

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 EXPERT OPINION

MAURICE SUBILIA, ET AL,

Defendants

This matter is before the Court on the motion of Plaintiff Fiber Materials, Inc. to strike the expert opinions of Phillip E. Johnson, Esq. offered in support of Defendants' pending Motion to Strike and Disqualify Counsel and to assist the court in its role as the finder of facts relevant to that pending motion.¹

Attorney Johnson's opinions are set forth in his affidavit, dated January 3, 2008. See Defendants' Reply to Plaintiff's Opposition to Defendants' Motion to Strike and Disqualify Counsel, Exh. A. The affidavit also includes a recitation of his extensive knowledge, experience, training and education in legal ethics and professional responsibility, a summary of information and material provided to him by Defendants' counsel, and, based on his review of that information and material, his understanding of the facts relevant to issues generated by Defendants' Motion to Strike and Disqualify Counsel.

After a review of the submissions and arguments of counsel, the court agrees with the parties that Attorney Johnson is qualified by knowledge, experience, training and education as an

¹ To be clear, Defendants' pending Motion to Strike and Disqualify Counsel is not the subject of this order. It will be the subject of a future evidentiary hearing.

expert in the field of legal ethics and professional responsibility. See M.R. Evid. 702. However, the court finds that most of the opinions expressed in his affidavit are “impermissible legal conclusions rather than permissible factual opinions.” *Burkhart v. Washington Metropolitan Area Transit Authority*, 112 F.3d 1207, 1212-13 (D.C. Cir. 1997); *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 99-101 (1st Cir. 1997).² Further, they are not objectionable simply because they may embrace “an ultimate issue to be decided by the trier of fact”, M.R. Evid. 704, but because they tell the court, as fact finder, “what result to reach.” *Burkhart*, 112 F.3d at 1212.³

² Among the opinions expressed by Attorney Johnson are the following:

1. Defendant Maurice Subilia did not waive the attorney-client privilege with respect to the legal memorandum at issue here, did not intend to waive that privilege and never authorized the disclosure of the memorandum. *Id.* at 4-5.
2. Under the circumstances, Attorney Beedy never should have read the memorandum or passed it on to her superiors, and her actions breached the professional standard of practice and ethical conduct applicable to Maine attorneys. *Id.* at 5.
3. Subilia’s signing of Plaintiff’s e-mail and computer use policy did not constitute a waiver of the attorney-client privilege, and that policy is contradictory and sends mixed messages regarding expectations of privacy. *Id.* at 6-7.
4. Subilia had a reasonable expectation of privacy with respect to personal communications and personal information on his employer-owned computer, and could reasonably expect that there would be no intrusion into his confidential attorney-client communications. *Id.* at 8.

³ It is noted that not all of Attorney Johnson’s opinions are objectionable legal conclusions. A few are permissibly directed to the relevant standards of care to which an attorney should be held. For example:

1. “No reasonable attorney would review a document from an opposing party that was clearly marked ‘ATTORNEY/CLIENT PRIVILEGE WORK PRODUCT.’” *Id.* at 5.
2. “Nor would a reasonable attorney in Maine read or continue reading a document that clearly contained confidential attorney-client communications between an opposing party and his attorney. Rather, a reasonable attorney would stop reading the document once alerted to its privileged nature and notify the opposing party of its existence. A reasonable attorney would not forward such a document to his or her client without permission from the opposing party.” *Id.*
3. “[T]he attorney’s obligation to respect the opposing party’s attorney-client privilege extends beyond aspects of privacy. There are occasions where attorneys and clients must communicate in settings where there may be no expectation of absolute privacy[.] The lack of absolute privacy does not make it permissible for opposing counsel to eavesdrop on attorney-client communications *Id.* at 7

Finally, to the extent that some of those opinions are permissibly directed to the requisite standard of care for an attorney, they offer no more than what the court can and must determine when it decides Defendants' Motion to Strike and Disqualify Counsel. The court is not satisfied that they "will assist [the court, in its role as a fact finder,] to understand the evidence or to determine a fact in issue" M.R. Evid. 702.

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

Plaintiff's Motions to Strike Expert Opinion of Phillip E. Johnson, Esq. is
GRANTED.

Dated: May 29, 2008



Chief Justice, Superior Court