

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Abingdon Division**

KNOX ENERGY, LLC,)
 Plaintiff,)
)
v.)
)
GASCO DRILLING, INC.,)
 Defendant.)

MEMORANDUM ORDER

)
GASCO DRILLING, INC.,)
 Counterclaim Plaintiff,)
)
v.)
)
KNOX ENERGY, LLC,)
CONSOL ENERGY, INC.)
 Counterclaim Defendants.)

Civil Action No. 1:12-cv-00046

This matter is before the court on Knox Energy, LLC’s, and Consol Energy, Inc.’s, Motion To Compel, (Docket Item No. 125) (“Motion”). The Motion was heard before the undersigned on July 3, 2014. Based on the arguments and representations of counsel, and for the reasoning set forth below, the Motion is **GRANTED**.

This action involves claims regarding the validity and enforceability of a gas drilling contract. According to the defendant and counterclaim plaintiff, Gasco Drilling, Inc., (“Gasco”), this contract was created when the parties executed a one-page form document addendum in 2011. Plaintiff and counter-claim defendant, Knox Energy, LLC, (“Knox Energy”), and counterclaim defendant,

Consol Energy, Inc., (“Consol”), contend that Gasco knew that this form was sent to it by mistake.

During the individual and Rule 30(b)(6) depositions of Gasco’s President Ben Ratliff, Gasco’s counsel objected to certain questions put to Ratliff as calling for information protected from disclosure by the attorney-client privilege, and he instructed Ratliff not to answer the questions. These questions asked Ratliff when he consulted an attorney “about” or “about anything related to” the addendum or Gasco’s counterclaim in this action, whether he consulted with an attorney regarding the addendum before returning the executed addendum to Consol and whether he consulted with an attorney regarding the addendum or Gasco’s counterclaim before submitting a bid to Consol for a Marcellus Shale drilling project in September 2011. The Motion seeks to overrule the objections and compel Ratliff’s answers to these questions.

Under Federal Rules of Evidence Rule 501, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision. *See* FED. R. EVID. 501. The court’s jurisdiction in this case is based on diversity, and the parties agree that Virginia state law controls this privilege issue. Virginia law recognizes “that confidential communications between an attorney and his client, made because of that relationship and concerning the subject-matter of the attorney’s employment, are privileged from disclosure....” *Grant v. Harris*, 82 S.E. 718, 719 (Va. 1914).¹ Under Virginia law, the proponent of the privilege has the burden to establish that the attorney-client privilege existed, that the

¹ While Virginia has adopted rules of evidence effective July 1, 2012, VA. R. EVID. Rule 2:502 states that the existence and application of the attorney-client privilege, in most instances, is governed by the common law.

communication under consideration is privileged and that the privilege was not waived. *See Commonwealth v. Edwards*, 370 S.E.2d 296, 301 (Va. 1988). The attorney-client privilege does not, however, protect all aspects of the attorney-client relationship. *See Hawkins v. Stables*, 148 F.3d 379, 383-84 (4th Cir. 1998) “[I]t protects only confidential communications occurring between the lawyer and his client.” *Hawkins*, 148 F.3d at 384. Also, the privilege is an exception to the general duty to disclose, and, thus, is an obstacle to investigation of the truth; as such, it should be strictly construed. *See Edwards*, 370 S.E.2d at 301.

In this case, the parties agree that the existence of the attorney-client relationship is not privileged against disclosure. Furthermore, Gasco’s counsel has not asserted that the attorney-client privilege prevents Ratliff from answering questions regarding whether he consulted with an attorney and the timing of the consultations. The issue here is whether Virginia law protects from disclosure the general subject matter of the consultation and whether the questions put to Ratliff call for disclosure of only the general subject matter of the consultation or call for disclosure of the confidential communications. Counsel have not provided the court with, and the court has not found, any Virginia precedent addressing this specific issue. While not binding on this court in this instance, federal precedent in this circuit recognizes that “the general purpose of the work performed [is] usually not protected from disclosure by the attorney-client privilege ... because such information ordinarily reveals no confidential professional communications between attorney and client.” *United States v. Under Seal*, 204 F.3d 516, 520 (4th Cir. 2000) (internal and external quotations omitted).

I find that the questions posed in this case, if answered, would not require Ratliff to reveal confidential communications with his counsel. The questions put

to Ratliff ask whether he consulted with counsel “about” the addendum or the counterclaim. To answer the questions, Ratliff would not be required to reveal any information he conveyed to his counsel. Nor would he be required to reveal any information or advice he received from his counsel. Therefore, I find that these questions seek only the general purpose of the consultations with counsel. I further hold that, since Virginia law protects as privileged only “communications” with counsel, that it would not protect from disclosure the general subject matter of the consultations.

Based on the above-stated reasons, the Motion is **GRANTED**, and it is **ORDERED** that the depositions of Ratliff may be reconvened, and Ratliff shall answer counsel’s questions regarding the general subject matter of his consultations with counsel.

ENTERED: this 9th day of July, 2014.

/s/ Pamela Meade Sargent

UNITED STATES MAGISTRATE JUDGE