STATE OF MAINE
SAGADAHOC, SS.

BUSINESS & CONSUMER COURT
LOCATION: WEST BATH
DOCKET NO.: BCD-WB-CV-07-33

FIBER MATERIALS, INC.,

Plaintiff

v.

ORDER ON PLAINTIFF'S MOTION TO STRIKE AND DISQUALIFY

MAURICE SUBILIA, ET AL,

Defendants

This matter is before the court on the motion of Defendants Maurice Subilia, Linda Subilia, Lealagi, Inc. and Sage Technologies, Inc.'s (hereinafter "Defendants") to strike paragraphs 103 through 105 of Fiber Materials, Inc.'s (hereinafter "FMI") complaint and to disqualify the firm of Jensen, Baird, Gardner & Henry as FMI's counsel in this case.[1] Defendants' motion arises out of the discovery and disclosure by FMI's counsel of a legal opinion given to Defendant Maurice Subilia ("Mr. Subilia") by his personal attorney and stored on a laptop computer issued to him by his employer, FMI.

At a hearing on the motion, the court heard testimony and received other evidence. The following facts, based upon evidence the court finds credible, are central to the determination of whether that legal opinion was protected by the attorney–client privilege, as Defendants maintain, and whether information contained in the opinion may serve as the basis for allegations made in FMI's Complaint.

[1] Although the defendants Linda Subilia, Lealagi, Inc. and Sage Technologies, Inc. have joined in the motion, at the motion hearing Mr. Sublia's counsel conceded that he alone holds the privilege at issue and he alone is pressing the motion to strike.

BACKGROUND

Mr. Subilia was the President of FMI from February 6, 1978 to April 5, 2007. FMI owned and issued laptop computers to its employees, including Mr. Subilia, pursuant to their employment with FMI. Mr. Subilia used the laptop for business and personal purposes at work, home, on business trips and while on vacation. Mr. Subilia also owned a personal laptop computer.

In 1999 an E-Mail and Computer Use Policy ("the Computer Policy") was adopted by FMI. On March 3, 1999 the policy was distributed to all of its employees. Mr. Subilia participated in several training sessions with FMI employees and explained the policy to them, including the provisions regarding "No Expectation of Privacy" and FMI's right to access and review all materials "which [employees] create, store, send, or receive on the computer or through the Internet or any other computer network." Defendants' Exh. 2 at ¶ A.[2] He also signed

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[2] The Computer Policy includes the following provisions:

> The Computer Resources [] are the property of FMI ...
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> ...
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> *No expectation of privacy.* The computers and computer accounts given to Users are to assist them in performance of their jobs. Users should not have an expectation of privacy in anything they create, store, send or receive on the computer system.
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> ...
>
> *Waiver of privacy rights.* Users expressly waive any right of privacy in anything they create, store, send or receive on the computer or through the internet or any other computer network. While FMI does not expect to access User computers on a regular basis, the Company reserves the right, and Users consent to allowing FMI to access and review all materials which Users create, store, send or receive on a computer or through the Internet or any other computer network. Users understand that FMI may use human or automated means to monitor use of its Computer Resources. FMI's President shall authorize the monitoring of its Computer Resources.
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> ...
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> *Inappropriate or unlawful material.* This policy does not prohibit incidental and occasional personal messages of a social nature which do not contain otherwise inappropriate or unlawful material.
>
> ...
>
> *Waste of computer resources.* [] Internet access is monitored, and actual web-site connections are recorded.
>
> ...

a document acknowledging that he read and agreed to comply with the Computer Policy. Since the Computer Policy was adopted, FMI exercised its right to review materials on employee computers somewhere between one and three times, at Mr. Subilia's direction.

In 2006 Mr. Subilia sought personal legal advice from his daughter, Gina Lindekugel, Esq. and from attorneys at the Verrill Dana law firm regarding a possible indemnification claim by him against FMI.[3] Beginning in February of that year, his daughter acted as an intermediary between Mr. Subilia and Verrill Dana. She helped her father formulate issues for the law firm, and exchanged communications and emails with the firm on her father's behalf.

Around March 22, 2006 Verrill Dana emailed a three-page legal opinion to Gina Lindekugel regarding Mr. Subilia's claim. The top of each page of the opinion was stamped "ATTORNEY CLIENT PRIVILEGE CONFIDENTIAL WORK PRODUCT." Attorney Lindekugel emailed the opinion to her father's FMI email address at FMI. Although Mr. Subilia had his own personal computer, his FMI email address was the only one his daughter had for him.

On October 24, 2006, the Computer Policy was again distributed to employees of FMI. It contained minor revisions to the 1999 policy language, but there were no substantive changes

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> *Responsibility for passwords.* [] Users understand that passwords do not provide secure protection of any files stored on their hard drive. Users should use the "H" or "Home" drive on the server for the most secure protection of files.
> *Passwords do not imply privacy.* Use of passwords to gain access to the computer system or to encode particular files or messages does not imply that Users have an expectation of privacy in the materials they create or receive on the computer system.
> ...
> *Storage of e-mail files.* The Company will regularly remove/delete old e-mail messages [], or files from the system every 90 days or as required to maintain efficient system operations.

Id. at pp. 2-4

[3] Mr. Subilia claimed that FMI "failed to fully indemnify him [for expenses and fines] in connection with a federal lawsuit and criminal proceeding." Defendants' Exh. 1

that affect the issues now before the court. Defendants' Exh. 3. Mr. Subilia again acknowledged in writing that he had read and agreed to comply with the Policy.

On April 3, 2007 federal agents from the FBI, ICE and IRS arrived at the offices of FMI. The agents told FMI's in-house counsel Jennifer Beedy that they wanted to talk with Mr. Subilia about certain payments he allegedly made. During a meeting at FMI that included Mr. Subilia, the agents told Attorney Beedy that their inquiries were not "currently" related to FMI. She then left the meeting.

That same day, the federal agents arrived at the Subilia home with a search warrant. The warrant included the right to search electronic devices in the home, including those owned by FMI. Mr. Subilia's wife, Linda Subilia, was present when the agents arrived, but left for her brother's house before the search began.

On April 4, 2007 Mr. Subilia sent emails to Attorney Beedy and Walter Lachman, who was the Chairman of the Board of FMI. *See* Plaintiff's Exh. 2.[4] He told them that he was under investigation for allegedly bribing a representative of the Army; that his home had been searched the night before; and he suggested that FMI might be implicated in the investigation. He also separately informed them that the agents took a mirror image of the hard drive of the FMI laptop used by him.

On the morning of April 5, 2007 Mr. Subilia arrived at FMI and gave Attorney Beedy a copy of the search warrant that had been served on him. They then participated in a conference call with Mr. Lachman. Mr. Subilia told Beedy and Lachman that he was under federal investigation arising out of his dealings with certain contractors in Alabama. At the conclusion

[4] The email to Mr. Lachman was actually addressed to his wife, Phyllis, with the expectation that she would pass it along to her husband.

of the phone conference, Mr. Subilia resigned from FMI and left the premises with the laptop computer that had been issued to him.

That same day, Attorney Beedy instructed Mr. Subilia's former secretary, Ms. Kennedy, to call Mr. Subilia at home to tell him to return the laptop to FMI. The computer belonged to FMI and Attorney Beedy was concerned that there might be something on the laptop relevant to a possible federal investigation involving FMI. Linda Subilia answered Ms. Kennedy's call and acknowledged that the FMI laptop was there. Ms. Kennedy told Mrs. Subilia that the laptop must be returned to FMI.

Mrs. Subilia told her husband about the phone call. Although they argued about whether to return the laptop, Mr. Subilia made no attempt to stop his wife from delivering the computer to FMI later that day. Mrs. Subilia returned the laptop to FMI with Mr. Subilia's knowledge. Attorney Beedy received the laptop and locked it in a file cabinet at FMI.

Some days later, Attorney Dilworth, one of Mr. Subilia's attorneys in the instant case, called Attorney Beedy to ask for the return of the laptop. After Beedy conferred with FMI's Massachusetts counsel, Michael Schneider, Esq., the request was denied.

Thereafter, Attorney Beedy retrieved the laptop and turned it on. After obtaining Mr. Subilia's password information from FMI's I.T. department, she accessed the emails and files on the computer and discovered the Verrill Dana legal opinion that had been emailed to Mr. Subilia by his daughter. The opinion had been downloaded and saved on the computer's hard drive, or "C" drive.

At first, Attorney Beedy considered the opinion to be privileged attorney-client material. She contacted the American Bar Association ethics search service to determine whether it was appropriate for her to read the opinion and give it to her superiors at FMI. She reviewed material referenced by the ABA's ethics search service and spoke with one of its attorneys. She also

consulted the website for the Maine Board of Overseers of the Bar, reviewed various bar rules and spoke with an assistant bar counsel. Finally, she attempted to contact a representative of the Maine Bar Association's ethics committee, but without success. She considered these efforts to be sufficient due diligence.

Attorney Beedy concluded that there was no prohibition against her reading the opinion or sharing it with FMI Chairman Lachman. She based her decision on the ethics materials she had read, and on the fact that Mr. Subilia had resigned and the laptop belonged to FMI. She also based her decision on FMI's Computer Policy and on Mr. Subilia's avowed knowledge of that policy.

On April 13, 2007, Attorney Beedy delivered the laptop and the legal opinion to Mr. Lachman and Attorney Schneider. After Attorney Beedy described her due diligence research, Lachman and Schneider read the opinion. Mr. Lachman then put the laptop in a safe.

On October 4, 2007 FMI filed the complaint in the instant action. Paragraphs 103 through 105 of the complaint refer to the Verrill Dana legal opinion and paragraphs 103 and 104 include verbatim passages from it. Defendants now move the court to strike those paragraphs pursuant to M.R. Civ. P. 12(f) on the grounds that the allegations contained in them are "impertinent" and inadmissible.[5] Defendants also ask the court to disqualify FMI's trial counsel on the grounds that they received and utilized privileged information and, therefore, gained an improper and unfair tactical advantage.

DISCUSSION

1. Motion to Strike Pursuant to M.R. Civ. P. 12(f)

Although there is very little Maine authority interpreting or applying Rule 12(f), "where a

[5] "... the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." M.R. Civ. P. 12(f).

Maine Rule of Civil Procedure is identical to the comparable federal rule," Maine courts often look to "constructions and comments on the federal rule *as aids* in construing our parallel provision." *Bean v. Cummings*, 2008 ME 18, ¶ 11, 939 A.2d 676, 679 (emphasis in original) (citations omitted). Fed. R. Civ. P. 12(f) is identical to Maine's rule in all material respects.

"Impertinent matter" as contemplated by Rule 12(f) includes allegations that cannot be supported by any admissible evidence. *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976); 2A Moore's Federal Practice § 12-21(1) (2d ed. 1975). Because paragraphs 103 through 105 not only reference Mr. Subilia's consultation with his attorneys, but also contain excerpts of their legal opinion to him, Defendants contend that those paragraphs must be stricken because they include privileged and, therefore, inadmissible material.

Generally, "[c]ourts disfavor the motion to strike, because it proposes a drastic remedy." 2 Moore's Federal Practice § 12.37 (citing *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards*, 677 F.2d 1045, 1057 (5th Cir. 1982); *Davis v. Ruby Foods, Inc.*, 269 F.3d 818, 819-821 (7th Cir. 2001); *NOW, Inc. v. Scheidler*, 897 F. Supp. 1047, 1087 n.28 (N.D. Ill. 1995); and *Stanbury Law Firm v. IRS*, 221 F.3d 1059, 1063 (8th Cir. 2000). In fact, "[i]n deciding whether to strike a Rule 12(f) motion on the ground that the matter is impertinent and immaterial, it is settled that the motion will be denied, unless it can be shown that no evidence in support of the allegation would be admissible." *Lipsky*, 551 F.2d at 893 (citations omitted). The decision to grant or deny a motion to strike is within the sound discretion of the court. 2 Moore's Federal Practice § 12.37.

(a) Attorney-Client Privilege

The attorney-client privilege is an evidentiary rule codified by Maine Rule of Evidence

502.[6] The purpose of the privilege "is to encourage clients to make full disclosure to their attorneys and to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Corey v. Norman, Hanson & DeTroy*, 1999 ME 196, ¶ 18, 742 A.2d 933, 941 (citations omitted).

In *United States v. United Shoe Machinery*, 89 F. Supp. 357 (D. Mass. 1950), the Federal District Court for the District of Massachusetts developed "[a]n often-cited test for distinguishing privileged communications from all other." John Gergacz, *Employees' Use of Employer Computers to Communicate with Their Own Attorneys and the Attorney-Client Privilege*, 10 Comp. L. Rev. & Tech J. 269, 271 (2006). Essentially, it is a three-part inquiry that "focuses on the roles of the parties to the communication[,] the nature of the information communicated [and] the confidentiality of the communication." *Id.*

In this case there does not appear to be a dispute as to the first two parts of the *United Shoe* test, namely that the Verrill Dana legal opinion is an attorney-client communication. Rather, the dispute centers on the third part – whether the communication was *confidential* and, thus, privileged.

Mr. Subilia argues that the communication was made in connection with the rendition of

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[6] Rule 502 describes the privilege, generally, as follows:

> 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 or the lawyer's representative, or (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, or (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

M.R. Evid. 502(b).

legal services and that it was both given, and reasonably understood to have been given, in confidence. He further argues that because only he, the client, may waive the privilege and because he did not at any time expressly or impliedly waive it, the communication is protected and information contained in it is inadmissible.

FMI, on the other hand, contends that the "confidentiality" element of Rule 502 is missing in this case. According to FMI, because the communication was stored on the laptop issued to Mr. Subilia but owned by FMI, and because Mr. Subilia expressly waived any right to privacy he may have had with respect to information stored on that computer, the legal opinion discovered by FMI was not "confidential" and is, therefore, not protected.

The legal question raised by Defendants' motion to strike deals with the evolving issues of employee privacy and the attorney-client privilege in the burgeoning area of electronic communications. Only a handful of courts around the country have had occasion to address the issue and it appears to be a question of first impression in Maine.

In the area of privilege law generally, "confidentiality" is understood to have both "a subjective and objective component; the communication must be given in confidence, and the client must *reasonably* understand it to be so given." *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 255 (Bankr. S.D.N.Y. 2005) (emphasis in original) (citations omitted). As one court has explained:

> To determine if a particular communication is confidential and protected by the attorney client privilege, the privilege holder must prove the communication was (1) intended to remain confidential *and* (2) under the circumstances, was *reasonably* expected and understood to be confidential.

Bogle v. McClure, 332 F.3d 1347, 1358 (11th Cir. 2003) (quoting *United States v. Bell*, 776 F2d 965, 971 (11th Cir. 1985)).

This standard, adopted by other courts around the country, is consistent with Maine's

privilege law. *See* M.R. Evid. 502(a)(5) (explaining that a communication is "confidential" if it is "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"); and Field & Murray, *Maine Evidence* § 502.4 at 219 (6th ed. 2007) ("Ordinarily, the known presence of a third person not reasonably necessary for the transmission of the communication negates" a client's intent that a communication be confidential.)

When evaluating whether employee emails sent by or stored on employer-issued computer systems are privileged, those courts that have been faced with the question presented here tend to begin by looking to "the analogous question of the employee's expectation of privacy" in order to better understand whether such communications are appropriately deemed confidential.[7] *In re Asia Global*, 322 B.R. at 256.

Generally, "[a]n employee's expectation of privacy in his office, desk and files 'may be reduced by virtue of actual office practices or procedures, or by legitimate regulation.'" *Id.* (quoting *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987)). Similarly, an employer's policies regarding computer and/or email use can impact and potentially diminish an employee's expectation that files stored on his or her work-issued computer or sent over an employer-issued email account are private. *Id.* Therefore, when called upon to measure an employee's expectation of privacy in computer files and emails, courts that have confronted the issue

[7] In doing so, however, many courts and commentators have observed that, while cases analyzing an "employee's expectation of personal privacy when using an employer's computer system," are helpful, they "should not be considered equivalent to a determination of privilege confidentiality. Privacy seems to be a more limited concept and narrower in its relation to confidentiality than what the attorney-client privilege requires of confidentiality" John Gergacz, *Employees' Use of Employer Computers to Communicate with Their Own Attorneys and the Attorney-Client Privilege*, supra at 275. *See also Curto v. Med. World Comm., Inc.*, 2006 U.S. Dist. LEXIS 29387 at * 15-16 (E.D.N.Y. May 15, 2006).

typically consider four factors:

> (1) does the corporation maintain a policy banning personal or other objectionable use, (2) does the company monitor the use of the employee's computer or email; (3) do third parties have a right of access to the computer or emails; and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?

Id. at 257.

A federal bankruptcy court established this four-factor test in *Asia Global*, one of the seminal cases addressing the question of email communications and the attorney client privilege. In that case, "executives used their employer's e-mail system to communicate with their personal attorney concerning actual or potential litigation with the employer, the owner of the email system." *Scott v. Beth Israel Med. Ctr.*, 847 N.Y.S.2d 436, 441 (N.Y.Sup. Ct. 2007)(discussing *Asia Global*). The issue before the court was whether those emails were protected by the attorney client privilege. *Asia Global*, 322 B.R. at 251.

The *Asia Global* court began its analysis by noting that "[a]lthough e-mail communication, like any other form of communication, carries the risk of unauthorized disclosure, the prevailing view is that lawyers and clients may communicate confidential information through unencrypted e-mail with a reasonable expectation of confidentiality and privacy." *Id.* at 256 (citations omitted). *See also* Me. Prof. Ethics Comm'n Op. No. 195 (June 30, 2008). Accordingly, the court held that "while disagreement exists, the transmission of a privileged communication through unencrypted e-mail does not, without more, destroy the privilege." *Asia Global*, 322 B.R. at 256.

However, consistent with the general principles of privilege law, the court also recognized that "the question of privilege comes down to whether the intent to communicate in confidence was objectively reasonable." *Id.* at 257. The court further allowed as how the existence of an office policy permitting employer-monitoring of emails or other stored data

would diminish an employee's expectation of privacy. In analyzing the Asia Global executives' claims that their email communications were private and confidential, the court ultimately concluded that the employer had failed to establish the existence of a company policy that diminished the executives' expectation of privacy. According to the court, although the employer had sufficiently demonstrated that it had access to the email communications stored on its server, the evidence regarding "the existence or notice of corporate policies banning certain uses or monitoring employee emails" was "equivocal." *Id.* at 259. In light of the possibility that such a policy did not exist or that the executives were unaware of it, the court in *Asia Global* could not conclude as a matter of law that the executives' expectation of privacy was unreasonable. *Id.* at 261. At its heart, the court's analysis makes clear that "confidentiality" is fact-sensitive. *Id.* at 259 ("the objective reasonableness of that intent [to communicate in confidence] will depend on the company's e-mail policies regarding use and monitoring, its access to the e-mail system, and the notice provided to the employees.")

Since the *Asia Global* decision, a number of courts around the country have adopted the four-part test or employed similar reasoning when determining whether communications between an employee-client and his attorney are privileged. *See e.g. Kaufman v. SunGuard Invest. Sys.*, 2006 U.S. Dist. LEXIS 28149 (D.N.J. 2006); *Scott,* 847 N.Y.S.2d 436; *Long v. Marubeni*, 2006 U.S. Dist. LEXIS 76594 (S.D.N.Y. 2006). *See also Sims v. Lakeside School*, 2007 U.S. Dist. LEXIS 69568 (W.D.W.A. Sept. 20, 2007). The test has also been discussed and, in some cases, adopted in cases involving the analogous marital privilege and the confidentiality of emails between spouses sent or stored on employer-owned computer systems. *See e.g. Sprenger v. Rector & Bd. of Visitors of Va. Tech*, 2008 U.S. Dist. LEXIS 47115 (W.D.V.A. June 17, 2008); *United States v. Etkin*, 2008 U.S. Dist. LEXIS 12834 (noting that "[t]here can be no confidential communication where spouses are on actual or constructive notice that their

communications may be overheard, read or otherwise monitored by third parties"). While there is a split of authority around the country as to whether and when such attorney-client communications are privileged, it is clear that determinations regarding expectations of privacy and confidentiality are fact-specific and must be made on a case-by-case basis.

Defendants do not dispute that FMI's Computer Policy was in place when the Verrill Dana opinion was received and downloaded by Mr. Subilia or that he had notice of it. In addition, unlike the computer policy in *Asia Global*, the FMI policy was clear and unequivocal. Instead, Defendants argue that the existence of the policy does not affect the confidentiality of the legal opinion. According to Defendants, although FMI instituted the policy, it did not enforce it and, as a result, Mr. Subilia had a reasonable expectation that his communications with his personal attorney were confidential and privileged, notwithstanding the policy.

An employer's enforcement of its computer policy is a factor that courts have considered when determining whether an employee has a reasonable expectation of privacy. *See e.g. Curto*, 2006 U.S. Dist. LEXIS 29387. Although this court agrees with Defendants that a failure to enforce a computer policy may result in an employee developing a "false sense of security" in emails or computer files, the court concludes that lack of enforcement is not a dispositive issue under the particular facts of this case.

First, the court notes that "[t]he burden of showing that a communication is within the privilege rests on the party asserting the privilege." Field & Murray, *Maine Evidence* § 502.4 at 219 (6th ed. 2007). *See also Asia Global*, 322 B.R. at 255. Therefore, it is Mr. Subilia's burden to demonstrate that the legal opinion was indeed confidential and subject to the privilege. In order to do so, Mr. Subilia bore the burden of demonstrating both that he intended the opinion to remain confidential and that any such intent on his part was reasonable under the circumstances.

Mr. Subilia did not testify at the motion hearing in this matter, other than by deposition, and did not offer any other evidence demonstrating his own subjective intent. Moreover, although he was asked about the legal opinion, the FMI computer policy and his awareness of the policy at his deposition, he asserted his Fifth Amendment right not to testify and refused to answer any of those questions. *See* Subilia Depo. at pp. 13-27. Although he was of course entitled to exercise his right not testify, under the Maine Rules of Evidence the court may permissibly infer from his assertion of that right that Mr. Subilia was aware that the opinion was saved on his FMI computer, was aware of the computer policy and understood that he had no expectation that the opinion saved on his FMI computer was private or confidential. *See* M.R. Evid. 513(a).

Although an intent that the opinion remain confidential might be inferred from the fact that each page was stamped "ATTORNEY CLIENT PRIVILEGE CONFIDENTIAL WORK PRODUCT," the existence of FMI's computer policy, Mr. Subilia's unique involvement with the policy and his role at FMI substantially undermine the reasonableness of any expectation that communication of the opinion would be private. Mr. Subilia was not simply an entry-level employee who was informed of a company computer policy at the time of hire and who then never had occasion to consider the policy again. He was both the President of the company and one of the FMI officials who played a crucial role not only in enacting the policy but also in training FMI's employees on the meaning and impact of it. In fact, Attorney Beedy testified that it was Mr. Subilia himself who stressed the need for FMI employees to understand the meaning and significance of the "No Expectation of Privacy" clause contained in the policy.

Further, although Mr. Subilia argues that FMI failed to enforce the policy and therefore, it did not mitigate or nullify his expectation of privacy, the evidence demonstrates that FMI,

acting through Mr. Subilia, had in fact enforced the policy. According to Attorney Beedy's testimony, Mr. Subilia authorized the review of an employee's computer and/or email at least once and as many as three times since the policy's inception. At least one of those instances apparently involved an allegation that the employee had been viewing pornography on an FMI-issued computer. While the court recognizes that the Computer Policy was not enforced frequently over the seven or so years since its inception, it was in fact enforced by none other than Mr. Subilia himself.

In light of Mr. Subilia's failure to sufficiently demonstrate a subjective intent on his part that the opinion not be disclosed to third persons, the court concludes that he has failed to meet his burden of proving that the opinion was confidential and subject to the attorney-client privilege. Moreover, even if such an intent had been adequately established, Mr. Subilia's involvement in the enactment and enforcement of the policy, his written acknowledgement that he had read and agreed to abide by the policy and his enforcement of it, though infrequent, lead the court to conclude that such an intent was not objectively reasonable.

(b) Waiver of Attorney-Client Privilege

Because the court concludes that neither the communication of the Verrill Dana legal opinion, nor the saving of it on the hard drive of the FMI laptop was confidential and, thus, was not protected by the attorney-client privilege, the court does not reach the question of waiver.

2. Motion to Disqualify Counsel

In light of the fact that the court has concluded that the opinion was not confidential or privileged it must also conclude that the motion to disqualify FMI's counsel cannot be granted.

With all of that said, the court would like to address the manner in which the issue of the Attorney-Client privilege was presented to this court — specifically, the decision by plaintiff's counsel to include information and quotes from the legal opinion in the complaint even though the

outcome of the confidentiality issue was not yet certain and in spite of the importance of the privilege that was at stake. Although the court has concluded that the opinion was not a privileged communication, its inclusion in the court record was not necessary to sustain the allegations of the complaint. Rather, its inclusion appears more to be an unnecessary act of brinksmanship regarding traditionally guarded communications in a highly revered relationship.

The Verrill Dana opinion was clearly and unequivocally an attorney-client communication. However, this court was only able to determine that it was not confidential and privileged after carefully weighing the credible facts presented at the motion hearing and after analyzing the issues in an area of the law that is not yet fully settled in the State of Maine. Quoting the opinion in the complaint, as FMI's counsel did, foreclosed any opportunity for the court to consider those issues in a more discrete way to protect against the possibility that the opinion was privileged — such as in a motion in limine. As a result, Mr. Subilia was compelled under the circumstances to bring a motion after the fact to strike it from a record that is accessible to the public.

DECISION

Based on the foregoing and pursuant to M.R. Civ. P. 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

Defendant's Motion to Strike and to Disqualify is DENIED.

Dated: October 27, 2008

Thomas E. Humphrey
Chief Justice, Superior Court

STATE OF MAINE
SAGADAHOC, SS.

BUSINESS & CONSUMER COURT
LOCATION: WEST BATH
DOCKET NO.: BCD-WB-CV-07-33

FIBER MATERIALS, INC.,

Plaintiff

v.

ORDER CORRECTING CAPTION OF PRIOR ORDER ON MOTION TO STRIKE AND DISQUALIFY

MAURICE SUBILIA, ET AL,

Defendants

The word "Plaintiff's" in the caption of the court's "Order on Plaintiff's Motion To Strike and Disqualify", dated October 27, 2008 is a typographical error and is hereby changed to "Defendants'".

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

Dated: October 30, 2008

Thomas E. Humphrey
Chief Justice, Superior Court