SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

TRUDY FENSTER **Plaintiff,** **vs.** **REGINA DECHABERT, MICHAEL DECHABERT, NICHOLAS DECHABERT, JACQUELINE DECHABERT, KYE WALKER individually, THE WALKER LEGAL GROUP, LLC, KYE WALKER, P.C., and COSPEEDYCA, LLC** **Defendants.**	**CASE NO. SX-16-CV-343**

MEMORANDUM OPINION

Pending before the Court are the November 22, 2016, Motion to Quash filed by Defendants Regina deChabert, Michael deChabert, Nicholas deChabert, and Jacqueline deChabert and Plaintiff's January 11, 2017, Motion to Disqualify Owner Defendants' Attorney. For the following reasons, Plaintiff's motion will be denied, while the deChaberts' motion will be granted in part and denied in part.

RELEVANT FACTUAL & PROCEDURAL HISTORY

This action involves a property dispute between Plaintiff Trudy Fenster, Defendants Regina deChabert, Michael deChabert, Nicholas deChabert, and Jacqueline deChabert, (collectively "the deChaberts"),[1] Defendants Kye Walker, the Walker Legal Group, LLC ("WLG"), Kye Walker, P.C. (collectively "Walker Defendants"), and Defendant Cospeedyca, LLC, over property located at 16AA Church Street, Christiansted, St. Croix ("the Property"). A

[1] In prior decisions, this Court has referred to the deChaberts collectively as the "Owner Defendants" or "Owners."

full description of the facts can be found in previous Opinions issued by the Court.[2] The Court briefly recounts the following relevant facts:

When Fenster entered into a contract with the deChaberts on March 25, 2016,[3] to purchase the Property, she was aware that the original lease agreement with WLG, a tenant, granted WLG the right of first refusal to purchase the Property subject to certain conditions, though Fenster challenges the enforceability of that provision.[4] Before her closing could occur, Fenster learned that WLG intended to exercise its right to purchase the Property; and, the deChaberts moved forward with selling the Property to WLG rather than Fenster.[5] As a result, Fenster filed a Complaint against Walker, WLG, and the deChaberts on May 23, 2016, and on June 2, 2016, Fenster filed an Emergency Application for Temporary Restraining Order and Preliminary Injunction.

Following the recusal of other judges, on July 13, 2016, the Court issued a Memorandum Opinion and Order temporarily enjoining the deChaberts from selling, and WLG and Walker from purchasing, the Property. By this time, however, the Property had already been conveyed by the deChaberts to WLG's assignee, Kye Walker, P.C., on July 8, 2016, a fact of which Defendants failed to inform the Court. As a result, the Court amended the TRO to prohibit Walker, WLG, and their assignees, including Kye Walker, P.C., from alienating or placing any encumbrances, including, *inter alia*, liens, mortgages, and agreements, upon, and making any substantial alterations or improvements to, the Property until a preliminary injunction hearing could be held.[6]

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[2] *Fenster v. Dechabert*, 65 V.I. 20 (Super. Ct. August 8, 2016); *Fenster v. Dechabert*, 2016 V.I. LEXIS 90 (Super. Ct. July 13, 2016).
[3] First Am. Compl. ¶¶ 10-28.
[4] First Am. Compl. ¶¶ 34-39.
[5] First Am. Compl. ¶¶ 43-44.
[6] July 20, 2016, Am. TRO and Order.

The Court was then informed by the Walker Defendants that Kye Walker, P.C. had already conveyed the Property to Cospeedyca, LLC.[7]

An evidentiary hearing on Fenster's request for injunctive relief has been scheduled and continued with the consent of the parties on numerous occasions. Presently, the preliminary injunction hearing is scheduled for November 16, 2017.[8]

On November 7, 2016, Fenster served the deChaberts' attorney, Donovan Hamm ("Hamm"), with a *subpoena duces tecum*, commanding Hamm to produce the following:

> 1. Any documents, emails and billings related to any legal advice given to the DeChabert [sic] Defendants in this matter as to (1) signing the Purchase Agreement with Trudy Fenster, (2) the first Right of Refusal/option of Walker Defendants, (3) whether the Purchase Agreement with Trudy Fenster was enforceable, (4) the effect of Walker Defendants' failure to pay rent on enforceability of option/First Right of Refusal that was given prior to the initiation of this lawsuit.[9]

After the deChaberts filed a Motion to Quash the subpoena On November 22, 2016, Fenster filed a response on December 13, 2016, and contemporaneously moved for an extension of time to file her response one day late.[10] The deChaberts filed a reply on December 23, 2016. On January 11, 2017, Fenster filed a Motion to Disqualify Owner Defendants' Attorney that the deChaberts opposed on February 10, 2017. The record reflects that Fenster did not file a reply.

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[7] The Walker Defendants claimed the sale to Cospeedyca was made in order to finance their purchase, although evidence presented by Fenster suggests the sale to Cospeedyca was contemplated before the Walker Defendants' closing.

[8] The Walker Defendants have since moved to continue the preliminary injunction hearing scheduled for November 16, 2017, due to a scheduling conflict. *See* Walker Defs.' September 8, 2017, Mot. to Continue November 16, 2017 Hearing. This motion remains pending.

[9] deChabert Defs.' Mot. to Quash, Ex. A, p. 2.

[10] Pl.'s December 13, 2016, Mot. for Extension of Time. Fenster, having shown the extension of time is sought as a result of excusable neglect, to which the deChaberts did not object, the Court will permit Fenster to file her response to the deChaberts' Motion to Quash one day late. *See* V.I. R. CIV. P. 6(b)(1); *See also* SUPER. CT. R. 10(a)(2). The Court recognizes that V.I. R. CIV. P. 6-2 sets out other filing requirements with which Fenster did not comply. *See* V.I. R. CIV. P. 6-2. However, the Court will not enforce that rule against Fenster since her Motion for Extension of Time was filed prior to the adoption of the new procedural rules. *See* V.I. R. CIV. P. 1-1(c)(2)(B).

STANDARD

I. Motion to Disqualify Counsel of Record.

"The Court is tasked with supervising the conduct of attorneys that appear before it; and has inherent power to disqualify any attorney if it finds such action is warranted."[11] "It is at the Court's discretion to determine whether disqualification is warranted."[12] "The underlying principle in considering motions to disqualify counsel is safeguarding the integrity of the court proceedings and the purpose of granting such motions is to eliminate the threat that the litigation will be tainted."[13] Although "doubts are to be resolved in favor of disqualification, the party seeking disqualification must carry a heavy burden and must meet a high standard of proof before a lawyer is disqualified."[14] "Vague and unsupported allegations are not sufficient to meet this standard."[15] "Motions to disqualify are viewed with disfavor and disqualification is considered a drastic measure which courts should hesitate to impose except when absolutely necessary."[16]

"Individual judges and magistrates [of the Superior Court] are, among other things, expected to disqualify licensed attorneys from representation if it results in an impermissible conflict of interest"[17] in violation of the Virgin Islands Rules of Professional Conduct.[18] Under

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[11] *Farrell v. Hess Oil V.I.*, 57 V.I. 50, 57 (Super. Ct. 2012) (citing *McKenzie Construction v. St. Croix Storage Corp.*, 961 F. Supp. 857, 859, 37 V.I. 105 (D.V.I. 1997)).
[12] *Id.* (citing ANNOT. MODEL R. PROF.'L CONDUCT "Preamble and Scope: Disqualification" annot. at 9 (6th ed. 2007)) (other citation omitted).
[13] *Rodriguez v. Spartan Concrete Prods., LLC*, 2017 U.S. Dist. LEXIS 62923, at *5 (D.V.I. Apr. 25, 2017) (quoting *McKenzie,* 961 F. Supp. at 859) (internal quotation marks omitted).
[14] *Farrell,* 57 V.I. at 57 (citations omitted).
[15] *Denero v. Palm Horizons Mgmt., Inc.*, 2015 U.S. Dist. LEXIS 25864, *8 (D.V.I. Mar. 4, 2015) (quoting *Cohen v. Oasin*, 844 F. Supp. 1065, 1067 (E.D. Pa. 1994)) (internal quotation marks omitted); *See Hamilton v. Dowson Holding Co.*, 2009 U.S. Dist. LEXIS 57715, at *12 (D.V.I. July 2, 2009) (stating "mere allegations of unethical conduct or evidence showing a remote possibility of a violation of the disciplinary rules will not suffice under this standard").
[16] *Denero*, at *7-8 (citing *Alexander v. Primerica Holdings, Inc.*, 822 F. Supp. 1099, 1114 (D.N.J. 1993)).
[17] *In re V.I. Bar Ass'n Comm. on the Unauthorized Practice of Law*, 59 V.I. 701, 727 (V.I. 2013); *See McKenzie v. Hess Oil V.I. Hovic*, 2013 V.I. LEXIS 101, *3 (V.I. Super. Ct. Jan. 30, 2013) ("The [Superior] Court is tasked with supervising the conduct of attorneys that appear before it and has inherent power to disqualify any attorney if it finds such action is warranted") (citing *McKenzie,* 961 F. Supp. at 859)).
[18] "Prior to February 1, 2014, Supreme Court Rule 203 provided that the ABA's Model Rules of Professional Conduct governed the conduct of members of the Virgin Islands Bar. However, effective February 1, 2014, Supreme Court

Supreme Court Rule 211.1.7, a lawyer may not represent a client "if the representation involves a concurrent conflict of interest."[19] "A concurrent conflict of interest exists if:

> (1) the representation of one client will be directly adverse to another client; or
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.[20]

However, a lawyer may represent a client despite the existence of a concurrent conflict of interest if:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (2) the representation is not prohibited by law;
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (4) each affected client gives informed consent, confirmed in writing.[21]

A lawyer is required to keep a client reasonably informed about the matter so that the client can make intelligent decisions with respect to the representation.[22]

In most circumstances, "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any of them practicing alone would be prohibited from doing so [because of a concurrent conflict of interest.]"[23] Where there is an imputation of a conflict of interest among lawyers associated in a law firm, the affected client may waive the disqualification under the conditions set forth above.[24] Additionally, where the conflict of interest "is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially

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Rule 211, which establishes the Virgin Islands Rules of Professional Conduct, governs the conduct of Virgin Islands attorneys." *In re Nevins*, 60 V.I. 800, 804 n. 1 (V.I. 2014) (citing Promulgation Order No. 2013-0001 (V.I. Dec. 23, 2013)).
[19] V.I.S.CT.R. 211.1.7(a).
[20] *Id.*
[21] V.I.S.CT.R. 211.1.7(b).
[22] V.I.S.CT.R. 211.1.4.
[23] V.I.S.CT.R. 211.1.10(a).
[24] V.I.S.CT.R. 211.1.10(c).

limiting the representation of the client by the remaining lawyers of the firm[,]" there is no imputation of a conflict of interest so as to require disqualification of other members of the prohibited lawyer's law firm.[25] Further, "[a] lawyer shall not use information relating to representation of the client to the disadvantage of the client unless the client gives informed consent,"[26] and, "[w]hile lawyers are associated in a firm," the prohibition against using this information to the disadvantage of the client applies to any and all of the lawyers of the law firm."[27]

II. Motion to Quash.

Prior to March 31, 2017, motions to quash subpoenas were governed by Super. Ct. R. 11 and, to the extent the dispute related to discovery matters, the Superior Court also applied Fed. R. Civ. P. 26 to 37 in accordance with Super Ct. R. 39.[28] The applicability of Fed. R. Civ. P. 45 to a subpoenas was unclear, as the Superior Court applied the provision in some cases,[29] but in others found the federal rule inconsistent with Super. Ct. R. 11 and, therefore, inapplicable.[30]

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[25] V.I.S.CT.R. 211.1.10(a).
[26] V.I.S.CT.R. 211.1.8(b).
[27] V.I.S.CT.R. 211.1.8(k).
[28] *Gourmet Gallery Crown Bay, Inc. v. Crown Bay Marina, L.P.*, 2016 V.I. LEXIS 195, *3 (V.I. Super. Ct. Nov. 30, 2016) ("Under Superior Court Rule 11(c), the Court may quash or modify a subpoena for production of documentary evidence if compliance would be unreasonable or oppressive"); *Id.* ("Under Superior Court Rule 39, Federal Rules of Procedure 26 to 37 govern discovery for matters before the Superior Court").
[29] *See, e.g., VI Taxi Ass'n v. West Indian Co.*, 2016 V.I. LEXIS 172, *6 (V.I. Super. Ct. Oct. 18, 2016) ("Subpoenas are governed by Superior Court Rule 11 which is supplemented by Federal Rule of Civil Procedure 45") (citing *Bertrand v. Cordiner Enters., Inc.*, 55 V.I. 247, 2011 V.I. LEXIS 62, *8(V.I. Super. Ct. 2011)).
[30] *See, e.g., Go Fast Charters LLC v. Texaco Caribbean, Inc.*, 2015 V.I. LEXIS 93, *7-10 n. 17 (V.I. Super. Ct. July 31, 2015) ("[R]econcil[ing] the procedures and requirements of SUPER. CT. R. 11 and FED. R. CIV. P. 45 . . . is not justified because the Supreme Court of the Virgin Islands overruled . . . [this] rationale") (citing *Terrell v. Coral World*, 55 V.I. 580, 590-91 & n. 12 (V.I. 2011) ("However, this Court has effectively rejected the argument that Superior Court Rule 7 can be invoked to have a federal rule 'supplement' a local rule in such a manner") (citing *Blyden v. People*, 53 V.I. 637, 659 (V.I. 2010), *aff'd sub nom., Virgin Islands v. Blyden*, 437 Fed. Appx. 127 (3d Cir. 2011)); *Gourmet Gallery*, 2016 V.I. LEXIS 195, at *12-13 (V.I. Super. Ct. Nov. 30, 2016) ("The V.I. Supreme Court has held that Federal Rule of Civil Procedure 45 is inapplicable to the Superior Court's proceedings because Superior Court Rule 11 governs service of subpoenas") (citing *Terrell*, 55 V.I. 580, 590-91). Notably, there is a split of authority as to whether a subpoena under FED. R. CIV. P. 45 is a proper device for obtaining documents from parties. *Compare Mortg. Info. Servs. v. Kitchens*, 210 F.R.D. 562, 565-66 (W.D.N.C. 2002) (holding that Rule 45 subpoenas may be used to compel documents from an opposing party) *with Hasbro, Inc. v. Serafino*, 168 F.R.D. 99, 100 (D. Mass. 1996) (holding that Rule 45 subpoenas should be limited to non-parties); *See See Joseph v. Pricesmart LLC*, 2016 V.I. LEXIS 17, *4 (V.I. Super. Ct. Feb. 29, 2016) ("FED. R. CIV. P. 45 is a vehicle to compel documents from a nonparty, whereas FED. R. CIV. P. 34 is the device to compel production from a litigant. As a result,

On April 3, 2017, the Supreme Court of the Virgin Islands adopted the Virgin Islands Rules of Civil Procedure, which went into effect on March 31, 2017.[31] The new procedural rules apply in "proceedings in any action pending on" March 31, 2017, unless doing so "would be infeasible or would work an injustice."[32] Under the new procedural rules, V.I. R. Civ. P. 45 governs subpoenas, as well as motions to quash, which largely resembles Fed. R. Civ. P. 45, save for minor changes.[33] In addition, Super. Ct. R. 11 was amended and provides, in pertinent part, that "Rule 45 of the Virgin Islands Rules of Civil Procedure shall govern issuance and compliance with subpoenas in all cases, both civil and criminal."[34]

ANALYSIS

I. Fenster's motion to disqualify the deChaberts' attorney and his law firm.

Fenster moves to disqualify the deChaberts' attorney Donovan Hamm and his law firm Hamm Eckard, LLP, claiming Hamm's representation of the deChaberts poses an actual conflict of interest that is adverse to his clients in violation of Rule 211.1.7 and Rule 211.1.10 of the Virgin

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the Court will treat Plaintiff's subpoena as a request for the production of documents under FED. R. CIV. P. 34"); FED. R. CIV. P. 34(c) ("As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection"). Similar to its federal counterpart, V.I. R. CIV. P. 45 provides that a subpoena may be issued to a "person" and does not specify whether the "person" may be a party or non-party. *Mortg. Info. Servs.*, 210 F.R.D. at 565 (discussing the use of the term "person" as opposed to "non-party" in FED. R. CIV. P. 45). And, like the corresponding federal rule, V.I. R. CIV. P. 34(c) states "[a]s provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection." V.I. R. CIV. P. 34(c); *See* FED. R. CIV. P. 34(c). Further, while SUPER. CT. R. 11, as amended in 2017, provides that subpoenas in all cases are governed by V.I. R. CIV. P. 45, it does not specify whether a subpoena is the proper vehicle for compelling documents from an opposing party. As a result, the ambiguity regarding whether Rule 45 subpoenas may be used to compel documents from an opposing party remains under the new procedural rules. The Court need not resolve the ambiguity here, since the contested *subpoena duces tecum* is directed to Hamm, who is not a party in this action. *C.f. McKinney/Pearl Rest., L.P. v. Metro. Life Ins. Co.*, 2016 U.S. Dist. LEXIS 60270, at *28 (N.D. Tex. May 6, 2016).

[31] *See In re: Adoption of the VI Rules of Civil Procedure*, Promulgation No. 2017-001, 2017 V.I. Supreme LEXIS 22 (V.I. Apr. 3, 2017).

[32] V.I. R. CIV. P. 1-1(c)(2)(B).

[33] *Compare* V.I. R. CIV. P. 45 *with* FED. R. CIV. P. 45.

[34] SUPER. CT. R. 11(a) (as amended on April 7, 2017).

Islands Rules of Professional Conduct.[35] Specifically, Fenster contends that Hamm's legal advice to the deChaberts in relation to the subject real estate transaction has been put in issue by the deChaberts, who, according to Fenster, have argued that the complained of acts and omissions by the deChaberts were a result of their reliance on Hamm's legal advice, resulting in an adverse "personal interest" for Hamm and his law in avoiding the theory that Hamm's legal advice to the deChaberts may have been erroneous.[36] In opposition, the deChaberts submit, *inter alia*, that Fenster lacks standing to seek disqualification of Hamm and his law firm because Fenster is unable to show that the alleged conflict constitutes an "ethical breach" that affects Fenster's "interest in a just and lawful determination of her claims[,]" that the deChaberts "have not asserted any claim or defense" that puts the advice of Hamm or his law firm to the deChaberts in issue, and that Fenster may not "dictate an opposing party's litigation strategy."[37]

A. Standing.

First, the Court addresses the deChaberts' standing argument. The Supreme Court of the Virgin Islands has made clear that standing in the Virgin Islands "is at best a non-jurisdictional claims-processing rule"[38] "that is subject to waiver should the party asserting the issue fail to raise it in a timely manner."[39] Because the deChaberts raised the standing issue at the first opportunity in their response to Fenster's motion to disqualify, it is properly before the Court.[40]

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[35] Pl.'s Mot. to Disqualify Owner Defs.' Attorney ("Pl.'s Mot. to Disqualify"), pp. 1, 14-22.
[36] Pl.'s Mot. to Disqualify, pp. 14-22.
[37] deChabert Defs.' Response in Opp'n to Pl.'s Mot. to Disqualify Owner Defs.' Attorney ("deChabert Defs.' Opp'n to Pl.'s Mot. to Disqualify"), pp. 1-4.
[38] *United Corp. v. Hamed*, 64 V.I. 297, 303 (2016) (citing *Hodge v. Bluebeard's Castle, Inc.*, 62 V.I. 671, 687 n. 8 (V.I. 2015)) (other citation omitted).
[39] *Benjamin v. AIG Ins. Co. of P.R.*, 56 V.I. 558, 564-65 (V.I. 2012) (citations omitted).
[40] deChabert Defs.' Opp'n to Pl.'s Mot. to Disqualify, p. 3.

"There is a split of authority on whether an opposing party has standing to file a motion to disqualify counsel."[41] "The first, and more restrictive view, is that only a current or former client has standing to seek an attorney's disqualification. The opposing view holds that an attorney-client relationship is unnecessary"[42] and permits courts to confer standing based on the applicable ethical rule that requires "an attorney [to] come forward if he has knowledge of an actual or potential violation of a Disciplinary Rule."[43] Neither the Supreme Court of the Virgin Islands nor the Superior Court has specifically defined the parameters of standing in the context of an opposing party's motion to disqualify counsel[44] and the Third Circuit has not definitively ruled on the issue.[45] However, the District Court of the Virgin Islands adheres to the latter approach and "has allowed parties to seek disqualification of opposing counsel where there is 'an ethical breach [that] so infects the litigation … that it impacts the moving party's interest in a just and lawful determination of [his or] her claims.'"[46] Considering the Virgin Islands Rules of Professional Conduct only require an attorney to report ethical violations that "raise[ ] a *substantial* question as to … [the potentially offending] lawyer's honesty, trustworthiness or fitness as a lawyer" as opposed to *all* ethical violations,[47] the Court is persuaded that the District Court's view best reflects this

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[41] *Olive v. DeJongh*, 2012 V.I. LEXIS 71, *6 n. 4 (V.I. Super. Ct. May 14, 2012) (citations omitted).
[42] Keith Swisher, Article, *The Practice and Theory of Lawyer Disqualification*, 27 Geo. J. Legal Ethics 71, 88 n. 62 (citing 25 AM. J. TRIAL ADVOC. 17, 18, 21-22 (2001)) (other citations omitted); *Id.* (collecting cases).
[43] *Santander Sec. LLC v. Gamache*, 2017 U.S. Dist. LEXIS 50189, at *8-9 (E.D. Pa. Apr. 3, 2017) (citing *Kevlik v. Goldstein*, 724 F.2d 844, 847 (1st Cir. 1984)) (internal quotation marks omitted).
[44] *See Olive,* 2012 V.I. LEXIS 71, at *6 n. 4 (declining to "extensively analyze" the standing issue because it was not raised by either party).
[45] *See Gamache*, 2017 U.S. Dist. LEXIS 50189, at *7-8 ("Whether a non-client may seek opposing counsel's disqualification is far from clear") (citing *In re Corn Deriv. Antitrust Litig.*, 748 F.2d 157, 161 (3d Cir. 1984) (The Third Circuit "[a]ssum[ed] without deciding that a motion to disqualify must be brought by a former client"); *In re Pressman-Gutman Co.*, 459 F.3d 383, 401 n.20 (3d Cir. 2006) (The Third Circuit "assumed without deciding that [non-client] defendants have standing to raise the disqualification issue"); *In re Congoleum Corp.*, 426 F.3d 675, 685-87 (3d Cir. 2005) (The Third Circuit conferred standing on non-client insurers to seek disqualification of their insured's "special counsel" in bankruptcy proceedings)).
[46] *Olive,* 2012 V.I. LEXIS 71, at *6 n. 4 (citing *Prosser v. Nat'l Rural Utils. Coop. Fin. Corp.*, 2009 U.S. Dist. LEXIS 37990, *4-6, 13-14 (D.V.I. May 1, 2009)); *See, e.g.*, *Nicholas v. Grapetree Shores, Inc.*, No. 05-119, 2013 U.S. Dist. LEXIS 42717, at *20 (D.V.I. Mar. 21, 2013).
[47] V.I.S.CT.R. 211.8.3(a) (emphasis added); *Accord Gamache*, 2017 U.S. Dist. LEXIS 50189, at *13.

jurisdiction's approach to standing as a prudential concern in the context of purported ethical violations by opposing counsel.

Here, the Court agrees with the deChaberts that Fenster lacks standing to seek disqualification of opposing counsel. While Fenster claims that Hamm and his law firm cannot competently represent the deChaberts due to his personal interest "in avoiding a professional negligence claim" by the deChaberts as a result of their reliance on Hamm's legal advice in regard to the underlying transaction, namely that the deChaberts breached their contract to purchase with Fenster, Fenster has not demonstrated how this impacts Fenster's interest in a just and lawful determination of Fenster's claims. Rather, all of the instances referenced by Fenster speak to the purported detriment Hamm's representation poses to the deChaberts, not as to Fenster's ability to effectively bring her case against the deChaberts or the integrity of these proceedings. For example, Fenster complains that the deChaberts did not assert as a defense in their Answer to Fenster's Complaint their reliance on Hamm's legal advice to breach their contract to purchase with Fenster,[48] but the deChaberts' failure to do so does not inhibit a just and lawful determination of Fenster's claims. On the contrary, the deChaberts' legal strategy results in Fenster having one less defense to combat in the course of these proceedings, which benefits Fenster in the prosecution of her case.

Further, Fenster contends that the deChaberts' Motion for Partial Summary Judgment, which remains pending, is based on the argument that the deChaberts' relied on Hamm's legal advice in breaching their contract to purchase with Fenster. But, the Court has reviewed that motion and finds Fenster's characterization overly broad. In their Motion for Partial Summary Judgment, the deChaberts maintain, *inter alia*, that WLG held a valid right of first refusal, of which

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[48] Pl.'s Mot. to Disqualify, pp. 15-16.

Fenster had actual knowledge. While this position is consistent with the legal advice purportedly given by Hamm to the deChaberts with respect to the underlying transaction, it is a far cry from Fenster's portrayal that the deChaberts are seeking to avoid liability as a result of their reliance on Hamm's legal advice.[49] In fact, Fenster's characterization appears at odds with her other contention that Hamm has failed to assert the deChaberts' reliance on Hamm's legal advice as a defense in the deChaberts' Answer in violation of Hamm's ethical duties.

Fenster submits exhibits that suggest the deChaberts did not plan to breach their contract with Fenster until they received counsel from Hamm. However, the only party to place the propriety of Hamm's advice in issue in this case is Fenster. Fenster has failed to point to any filing by the deChaberts that remotely indicates otherwise.

Because Fenster has failed to demonstrate Hamm's representation of the deChaberts impacts a just and lawful determination of Fenster's claims, Fenster lacks standing to move to disqualify Hamm and Hamm Eckard, LLP, from this case.

B. Merits.

Despite finding that Fenster lacks standing to seek disqualification of Hamm and his law firm, the Court will consider the merits of Fenster's motion because the Court has the inherent authority to disqualify in remedying ethical violations.[50] The resolution of a motion to disqualify counsel typically involves a two-step inquiry.[51] "Once courts find or suspect a substantive violation, they then engage in a balancing test to determine whether disqualification is the appropriate remedy for the case."[52] As to the first step, Fenster contends that Hamm has violated

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[49] *See* deChabert Defs.' October 14, 2016, Mot. for Partial Summ. J.
[50] *supra* n. 11 & n. 17.
[51] Swisher, 27 Geo. J. Legal Ethics at 86 (citations omitted).
[52] *Id.* at 86-87 (citations omitted).

Supreme Court Rules 211.1.7, which provides that a concurrent conflict of interest exists where the lawyer's personal interest poses a significant risk of materially limiting the lawyer's representation of a client.[53]

In considering whether a substantive violation has occurred, the Court looks to the Comments accompanying the ABA's Model Rules of Professional Conduct for guidance.[54] With respect conflicts of interest resulting from the lawyer's personal interest, Comment 10 to Model Rule 1.7 provides:

> The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.[55]

As to the material limitation of a conflict of interest, Comment 8 to Model Rule 1.7 instructs:

> Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. ... The critical questions are the likelihood that a difference in [the client's and lawyer's] interests will eventuate and, if it does, whether ... [the conflict] will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.[56]

Here, Fenster's objection rests squarely on the concerns raised by these Comments in that Fenster contends that, because Hamm advised the deChaberts to breach their contract to purchase with

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[53] V.I.S.CT.R. 211.1.7(a).

[54] The Virgin Islands Rules of Professional Conduct resemble the ABA's Model Rules of Professional Conduct. *Compare* V.I.S.CT.R. 211.1.0 *et seq.* with MODEL R. PROF. CONDUCT 1.0 *et seq.*; *King v. Appleton*, 61 V.I. 339, 353 n.12 (V.I. 2014) ("The Virgin Islands Rules of Professional Conduct — like the Model Rules of Professional Conduct in force before February 1, 2014, *see* Prom. Order No. 2013-0001 (V.I. Dec. 23, 2013) — state that a concurrent conflict of interest exists where "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer") (citations omitted); V.I.S.CT.R. 203 ("[T]o the extent applicable, the accompanying or related ABA Interpretive Guidelines, Comments and Committee Comments... govern the conduct of members of the Bar of this Territory").

[55] MODEL R. PROF. CONDUCT 1.7 cmt. 10.

[56] MODEL R. PROF. CONDUCT 1.7 cmt. 8.

Fenster, Hamm is unable to give the deChaberts detached legal advice in this lawsuit based on the deChaberts breach of contract.

The Court recognizes that the deChaberts' purported breach of their purchase agreement with Fenster is directly at issue in this case. However, the Court agrees with the deChaberts that Hamm Eckard, LLP, is not automatically subject to a claim of legal malpractice merely because Fenster disagrees with the legal opinion of Hamm and the positions taken by the deChaberts in the course of litigation. Moreover, any contention that Hamm committed legal malpractice by advising the deChaberts to breach their purchase agreement with Fenster, which appears to have been based on Hamm's legal opinion that WLG held a valid right of first refusal, is premature and speculative.[57] The Superior Court commits error by considering the merits of legal malpractice claims that is not ripe.[58] Considering the Court has yet to determine the validity of WLG's purported right of first refusal, it would be precipitous to assess the legitimacy of Hamm's legal advice within the context of this motion.

Fenster also contends that the deChaberts' failure to assert as a defense their reliance on Hamm's legal advice with respect to the underlying transaction demonstrates that Hamm's personal interest has materially interfered with his independent professional judgment. In the criminal context, some courts in other jurisdictions have concluded a conflict of interest exists where the lawyer puts his or her personal interest ahead of the client's by directly undermining the

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[57] *See Simon v. Joseph,* 59 V.I. 611, 621-22 (V.I. 2013) ("While this Court has never set forth the elements of legal malpractice when pied as a tort, in its January 11, 2012 Opinion, the Superior Court, relying on persuasive, but not binding, authority from the District Court and courts of other jurisdictions, held that a legal malpractice plaintiff must prove '1) the attorney-client relationship giving rise to a duty; 2) breach of that duty; 3) the causal connection between the negligent conduct and the resulting injury, and 4) actual loss or damage'") (citing *Moorehead v. Miller*, 102 F.R.D. 834, 838, 21 V.I. 79 (D.V.I. 1984)).

[58] *See Simon,* 59 V.I. at 626-630; *See also Smith v. Law Offices of Karin A. Bentz, P.C.*, 2017 V.I. LEXIS 111, *10 (Super. Ct. July 20, 2017) ("[W]ith respect to whether Smith's legal malpractice claim is ripe for the Court to hear now rather than at a later time, the Court looks to the following framework to determine the prudence of hearing a claim of future injury — "(1) whether an issue is fit for judicial decision and (2) whether and to what extent the parties will endure hardship if decision is withheld") (citations omitted).

client's defenses.[59] While the record reflects that the deChaberts have not asserted their reliance on Hamm's legal advice as a defense to Fenster's claims, as Fenster suggests, the Court agrees with the deChaberts that this may well represent the deChaberts' legal strategy rather than evidence that Hamm's personal interest has materially interfered with his independent professional judgment in this case. In fact, Fenster relies on case law indicating that the attorney-client privilege is waived "where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication[.]" Contrary to Fenster's position, that view supports the deChaberts' contention that they strategically chose not to assert the defense in order to preserve their attorney-client privilege with Hamm.[60]

Fenster has also failed to identify any case with facts similar to those at issue here in support her proposition that Hamm's legal advice to the deChaberts with respect to the underlying transaction creates an "unconsentable" conflict of interest in violation of Supreme Court 211.1.7 so as to require Hamm's disqualification.[61] Typically, the Court will not make a movant's arguments for him or her when he or she has failed to do so.[62] Notwithstanding, the Court's research has revealed two cases where courts in other jurisdictions disqualified counsel based on the concerns raised by Comment 10 to Model Rule 1.7.

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[59] *See United States v. Savage*, 2013 U.S. Dist. LEXIS 177082, at *12-13 (E.D. Pa. Dec. 17, 2013) (collecting cases).
[60] *Rhone-Poulenc Rorer v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994); Pl.'s Mot. to Disqualify, p. 18 (citing *Rhone*, 32 F.3d 851).
[61] "A conflict is 'consentable' and subject to waiver when the lawyer involved can properly ask for such consent and can properly provide representation on the basis of the client's consent." *Samuel v. United Corp.*, 2015 V.I. LEXIS 18, *5-6 (V.I. Super. Ct. Mar. 2, 2015) (citing MODEL R. PROF. CONDUCT 1.7 cmts. 14-15). This occurs when the four requirements of Supreme Court Rule 211.1.7(b) are met. *See In re the Suspension of Maynard*, 60 V.I. 444, 450 (V.I. 2014) ("[P]ursuant to Model Rule of Professional Conduct 1.7, the existence of a concurrent conflict of interest will not preclude representation if, and only if, four requirements are met ...").
[62] *Joseph v. Joseph*, 2015 V.I. LEXIS 43, *5 (V.I. Super. Ct. Apr. 23, 2015) ("[I]n general, the Court will not make a movant's arguments for him when he has failed to do so") (citations omitted); *Bertrand v. Mystic Granite & Marble, Inc.*, 63 V.I. 772, 782 (V.I. 2015) ("[S]imply stating a principle of law without any argument or explanation of how it applies to the case at hand is not sufficient to fairly present the issue to the Superior Court") (citing *Yusuf v. Hamed*, 59 V.I. 841, 851 n.5 (V.I. 2013)).

In a Connecticut case involving claims against a defendant for misappropriation of trade secrets, violation of the state's consumer protection statute, fraud, and abuse of process based on the conduct of the defendant's attorneys in a separate patent infringement action, the court disqualified the attorneys' law firm, whose conduct formed "the primary wrongdoing about which the plaintiff complain[ed,]" from representing the defendant. The court reasoned that the law firm "cannot reasonably be expected to provide [the defendant] ... with an unbiased assessment of the conduct" since the law firm "may well be faced with the choice of either implicating its own client as the driving force behind the conduct at issue, or exonerating its client from such conduct by claiming that [the law firm] engaged in it without [the client's] ... knowledge or authorization."[63] However, unlike that case, primary wrongdoing about which Fenster complains here is the deChaberts' breach of contract as opposed to the conduct of Hamm, which reduces the risk that Hamm's professional judgment and "ability to examine alternatives which may be available to" the deChaberts will be clouded by Hamm's involvement in the underlying transaction.[64]

In the second case, a Pennsylvania trial court disqualified counsel and his law firm based on Comment 10 to Model Rule 1.7, which had been adopted in the Explanatory Comments to Pennsylvania's Rules of Professional Conduct, but that case involved an action to recover unpaid legal fees by defense counsel's former law firm for services rendered by defense counsel while at his old firm.[65] While the court noted that defense counsel "could conceivably become the target of a legal malpractice law suit asserted by [the defendant,]" the court also found that defense counsel

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[63] *Times Fiber Communs. v. Trilogy Communs.*, 1996 Conn. Super. LEXIS 3119, at *3-4, 9-10 (Super. Ct. Nov. 27, 1996); *See also Jamieson v. Slater*, 2006 U.S. Dist. LEXIS 86712, at *19 (D. Ariz. Nov. 27, 2006) ("In the present case, the interests of Jagelski and Marchant conflict with the interests of Slater because the actions of Slater while he represented Marchant and Jagelski in lawsuits against Plaintiff is the *primary wrongdoing* for which Plaintiff seeks to recover damages" with respect to Plaintiff's abuse of process claim) (citations omitted).
[64] *Times*, 1996 Conn. Super. LEXIS 3119, at 9.
[65] *See Weir & Partners, LLP v. Meadows Invs., LLC*, 2016 Phila. Ct. Com. Pl. LEXIS 39 (Pa. C.P. Mar. 28, 2016); PA. R.P.C. 1.7 cmt. 10.

stood in an adverse position to his client, which together convinced the Court that disqualification of defense counsel and his law firm was necessary because they "may find it difficult or impossible to give [their client] ... 'detached advice' in the instant action."[66] The concerns raised by the adverse position of defense counsel and his client in that case are simply not present here, where the only basis for finding adversity stems from Fenster's claim that Hamm erroneously and negligently advised the deChaberts to breach their contract with Fenster.

In addressing arguments similar to Fenster's, courts in other jurisdictions have been reluctant to find conflicts of interest based on the "superficial plausibility" that the integrity of the lawyer's conduct is "in serious question" due to the opposing party's criticism of the lawyer's legal advice or opinion to his or her client in the underlying transaction, which, without more, fails to show that the lawyer's loyalty to his or her client is in question.[67] The Court agrees with that reasoning, which furthers the application of an exacting standard to motions to disqualify counsel in order to discourage the use of the motions as a tactic to harass the opposing party and lawyer, where "mere allegations of unethical conduct or evidence showing a remote possibility of a violation of the disciplinary rules will not suffice[.]"[68]

Finally, the Court recognizes that the disqualification of counsel involved in an underlying real estate transaction from resulting litigation is more frequently addressed by courts in other

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[66] *Weir*, 2016 Phila. Ct. Com. Pl. LEXIS 39, at *7-9.
[67] *See United Food & Commercial Workers Health & Welfare Fund v. Darwin Lynch Adm'rs, Inc.*, 781 F. Supp. 1067, 1071 (M.D. Pa. 1991); *C.f. FDIC v. United States Fire Ins. Co.*, 50 F.3d 1304, 1314 (5th Cir. 1995) ("An examination of the context in which this passage [(Comment 10 to MODEL R. PROF. CONDUCT 1.7)] ... indicates that the ABA drafting committee was primarily concerned with economic conflicts of interest -- for example, those involving fees or business enterprises in which the lawyer has an undisclosed interest. Notwithstanding one hypothetical scenario wherein the interests of Kenney and the FDIC might be characterized as tangentially conflicting, Kenney's interests are otherwise consistent with those of her client").
[68] *Hamilton*, 2009 U.S. Dist. LEXIS 57715, at *12 (citations omitted).

jurisdictions in relation to the "lawyer as witness" rule,[69] which is reflected in Supreme Court Rule 211.3.7 and the ABA's Model Rule 3.7.[70] However, Fenster does not move for disqualification on this ground and the record does not yet reflect that Hamm is a *necessary* witness in the trial of this case.[71]

In light of the foregoing, the Court finds that Fenster has failed to support her claim that Hamm's legal advice to the deChaberts with respect to the underlying transaction creates an impermissible personal interest by Hamm that poses a significant risk of materially interfering with Hamm's representation of the deChaberts. As a result, the Court is unable to find that Hamm has violated Supreme Court 211.1.7 or that the disqualification of Hamm and his law firm, Hamm Eckard, LLP, is warranted. In the absence of a demonstrated ethical violation by Hamm, the Court need not balance the factors relevant to determining whether disqualification is appropriate.

Notwithstanding this conclusion, the Court reminds counsel of record of their continuing duty to keep their clients informed and to obtain informed, written consent of any waivable conflicts of interest that may arise during the course of this litigation in accordance with the Virgin Islands Rules of Professional Conduct.

II. The deChaberts' motion to quash.

The deChaberts move to quash Fenster's *subpoena duces tecum* to Hamm on the grounds that it is procedurally deficient because it does not comply with the form requirements of Fed. R.

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[69] *See* David B. Harrison, Annotation, 5 A.L.R.4th 574, *Disqualification of attorney because member of his firm is or ought to be a witness in case—modern cases* (2017) (collecting cases); *See also* Annotation, 68 A.L.R.3d 967, *Attorney and client: conflict of interest in real-estate closing situations* (2017).
[70] *Compare* V.I.S.CT.R. 211.3.7 *with* MODEL R. PROF. CONDUCT 3.7.
[71] For the "lawyer as witness" rule to apply, "[t]he lawyer's likely testimony must be relevant, material and unobtainable elsewhere. If it is likely that the testimony can be obtained through other means, then the attorney is not a necessary witness." *See Daily News Publ. Co.*, 2012 V.I. LEXIS 54, at *11 (citing ANNOT. MODEL R. PROF.'L CONDUCT "Subsection (a): Lawyer May Not Act as Advocate at Trial if Likely to Be Deemed Necessary Witness" annot. at 361) (internal and other citations omitted).

Civ. P. 45(a) and seeks undiscoverable information protected by attorney-client privilege and the work product doctrine.[72] In opposition, Fenster argues that the requested information is not privileged since the deChaberts did not rely on Hamm's advice "at the time they executed the purchase agreement" and, even if they did, the deChaberts waived any privilege by taking "the position before litigation commenced" that their decision to breach the contract with Fenster was based on the legal advice of Hamm, and, in any event, the privilege does not extend to facts contained in the deChaberts' communications to Hamm and does not apply "when the party places the advice of their attorney in issue."[73]

A. Procedural sufficiency of the subpoena.

First, the Court must determine whether the standard set forth in V.I. R. Civ. P. 45 applies despite that the deChaberts' Motion to Quash and other filings submitted in relation thereto were filed prior to the promulgation of the Virgin Islands Rules of Civil Procedure. The deChaberts' motion is largely premised Fed. R. Civ. P. 45, which according to the deChaberts, supplements Super. Ct. R. 11.[74] In her opposition, Fenster cites neither Super. Ct. R. 11 nor Fed. R. Civ. P. 45, centering her argument instead on authority privileges.[75] However, Fenster states in her *subpoena duces tecum* to Hamm that the subpoena is brought "pursuant to Rules 26, 30, and 45 of the Federal Rules of Civil Procedure … ."[76]

Specifically, the deChaberts contend that Fenster's subpoena is procedurally deficient because it fails to "set out the text of Fed. R. Civ. P. 45(d) and (e)" as required under Fed. R. Civ. P. 45(a)(1)(A)(iv)."[77] The relevant form requirements of V.I.R. Civ. P. 45(a)(1)(A) are the same

[72] deChabert Defs.' Mot. to Quash, pp. 2-4.
[73] Pl.'s Response to deChabert Defs.' Mot. to Quash, pp. 1-2.
[74] deChabert Defs.' Mot. to Quash, p. 2.
[75] *See* Pl.'s Response to Owner Defs.' Mot. to Quash, pp. 9-14.
[76] deChabert Defs.' Mot. to Quash, Ex. A, p. 1.
[77] deChabert Defs.' Mot. to Quash, p. 2.

as those set forth in Fed. R. Civ. P. 45(a)(1)(A).[78] The Court will not subject Fenster's subpoena to the form requirements of V.I. R. Civ. P. 45(a)(1)(A), since that rule was not in effect at the time Fenster drafted and issued the subpoena to Hamm. Notwithstanding, Fenster was arguably subject to the form requirements by virtue of the federal rule under which Fenster brought the subpoena.[79] On the other hand, at the time Fenster issued the subpoena, former Super. Ct. R. 11 applied, which sets forth form requirements that differ from V.I.R. Civ. P. 45(a)(1)(A) and its federal counterpart and "does not require any text to inform non-parties of their rights."[80] As discussed, prior to the adoption of the Virgin Islands Rules of Civil Procedure, there was discordant precedent in the Superior Court regarding whether Fed. R. Civ. P. 45 could be applied to supplement Super. Ct. R. 11.[81] In light of that ambiguity, and considering that Fenster's subpoena complied with the form requirements of former Super Ct. R. 11, but not those in Fed. R. Civ. P. 45(a)(1)(A)(iv), the Court will not quash Fenster's subpoena as procedurally deficient.

B. Attorney-client privilege and the work product doctrine.

a. Applicable law.

As to the rule governing the Court's authority to quash subpoenas, the standards delineated in V.I. R. Civ. P. 45 and former Super. Ct. R. 11 differ. V.I. R. Civ. P. 45(d)(3)(A) provides, in pertinent part, that "[o]n timely motion, the court … must quash or modify a subpoena that: … (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies;

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[78] *Compare* V.I.R. CIV. P. 45(a)(1)(A) *with* FED. R. CIV. P. 45(a)(1)(A).
[79] *See* deChabert Defs.' Mot. to Quash, Ex. A, p. 1.
[80] *Bertrand,* 55 V.I. at 254 (citing SUPER. CT. R. 11(a) (1966)). Specifically, SUPER. CT. R. 11(a) (1966) provided:

> Form and issuance. A subpoena shall be issued by the judge or clerk or deputy clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and if the witness is to testify on behalf of the Government, it shall so note, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed, to a party requesting it, who shall fill in the blanks before it is served.

[81] *supra* n. 29 & n. 30.

or (iv) subjects a person to undue burden."[82] In contrast, the former version of Super. Ct. R. 11 provided that "[t]he judge, on motion made promptly, may quash or modify the subpoena if compliance would be unreasonable or oppressive."[83] However, under either standard, the practical effect is the same in the circumstances at issue here since the compulsory production of information protected under attorney-client privilege or the work product doctrine, which is neither subject to an exception nor waived, would be unreasonable under former Super. Ct. R. 11.[84] As a result, an application of V.I. R. Civ. P. 45(d)(3)(A) would be neither infeasible nor an injustice, notwithstanding that the new procedural rules were promulgated while this case was pending.[85] Consequently, the Court will apply V.I. R. Civ. P. 45(d)(3)(A) in determining whether Fenster's subpoena must be quashed because it seeks information protected by the attorney-client privilege and work product doctrine.

Discovery in the Virgin Islands, including that which is sought by way of a subpoena, is limited to "any nonprivileged matter that is relevant to any party's claim or defense."[86] 5 V.I.C. § 852 governs attorney-client privilege and the work product doctrine in the Virgin Islands.[87] "The attorney-client privilege protects communications between attorneys and clients from

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[82] V.I. R. CIV. P. 45(d)(3)(A).
[83] SUPER. CT. R. 11(c) (1966)).
[84] *See VI Taxi Ass'n*, 2016 V.I. LEXIS 172, at *7 ("The subpoena violates the discovery rules and compliance would be unreasonable"). Discovery in the Virgin Islands is limited to nonprivileged matter. *infra* n. 86; *See also* 5 V.I.C. § 852 (delineating attorney-client privilege and work-product protection in the Virgin Islands).
[85] V.I. R. CIV. P. 1-1(c)(2)(B).
[86] V.I. R. CIV. P. 26(b)(1). Prior to the adoption of the Virgin Islands Rules of Civil Procedure, the scope of discovery in the Virgin Islands was governed by FED. R. CIV. P. 26(b)(1). *Gourmet Gallery*, 2016 V.I. LEXIS 195, at *3, 13 ("Under Superior Court Rule 39, Federal Rules of Procedure 26 to 37 govern discovery for matters before the Superior Court ... FRCP 26(b)(1) limits discovery to non-privileged matter"). The scope of discovery under V.I. R. CIV. P. 26(b)(1) resembles that set forth in FED. R. CIV. P. 26(b)(1) prior to the 2015 amendments. *See* FED. R. CIV. P. 26(b)(1) (2010). Nevertheless, because the scope of discovery in the Virgin Islands has always been limited to nonprivileged matter, an application of V.I. R. CIV. P. 26(b)(1) is feasible and will not result in injustice. *See* V.I. R. CIV. P. 1-1(c)(2)(B). Consequently, the Court will apply V.I. R. CIV. P. 26(b)(1), despite that the deChaberts' motion to quash was filed prior to the adoption of the new procedural rules.
[87] *See also* V.I. R. EVID. 501(b) ("Privileges recognized in this jurisdiction include: ... attorney-client privilege as provided in 5 V.I.C. § 852").

compelled disclosure"[88] and "encourages clients to make full and frank disclosures to their attorneys, who are then better able to provide candid advice and effective representation."[89] "In order for the attorney-client privilege to attach to a communication, 'it must be '(1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.'"[90] Also,

> [t]he attorney-client privilege ... is personal, belongs solely to the client, and generally cannot be asserted by anyone other than the client. Additionally, the burden of showing the existence of circumstances justifying the recognition of the attorney-client privilege rests with the party asserting the privilege, and "[b]ecause it impedes full and free discovery of the truth, the attorney-client privilege is strictly construed."[91]

As to the work product doctrine, this privilege is recognized by 5 V.I.C. § 852(e) as alternatively qualified and absolute. "[I]nformation the attorney creates or acquires while preparing for litigation" is protected by an attorney's qualified work product immunity, but "may be subject to discovery if the party requesting them proves (i) a substantial need for materials, and (ii) an inability to obtain a substantial equivalent of those materials by another method."[92] On the other hand, "[a]n attorney possesses absolute immunity from disclosing work products when they divulge the attorney's 'mental impressions, conclusions, opinions, or legal theories' regarding litigation."[93] In applying the work product doctrine, the Superior Court has held:

> The [work product] doctrine applies if a document or material was prepared "at a time when litigation was reasonably predictable or foreseeable" and was prepared "primarily for the purpose of litigation." When materials are prepared "merely in the ordinary and regular course of a party's business, they are outside the scope of

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[88] *Browne v. People of the V.I.*, 56 V.I. 207, 235 n. 21 (V.I. 2012); 5 V.I.C. § 852(b).
[89] *Browne,* 56 V.I. at 235 (citing *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 130 S. Ct. 599, 606, 175 L. Ed. 2d 458 (2009)) (internal quotation marks omitted).
[90] *Browne,* 56 V.I. at 235 n. 21 (citing *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 359 (3d Cir. 2007)) (emphasis omitted) (other citation omitted).
[91] *Id.* at 235 (citing *United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010)) (internal citations omitted).
[92] 5 V.I.C. § 852(e)(1).
[93] 5 V.I.C. § 852(e)(2).

work product protection." Because it is an evidentiary privilege, "the work product doctrine should be strictly construed."[94]

b. Attorney work product and exceptions to the attorney-client privilege for information pre-existing the attorney-client relationship, physical evidence, underlying facts, and payments.

Fenster's subpoena requests "any documents, emails and billings related to any legal advice given to the DeChabert [sic] Defendants in this matter" as to various issues relevant to this case.[95] The deChaberts contend that the information requested by Fenster is "obviously attorney-client privileged and/or subject to the work-product privilege."[96] The Court agrees that the documents and e-mails acquired by Hamm while preparing for litigation are protected under the work product doctrine. And, because Fenster has failed to prove a substantial need for the materials or an inability to obtain a substantial equivalent of those materials by another method, as required under 5 V.I.C. § 852(e)(1), the requested materials that were prepared by Hamm when litigation was reasonably predictable or foreseeable are not discoverable. Furthermore, even assuming, *arguendo*, Fenster had made the requisite showing, 5 V.I.C. § 852(e)(2) prohibits the discovery of materials that divulge Hamm's "'mental impressions, conclusions, opinions, or legal theories' regarding litigation."[97]

Fenster also contends that the deChaberts "did not hold any privilege at the time they executed the purchase agreement [because] … they did not rely on any counsel's advice at that

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[94] *Joseph*, 2016 V.I. LEXIS 17, at *14 (internal and other citations omitted).
[95] *See* deChabert Defs.' Mot. to Quash, Ex. A, p. 2.
[96] deChabert Defs.' Mot. to Quash, p. 1.
[97] 5 V.I.C. § 852(e)(2); *See also* V.I. R. Civ. P. 26(b)(3)(A)-(B) ("If the court orders discovery of … [documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative], it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation").

time."[98] "[C]ontracts are [generally] not privileged"[99] and 5 V.I.C. § 852(d)(8) provides that "physical evidence that the client provides to the lawyer … and documents pre-existing the attorney-client relationship" are not protected by the attorney-client privilege.[100] While the Court recognizes the discoverability of this type of information as nonprivileged matter, Fenster's subpoena is simply deficient in requesting it. According to the express language of the subpoena, Fester seeks information "related to any *legal advice* given to the DeChabert [sic] Defendants" by Hamm,[101] which is subject to the attorney-client privilege and work product doctrine. Because the subpoena fails to request information that is nonprivileged or subject to the aforementioned exceptions, disclosure is not warranted on this ground.

Similarly, Fenster also contends that "[a]ny facts disclosed to [Hamm] that were not disclosed to seek his opinion or services are not" privileged.[102] Fenster is correct that attorney-client privilege "does not protect disclosure of the underlying facts by those who communicated with the attorney."[103] Under this principle, "[t]he client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney."[104]

Nevertheless, the subpoena also fails under this point of law. In her subpoena, Fenster does not request information pertaining to facts disclosed by the deChaberts. Again, Fenster only seeks information related to Hamm's *legal advice* to the deChaberts regarding the underlying

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[98] Pl.'s Response to deChabert Defs.' Mot. to Quash, p. 9.
[99] *Gourmet Gallery*, 2016 V.I. LEXIS 195, at *13.
[100] 5 V.I.C. § 852(d)(8).
[101] *See* deChabert Defs.' Mot. to Quash, Ex. A, p. 2. (emphasis added).
[102] Pl.'s Response to deChabert Defs.' Mot. to Quash, 14; *See id.* at 9-10.
[103] *Joseph*, 2016 V.I. LEXIS 17, at *16 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 395-396, 101 S. Ct. 677, 66 L. Ed. 2d 584 (U.S. 1981)).
[104] *Id.* (quoting *Upjohn,* 449 U.S. at 395-396).

transaction.[105] Consequently, Hamm is not required to produce the requested information pertaining to the underlying facts communicated to Hamm by the deChaberts since this is beyond the scope of the subpoena.

Fenster's subpoena also requests "billings" related to Hamm's legal advice to the deChaberts.[106] 5 V.I.C. § 852(d)(8) provides that the attorney-client privilege "does not apply to ... attorney fee arrangements" or "agreements and payments."[107] Therefore, the requested "billings" are discoverable by Fenster to the extent they do not contain confidential communications between Hamm and the deChaberts regarding Hamm's legal assistance in this matter and are not subject to Hamm's work product immunity under 5 V.I.C. § 852(e).[108]

c. Exception for waiver.

Finally, Fenster argues that Regina deChabert waived the deChaberts' attorney-client privilege by informing Fenster that the deChaberts relied on Hamm's advice in breaching the purchase agreement with Fenster.[109] Waiver is an exception to attorney-client privilege under 5 V.I.C. § 852(d)(9),[110] wherein the privilege is "lost if the client waives confidentiality as to one or more issues such as by disclosing privileged communications to a third party or the client or the attorney breaches a duty that is owed to each other."[111] Additionally, 5 V.I.C. § 861 provides, in pertinent part, that waiver occurs when the "holder of the privilege ... voluntarily discloses or

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[105] *See* deChabert Defs.' Mot. to Quash, Ex. A.
[106] deChabert Defs.' Mot. to Quash, Ex. A, p. 2.
[107] 5 V.I.C. § 852(d)(8).
[108] *In re Joseph*, 65 V.I. 217, 229 (V.I. 2016) (The Court cannot "read into [a] ... statute that which the legislature has not sought fit to include") (citations omitted).
[109] Pl.'s Response to deChabert Defs.' Mot. to Quash, pp. 11-14.
[110] 5 V.I.C. § 852(d)(9).
[111] 5 V.I.C. § 852(d)(9).

consents to disclosure of any significant part of the privileged matter."[112] Waiver of privileges, including limitations thereon, are also addressed by V.I. R. Evid. 502 and V.I. R. Civ. P. 26(b).[113]

Fenster attaches numerous exhibits that suggest the deChaberts looked to Hamm for legal advice regarding the enforceability of the right of first refusal in WLG's lease and whether to breach the purchase agreement with Fenster.[114] Fenster also avers that Regina deChabert informed Fenster during a telephone conversation that Hamm had "sanctioned the breach and had advised her that the Walker Defendants held a valid right of first refusal."[115]

The relevant questions with respect to waiver are whether the deChaberts waived their attorney-client privilege with Hamm by: (1) communicating to Fenster aspects of Hamm's legal opinion regarding the deChaberts' breach of the purchase agreement; (2) permitting Fenster to discuss the underlying transaction with Hamm; and (3) putting Hamm's legal advice in issue by stating, before the commencement of litigation,[116] that the deChaberts were relying on Hamm's legal advice. Waiver, as described in 5 V.I.C. § 861, is particularly relevant to the first and second issues, which turn on whether Regina deChabert voluntarily disclosed, or consented to Hamm's disclosure of, any significant part of the privileged matter to Fenster. Fenster does not allege, and the record does not reflect, that the deChaberts gave Hamm prior consent to disclose privileged information to Fenster. Though not raised by the deChaberts, the Court notes there may be a

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[112] 5 V.I.C. § 861; *See* also V.I. R. EVID. 502(a); *Addie v. Kjaer*, 2008 U.S. Dist. LEXIS 107548, at *7 (D.V.I. Jan. 10, 2008) ("The attorney-client privilege is also waived when a client voluntarily discloses privileged communications to a third party") (citations omitted).
[113] *See* V.I. R. EVID. 502; V.I. R. CIV. P. 26(b)(3), (5).
[114] *See* Pl.'s Response to deChabert Defs.' Mot. to Quash, Exs. 1, 3, 4, 6, 9-14. Some of the exhibits indicate that the deChaberts communicated with Hamm through their realtor. *See id.* at Exs. 1, 3-5, 16-17. However, Fenster does not contend that deChaberts waived their attorney-client privilege by doing so. Nevertheless, the Court notes that the attorney-client privilege protects communications between an attorney and the "representative of a client." *See* 5 V.I.C. § 852(a)(2), (b)(1).
[115] Pl.'s Response to deChabert Defs.' Mot. to Quash, p. 5.
[116] Pl.'s Response to deChabert Defs.' Mot. to Quash, p. 10 ("Owner Defendants waived any privilege they might have been able to assert when they took the position *before litigation commenced*, that when they anticipated breaching the Contract for Purchase and then breached it, they relied on the advice of their counsel") (emphasis added).

question regarding the voluntariness of Regina deChabert's disclosure to Fenster in these circumstances.[117]

During these proceedings, Fenster, a local attorney, has indicated she participated in the underlying transaction with the help of her realtor, Stephanie Hodge.[118] Once the dispute arose between Fenster, the deChaberts, and Walker, Fenster indicated that she was representing herself but that she intended to retain counsel to handle the matter once litigation commenced.[119] Fenster has since retained counsel in this action. According to Fenster, as evidenced by the exhibits and argument submitted by Fenster in connection with her motion to disqualify and in response to the deChaberts' motion to quash:[120]

> (1) On April 5, 2016, the deChaberts' realtor, Barbara Bryan,[121] informed Fenster's realtor, Hodge, that the deChaberts had sought Hamm's legal advice with respect to "whether Walker Legal's default on rent negates the 30 day right of refusal[,]" further stating that "[w]e have followed up again with him and if we do not get an answer, Regina is leaning towards simply sending the Notice [to Quit] today";[122]
>
> (2) On May 3, 2016, after Fenster learned that that "the Walker Defendants ... were exercising their right under their Lease agreement[,]" Fenster "immediately sent a text message to Regina DeChabert [sic] asking her what was going on[,]"[123] to which Regina deChabert responded via text message that the deChaberts were "waiting on a response from Hamm's office, regarding the status of [WLG's] ...

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[117] *C.f.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 79 (3rd 2000) ("The attorney-client privilege is waived if the client, the client's lawyer, or another authorized agent of the client voluntarily discloses the communication in a non-privileged communication"); *Id.* at cmt. g ("To constitute waiver, a disclosure must be voluntary. The disclosing person need not be aware that the communication was privileged, nor specifically intend to waive the privilege. A disclosure in obedience to legal compulsion or as the product of deception does not constitute waiver").

[118] *See* Pl.'s Mot. to Disqualify, Aff. of Trudy Fenster, ¶¶ 6, 21, 23, 29-30, 45-46, 53.

[119] Pl.'s Mot. to Disqualify, Ex. 21 (In an e-mail dated May 13, 2016, Hamm asks Fenster who her attorney is. In her response the following day, Fenster states "[f]or now it is me until I finish up the complaint and injunction petition and hand it over to Lee or whomever I will want to handle this").

[120] The following is provided solely for purposes of showing Fenster's representations to the Court during these proceedings. In so doing, the Court takes no position with respect to the admissibility or credibility of Fenster's statements or exhibits.

[121] Fenster also appears to refer to the deChaberts' relator as Barbara Richards. *See* Pl.'s Response to deChabert Defs.' Mot. to Quash, p. 7.

[122] Pl.'s Response to deChabert Defs.' Mot. to Quash, Ex. 5.

[123] Pl.'s Mot. to Disqualify, Aff. of Trudy Fenster, ¶¶ 67-68.

lease" and that "as far as I [(Regina deChabert)] am concerned, she [(Walker)] was month to month and in default. Waiting on our counsel to respond";[124]

(3) The following day, on May 4, 2016, Fenster agreed to speak to Regina deChabert on the telephone,[125] wherein Fenster and Regina deChabert "discussed the way going forward and … [Regina deChabert] gave … [Fenster] no impression that … [Regina deChabert] was going to breach the … [purchase agreement]";[126]

(4) "On the morning of May 5, 2016, Regina DeChabert [sic] sent … [Fenster] a text message[,]" informing Fenster that Regina deChabert's siblings wanted to move forward with Walker's offer;[127]

(5) That same morning, Fenster sent Regina deChabert a text message, a portion of which reads: "Morning Regina. I will send you my invoices when I get to the office but I think you should not let this girl punk you, I think you should file your eviction action as she was to be out of your building yesterday. And your lawyer needs to do it asap as he is on the hook for malpractice…"[128] In a separate message to Regina deChabert, Fenster requested permission to speak with the deChaberts' attorney;[129]

(6) Fenster then spoke to Hamm on the telephone and communicated with him several times regarding the dispute;[130]

(7) On May 14, 2016, Fenster informed Regina deChabert, as follows: "I [(Fenster)] am sure by now you have heard from your lawyer that I am going to fight this. I just want you to know this is not about you, it's [sic] about principle. Noone [sic] gets to be in default of a bilateral agreement and then gets to hijack someone else's deal. Don't respond since we are nor [sic] going possibly have to litigate this. Just wanted to share with you where I am coming from";[131]

(8) In response, Regina deChabert stated: "[a]ll I can do is ask you please not to. We asked Donovan [(Hamm)] to prepare a release and are prepared to reimburse your out of pocket expenses. I am getting the blame all around and the additional expenses, and now legal fees. Sorry we find ourselves here."[132]

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[124] Pl.'s Response to deChabert Defs.' Mot. to Quash, Ex. 6; *See also* Pl.'s Mot. to Disqualify, Aff. of Trudy Fenster, ¶¶ 67-69.
[125] Pl.'s Response to deChabert Defs.' Mot. to Quash, Ex. 7; Pl.'s Mot. to Disqualify, Aff. of Trudy Fenster, ¶ 72.
[126] Pl.'s Mot. to Disqualify, Aff. of Trudy Fenster, ¶¶ 71-73.
[127] Pl.'s Mot. to Disqualify, Aff. of Trudy Fenster, ¶ 74.
[128] Pl.'s Response to deChabert Defs.' Mot. to Quash, Ex. 7. The remaining portion of the text message was not submitted by Fenster with her exhibit. *See id.*
[129] Pl.'s Response to deChabert Defs.' Mot. to Quash, Ex. 8.
[130] Pl.'s Response to deChabert Defs.' Mot. to Quash, pp. 5-6, Exs. 9-15; Pl.'s Mot. to Disqualify, Aff. of Trudy Fenster, ¶¶ 75-76.
[131] Pl.'s Mot. to Disqualify, Aff. of Trudy Fenster, ¶ 77 & Ex. 24.
[132] Pl.'s Mot. to Disqualify, Aff. of Trudy Fenster, ¶ 78 & Ex. 24. The exhibit does not describe Regina deChabert's alleged response in its entirety. *See* Pl.'s Mot. to Disqualify, Ex. 24.

The foregoing—all of which are representations made by Fenster to this Court during these proceedings—suggest that Fenster repeatedly communicated with Regina deChabert regarding the underlying transaction and the legal implications thereof, despite Fenster's knowledge that the deChaberts were represented by Hamm. More troubling is that Fenster now seeks to use Regina deChabert's alleged statements against the deChaberts on the grounds that Regina deChabert waived her attorney-client privilege by disclosing to Fenster that the deChaberts had relied on Hamm's advice in deciding to breach the purchase agreement.

The Virgin Islands Rules of Professional Conduct, namely Supreme Court Rule 211.4.2, prohibit a lawyer from "communicat[ing] about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."[133] "In dealing on behalf of a client with a person who is not represented by counsel"[134] or in circumstances where the lawyer is unaware that the person is represented by counsel in the matter,[135] Supreme Court Rule 211.4.3 provides:

> [A] lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.[136]

The Comments to the ABA's Model Rules 4.1 and 4.3, upon which Supreme Court Rules 211.4.2 and 211.4.3 are based,[137] indicate that these rules serve to protect "a person who has chosen

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[133] V.I.S.CT.R. 211.4.2.
[134] V.I.S.CT.R. 211.4.3.
[135] MODEL R. PROF. CONDUCT 4.1 cmts. 8-9.
[136] V.I.S.CT.R. 211.4.3.
[137] *Compare* V.I.S.CT.R. 211.4.2, 211.4.3 *with* MODEL R. PROF. CONDUCT 4.2, 4.3.

to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation."[138] The rules "appl[y] even though the represented person initiates or consents to the communication[,]" and, "if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted[,]" the lawyer "must immediately terminate [the] communication[.]"[139]

The Court recognizes that "[p]arties to a matter may communicate directly with each other."[140] And, that the rules do "not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person" in circumstances where "the lawyer has explained that the lawyer represents an adverse party and is not representing the person[,]" in which case "the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations."[141]

However, while some communication between Fenster and Regina deChabert, as parties to the underlying transaction, was likely permissible under Supreme Court Rules 211.4.2 and 211.4.3, the ethical line is blurred once the dispute between Fenster, the deChaberts, and Walker arose because Fenster, in representing herself, stood in the role of both party and opposing counsel, yet continued to communicate with Regina deChabert, whom Fenster knew was represented by Hamm, concerning the underlying transaction. And, it is through this communication that Fenster alleges Regina deChabert waived her attorney-client privilege with respect to information

[138] MODEL R. PROF. CONDUCT 4.2 cmt. 1; *See also* MODEL R. PROF. CONDUCT 4.3 cmt. 1.
[139] MODEL R. PROF. CONDUCT 4.2 cmt. 3.
[140] MODEL R. PROF. CONDUCT 4.2 cmt. 4.
[141] MODEL R. PROF. CONDUCT 4.3 cmt. 2.

pertaining to Hamm's legal advice. It is this exact scenario that the relevant ethical rules are designed to avoid, namely, the "inadvertent or legally imprudent disclosures of privileged information[,]" in order to protect the attorney-client privilege that is so "critical to a strong client-lawyer relationship."[142] Indeed, in considering ethical rules identical to Supreme Court Rule 211.4.2, "[c]ourts and commentators have [further] noted that … [the rule] is designed 'to prevent situations in which a represented party may be taken advantage of by adverse counsel; the presence of the party's attorney theoretically neutralizes the contact.'"[143] Given that the sole basis of Fenster's waiver argument rests on her communications with Regina deChabert, the ethicality of which is questionable, the Court cannot conclude that Regina deChabert's disclosures to Fenster were voluntarily made so as to constitute waiver of the deChaberts' attorney-client privilege.

Likewise, the Court also concludes that the deChaberts did not waive their attorney-client privilege by placing "the advice of their attorney in issue" in taking "the position before litigation commenced" that the deChaberts breached the contract to purchase with Fenster in reliance on Hamm's legal advice. The Court recognizes that some courts in other jurisdictions have held that "[w]hen confidential communications are made a material issue in a judicial proceeding, fairness demands treating the defense as a waiver of the privilege."[144] Examples in which courts have found

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[142] Geoffrey C. Hazard, Jr. & Dana Remus Irwin, *Toward a Revised 4.2 No-Contact Rule*, 60 Hastings L.J. 797, 802 (2009) (The ABA's Model Rule 4.2 "protects the attorney-client privilege—critical to a strong client-lawyer relationship—by precluding inadvertent or legally imprudent disclosures of privileged information. This last function—protection of the attorney-client privilege—is thought by many to be the core function of Rule 4.2") (footnotes omitted).

[143] *Univ. Patents, Inc. v. Kligman,* 737 F. Supp. 325, 327 (E.D. Pa. 1990) (citing *Frey v. Department of Health and Human Services*, 106 F.R.D. 32, 34 (E.D. N.Y. 1985)) (other citations omitted); *See also Polycast Tech. Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 625 (S.D.N.Y. 1990) ("The proscription against a lawyer communicating directly with an opposing party who is represented by counsel is based on a variety of rationales. First, 'it prevents unprincipled attorneys from exploiting the disparity in legal skills between attorney and lay people'") (citations omitted).

[144] *Conkling v. Turner*, 883 F.2d 431, 434 (5th Cir. 1989) (citations omitted); *See Addie*, 2008 U.S. Dist. LEXIS 107548, at *6 ("[T]he attorney-client privilege may be waived when the privilege holder asserts a claim or defense that put his attorney's advice in issue in the litigation. The advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove the claim or defense by disclosing or describing an attorney client communication") (internal and other citations omitted); *Rhone-Poulenc Rorer*, 32 F.3d at 863 ("The advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing

waiver based on this principle include, *inter alia*, where the defendant "seeks to limit its liability by describing that advice and by asserting that he relied on that advice"[145] or where a party attests in an affidavit as to conversations with his lawyer, which puts the remaining material portions of those conversations in issue.[146]

However, Fenster has failed to identify any filing, affidavit, or document that actually suggests the deChaberts have made their confidential communications with Hamm a material issue in these proceedings. As discussed, Fenster has pointed out that the record indicates that the deChaberts have not asserted their reliance on Hamm's legal advice as a defense.[147] Despite Fenster's characterization, the deChaberts' Motion for Partial Summary Judgment is not premised on this theory,[148] nor does Regina deChabert describe or even allude to confidential communications with Hamm in her affidavit associated therewith.[149] In addition to pointing to her communication with Regina deChabert, which the Court has already found does not warrant a finding of waiver, Fenster also refers to her communication with Hamm.[150] However, the exhibits attached by Fenster merely show that Hamm and Fenster discussed relevant law in relation to the underlying facts of this case, but nowhere in the correspondence does Hamm divulge confidential communications between the deChaberts and himself.[151] Because Fenster has failed to point to

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or describing an attorney client communication") (citations omitted); *Frontier Ref. v. Gorman-Rupp Co.*, 136 F.3d 695, 699-700 (10th Cir. 1998) (discussing three "general approaches [used by courts] to determine whether a litigant has waived the attorney-client privilege").

[145] *See Rhone-Poulenc Rorer*, 32 F.3d at 863.

[146] *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 2013 U.S. Dist. LEXIS 113091, at *8-9 (E.D. Tex. Aug. 12, 2013) (citing *Conkling*, 833 F.2d 431).

[147] *See* Pl.'s Mot. to Disqualify, p. 20 ("Hamm and his law firm are incapable of doing that, as the record of the case thus far shows that they have failed to even assert a prime defense held by their clients, that they relied on the advice of client").

[148] *See* deChabert Defs.' October 14, 2016, Mot. for Partial Summ. J.

[149] *See* deChabert Defs.' October 14, 2016, Mot. for Partial Summ. J., Aff. of Regina deChabert; Pl.'s Mot. to Disqualify, Ex. 8.

[150] Pl.'s Response to deChabert Defs.' Mot. to Quash, pp. 13-14, Exs. 9-17.

[151] *See id.*; *C.f. Commonwealth v. Goldman*, 395 Mass. 495, 499-500, 480 N.E.2d 1023 (Mass. 1985) (where a witness testifies about the underlying *topic* of a privileged communication there is no waiver, but where the witness testifies to the *specific* privileged communication, there may be a waiver); RESTATEMENT (THIRD) OF THE LAW

anywhere in the record that demonstrates the deChaberts have placed their reliance on Hamm's legal advice in issue, wavier of the attorney-client privilege is not warranted on this ground.

C. Privilege log.

V.I. R. Civ. P. 45(e)(2) prescribes duties in responding to a subpoena and provides, *inter alia*, that "[a] person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must: (i) expressly make the claim; and (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim."[152] This same rule is also made applicable to *parties* withholding information "otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material" under V.I. R. Civ. P. 26(b)(5)(A). Both rules resemble their federal counterparts, Fed. R. Civ. P. 45(e)(2)(A) and Fed. R. Civ. P. 26(b)(5)(A).[153] While it is questionable whether the latter applied to subpoenas issued in Superior Court proceedings prior to the adoption of the Virgin Islands Rules of Civil Procedure,[154] it is clear that the former federal rule applied—insofar as it is applicable to the deChaberts as parties and discovery—at the time Fenster's subpoena was issued.[155]

The deChaberts concede the necessity of providing a "privilege log" in circumstances where information is withheld as privileged, but argue "the only possible response from the de

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GOVERNING LAWYERS § 79 cmt. e ("Waiver results only when a nonprivileged person learns the substance of a privileged communication. Knowledge by the nonprivileged person that the client consulted a lawyer does not result in waiver, nor does disclosure of nonprivileged portions of a communication or its general subject matter").

[152] V.I. R. CIV. P. 45(e)(2)(A).

[153] *Compare* V.I. R. CIV. P. 45(e)(2)(A) *and* V.I. R. CIV. P. 45(b)(5)(A) *with* FED. R. CIV. P. 45(e)(2)(A) *and* FED. R. CIV. P. 26(b)(5)(A).

[154] *supra* n. 29 & n. 30.

[155] *See* SUPER. CT. R. 29(a) (1970) (making FED. R. CIV. P. 26-27, inclusive, applicable to depositions and discovery in Superior Court proceedings); *See also Abdallah v. Abdel-Rahman*, 2016 V.I. LEXIS 174, *15 (V.I. Super. Ct. Sept. 23, 2016) (requiring the defendants provide a privilege log for their initial discovery disclosures, as required under FED. R. CIV. P. 26(b)(5)(A)(ii)).

Chabert[s] … is a blanket assertion of privilege" because "the only documents sought by Plaintiff pursuant to the [s]ubpoena are documents in the possession of the de Chabert[s'] … attorney pertaining to 'legal advice' given to the de Chabert[s] … 'in this matter' related to four subsets of information, all of which go to the heart of the matters at issue in this [a]ction", and any privilege log produced in response to the foregoing request would, pursuant to Plaintiff's own request, include[e] the phrase "for purposes of legal advice" with regard to each and every item."[156] Fenster does not address the privilege log issue.[157]

The Court agrees with the deChaberts that the production of a privilege log in this instance would be futile given the express language of the subpoena.[158] Because Fenster requests information pertaining to Hamm's legal advice, any description of the nature of the withheld documents, communications, or tangible things would necessarily divulge information pertaining to Hamm's legal advice to the deChaberts, which is subject to the attorney-client privilege and work product doctrine. And, as the Court discussed at length above, the only materials requested by Fenster that are not subject to the attorney-client privilege or the work product doctrine are those evincing payments made by the deChaberts to Hamm, or his law firm, for legal services. Consequently, while the Court will direct Hamm to produce the requested "billings" by the Chaberts, the Court will not require the deChaberts to submit a privilege log to Fenster.

D. The deChaberts' request for sanctions.

In their motion, the deChaberts request the Court exercise its inherent power to impose sanctions against Fenster for her "bad faith use of process" because the subpoena was issued "for

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[156] deChabert Defs.' Mot. to Quash, p. 4 (emphasis omitted).
[157] *See* Pl.'s Response to deChabert Defs.' Mot. to Quash.
[158] *See Lemberg Law LLC v. Hussin,* 2016 U.S. Dist. LEXIS 76772, at *15-16 (N.D. Cal. June 13, 2016) ("Although blanket assertions of privilege are disfavored, Rule 45 explicitly instructs that a court must quash a subpoena that seeks disclosure of privileged material, and courts have done so where the issuing party fails to explain 'what non-privileged, relevant information [the witness] could offer'") (internal and other citations omitted).

purposes of harassment and/or vexatious multiplicity of proceedings and costs."[159] Fenster does not respond to this request in her opposition,[160] but the deChaberts reiterate it in their reply.[161]

It is axiomatic that the Court has the inherent power to impose sanctions[162] against parties that "act in bad faith, vexatiously, wantonly, or for oppressive reasons."[163] Further, "[t]he Legislature has enacted numerous statutes that explicitly or implicitly authorize the Superior Court to impose sanctions for violation of procedural rules[,]"[164] including, *inter alia*, under the Court's "incidental powers as codified in 4 V.I.C. § 243."[165] In either instance, "the decision to impose sanctions "is a decision particularly committed to the sound discretion of the [trial] court . . . ."[166]

While the Court recognizes the deChaberts' frustration in having to expend time, effort, and funds in responding to Fenster's subpoena, the Court is not convinced that Fenster issued and served the subpoena in bad faith, vexatiously, wantonly, or for oppressive reasons, or in violation of a procedural rule.[167] As discussed at length above, there are circumstances that could

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[159] deChabert Defs.' Mot. to Quash, p. 4.
[160] *See* Pl.'s Response to deChabert Defs.' Mot. to Quash.
[161] deChabert Defs.' Reply in Further Support of Mot. to Quash, p. 5.
[162] *In re Rohn*, 2017 V.I. Supreme LEXIS 47, at *8 (V.I. Aug. 1, 2017) ("[T]his Court held that Virgin Islands courts possess the inherent power to impose sanctions independent of any statutory or procedural rules") (citing *In re Moorhead*, 63 V.I. 689, 693 (V.I. 2015)) (other citations omitted); *See also Withey v. Bermudez*, 2014 V.I. LEXIS 108, *9-10 (V.I. Super. Ct. Dec. 16, 2014) ("[R]ules and statutes do not displace Court's inherent powers to impose sanctions. Rather, court's [sic] may fill in the gaps of sanctions law with their own inherent powers where there is a finding of bad faith . . . and where 'neither the statutes nor the rules are up to task'") (citing *United States v. Hudson & Goodwin*, 11 U.S. 32, 33 (U.S. 1812); *Chambers v. Nasco, Inc.*, 501 U.S. 32, 111 S. Ct. 2123, 115 L. Ed. 2d 27, (U.S. 1991)).
[163] *In re Rohn*, 2017 V.I. Supreme LEXIS 47, at *13 n.4 (Cabret, J., dissenting in part) (citing *Chambers*, 501 U.S. at 33).
[164] *Id.* at *6-8 (citing 4 V.I.C. § 243(1)-(3); 4 V.I.C. § 281(1)-(2); 4 V.I.C. § 282;) (other citations omitted).
[165] *V.I. Taxi Ass'n v. V.I. Port Auth.*, 2015 V.I. LEXIS 67 (V.I. Super. Ct. June 15, 2015).
[166] *In re Rohn*, 2017 V.I. Supreme LEXIS 47, at *9 (citations omitted).
[167] Relevant here is V.I. R. CIV. P. 45(d)(1), which provides that the Court "must enforce th[e] duty" of the "party or attorney responsible for issuing and serving a subpoena" to "take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena" by "impos[ing] an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply." This rule mirrors FED. R. CIV. P. 45(d)(1). *Compare* V.I. R. CIV. P. 45(d)(1) *with* FED. R. CIV. P. 45(d)(1). However, Fenster's subpoena was issued and served prior to the adoption of this rule, at which time there was confusion regarding the applicability of FED. R.

conceivably warrant the production of otherwise privileged information. Without more, Fenster's subpoena, in and of itself, is not a sufficient basis for imposing sanctions against Fenster or her counsel.

The Court also declines the deChaberts' invitation to impose sanctions against Fenster for failing to cite a case from the United States District Court of the Virgin Islands.[168] Although Virgin Islands attorneys are obligated by the Virgin Islands Rules of Professional Conduct, as well as the procedural rules, "to disclose to the tribunal legal authority in the controlling jurisdiction"[169] under the circumstances presented here, this obligation only required Fenster to cite binding authority.[170] The Supreme Court of the Virgin Islands has long held that "decisions of the District Court sitting in its capacity as a local trial court are not binding on the Superior Court" and are merely persuasive.[171] Consequently, there is no justification for imposing sanctions against Fenster or her counsel on this ground.

CONCLUSION

In light of the foregoing, Fenster's Motion to Disqualify Owner Defendants' Attorney will be denied, while the deChaberts' Motion to Quash will be granted in part and denied in part. Specifically, Hamm will be directed to produce the requested materials, namely "billings" that constitute payments made by the deChaberts to Hamm for his legal services. As to all other

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CIV. P. 45 to subpoenas issued in Superior Court proceedings. *supra* n. 29 & n. 30. As a result, the Court will not apply V.I. R. CIV. P. 45(d)(1) when considering the deChaberts' request for sanctions. *See* V.I. R. CIV. P. 1-1(c)(2)(B).

168 *See* deChabert Defs.' Reply in Further Support of Mot. to Quash, p. 5. The District Court case at issue is *Addie,* 2008 U.S. Dist. LEXIS 107548.

169 V.I.S.CT.R. 211.3.3(a)(2); *See* V.I.S.CT.R. 211.3.1; V.I. R. CIV. P. 11(b).

170 *Percival v. People of the V.I.*, 62 V.I. 477, 491 (V.I. 2015) (finding the appellant waived the issue by failing "fails to cite a single binding authority in his appellate brief, instead relying exclusively on persuasive authority from the District Court and the Third Circuit") (citing V.I.S.CT.R. 15(b)) (other citation omitted).

171 *Better Bldg. Maint. of the V.I., Inc. v. Lee*, 60 V.I. 740, 755 (V.I. 2014) (citations omitted); *See Hamed v. Hamed,* 63 V.I. 529, 536 (V.I. 2015) ("[D]ecisions issued by the Appellate Division after 2007, like decisions of the District Court or Third Circuit heard through diversity or supplemental jurisdiction, are not binding on the Superior Court, since the role of the federal courts in those cases is not to independently determine Virgin Islands law, but to predict how this Court would determine Virgin Islands law") (citations omitted).

requested materials, Fenster's *subpoena duces tecum* must be quashed because it requires the disclosure of privileged or otherwise protected matter for which no exception or waiver applies and is deficient in seeking the production of nonprivileged information. Finally, for the reasons stated above, the Court declines to impose sanctions against Fenster or her counsel.

Dated: September 27, 2017.

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

ATTEST: Estrella H. George
Clerk of Court ___/___/___

by: for
Lori Boynes-Tyson
Court Clerk Supervisor 9/27/2017