The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

Cheryl C. Moore, M.D.

v.

Charles W. Grau, Esq., et al.

NO. 2013-CV-150

ORDER

The Plaintiff, Cheryl Moore, M.D. ("Dr. Moore"), has brought a complaint against the Defendants, Attorney Charles Grau ("Grau") and Upton & Hatfield, LLP ("Upton Hatfield"), alleging legal malpractice, breach of contract, and violation of RSA 358-A. Plaintiff filed interrogatories seeking communications between members of Upton Hatfield, and the Defendants objected on the ground of attorney-client privilege. The Plaintiff has filed a Motion to Compel the Defendants to produce 17 emails between Grau and other members of the firm. The Defendants object, again asserting that the documents are privileged.

For the following reasons, the Court finds that Defendants have made a prima facie showing that the documents they seek to withhold are privileged on the basis of attorney-client privilege; however the Court must examine the documents *in camera* to determine whether or not they are in fact privileged. Plaintiff's counsel shall file a brief memorandum providing the Court with guidance in making the determination as to what advice in the emails sought would relate to advancing the firm's interest in limiting exposure to liability and what advice in the emails sought would relate to advancing the client's interests in obtaining sound legal representation in the context of this case. The

pleading shall be filed within ten days of the Clerk's Notice of Decision.

I

A

The Motion to Compel and the Opposition were supported by affidavits and memoranda. However, given the novelty of the issue raised, after reviewing the pleadings and the relevant law, the Court ordered that an evidentiary hearing be held on the circumstances of the communications as to which privilege was claimed. (Order, September 8, 2014.) An evidentiary hearing was held on December 1, 2014. Following the hearing, the Court finds that most of the facts surrounding the communications at issue do not appear to be in serious dispute.

The Plaintiff is a physician who engaged the legal services of Attorney Grau and his firm, Upton Hatfield, to represent her in the case of Wentworth-Douglass Hospital v. Young & Novis, P.A., D.N.H. No. 10-CV-120-SM, 2012 U.S. Dist. LEXIS 90446 (D.N.H. June 29, 2012) ("WDH action"). Following the conclusion of that case, the Plaintiff initiated a malpractice action against the Defendants. As part of her malpractice action, the Plaintiff served the Defendants interrogatories, which asked the Defendants to identify and produce a wide range of communications in connection with their representation of the Plaintiff in the WDH action. (Pl.'s Ex. A.) These communications included emails and conversations to which "[a]ny member or employee of Upton & Hatfield, LLP" was a party. (Id.) While the Defendants have produced numerous documents, they have withheld certain documents listed in a privilege log served upon the Plaintiff. See (Pl.'s Ex. B.)

The Plaintiff's Motion concerns a series of emails identified in the privilege log

that range in date from August 9, 2010 to August 31, 2012. During this time, the Defendants were representing the Plaintiff in the WDH action. All but one of the emails were either sent to or received by Attorney Hilliard. (Id.) The Plaintiff has limited the scope of her Motion to 17 of these emails. (Pl.'s Mot. to Compel at 3.) The Defendants have asserted that those 17 emails are protected by the attorney-client privilege because Attorney Hilliard was acting as the in-house legal counsel for the Defendants at the time of the emails. The Plaintiff disputes the claim of attorney-client privilege.

B

As the party claiming privilege, the Defendants bore the burden of proof at the evidentiary hearing. Defendants called Attorney James Raymond ("Raymond"), who testified that he has been a member of the New Hampshire Bar since 1982 and has been a member of the Upton Hatfield firm since 1986. He is the managing partner of Upton Hatfield. Because Upton Hatfield only has 20 lawyers, he does not act as managing partner in a full-time capacity but has an active practice as a business lawyer.

He testified that he was aware that Hilliard has an extensive background in ethics and professional responsibility law. Raymond testified that Hilliard consults with and represents other law firms in the state on ethics issues. Hilliard has acted as Upton Hatfield's ethics counsel for over ten years. The firm encourages lawyers to contact Hilliard for ethical advice. Because the firm is relatively small, Hilliard maintains an active caseload as well as acting as ethics counsel for the firm. Raymond testified that Upton Hatfield sees a benefit in having in-house ethics counsel because there is no additional cost to the firm and there is an immediate access to ethics counsel. As managing partner, Raymond is familiar with Upton Hatfield's billing practices. Upton

Hatfield does not generally bill clients for advice given to its lawyers by Hilliard regarding their ethical obligations.

Raymond also testified that there was no formal process by which Hilliard became Upton Hatfield's in-house ethics counsel. No formal vote was ever taken to appoint him as in-house ethics counsel to the firm. There are no written guidelines by which Hilliard functions as in-house ethics counsel, and when the firm is engaged by a client, the firm does not make a client aware that Hilliard may advise Upton Hatfield lawyers on ethical issues. The firm has never had a dispute with a client over Hilliard's role.

Attorney Hilliard also testified during the hearing. He stated that he has been member of the New Hampshire Bar since 1976 and a member of the Upton Hatfield firm since 1980. He is a *magna cum laude* graduate of Cornell Law School where he was a member of the Cornell Law Review and the Order of the Coif. He has acted as an adjunct professor of law at the University of New Hampshire School of Law from 2004 to the present, where he has taught, amongst other things, professional responsibility in the legal setting. Moreover, he has served in a number of positions with the New Hampshire Bar Association, including as its president.

He testified that he became very familiar with the Rules of Professional Conduct when they were rewritten in the 1980s and began representing other lawyers before the New Hampshire Professional Conduct Committee. As that practice area grew, he began to function as ethics counsel for the firm. He has acted as ethics counsel for the firm since the 1980s when the firm consisted of approximately eight to nine lawyers. He testified that "it just came to be" that he became the law firm's adviser on ethical issues.

No formal appointment was ever made. He has considered himself to be the firm's "de facto" in-house ethics counsel from the 1980s through the present time, including the 2009 to 2012 period during which the firm represented Dr. Moore.

He believes that acting as ethics counsel has benefited the firm because it allows Upton Hatfield's lawyers prompt access to ethical advice. He occasionally receives calls at home. Furthermore, he testified that has spent time in Africa teaching, and while there, it was not uncommon for him to receive calls from members of the firm in the United States seeking his advice on ethics issues. He does not bill the firm's clients for time spent in responding to an ethical issue. He believes that the firm encourages Upton Hatfield lawyers to call him on ethical issues. He has contact with other lawyers in New Hampshire who perform a similar function at other New Hampshire firms. Based on his experience, it would be atypical for a New Hampshire firm to formally designate a lawyer as the ethical adviser to the firm.

The Upton Hatfield billing records relating to Dr. Moore show two time entries for time billed by Hilliard; one on December 17, 2009 and one on May 28, 2010. Hilliard testified that he had a vague recollection that he was consulted on the case by Grau about theories of cause of action. However, he added that he reviewed the privilege log and testified that the 17 documents sought by the Plaintiff relate to ethical advice, and not to advice on the case. At the time he gave the advice which is the subject of the dispute, he considered the Upton Hatfield lawyers handling Dr. Moore's case, Grau and Attorney Lisa Hall ("Hall"), to be his clients.

Dr. Moore was also called as a witness by the defendants. She testified that she had retained the Upton Hatfield firm and believed that she would be represented by

Grau. She was never advised that Hilliard would be acting as ethics counsel but was told that Hilliard was working on her case. She regularly received bills from Upton Hatfield and does not recall Grau ever saying that he needed to consult with ethics counsel.

Finally, Grau testified that he has been a New Hampshire attorney since 1983 and has practiced at Upton Hatfield since 1986. He currently practices in insurance law, insurance and commercial litigation, and public sector labor relations. Grau stated that Hilliard has served as ethics counsel for as long as he has been with the firm. Grau consulted with Hilliard, in Hilliard's capacity as ethics counsel, during Grau's representation of Dr. Moore and has consulted with him on other occasions regarding ethical issues. All of the documents which are being withheld on ethical grounds relate to his communications with Hilliard regarding ethical issues in the representation of Dr. Moore. He considers the communications with Hilliard which are the subject of the dispute to be confidential.

II

New Hampshire Rule of Evidence 502 restates the common-law attorney-client privilege. "The 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) (citation and quotation omitted). The classic explication of the privilege is: "Where legal advice . . . 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 . . . unless the protection is waived by the client or his legal representatives." Id. The purpose of the privilege has been

articulated by the United States Supreme Court: "[T]he privilege exists 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." Upjohn Co. v. United States, 449 U.S. 383, 390 (1981). "The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." Id. at 389.

If a corporation employs an attorney to serve as in-house counsel, "the corporation is the attorney's client, but confidential communications between the in-house counsel and the corporation's employees that are intended to help counsel to provide the corporation with sound legal advice are protected by the attorney client privilege." RFF Family Partnership, LP v. Burns & Levinson, LLP, 991 N.E.2d 1066, 1071 (Mass. 2013) (citing Upjohn Co., 449 U.S. at 391–92). In a similar context, when a governmental entity hires an attorney to serve as its in-house counsel, the entity itself is the client, but any confidential communications between counsel and the entity's employees, undertaken for the purpose of obtaining legal advice, is protected by the privilege. RFF Family Partnership, LP, 991 N.E.2d at 1071.

Standing in isolation, a communication by a lawyer to another lawyer about a legal issue would seem to fall squarely within the context of attorney-client privilege. St. Simons Waterfront, LLC v. Hunter, MacLean, Exley and Dunn, PC, 746 S.E.2d 98, 103–04 (2013). However, traditionally, many courts have not accepted a claim of privilege in these circumstances. Some courts have adopted the so-called "fiduciary exception" to the attorney-client privilege. This exception derives from 19th-century English trust law and provides that when a trustee obtains legal advice to guide the administration of the trust

and not for the trustee's own defense in litigation, the beneficiaries are entitled to production of documents related to that advice. Such courts reason that the legal advice is sought for the beneficiary's benefit, and is obtained at the beneficiary's expense by using trust funds to pay the attorney's fees. United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2321 (2011). A number of federal courts have taken this view. Crimson Trace Corp. v. Davis Wright Tremaine LLP, 326 P.3d 1181, 1193 (Or. 2014) (collecting cases).

Other courts have found a so-called "current client" exception to the attorney-client privilege. Such courts reason that when a law firm chooses to represent itself, it runs the risk that representation may create an impermissible conflict of interest with one or more of its current clients. Again, this rule seems to have been followed by some federal courts and some state courts in the past. See RFF Family Partnership, LP, 991 N.E.2d at 1076. As the Massachusetts Supreme Judicial Court in RFF Family Partnership, LP noted, "the rationales used by courts in reaching this conclusion are varied" but the underlying theme seems to be that, where a current outside client threatens legal action against a law firm and the attorneys in the firm seek legal advice from the law firm's in-house counsel, "the law firm is both the attorney for the outside client and itself a client, and these two 'clients' have conflicting interests." Id. at 1077; see also Crimson Trace Corp., 326 P.3d at 1192. The Massachusetts Supreme Court noted in 2013 in RFF Family Partnership LP, that "the majority of courts that have been confronted with the issue . . . have invoked some variation of the current client exception and ruled that, where a law firm seeks legal advice from its in-house counsel in response to an adverse claim brought by a current outside client, the communications are not protected from disclosure to the outside client." 991 N.E.2d at 1076–77.

The New Hampshire Supreme Court has never spoken on this issue. However, cases cited by both parties, decided in 2013 and 2014, suggest that the law in this area is developing rapidly, and that the traditional rule would not likely be accepted by the New Hampshire Supreme Court. See, e.g., RFF Family Partnership, LP, 991 N.E.2d at 1076.

III

Law firms face a vast array of increasingly complex regulations where the line between conduct that is permissible and impermissible is often unclear. See Elizabeth Chambliss, The Scope of In-Firm Privilege, 80 NOTRE DAME L. REV. 1721, 1756 (2005) (citing Upjohn Co., 449 U.S. at 392). Moreover, the rules of professional conduct require attorneys to make reasonable efforts to ensure that their law firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the professional conduct Rules. See N.H. R. Prof. Conduct 5.1. When a firm takes this course of action, "the attorney-client privilege serves the same purpose as it does for corporations or governmental entities: it guarantees the confidentiality necessary to ensure that the firm's partners, associates, and staff employees provide the information needed to obtain sound legal advice." RFF Family Partnership, LP, 991 N.E.2d at 1072. "[B]road protection of communications with law firm in-house counsel, including communication about the representation of a current client of the firm . . . would encourage firm members to seek early advice about their duties to clients and to correct mistakes or lapses, if possible, to alleviate harm." Id. (citation omitted).

Within the last 18 months, both the Massachusetts Supreme Judicial Court and the Georgia Supreme Court have held that at least in some circumstances, the attorney-client privilege applies to communications between a law firm's attorney and its in-

house counsel regarding a client's potential claims against the firm. St. Simons Waterfront, LLC, 746 S.E.2d at 108; RFF Family Partnership, LP, 991 N.E.2d at 1080. Both courts have articulated significant concerns which would result from such application of the rule that an attorney threatened with a malpractice claim could not seek legal advice from an in-house attorney. As the RFF Family Partnership, LP court noted:

> If this were the law, an attorney threatened with a malpractice claim would have four practical alternatives: first, he could withdraw from the representation without first consulting with better informed and more dispassionate in house ethics counsel; second, he could advise the client of the conflict without first consulting with in-house counsel, and seek the client's consent to confer with in-house counsel; third, he could confer with in-house counsel without first having withdrawn from the representation or obtaining the client's informed consent, recognizing that the communications would not be protected from disclosure to the client; or fourth, he could retain an attorney in another law firm to discuss how best to proceed.

991 N.E.2d at 1073–74.

The court reasoned that such a regime would not serve the interest of justice, or clients:

> The first alternative poses the risk that a law firm, without the benefit of expert advice, may unnecessarily withdraw from a representation where the apparent conflict was illusory or reparable, or withdraw without adequately protecting the client's interests. The second alternative poses the risk that the law firm may advise the client about the conflict before itself obtaining the advice that would enable it better to understand the conflict. The third alternative poses the risk that the information provided to in-house counsel will be withheld or "sugar-coated" because of the risk of disclosure to the client, and the advice received will suffer from the lack of candor. The fourth alternative, apart from the additional cost to the law firm, may delay the receipt of the ethical advice because new counsel will need to be retained and the new counsel's law firm will need to complete its own conflicts check. None of these alternatives best serve the interests of the client.

Id. at 1074 (citation omitted).

The Court is persuaded that recognition of an in-house attorney client privilege does not create a conflict of interest. In recognizing the privilege, the Georgia Supreme Court rejected a claim that privilege does not exist because a conflict would result under the Georgia Rules of Professional Conduct. The Georgia Rules provide that "nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty." St. Simons Waterfront, LLC, 746 S.E.2d at 106. Similarly, the New Hampshire Rules of Professional Conduct provide that "[t]he purpose of the rules can be subverted when the rules are invoked by opposing parties as procedural weapons" and that "[v]iolation of a Rule should not in itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached." N.H. R. Prof. Conduct: Statement of Purpose ¶¶ 1, 3.

In RFF Family Partnership, LP, (supra) the Massachusetts Supreme Judicial Court rejected the claim that a conflict exists at all when an attorney seeks advice on his own behalf:

> The rule of imputation safeguards the duty of loyalty by prohibiting a law firm from representing two clients who are adverse to each other, where loyalty to one client may risk disloyalty to the other client. A law firm can avoid conflicting loyalties by refusing to represent an adverse outside client. But where a law firm is already representing a client and that client threatens to bring a claim against the law firm, the potential conflict between the law firm's loyalty to the client and its loyalty to itself cannot be avoided and must instead be addressed, either by resolving the conflict satisfactorily to the client or withdrawing from the representation. However, a law firm is not disloyal to a client by seeking legal advice to determine how best to address the potential conflict, regardless of whether the legal advice is given by in-house counsel or outside counsel. Applying the rule of imputation in such circumstances therefore would not avoid conflicting loyalties or prevent disloyalty; it would simply prevent or delay a law firm from seeking the expertise and advice of in-house counsel in

deciding what to do when there is a potential conflict.

RFF Family Partnership, LP, 991 N.E.2d at 1078–79 (citation omitted).

An in-house privilege was recognized by the Oregon Supreme Court in Crimson Trace Corp. v. Davis Wright Tremaine LLP, and the California Second District Court of Appeals in Palmer v. Superior Court, No. B255182, 2014 WL 6662053 (Cal. Ct. App. 2d Nov. 25, 2014). Both cases involved a statutory attorney-client privilege, and both the Oregon and California courts held that no fiduciary or current client exception to the statutory attorney-client privilege existed. Crimson Trace Corp., 326 P.3d at 1195; Palmer, 2014 WL 6662053, at *13. Both courts emphasized the fact that the privilege they construed was a statutory privilege, and it distinguished the federal cases which, like New Hampshire, Georgia, and Massachusetts, apply a common-law attorney-client privilege:

> As the Crimson Trace court found in regard to Oregon law, in California it is well-settled that "the attorney-client privilege is a legislative creation, which courts have no power to limit by recognizing implied exceptions."

Palmer, 2014WL 6662053, at *8.

But significantly, both courts also rejected, as did the Massachusetts and Georgia courts, the claim that the privilege could not exist because a conflict exists whenever an attorney seeks advice from another attorney on behalf of him or herself. Crimson Trace Corp., 326 P.3d at 1195; Palmer, 2014 WL 6662053, at *10. The Oregon and California courts reasoned that rules of professional conduct may require or prohibit certain conduct and the breach of those rules may lead to disciplinary proceedings, but that has no bearing on the interpretation or application of a rule of evidence that clearly applies. Id. Moreover, as the California Court of Appeals noted:

> As a practical matter, it is not a foregone conclusion that an attorney's consultation with in-house counsel in regard to a client dispute will always be adverse to the client. A law firm is not necessarily disloyal to a client by 'seeking legal advice to determine how best to address the potential conflict, regardless of whether the legal advice is given by in-house counsel or outside counsel.' The attorney's and client's interests are likely to dovetail insofar as the attorney seeks to resolve the dispute to the client's satisfaction or determine through consultation with counsel what his or her ethical and professional responsibilities are in order to comply with them.

Palmer, 2014 WL 6662053, at *10 (citation omitted).

Recognition of an in-house attorney-client privilege encourages lawyers to seek advice promptly about how to correct the error, so that there is some chance of allowing a mistake to be rectified before the client is irreparably damaged. RFF Family Partnership, LP, 991 N.E.2d at 1072. Moreover, as the Massachusetts Supreme Judicial Court noted, "[i]t may not always be clear when the interests of the client and the law firm have become so adverse that withdrawal is required in the absence of client waiver, and even when it is clear that withdrawal is necessary, a law firm may need to consider how to minimize the potential adverse consequences of withdrawal to the client . . . ." Id. at 1073.

Similarly, both the Massachusetts and Georgia courts, which dealt with common-law privileges akin to New Hampshire's held that the so-called "fiduciary exception," does not bar a claim of privilege. These courts reasoned that the "fiduciary exception" doctrine should not apply when a law firm seeks advice about its own conduct, because the communications are not for the benefit of the client, but for the firm. Id. at 1075; see also St. Simons Waterfront, LLC, 746 S.E.2d at 108 ("Attorneys within a firm seeking advice to defend against threatened litigation by a current client clearly do not share a mutuality of interest with that client. Therefore, the fiduciary exception does not apply .

. . .”). The Court finds these cases persuasive, and finds that the in-house privilege as part of the common law of New Hampshire.

IV

The Court’s task is to determine the parameters of the attorney-client privilege in the circumstances of the instant case, where there is no New Hampshire decision directly on point. Plaintiff does not dispute that an attorney-client privilege may exist between a law firm and its in-house counsel, but argues that the circumstances under which such a claim of privilege may be made is bounded by the criteria used by the Massachusetts Supreme Judicial Court in RFF Family Partnership, LP.

In RFF Family Partnership, LP, the Massachusetts Supreme Judicial Court articulated a four-part test by which a court can ascertain whether confidential communications between law firm attorneys and a law firm’s in-house counsel concerning a malpractice claim are privileged from disclosure to the client. Such communications are generally privileged, provided that:

> (1) the law firm has designated an attorney or attorneys within the firm to represent the firm as in-house counsel, (2) the in-house counsel has not performed any work on the client matter at issue or a substantially related matter, (3) the time spent by the attorneys in these communications with in-house counsel is not billed to a client, and (4) the communications are made in confidence and kept confidential.

Id. at 1068.

Plaintiff argues that since the requirements of RFF Family Partnership, LP have not been satisfied by the Defendants, the privilege should not apply. She points out that Hilliard was never formally designated to act as in-house counsel, and that there are two time entries of December 17, 2009 and May 28, 2010 that established that he performed some amount of work on the file, which was billed to the client. Plaintiff does not claim

that the billing for this work is an issue that is the subject of the malpractice claim, but argues that failure to comply with the requisites of RFF Family Partnership, LP defeats the privilege claim.

The Massachusetts Supreme Judicial Court did not explain in detail the reasoning behind its requirement that four conditions be met before the privilege will be applicable. But it is obvious that the rationale behind the court's decision is that substantive advice, given about a case which may be damaging to a firm if a claim is made against it, should not be cloaked by attorney-client privilege. The case before the Massachusetts court involved Burns and Levinson, LLP, which describes itself on its website as a 120 lawyer firm with offices in Providence, Rhode Island New York City, and other cities in New England, as well as a wholly-owned subsidiary office in Québec. Some of the other cases which have decided this issue in the last 18 months have also involved larger firms. See, e.g., Palmer, 2014 WL 6662053 (defendant claimed privilege with respect to advice given to a member of the firm in Los Angeles by a partner in the firm's Boston office who was the firm's general counsel, and a partner in the firm's Chicago office who was the firm's claims counsel); Crimson Trace Corp., 326 P.3d at 1184 (defendant law firm sought to protect advice provided to lawyers involved in the case with the firm's Quality Assurance Committee, described as "a small group of . . . lawyers that had been designated by the firm as in-house counsel").

The vast majority of New Hampshire law firms are made up of less than three lawyers; few firms, if any, are large enough to have full-time in-house counsel.[1] However, the benefits of recognition of an attorney-client privilege between lawyers and

[1] Indeed, according to the New Hampshire Bar Association statistics as of May 20, 2014, roughly 60% of

other lawyers in their firm from whom they seek advice plainly should be available to New Hampshire lawyers and their clients.

The Georgia Supreme Court has held that the attorney-client privilege applies to communications between a law firm's attorneys and its in-house counsel regarding a client's potential claims against the firm when the following circumstances exist:

> (1) There is a genuine attorney-client relationship between the firm's lawyers and in-house counsel; (2) the communications in question were intended to advance the firm's interests in limiting exposure to liability rather than the client's interests in obtaining sound legal representation; (3) the communications were conducted and maintained in confidence, and (4) no exception to the privilege applies.

St. Simons Waterfront, LLC, 746 S.E.2d at 108.

The court also noted that "[t]he less formality associated with the position, and the more the in-house counsel is involved in the representation of firm clients, the greater will be the significance of other factors, such as billing and record-keeping, in assessing the existence of an attorney-client relationship between in-house counsel and the firm." Id. at 105.

The Court believes that the flexible approach of St. Simons Waterfront, LLC is more workable considering the reality of how New Hampshire law firms function than the RFF Family Partnership, LP approach, which is applicable to very large, multi-office firms with full-time general and/or ethics counsel. While the bright line approach of the RFF Family Partnership, LP would be easier for a court to apply, it would, as a practical matter, result in in-house attorney-client privilege being unavailable to New Hampshire lawyers. The purposes of the RFF Family Partnership, LP rules can be satisfied by applying the criteria of St. Simons Waterfront, LLC to the case before the Court.

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lawyers in the State of New Hampshire are members of firms that have less than five attorneys in the firm.

Here, there is at least a prima facie showing by the defendant law firm that an attorney-client relationship existed between the Grau and Hilliard. The Court finds as a fact that Hilliard functioned as de facto ethics counsel for the Upton Hatfield firm. The fact that Hilliard billed a small amount of time early in the representation should not act as a *per se* rule of disqualification, any more than the fact that Grau apparently billed his client for conversations with Hilliard, for which Hilliard did not bill. In New Hampshire practice, it is common for lawyers in small and medium-sized firms to consult with other lawyers about the facts of a case on a formal or informal basis. Where the lawyer consulted with does not bill for his time, he may not even be aware of the name of the client he was consulted about. Because he was also a senior litigator at the firm and maintained a practice of his own, it is not surprising that Hilliard might be consulted by one of his colleagues about a case.

The fact that Hilliard acted as ethics counsel but also maintained an active practice does not create a *per se* bar to a claim of privilege. However, in order for it to be privileged, the advice Hilliard gave must be advice that is within the purposes articulated by the courts in both RFF Family Partnership, LP and St. Simons Waterfront, LLC. If it is not, the privilege would simply be improperly used to shield relevant and admissible evidence from a plaintiff. (Pl.'s Reply to Obj. to Motion to Compel ¶ 5.)

Defendants have filed the emails that they claim are privileged under seal, and have invited the court to review them. Given the absence of a bright line rule, Court believes that in order to determine whether or not Defendant's privilege claim may be sustained, the Court must review the documents *in camera* and determine whether the

communications were "intended to advance the firm's interest in limiting exposure to liability rather than a client's interests in obtaining sound legal representation." St. Simons Waterfront, LLC, 746 S.E.2d at 108.

In all litigation, counsel for the parties have a better grasp of the details of the case than a court reviewing a motion. Therefore, in order to facilitate the review Plaintiff's counsel shall provide the Court with a brief description of what the legal issues are in the case, and what subjects the Plaintiff believes would be the subject of advice intended to advance the client's interest in sound legal representation and what advice would be intended to advance the firm's interest in limiting legal exposure in the circumstances of this case. The pleading shall be filed within ten days of the date of the Clerk's Notice of Decision.

SO ORDERED.

12/15/14
DATE

s/Richard B. McNamara
Richard B. McNamara,
Presiding Justice

RBM/