

of fiduciary duty, aiding and abetting breaches of fiduciary duty, fraud, conspiracy and violations of the Texas Deceptive Trade Practices Act.

II.

On October 11, 2013, Plaintiff served his First Set of Interrogatories on Freed and his First Request for Production of Documents on both Defendants.

III.

On November 11, 2013, Freed served her responses to the interrogatories, and on November 25, 2013, Defendants provided their responses to the requests for production. On March 4, 2013, first amended responses were served. True and correct copies of the first amended responses are attached as Exhibits 1 and 2. Defendants have provided partial responses, but Defendants have also raised objections which Plaintiff believes should be overruled, ignored the parameters of some of the requests, and withheld some documents and responses altogether.

IV.

At Plaintiff's request, a privilege log was provided by Defendants on January 31, 2014. A true and correct copy of that privilege log is attached hereto as Exhibit 3. As will be discussed in more detail herein, Defendants have withheld documents which do not appear to be protected by a privilege.

V.

At issue in this case is not only what was done by Defendants in connection with their representation of Elmer and Nelva Brunsting, but also who directed Defendants' actions. As a result, it is critical to know with whom Defendants communicated about what was done during Nelva's lifetime and from whom Defendants took their direction. Relevant documents were allegedly signed in August of 2010, and Nelva Brunsting allegedly resigned as trustee of the trusts prepared by

Defendants on December 21, 2010, but Defendants continued to represent Nelva Brunsting until her death on November 11, 2011. Since at some point Defendants contend they also began to represent Anita Brunsting who allegedly succeeded her mother as trustee, a conflict of interest arose because of the multiple representation. And apparently at some point, Defendants began to represent both Anita and Amy Brunsting who eventually became co-trustees after their mother's death. The circumstances surrounding Nelva Brunsting's alleged execution of certain documents are also critical. Thus, the dates of communications, meetings, and work done by Defendants relating to the Brunsting trusts are critical and need to be confirmed.

VI.

Boilerplate Objections Should Be Overruled¹

Defendants have repeatedly used boilerplate objections which do not apply and should be overruled. Those include:

1. Objections that the request or interrogatory assumes facts not in evidence. This objection is repeated throughout, even though it does not apply to discovery requests. No evidence has been offered or admitted at this point.
2. Objections that the request or interrogatory requires Defendants to marshal their evidence. This objection is also included repeatedly. The requests and interrogatories are very specific, do not require Defendants to marshal their evidence, and the objection should be overruled.
3. The objection that the requests and interrogatories are attempts to limit later deposition or trial testimony by requesting information that would be better elicited through

¹ Since these objections are repeated throughout the responses, Plaintiff will not necessarily repeat them with regard to each response addressed. Plaintiff requests, however, that they be overruled as to each request.

deposition or trial. One of the purposes of discovery is to confirm the facts. This is not a proper objection and should also be overruled.

VII.

Deficiencies in Interrogatory Answers

Plaintiff has the following complaints concerning Freed's interrogatory answers:

1. Interrogatory number 1 sought both cell phone numbers and cell phone providers. A cell phone number was provided, but the provider was not. This information is needed so that proper subpoenas can be issued, if necessary, to confirm when calls were made and to whom.

2. Likewise, Interrogatory number 3 requests both internet addresses and internet service providers for all email addresses used by Freed since July 1, 2010. While the email addresses were provided, and one of those addresses contains the provider's name within the address, the internet service provider for the Vacek.com email address can not be determined by what was provided. Again, this information will be needed for any subpoenas which become necessary.

3. Interrogatory number 14 asked Defendants to specify the dates, locations, and participants of all meetings between any representative of Vacek & Freed and Nelva Brunsting after July 1, 2010. In addition to the boilerplate objections, Defendants claim that the information sought is protected by attorney-client privilege. The objections are without merit. Privilege can not apply to a question about when meetings with Nelva occurred. This information is not protected by the attorney-client privilege since Plaintiff is acting as Nelva's executor in this lawsuit. In addition, even if information concerning Nelva could be privileged under some circumstances from her own executor, the content of conversations is not sought in this interrogatory. Although Freed made an answer, subject to her objections, it is important that the objections be addressed and overruled, so

that there can be no assertion later that any additional information was withheld based upon those objections.

4. Interrogatory number 15 sought the date of every telephone conversation that a representative of Vacek & Freed had with Nelva Brunsting after July 1, 2010, and again asked that any other participating parties be identified. The same objections as those raised in interrogatory number 14 were again raised for the same reasons and they are, likewise, without merit and should be overruled. The response also indicates that the answer only addresses calls up through Nelva's resignation as trustee, leaving an additional 11 months unaddressed. Again an attorney-client privilege which is not explained, and can not be proven, is asserted. The objections should be overruled so that there can be no question that a complete response has been given and that information is not being withheld based upon those objections. The interrogatory response should also be amended to include the entire period of July 1, 2010 through Nelva's death on November 11, 2011.

5. Interrogatory number 16 requests the same information concerning telephone conferences with Anita Brunsting after July 1, 2010. The same objections were again raised and they are without merit as to this interrogatory as well. In connection with this request, attorney-client privilege was also asserted, but this interrogatory includes a period of apparent joint representation to which privilege could not be applied, even if the interrogatory sought the substance of conversations, which it does not. Therefore, that objection must also be overruled. Again, with regard to interrogatory number 16, the response made specifies that the information provided is only from July 1, 2010 up to the time that Nelva resigned on December 21, 2010. The objections should be overruled so that it is clear a complete response is being made and that information is not being

withheld based upon those objections. The interrogatory should be answered for the entire period after July 1, 2010.

6. Interrogatory number 17 requests information concerning telephone conferences with Amy Brunsting and participants in those telephone conferences. The same objections were again raised and they are without merit as to this interrogatory as well. Again, with regard to interrogatory number 17, the response made specifies that the information provided is only being from July 1, 2010 up to the time that Nelva resigned on December 21, 2010. Defendants also object to this interrogatory on the basis of attorney-client privilege, but as was explained in connection with interrogatory number 16, that objection is also without merit. The objections should be overruled so that it is clear a complete response is being made and that information is not being withheld based upon those objections. The interrogatory should be answered for the entire period, after July 1, 2010.

7. Interrogatory number 18 requests information concerning telephone conferences between representatives of Vacek & Freed and another Brunsting daughter, Carole Brunsting. The same objections, except that of attorney-client privilege, were again raised and they continue to be without merit. Once again, with regard to interrogatory number 18, the response made specifies that the information provided is only being from July 1, 2010 up to the time that Nelva resigned on December 21, 2010. The objections should be overruled so that it is clear a complete response is being made and that information is not being withheld based upon those objections. The interrogatory should also be answered for the entire period after July 1, 2010.

VII.

Deficiencies in Responses to Request for Production

Plaintiff has the following complaints concerning the Defendants' responses to the request for production:

1. Request for Production No. 3 seeks agreements with Anita Brunsting. Defendants raise objections to this request which are without merit. To the extent Defendants have any agreements involving Anita Brunsting, those agreements should be provided through discovery in this case. Defendants' objections include a claim that agreements are protected by the attorney-client privilege. Defendants are apparently asserting that protection to avoid production of their fee agreement with Anita Brunsting. Because no documents were provided, Plaintiff can only presume there is such an agreement exists because at some point Defendants assert they began to represent Anita Brunsting. Therefore, Defendants claim they have a privilege which prevents them from providing information concerning the trusts they created on behalf of Elmer and Nelva Brunsting, even while they were still representing Nelva. Moreover, attorney-client privilege does not protect a fee agreement which establishes an attorney-client relationship. *Allstate Texas Lloyds v. Johnson*, 784 S.W.2d 100 (Tex. App.–Waco 1989, original proceeding). In this instance the question of when Defendants' attorney relationship with Anita began is particularly relevant, both for evidentiary and for substantive issues. The objections should be overruled and the documents should be ordered produced.

2. Request for Production No. 4 seeks agreements with Amy Brunsting. The same objections are raised by Defendants and those objections should be overruled for the reasons specified in paragraph 1 above.

3. Request for Production No. 9 seeks invoices for services provided or expenses incurred on behalf of Anita or Amy Brunsting. Defendants have produced no documents in response to this request and have asserted an objection of attorney-client privilege in addition to their boilerplate objections. Fee information is not ordinarily protected by attorney-client privilege and Defendants must establish that the privilege exists. *Jim Walter Homes, Inc. v. Foster*, 593 S.W.2d

749 (Tex. Civ. App.–Eastland 1979, no writ). In doing that, they must establish the documents are privileged and also that they do not fall under a joint representation exception. Even if the documents contained privileged information, there is no apparent reason that privileged portions could not be redacted.

4. Request for Production No. 10 seeks documents reflecting payments made on the invoices sought in Request No. 9. The same objections are raised and should be overruled for the reasons set forth in number 5 above.

5. Request for Production No. 11 seeks invoices for services provided or expenses incurred on behalf of any of the Brunsting Trusts. Defendants purport to have attached some responsive documents. These documents do not constitute attorney-client privileged documents even for the period after Nelva’s death, and redactions can be used to protect entries detailed enough to cause concern. The objections should be overruled and the documents ordered produced.

6. Request for Production No. 12 seeks documents reflecting payments made on the invoices sought in Request No. 11. The same objections are raised and should be overruled for the reasons set forth in number 7 above.

7. Request for Production No. 21 seeks original documents signed by certain parties. Since Defendants raise objections, including one concerning attorney-client privilege, it is unclear which originals are being offered for Plaintiff’s review. These objections should be overruled and Plaintiff should be allowed to review all originals of the documents requested in Request No. 21.

8. Request for Production No. 22 seeks originals of certain documents notarized by Candace Freed, and Request for Production No. 23 requests originals of certain documents notarized or witnessed by anyone at Vacek & Freed. Both of these requests are met with attorney-client privilege. Since these request notarized documents and documents attested to by an attorney are not

privileged, it is unclear how they could be documents which are even intended to be confidential. “When the lawyer acts as attesting witness, the approval of the client to his doing so may safely be assumed, and waiver of the privilege as to any relevant lawyer-client communications is a proper result.” Fed. R. Evid. 503 Adv. Comm. Note. These objections should be overruled.

9. Request for Production No. 26 seeks all joint representation or conflict of interest disclosures provided to Elmer, Nelva, Anita and/or Amy Brunsting. Defendants raise the same objections again but claim responsive documents have been produced. Plaintiff has found no such documents in Defendants’ production.

10. Request for Production No. 29 requests documents establishing an attorney-client relationship with Anita Brunsting and Request for Production No. 30 asks for documents terminating that relationship. Request for Production No. 31 and 32 seek documents establishing and terminating any attorney-client relationship with Amy Brunsting. Defendants raise the same objections, including attorney-client objections to these requests. The terms and conditions of an attorney’s employment and the purpose for which they are employed are not confidential. *Allstate Texas Lloyds v. Johnson*, 784 S.W.2d 100 (Tex. App.–Waco 1989, original proceeding); *Jim Walter Homes, Inc. v. Foster*, 593 S.W.2d 749 (Tex. Civ. App.–Eastland 1979, no writ). The mere establishment and termination of an attorney-client relationship are not normally subject to attorney-client privilege. As with all of their other assertions of privilege, Defendants do not attempt to redact information they believe to be privileged so that at least the existence and date of the establishment, if any, and the termination, if any, can be confirmed. This information would be relevant to the issue of the existence of a joint representation which would impact Defendants’ claims of privilege and also to the substantive issues in the case because of the conflict of interest created by a joint representation.

11. Requests for Production No. 34, 35, and 36 sought cell phone and long distance records and logs reflecting telephone calls and faxes with certain parties from July 1, 2010 to the present. Defendants have raised their same objections to these requests, including that of attorney-client privilege. Defendants do claim that some attached responsive documents were provided but Plaintiff does not find these items in what was produced. In response to Request No. 35, Defendants claim they have no long distance phone records, so Plaintiff assumes they are withholding such items because of privilege. It is not credible for Defendants to have no long distance and cell phone records, even if they do not keep logs. Since most fax machines maintain logs of transmissions, the lack of logs is also questionable. Nevertheless, none of these records seek communications, so privilege does not shield them.

12. Request for Production No. 48 requests calendars so that it can be determined when meetings or telephone conferences occurred which are relevant. Defendants objected based upon attorney-client privilege, and while Defendants claim to have provided some information, there appear to be no calendars provided. Likewise, there appear to be no calendars included on Defendants' privilege log. The objection should be overruled and the documents provided.

VIII.

Problems with Defendants' Privilege Log

Privilege is not presumed. *In re E.I. DuPont de Nemours and Co.*, 136 S.W.3d 218, 225 (Tex. 2004). Likewise, there is no presumption that parties listed on a privilege log fall within a privilege. *Id.* Defendants have the burden of establishing privilege, and documents have been withheld by Defendants which are not afforded such protection and which contain relevant

information which is not protected. Defendants' privilege log² reflects documents withheld which do not fall in privileged categories. Those include billing statements and communications during a time in which Defendants apparently represented both Nelva and Anita with regard to the Brunsting Trusts. Moreover, pre-existing documents do not become privileged as a result of the creation of an attorney-client relationship. *Mortgage America Corp. V. American Nat. Bank of Austin*, 651 S.W.2d 851 (Tex. App.–Austin 1983, writ ref'd n.r.e.). Without the information concerning establishment of the attorney-client relationship with Anita and with Amy, it is impossible to determine whether a privilege is being asserted as to pre-existing documents.

1. In the category of fees, there are privilege log entries relating to fee statements. (See Exhibit 3, lines 4-15). There are also entries for emails concerning attorney's fees. (See Exhibit 3, lines 23, 33-34, 41, 48, and 50)

2. It is not impossible to confirm from the information on privilege log if fee agreements are included, but they appear to be. (See Exhibit 3, lines 1-3, 17-20)

3. Nine entries in the privilege log fall within the joint representation period (See Exhibit 3, lines 1-2, 4-6, 16-19) and should not be privileged.

4. A chart is described on Defendants' privilege log which contains "Attorney notes/history of representation" (See Exhibit 3, line 51) for which no dates are provided. That document must cover the period during which Defendants' represented Nelva, as well as the joint representation period, and should be produced even if Defendants are allowed to redact certain portions.

² For ease of reference, Plaintiff has numbered the rows in Defendants' privilege log which is attached hereto as Exhibit 3.

IX.

Plaintiff asks that Defendants' objections be overruled and that Plaintiff be required to amend the discovery requests and produce the documents sought within 10 days after the Court's ruling.

WHEREFORE, PREMISES CONSIDERED, Plaintiff asks that Defendants' objections to Plaintiff's requests be overruled, that Defendant be required to appropriately amend and supplement their responses within ten (10) days after the Court's ruling, and for such other and further relief to which Plaintiff may show himself entitled.

Respectfully submitted,

BAYLESS & STOKES

By: /s/ Bobbie G. Bayless

Bobbie G. Bayless

State Bar No. 01940600

2931 Ferndale

Houston, Texas 77098

Telephone: (713) 522-2224

Telecopier: (713) 522-2218

bayless@baylessstokes.com

Attorneys for Plaintiff

CERTIFICATE OF CONFERENCE

The parties have discussed these issues and are unable to reach an agreement on the matters submitted to the Court.

/s/ Bobbie G. Bayless
BOBBIE G. BAYLESS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing instrument was forwarded to counsel of record via Telecopier and Email on the 28th day of March, 2014, as follows:

Cory S. Reed
Thompson Coe Cousins & Irons, LLP
One Riverway, Suite 1600
Houston, Texas 77056

/s/ Bobbie G. Bayless
BOBBIE G. BAYLESS