the records, she was not protected by any attorney–client privilege that otherwise might preserve the confidential nature of her therapy records.

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[4] *See* M.R. Evid. 503(b); and 32 M.R.S. § 7005.

[5] The 14–day period for objecting to a subpoena begins on the date of service upon the intended deponent. M.R. Civ. P. 45(c)(2)(B). The Rules also provide that "[a] subpoena may be served by any person who is not a party and is not less than 18 years of age, *including the attorney of a party*." M.R. Civ. P. 45(b)(1) (emphasis added). On this motion record, it is not clear when Defendants' counsel delivered the subpoena and check to Ms. Simpson. However, in view of the court's analysis regarding objections to the production of privileged documents under Rule 45(d)(2), the date of service upon Ms. Simpson is not material to this court's determination.

M.R. Evid. 502 codifies the long-standing common law privilege for attorney-client communications and expressly addresses the issue presented here. Under that Rule:

> 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 (1) between the client or the client's representative and the client's lawyer . . . (2) between the lawyer and the lawyer's representative, or (3) *by the client* or the client's representative or the lawyer or a representative of the lawyer *to a lawyer* or a representative of a lawyer *representing another party in a pending action and concerning a matter of common interest therein*, . . .

M.R. Evid. 502(b) (emphasis added).

"Client" is defined under the Rule as "a person . . . who is rendered professional legal services by a lawyer, or *who consults a lawyer with a view to obtaining professional legal services from the lawyer*." M.R. Evid. 502(a)(2) (emphasis added). One commentator has explained the definition of client and the application of the privilege as follows:

> The definition of "client" . . . includes consultation with a view to obtaining professional services. It does not matter that employment does not follow. No fee needs to have been paid or contemplated. The services must be legal services. If the lawyer is acting as a friend or relative or as a business advisor instead of a legal advisor, the communication is not protected from disclosure. The trouble is that it is not always easy to decide in what capacity a lawyer is acting. The lawyer often gives counsel on business or personal matters along with his or her legal advice and is expected to do so. *In other circumstances the lawyer might render privileged legal advice to a third party, by whom he has not been retained, in a transaction in which he represents other parties.* The best test should be to regard a communication to a lawyer as privileged if it concerns a predominantly legal problem, regardless of the relationship.

Richard H. Field & Peter L. Murray, *Maine Evidence* § 502.2, 216 & fn. 34 (6th ed. 2008) (emphasis added) (citing *Rich v. Fuller*, 666 A.2d 71, 75 (Me. 1995)).[6]

[6] In *Fuller*, the Law Court held that a third-party to a lease-to-own agreement that was not represented by counsel could nevertheless claim the attorney-client privilege with respect to communications she had with another party's attorney. According to the Law Court, "[i]t is a fair inference that" the attorney is "in effect, rendering professional legal services by speaking with [the third party] alone, and making sure the agreement was consistent with her personal desires." *Id.* 666 A.2d at 75.

In this case, although Ms. Simpson testified at her deposition that she did not believe that Defendants' counsel was her attorney at the time she disclosed her therapy records to him, she also testified at the motion hearing that she believed she was providing those records to him in confidence. She further clarified that her belief that he was not her attorney was related, in part, to the fact that she could not pay him.[7] Additionally, it is undisputed that Defendants' counsel received the records in connection with his efforts to prepare Ms. Simpson for her deposition in an action pending against his client. In the court's view, the circumstances surrounding that attorney's consultation with Ms. Simpson and her disclosure of her therapy records to him rendered their communications privileged. Thus, the disclosure to him of her therapy records did not constitute a waiver by Ms. Simpson of the mental health professional-patient privilege. *See* M.R. Evid. 510.

C. Waiver Of Privilege Based On Disclosure To Mark Redman

Notwithstanding the court's determination that Ms. Simpson's communications with Defendants' counsel were privileged, the court concludes that Ms. Simpson did waived the privilege when she previously discussed her therapy sessions and diagnosis with Mark Redman. *See* Simpson Deposition at pp. 200, 213. As noted above, the holder of a privilege against disclosure "waives the privilege if the person [] voluntarily discloses or consents to disclosure of any significant part of the privileged matter." M.R. Evid. 510. In the court's view, the fact that Ms. Simpson voluntarily disclosed purportedly "confidential" matters to Mark Redman, militates against a finding that those matters were confidential or that any privilege that otherwise would have attached to them was not waived by Ms. Simpson. This conclusion, however, does not end the analysis.

[7] As noted above, the privilege is not dependent upon the attorney being retained or otherwise compensated for the consultation or the legal services rendered.

D. Relevance Of Records

Ms. Simpson argues that even if her therapy records are not privileged, they are not relevant to this action and, thus, are not discoverable. The Rule governing discovery in civil actions is clear: "[p]arties 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). "Relevant" evidence, in turn, is defined to mean:

> evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

M.R. Evid. 401. Relevance "incorporates materiality [which] looks to what is in issue in the case as reflected in the pleadings and controlled by the substantive law." *Maine Evidence* § 401.1 at 92.

In this case, Plaintiffs' complaint asserts, among other things, that Defendants failed to adequately defend Peter Redman against allegations of harassment by Ms. Simpson, that Ms. Simpson had an ulterior motive for making those allegations, and that the allegations were false. According to Plaintiffs, had Defendants obtained Ms. Simpson's therapy records they might have discovered evidence of her fabrication or ulterior motive and, as a result, the June 2004 letter of apology that essentially verified her claims would not have been issued.

Contrary to these assertions, however, there is nothing in the motion record to suggest that Defendants would have had the ability to review Ms. Simpson's therapy records prior to the issuance of the letter of apology, so–called, in June 2004. At the hearing on the instant motion, Ms. Simpson testified that she would not have disclosed her records to Defendants in 2004 had she been asked. In the absence of her agreement to turn over the records to Defendants or of some lawful mechanism pursuant to which Defendants could have compelled disclosure of the

records at that time, the court concludes that Defendants could not have accessed Ms. Simpson's therapy records in connection with their defense of Peter Redman. Although the court has concluded that Ms. Simpson waived her privilege with respect to the therapy records, Plaintiffs have failed to demonstrate how Defendants could have obtained those records in connection with a defense of Mr. Redman in 2004 and, thus, they are not relevant to Plaintiffs' claim of professional negligence in the instant action.

DECISION

In light of the foregoing, the court declines to grant Plaintiffs' motion for contempt and grants Ms. Simpson's motion to quash. Further, in light of the fact that Plaintiffs have exhausted the allowable time limits on depositions and that no request has been made or reason shown for extending those limits, the court grants Ms. Simpson's motion to terminate her deposition. *See* M.R. Civ. P. 30(d)(2) & (3).

Pursuant to M.R. Civ. P. Rule 79(a), the Clerk is directed to enter this Order on the Civil Docket by a notation incorporating it by reference and the entry is

> Plaintiffs Motion To Enforce Subpoena And For Contempt Against Deponent is DENIED; and
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> Deponent's Motion to Quash Subpoena is GRANTED, insofar as it pertains to the Deponent's privileged records, and Deponent's further Motion To Terminate Deposition is GRANTED.

Dated: February 23, 2010

Chief Justice, Superior Court