

15-1100

Oct. 29. 2015 2:08PM

No. 1933 P. 2/31

IN THE CIRCUIT COURT OF JACKSON COUNTY, WEST VIRGINIA

THOMAS T. MARTIN, et ux.,
Plaintiffs,

Vs.

CIVIL ACTION NO. 09-C-31
(Judge Thomas C. Evans, III)

A.I.O. HOLDINGS, LLC, et al.,
Defendants.

ORDER

(Re: Motion to Quash Subpoena in relation to Motion for Sanctions)

This matter is before the Court on Mr. Kaminski's Motion to Quash the Plaintiffs' subpoena. For the reasons set forth more fully herein, the Motion to Quash is **DENIED**.

Statement of Facts

On January 27, 2004, the Plaintiffs leased the right to drill for and produce natural gas on approximately sixty-one (61) acres (the "Martin Lease") to Martin Twist Energy Corporation ("MTEC"). Pursuant to that lease, MTEC drilled three (3) wells upon the Plaintiffs' property. The three (3) wells were the Martin #1, Martin #2, and Martin #4 well.

Thereafter, AIO loaned MTEC two-million dollars (\$2,000,000), with the loan collateralized by various oil and gas leases and wells, including the Martin Lease and the wells drilled thereunder. MTEC defaulted on its loan with AIO and as a result, AIO instituted a foreclosure proceeding against MTEC in the Circuit Court of Jefferson County, Kentucky. As part of the Agreed Judgment entered by the Court, MTEC

transferred its entire right and interest in the Martin Lease and the wells drilled thereunder to AIO on October 8, 2008. On March 12, 2009, Plaintiffs filed suit against AIO on multiple grounds, including its failure to pay Plaintiffs appropriate royalties under the Martin Lease. On April 15, 2009, Counsel for AIO made his first appearance in the case by removing the case to federal court. The case was later remanded back to state court.

Shortly thereafter, Counsel for AIO filed a counterclaim against Mr. Martin. The Counterclaim alleged that Mr. Martin interfered with AIO'S production from the three (3) wells when he chased AIO employees off of the property with a gun and prohibited them from working on the wells. Under the original Scheduling Order this Court found that this case was an appropriate case to refer to mediation and ordered the parties to complete such mediation not less than two (2) weeks prior to the pre-trial conference. This Court ordered each party to present a representative that had full decision making discretion to examine and resolve issues involved in this case.

On July 16, 2010, the Martins, and Todd Pilcher, on behalf of AIO, appeared before the Hon. Judge Andrew A. MacQueen, to attempt to resolve this case. The Martins presented a settlement offer in the form of a certain Settlement Agreement and Mutual Release, but Mr. Pilcher rejected the settlement offer on behalf of AIO. On November 2, 2010, AIO served "*Defendant A.I.O. Holdings, LLC'S Responses to Plaintiffs' First Set of Interrogatories and Requests for Production of Documents*" upon Plaintiffs. The responses were signed by Counsel and verified by Mr. Pilcher.

Interrogatory 4 asked AIO to identify the legal and factual basis for each defense set forth in its answer. AIO responded in part, "Defendant does contend that it complied

with all of its obligations under the subject lease agreement including its right to operate the subject wells and its duty to pay royalties/shut-in fees." Interrogatory 11 asked AIO to identify each person or entity know to it that had rights in the Martin Lease. AIO responded, "None other than the present parties." Interrogatory 15 requested AIO to identify all communications it has had with Plaintiff regarding the lease of their property. AIO responded in part, "Too numerous to detail, but plaintiff has threatened defendant's employees or contractors on numerous occasions."

On May 12, 2011, AIO served "*Defendant's Responses to Plaintiffs' First Requests to Admit to A.I.O. Holdings, LLC.*" The responses were signed by Counsel, but were not signed or verified by any other individual. Request 1 asked AIO to admit that it came into possession of the Martin Wells through proper foreclosure proceedings in Kentucky. This request was admitted by AIO. Request 3 asked AIO to admit that it maintained documentation of its gas production from the Martin Wells. Request 4 asked AIO to admit that it maintained documentation of its revenues from the Martin Wells. Request 5 asked AIO to admit that it maintained documentation of its costs incurred from the Martin Wells. AIO admitted all three of these requests.

Request 6 asked AIO to admit that it had paid all taxes due on the Martin Wells to the State of West Virginia. AIO admitted this request. Request 14 asked AIO to admit that it maintains the Martin Wells to ensure optimum gas production. AIO admitted this request. Request 17 asked AIO to admit that it is currently producing gas from the Martin Wells. AIO responded that it could not admit or deny this request because the Martin Wells were "shut-in."

Plaintiffs advised Counsel for AIO that its responses to Plaintiffs' Interrogatories and Requests for Production were incomplete. When AIO refused to supplement its responses, Plaintiffs filed a Motion to Compel. In his response to the Motion to Compel, Counsel for AIO stated that he refused to provide the contact information for Mr. Pilcher and Mr. Rager because both men were employed by AIO, and therefore, all contact with them must occur through counsel. Counsel then justified his failure to schedule the Rule 30(b)(7) deposition of the AIO corporate representative because Mr. Pilcher, the designated representative, was unavailable and "is the only individual with such knowledge."

AIO served its supplemental responses to Plaintiffs' interrogatories on August 8, 2011. In supplemental response to Interrogatory 8, AIO stated that no additional production reports were available because the wells had been shut-in since the time of the last reports. The latest production report provided to Plaintiffs by AIO showed production during May, 2009. There were only two checks received by the Martins after May, 2009. They were dated June 11, 2010, but they did not reference the corresponding month of production.

Plaintiffs' Motion to Compel has heard by this Court on August 12, 2011. During that hearing, Counsel for AIO stated that from the inception of this case through July of 2011, "Pilcher was the only person that I had any contact with relative to this case." When the Court inquired as to whether Mr. Pilcher was an employee of AIO, the following exchange occurred:

Kaminski: He is *not* a direct employee of AIO and *never* was.

Court: What is he?

Kaminski: He is an independent contractor...

Court: *How can AIO designate as a corporate representative an independent contractor? I've never heard of that.*

Kaminski: I have. It is rare, your Honor, but I have seen it done. Under 30(b)(7), *the corporation*, as I understand it, *is to designate the person* with the most knowledge about the given subjects that are listed...

Court: *So AIO can't control him*, and he's refusing to cooperate.

Kaminski: That is correct, your Honor. I don't know where he is.

Court: Is he really ill?

Kaminski: I don't know.

Court: *Nobody knows at AIO?*

Kaminski: It has been – *yeah*, I – the only – *it's been represented to me* that he was admitted and put into a 90-day treatment facility in Illinois, and then I haven't heard from him since, so.

On September 14, 2011, Mr. Gregory P. Anastas, the Rule 30(b)(7) representative of AIO, was deposed. Mr. Anastas testified that the sole member of AIO is Advantage Investments. He is the only member of Advantage Investments (pg. 14). Also, AIO has no employees and no day-to-day operations. Mr. Anastas did not learn about the lawsuit until well into 2011. When asked who was managing the lawsuit on behalf of AIO before he became aware of it, he stated, "I don't know." Mr. Anastas was not aware of previous court dates in this case and does not know who retained Mr. Kaminski.

Mr. Anastas testified further:

Q: ... Do you know who answered the initial interrogatories for the company?

A: **No.**

Q: If there's no employees or anyone involved with A.I.O. Holdings other than yourself, how could anyone else have answered the interrogatories?

A: **I have no idea.**

Q: Were you aware that there was a mediation in this case over a year ago?

A: **I was not.**

Q: Did you authorize anybody to go to that mediation?

A: **I did not.** I don't recall that.

Q: So, you didn't authorize Todd Pilcher (Pilcher) to go to the mediation with authority to set [sic] on?

A: **No. I don't know who that is.**

Also, MTEC has no involvement whatsoever with AIO; it has no managerial discretion; and does not consult with AIO. Mr. Anastas further testified that, until he was advised by Plaintiffs' Counsel during his deposition, he did not even know that AIO had an interest in the Martin Lease or the wells drilled thereunder. Mr. Anastas then re-confirmed that he had never heard of Todd Pilcher or Jonathan Rager.

AIO has never authorized anyone to maintain the Martin wells or to monitor production from the wells. Despite this fact, Mr. Rager was retained by Blue Light of Kentucky, LLC ("Blue Light") to tend the Martin wells. Blue Light's managing member was Martin Twist, and it had an office address of 530 W. Main Street, Louisville, Kentucky. As late as August 2, 2011, Mr. Rager was instructed to forward the Martin well meter readings to Martin Twist.

On the same day that Mr. Anastas was deposed, but several hours after the deposition, Martin Twist telephoned Mr. Rager and requested copies of all production logs for the Martin wells. Mr. Twist informed Mr. Rager that he was requesting this information because of allegations that were made during Mr. Anastas' deposition. Anastas did not know about AIO's counterclaim until he was told about it by Mr. Kaminski. In addition, AIO has no evidence whatsoever to support its counterclaim against Mr. Martin. Mr. Anastas testified that:

- a. AIO has no records in its possession related to the Martin Wells;
- b. AIO has never made a royalty payment to the Martins;
- c. AIO has never received one cent from the production from the Martin wells;
- d. AIO cannot speak to the amount of gas produced from the Martin wells; and
- e. AIO cannot counter Mr. Martin's claims that he has not been properly compensated by AIO under the Martin Lease.

Plaintiffs filed their Motion for Sanctions as a result of Mr. Anastas' deposition. On the same day Mr. Kaminski received the Motion for Sanctions, he received an operating agreement showing that A.I.O. had in fact allowed Mr. Twist to operate the wells. Mr. Kaminski immediately moved to withdraw from the case.

A.I.O. agreed to waive their attorney client privilege in regards to any communications between Mr. Kaminski and A.I.O., people acting on behalf of A.I.O., and people purporting to act on behalf of A.I.O. A.I.O. then provided Plaintiffs with communications from Mr. Kaminski. Plaintiffs then served Mr. Kaminski with a subpoena requesting categories of documents. Mr. Kaminski opposed the subpoena on

the basis of the attorney client privilege. He then filed the Motion to Quash that is the subject of this order.

Standard of Review

Pursuant to Rule 45 of the West Virginia Rules of Civil Procedure, a subpoena may be quashed if it requires disclosure of privileged information and no waiver or exception applies. The attorney-client privilege doctrine is to be strictly construed. State ex rel. United Hospital Center v. Bedell, 199 W.Va. 316, 484 S.E.2d 199 (1997). Finally, the burden of establishing the attorney-client privilege always rests upon the person asserting it. State ex rel. USF & G v. Canady, 194 W. Va. 431, 441, 460 S.E.2d 677, 687 (1995).

Existence of Attorney-Client Privilege

The threshold issue to be determined in this case is whether the requested documents are protected from disclosure by the attorney-client privilege. In order to successfully invoke the attorney-client privilege, procedural and substantive requirements must be followed.

Procedural Requirements

To meet the procedural requirement for invoking the attorney-client privilege, a party must file a privilege log identifying the document that is allegedly privileged by name, date, custodian, source and the basis for the claim of privilege. State ex rel. Nationwide v. Kaufman, 222 W.Va. 37, 43, 658 S.E.2d 728, 734 (2008). The privilege log is to be provided to the Court and to the requesting party prior to any hearing

seeking to compel or limit discovery so that the application of the privilege can be determined on a document-by-document basis. Id.

In this case, the Plaintiffs' subpoena was issued on January 22, 2013. Mr. Kaminski filed his motion to quash based upon the attorney-client privilege on January 31, 2013. However, he did not provide a privilege log. On July 18, 2013 Plaintiffs' counsel requested in writing that Mr. Kaminski's counsel follow the proper procedure and provide a privilege log prior to the hearing on the motion to quash. Plaintiffs' counsel explained that it would be impossible for this Court to determine whether the documents were privileged if it did not know which documents were at issue. Mr. Kaminski's counsel responded that it would not provide a privilege log at that time because he was not going to "waste our time" responding to the Plaintiffs' "fishing expedition."

It is improper for Mr. Kaminski to refuse to comply with the subpoena under the cover of the attorney-client privilege, and then refuse to identify the privileged documents. Whether the privilege applies is to be determined on a document-by-document review by this Court. This cannot be done if Mr. Kaminski refuses to identify the documents to be reviewed. The West Virginia Supreme Court clearly mandated that a privilege log must be provided to the court and the opposing party when documents are withheld under claim of privilege. Given that Mr. Kaminski willfully violated the required procedure for invoking the attorney-client privilege, the privilege has not been properly invoked. As such, this Court cannot find as a matter of law that the privilege applies to each requested document because it does not know what those documents are. Therefore, the motion to quash must be denied.

Under normal circumstances, this would be the end of this Court's Order. However, this Court believes that the attorney-client privilege is sacrosanct. As such, this Court will not reject a claim of attorney-client privilege unless it is abundantly clear that the privilege does not exist. For this reason, this Court has given Mr. Kaminski every opportunity to show that the privilege does exist. Despite the rather passionate and articulate arguments provided by Mr. Kaminski, it is clear to this Court that the requested documents are not protected by the privilege for multiple reasons. However, out of an abundance of caution, and to show that it is abundantly clear that the privilege does not apply, this Court will set forth each additional basis for its rejection of the claim of privilege.

Substantive Requirements

In order to meet the substantive requirement for invoking the attorney-client privilege, the following three elements must be shown: (1) both parties contemplated the existence of the attorney-client relationship; (2) the advice must have been sought by the client from the attorney in his capacity as a legal adviser; and (3) the communication between the attorney and client must be identified to be confidential.¹⁹ *Syllabus Point 2, State v. Burton*, 163 W.Va. 40, 254 S.E.2d 129 (1979). In this case, Mr. Kaminski has failed to prove each of these three elements.

The first requirement to be proven is that both parties contemplated the existence of the attorney-client privilege. To begin, it must be noted that Mr. Kaminski has not provided the actual identity of the entity or individual on whose behalf he is invoking the attorney-client privilege. Therefore, it is impossible for this Court to determine whether

the client contemplated the existence of the attorney-client relationship since this Court does not even know the client's identity.

However, Mr. Kaminski did address the first element in his motion to quash. The only analysis dedicated to the first element is as follows:

First, both parties must contemplate that an attorney-client relationship does or will exist. Consequently, in order to circumvent the privilege, it stands to reason that both parties not contemplate such a relationship to exist. Here Plaintiff presents no evidence that the third-parties acting on behalf of AIO did not so contemplate. Therefore, Kaminski cannot make any other assumptions in the absence of evidence and is required to maintain the privilege.

(emphasis in original). This analysis is legally and logically incorrect. First, the privilege does not automatically apply. It only applies if it is proven that both parties contemplated the existence of the attorney-client relationship. If either Mr. Kaminski or the "client" did not contemplate the existence of the relationship, the privilege does not apply. Therefore, Mr. Kaminski's claim that the privilege applies unless both parties do not contemplate such a relationship to exist is simply false.

This argument also improperly attempts to shift the burden of proof. Instead of meeting his burden of proving that the privilege applies, Mr. Kaminski claims that the Plaintiffs must prove that the privilege does not apply. He then claims that he can invoke the privilege because the Plaintiffs' failed to present sufficient evidence to circumvent the privilege. Mr. Kaminski's position is simply not supported by the law. The burden is upon Mr. Kaminski to prove that both parties contemplated the existence of the attorney-client relationship. He failed. Not only did he fail to prove that the unnamed "client" contemplated the existence of the relationship, he failed to even

identify the client. Perhaps even more importantly and problematic, Mr. Kaminski failed to allege that he contemplated the existence of an attorney-client relationship with any entity in this case other than A.I.O. Therefore, because Mr. Kaminski offered no proof that both he and the "client" contemplated the existence of the attorney-client relationship, he has failed to prove the first of the three required elements. For this reason alone, Mr. Kaminski's attempt to invoke the attorney-client privilege must fail.

The second requirement is that the advice must have been sought by the client from the attorney in his capacity as a legal adviser. Again, it must be noted that the actual "client" has not been identified and no evidence has been presented to prove this element in Mr. Kaminski's motion to quash. It is important to recognize that even though the client has not been identified, it is unlikely, if not impossible, for the client to be Mr. Twist. Mr. Kaminski submitted answers to interrogatories on behalf of A.I.O. stating that the only two individuals that knew anything about this case were Todd Pflücher and Jonathan Rager. He also signed the same discovery responses that acknowledged that Mr. Twist had no interest in the gas lease because he had lost his interest in a foreclosure action to A.I.O. Finally, the Plaintiffs requested to take the deposition of Mr. Twist approximately two years after this case was filed. In response to that request, Mr. Kaminski informed Plaintiffs' counsel in writing that Mr. Twist would not be made available for deposition because Mr. Twist knew nothing about the Plaintiffs' claims. It is difficult for this Court to envision a scenario where an individual would seek advice from a lawyer regarding a case in which the individual does not have an interest and about which he has no knowledge. Regardless, Mr. Kaminski has provided this

Court with no evidence proving the existence of the second required element. For this reason alone, Mr. Kaminski's attempt to invoke the attorney-client privilege must fail.

The third requirement is that the communication between the attorney and client must be identified to be confidential. Mr. Kaminski has failed to prove this element as he has failed to identify the client, he has failed to identify the communications in dispute, and he has failed to offer any evidence that the alleged communications were considered confidential by himself and the client. Again, it is difficult for this Court to envision a scenario where Mr. Kaminski could ever prove this element in relation to Mr. Twist. In addition to the fact that Mr. Twist had no interest in this case and knew nothing about this case, Mr. Kaminski testified in open court and on the record that the only person he discussed this case with from its inception in March of 2009 until at least June of 2011 was Mr. Todd Pilcher. Mr. Kaminski withdrew from this case shortly thereafter. Therefore, in order to prove this element, Mr. Kaminski would have to provide evidence that he had confidential communications regarding this case with an individual that he did not talk to and who knew nothing about this case. One simple fact remains; Mr. Kaminski offered no evidence in his motion to quash to prove this element. As such, it is not an issue of whether this Court erred in weighing the evidence or in determining whether Mr. Kaminski met his burden in proving this element. No evidence was submitted to prove the existence of this element. Since Mr. Kaminski offered no evidence to prove this element, he failed to meet his burden proof. This reason alone warrants the denial of Mr. Kaminski's motion to quash.

Attorney-Client relationship Is Case Specific

Mr. Kaminski acknowledged that he did not represent Mr. Twist or any Twist entity in this case. However, Mr. Kaminski argued that his communications with Mr. Twist regarding this case were still subject to the attorney-client privilege because he represented Mr. Twist in other unrelated cases. This argument fails because the attorney-client privilege is case-specific.

For example, in In re Grand Jury Investigation, 640 F.Supp. 1047 (S.D. W.Va. 1986), the government sought to have an attorney testify against his unnamed client before the grand jury. The lawyer also represented a client known as A.D., whom the government believed was part of a criminal conspiracy with the lawyer's unnamed client. The government believed that the unnamed client had hired the attorney to represent A.D. and that he did so as part of the conspiracy. The attorney refused to testify against his unnamed client on the grounds of the attorney-client privilege. The lawyer did so on the basis that he had a current attorney-client relationship with the unnamed client in a separate state court proceeding. However, the lawyer did not represent the unnamed client in the case in which the lawyer was asked to testify.

As additional support for his ruling that the attorney-client privilege did not apply, Judge Haden cited the following portion of In re Grand Jury Proceedings (Pavlick), 680 F.2d 1026 (5th Cir. 1982):

Even if the anonymous fee-payer was in other respects a client of the attorney, he was not the client with respect to the matter for which the fee was paid and for which the attorney was to be interrogated. The three individuals who were the beneficiaries of the attorney's services were the clients. Because those three had waived the attorney-client privilege and because the unnamed client had failed to establish an attorney-client relationship, the concurring judges believed it unnecessary to discuss

whether the legal services were provided pursuant to a conspiracy.

The relevant facts of the instant case are nearly identical to the facts in Judge Haden's case. In both cases, an anonymous fee-payer retained the lawyer to represent the named defendant. In both cases, the lawyer was asked to provide information related to the anonymous fee-payer. In each case, the lawyer refused citing his attorney-client relationship with the anonymous fee-payer. Also, in both cases, the lawyer did not represent the anonymous fee-payer in the case in which the lawyer was being asked to provide information. The lawyers in both cases based their objections on the fact that they had an attorney-client relationship with the anonymous fee-payer in some other case. Finally, in both cases, the actual client being represented by the lawyer agreed to waive the attorney-client privilege.

This Court also recognizes that Judge Haden's reasoning and the holding in Pavlick are consistent with the holdings of numerous other jurisdictions that have addressed this same issue. See, Panko v. Alessi, 362 Pa.Super 384 (Pa. Sup. Ct. 1987) (attorney-client privilege did not bar lawyer from testifying against vendor that he represented in unrelated matter); Lopez v. State, 651 S.W.2d 830 (Texas Ct. App. 1983) (Lawyer that represented client in unrelated case could testify against client in criminal case); State v. Murvin, 304 N.C. 523 (N.Car. S.Ct. 1981) (Attorney-client privilege did not protect disclosure of communication to attorney because the communication did not relate to the matter for which she was consulting the attorney); Tepsich v. Howe Construction, 377 Mich. 18 (Mich. S.Ct. 1965) (attorney-client relationship in unrelated case did preclude attorney from testifying against his client in

matter where no attorney-client relationship existed); O'Connor v. Padgett, 82 Neb. 95, 116 N.W.1131 (Neb. S.Ct. 1908) (a communication to an attorney, where there is no attorney-client relationship, is not privileged even though attorney employed in some other capacity); Rand v. Ladd, 238 Iowa 380 (Iowa S.Ct. 1947) (Lawyer who represented client in former prosecution could testify against client in injunction hearing without violating attorney-client privilege); People v. Hall, 55 Cal.App.2d 343 (Cal. Ct. App. 1942) (that attorney represented client with respect to one matter did not preclude him from testifying against client in entirely different matter where attorney-client relationship did not exist); Denunzio's Receiver v. Scholtz, 25 Ky.L.Rptr 1294 (Ky. Ct. App. 1903) (privilege does not apply to communications that do not concern the matter in which the lawyer represented the client); Milan v. State, 24 Ark. 346 (Ark. S.Ct. 1866) (Lawyer may testify against client as to matters in which no attorney-client relationship exists); and Churchill v. Corker, 25 Ga. 479 (Ga. S.Ct. 1858) (privilege does not preclude lawyer from testifying against client regarding facts that occurred in unrelated case).

This Court adopts the reasoning of Judge Haden, the Pavlick court and the numerous other courts cited above and holds that communications *regarding this case* between Mr. Kaminski and Mr. Twist are not protected by the attorney-client privilege because Mr. Kaminski and Mr. Twist did not have an attorney-client relationship *in this case*. Since the subpoena only sought communications between Mr. Kaminski and Mr. Twist related to this case, the requested documents are not protected by the attorney-client privilege and must be produced. For this reason, Mr. Kaminski's motion to quash must be denied.

Waiver of the Attorney-Client Privilege

This Court has already determined that the requested documents under the subpoena are not protected by the attorney-client privilege. *Assuming arguendo*, that the requested documents were protected by the attorney-client, they would still be discoverable because the attorney-client privilege has been waived in this case. The attorney-client privilege belongs to the client alone. State ex rel. Medical Assurance of West Virginia, Inc. v. Recht, 213 W. Va. 457, 465, 583 S.E.2d 80, 88 (2003). Therefore the client may waive the privilege by disclosing privileged communications to third parties. State ex rel. McCormick v. Zacaib, 189 W.Va. 258, 430 S.E.2d 316 (1993). That is because "any disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the attorney-client privilege." *Id.* Finally, any voluntary disclosure by the client to a third party waives the privilege not only as to the specific communication disclosed, but also as to all other communications relating to the same subject matter. *Id.*

A.I.O. was Mr. Kaminski's only client in this case. As such, it is the only entity capable of waiving the attorney-client privilege as to confidential communications with Mr. Kaminski in this case. A.I.O. expressly waived its attorney-client privilege as to all communications between Mr. Kaminski and 1) A.I.O.; 2) third parties acting on A.I.O.'s behalf; and 3) third parties posing as A.I.O. In furtherance of this written waiver, A.I.O. provided the Plaintiffs with Mr. Kaminski's communications with Todd Pilcher and Greg Anastas. Therefore, A.I.O. has waived its attorney-client privilege in two separate respects. It waived the privilege in a writing that was verified by its sole owner. It also waived the privilege by providing the Plaintiffs with actual copies of the confidential

communications. A.I.O. could have simply provided the written waiver to the Plaintiffs and required them to obtain the documents directly from Mr. Kaminski. By executing the written waiver and providing Plaintiffs with the actual communications, there is no question that A.I.O. waived its attorney-client privilege as to all communications between Mr. Kaminski and 1) A.I.O.; 2) third parties acting on A.I.O.'s behalf; and 3) third parties posing as A.I.O.

Mr. Kaminski has not argued that his communications with Mr. Twist fall outside of one of the three categories of communications identified in A.I.O.'s waiver. Instead, he argues that Mr. Twist also has an attorney-client interest in those communications that cannot be waived by A.I.O. Mr. Kaminski claims that, because Mr. Twist has a right to operate the wells pursuant to the recently disclosed operating agreement, he is akin to a third-party insured that has its own attorney-client privilege.

The attorney-client privilege cannot be manufactured after-the-fact. Throughout the course of this litigation, Mr. Kaminski denied that Mr. Twist had any involvement in this case or had any right to operate the gas wells. Mr. Kaminski claims that it was only after he obtained a copy of the operating agreement that he learned that Mr. Twist was operating the wells. This fact is fatal to Mr. Kaminski's argument. Since Mr. Kaminski withdrew as counsel for A.I.O. immediately upon his receipt of the operating agreement, all of his communications with Mr. Twist regarding this case would have had to have occurred prior to his receipt of the operating agreement. Thus, Mr. Kaminski was not communicating with Mr. Twist as the operator of the wells because Mr. Kaminski did not know that Mr. Twist was the operator of the wells when the conversations occurred. Therefore, even if Mr. Twist's status as operator were akin to a third-party insured, he

did not communicate with Mr. Kaminski in his capacity as the operator. For this reason, this Court finds that Mr. Twist has no right to assert the attorney-client privilege based upon his status as well operator. The only privilege in this case belongs to A.I.O. Since A.I.O. has clearly waived the privilege in relation to the requested documents, Mr. Kaminski must produce any responsive documents in his possession. Accordingly, Mr. Kaminski's motion to quash is denied.

Application of the Crime/Fraud Exception

Even if Mr. Kaminski's communications with Mr. Twist were privileged and had not been waived, they would still be discoverable due to the application of the crime-fraud exception to the attorney-client privilege. The crime-fraud exception operates to remove the privilege attaching to communications between a client and his or her counsel that were made in furtherance of a fraudulent or criminal scheme. State of W. Virginia ex rel. Allstate Ins. Co. v. Madden, 215 W. Va. 705, 716, 601 S.E.2d 25, 36 (2004). This exception "applies even if the attorney is unaware of the client's criminal or fraudulent intent." Id. at 473.

The trial court has discretion as to whether to conduct an in-camera review of the privileged materials to determine if the crime/fraud exception to the attorney-client privilege applies. Id. at 718. If there is *prima facie* evidence sufficient to establish the existence of a crime or fraud so as to render the exception operable, the court need not conduct an in-camera review of the otherwise privileged materials before finding the exception to apply and requiring disclosure of the previously protected materials. Id. at 718-19.

Finally, there was significant disagreement between the parties as to the type of conduct required to invoke the crime-fraud exception. Counsel for Mr. Kaminski stated the exception does not apply to civil fraud, but only to criminal fraud. Counsel for the Plaintiffs stated that the exception applies to criminal fraud, common law fraud, as well as fraud upon the court. Counsel for Plaintiff is correct. For purposes of the crime-fraud exception to the lawyer-client privilege, "fraud" would include the commission and/or attempted commission of fraud on the court or on a third person, as well as common law fraud and criminal fraud." Madden at 717.

Plaintiffs have provided prima facie evidence to support a finding that the crime-fraud exception applies. The important facts are as follows. Mr. Lonny Armstrong worked for Mr. Twist for several years. Mr. Twist was sued in the matter Bengfort v. Martin Twist, et al., Civil Action No. 07-C-2358. In that case, Mr. Armstrong was deposed by various attorneys, including Mr. Kaminski. During that deposition, Mr. Armstrong testified that Martin Twist had him create new companies in the name of nominal individuals. Mr. Twist would then have the new company place a lien on the assets of one of his existing companies so that it could foreclose upon those assets. Once the assets were foreclosed upon, Martin Twist would retain control of the assets. This was done in order to protect the assets of Mr. Twist's companies from creditors.

Mr. Armstrong identified three specific companies involved in such transactions. They were Blue Flame Energy Company, LLC, Cherokee Drilling Co., and A.I.O. Holdings, the current defendant. More specifically, Mr. Armstrong testified that Cherokee Drilling had significant debt and that Mr. Twist wanted to protect the company's assets from creditors. Therefore, Mr. Twist had Mr. Armstrong create Blue

Flame Energy in Mr. Armstrong's name. Cherokee Drilling's assets were then transferred to Blue Flame to protect them from Cherokee Drilling's creditors.

Likewise, Mr. Armstrong testified that Martin Twist asked him to create A.I.O., which he did. He claims that Mr. Twist asked him to do so in order for him to protect Martin Twist Energy Company's assets from creditors. Mr. Armstrong further testified that the plan was to have Martin Twist Energy Company default on a loan from A.I.O. so that A.I.O. could place a first lien upon the assets in order to protect them from creditors. Throughout the course of this proceeding, Counsel for Mr. Kaminski has challenged the truthfulness of Mr. Armstrong's deposition testimony. Counsel argues that the testimony is unreliable because it was given as a *quid pro quo* for Mr. Armstrong being dismissed from that lawsuit with prejudice.

During the pendency of this lawsuit, Mr. Twist was indicted by the U.S. Attorney's Office for the Western District of Kentucky for the very conduct Mr. Armstrong discussed in his deposition. More specifically, he was indicted for creating Blue Flame Energy in the name of a nominee owner in order to conceal the assets of Cherokee Drilling and Martin Twist Energy Company, as well as transferring real estate and business holdings to nominee owners in order to remove his name and prevent collection activity.

Then, on July 9, 2013, Mr. Twist entered into a plea agreement acknowledging that he had committed the acts set forth in the indictment. More specifically, Mr. Twist admitted to creating new companies in the name of nominee owners in order to protect his assets. He verified Mr. Armstrong's testimony that he transferred assets out of Cherokee Drilling and Martin Twist Energy Company and into Blue Flame to avoid

creditors. Then, that same day, Mr. Twist appeared before the Honorable Charles R. Simpson, III and admitted his guilt by pleading guilty in federal court.

Mr. Twist confirmed every aspect of Mr. Armstrong's testimony regarding Cherokee Drilling and Blue Flame. The reliability of Mr. Armstrong's testimony regarding Cherokee Drilling and Blue Flame gives additional credence to his testimony regarding A.I.O. In addition to Mr. Armstrong's testimony, there is additional evidence to support the claim that A.I.O. was created in order to place a lien on Martin Twist Energy's assets, and that Mr. Twist intended all along to retain control of those assets.

In October of 2009, Mr. Twist, Martin Twist Energy, Cherokee Energy, Cherokee Drilling and Joerhea Realty, LLC had judgment entered against them in favor of A.I.O. as a result of the default on A.I.O.'s alleged \$2,000,000 loan. However, before doing this, Martin Twist Energy Company had already sold and assigned the boreholes of the Plaintiffs' wells, and all of the gas produced from the wells, to Appalachian Energy Partners 2003-S, LLP. Appalachian Energy Partners 2003-S, LLP's sole member and registered agent is Cherokee Energy Company, LLC. Cherokee Energy Company, LLC's registered agent and member is Martin Twist. Therefore, despite the appearance that A.I.O. was the new owner of the Plaintiffs wells, Martin Twist still retained an interest in the gas produced from the wells.

Based upon that judgment, the Plaintiffs filed this case against A.I.O instead of Martin Twist Energy Company. A.I.O. answered the complaint and filed a counterclaim against the Plaintiffs. A.I.O. then responded to numerous discovery requests served by the Plaintiffs. In response to several of those requests, A.I.O. represented that it was the only entity that had any right in the Plaintiffs' lease. It represented that the only two

people who knew anything about the case were two employees of A.I.O., Todd Pilcher and Jonathan Rager. It further stated that neither Mr. Twist, nor any of his related entities, had any rights in the lease or authority to operate the wells. A.I.O. stated that it had operated the Plaintiffs' wells in accordance with the lease, that it had paid the Plaintiffs the appropriate royalty payments, and that it had provided the Plaintiffs with all of the production reports in its possession. Shortly thereafter, A.I.O. attended the court ordered mediation and attempted to negotiate a settlement in this case. Mr. Pilcher is the individual that verified A.I.O.'s answers to interrogatories and attended the mediation on A.I.O.'s behalf.

When the mediation failed, the Plaintiffs sought to take the deposition of Mr. Twist as well as the Rule 30(b)(7) deposition of A.I.O.'s corporate representative. Mr. Kaminski refused to present Mr. Twist for deposition on the basis that Mr. Twist knew nothing about this case. However, he did agree to present Mr. Pilcher as A.I.O.'s corporate representative. The parties were unable to schedule Mr. Pilcher's deposition and the Plaintiffs filed a motion to compel with this Court. During the hearing, Mr. Kaminski stated that Mr. Pilcher was unavailable and could not be located. When asked who else could be made available, Mr. Kaminski responded that Mr. Pilcher was the only person he had spoken to since the inception of this lawsuit, which was over two years old at this point. Mr. Kaminski was given time to identify a new corporate representative for the deposition.

Shortly thereafter, the Rule 30(b)(7) deposition of Mr. Greg Anastas was conducted. During the deposition, Mr. Anastas stated that he was the sole owner of A.I.O. He further testified that A.I.O. had no employees and that he had never heard of

Mr. Pilcher or Mr. Rager. Mr. Anastas further testified that did not know about the lawsuit until shortly before his deposition, that he did not retain Mr. Kaminski to represent A.I.O., and that he never authorized anyone to answer discovery or to attend the mediation.

More importantly, Mr. Anastas testified that he did not even know that he owned the gas wells on Plaintiffs' property. He stated that A.I.O. had no knowledge of who was operating the wells or any knowledge regarding the counterclaim filed on A.I.O.'s behalf. He testified that A.I.O. had no records related to this case or the wells on the Plaintiffs' property. He also testified that A.I.O. never made a single royalty payment to the Plaintiffs and that A.I.O. had no evidence whatsoever to contradict the allegations in the Plaintiffs' complaint. Finally, Mr. Anastas testified that A.I.O. never operated the wells and that he had never authorized anyone to operate the wells on behalf of A.I.O.

Shortly after Mr. Anastas' deposition, Mr. Kaminski received an operating agreement between A.I.O. and 530 West Main, LLC that allowed 530 West Main, LLC to operate the subject wells. The operating agreement was effective as of 2008 and was signed by Mr. Anastas on behalf of A.I.O. and by Mr. Twist on behalf of 530 West Main, LLC. Throughout this proceeding, this Court has learned that Mr. Pilcher, the individual purporting to act on behalf of A.I.O., actually worked for Mr. Twist, not A.I.O. In fact, during the pendency of this case, Mr. Kaminski represented Mr. Twist and Mr. Pilcher, in his capacity as a Twist employee, in a separate unrelated lawsuit. It was also revealed to this Court by counsel for Mr. Kaminski that it was in fact Mr. Twist that had retained Mr. Kaminski to represent A.I.O. in this case.

For over two years, it was represented to this Court and the Plaintiffs that A.I.O. was the sole owner and operator of the wells. It was also represented that Mr. Twist had no involvement in this case or in the operation of the wells. A.I.O. even moved for summary judgment on the basis that it had complied with all of the terms of the lease.

A counterclaim, discovery responses, a motion for summary judgment and other pleadings that contain false and fraudulent information have been filed with this Court. The falsified information was provided by a Martin Twist employee that pretended to work for A.I.O. The Martin Twist employee directed this litigation for over two years without any authority from A.I.O. and without advising A.I.O. of the lawsuit. More importantly, the Martin Twist employee directed this litigation in a manner that completely shielded Martin Twist's involvement in this case from this Court and the Plaintiffs.

The actual named defendant in this case did not know about this case for the first two years it was being litigated. Mr. Kaminski was retained by Mr. Twist. Mr. Kaminski's only contact in this case for two years was a Martin Twist employee. Martin Twist was paying Mr. Kaminski's legal invoices. Mr. Twist and his employee controlled every aspect of this litigation up until Mr. Anastas' deposition. They did so to hide the fact that Mr. Twist had been operating the wells all along. Now that the operating agreement has finally been disclosed, Mr. Twist's involvement in this case and Mr. Pilcher's lies cannot be disputed.

The Plaintiffs have provided sufficient evidence to establish *prima facie* that a fraud has been perpetrated on this Court. There is no doubt that Mr. Pilcher caused false and fraudulent information to be submitted to this Court. This is further evidenced

by the fact that Mr. Kaminski has disavowed all of the written discovery responses provided by Mr. Pilcher on behalf of A.I.O. While Mr. Kaminski correctly refused to identify which discovery responses were false, he did acknowledge that there were false responses.

Based upon the significant evidence provided by both parties, it is apparent that substantial efforts have been undertaken to hide Mr. Twist's involvement in the subject matter of this lawsuit. Mr. Pilcher would not have been able to falsely represent that he worked for A.I.O. and shield Mr. Twist if the lawyer in this case reported to A.I.O. or Mr. Anastas, instead of Mr. Twist. Therefore, Mr. Kaminski's communications with Mr. Twist related to this lawsuit were in furtherance of what appears to be a scheme for Mr. Twist to secretly direct this litigation on behalf of A.I.O. Accordingly, this Court finds as a matter of law that the crime-fraud exception applies to the requested documents. Therefore, Mr. Kaminski's assertion of the attorney-client privilege must fail and his motion to quash must be denied.

Knowledge of Mr. Kaminski

This crime-fraud exception applies even if the attorney is unaware of the client's criminal or fraudulent intent. State of W. Virginia ex rel. Allstate Ins. Co. v. Madden, 215 W. Va. 705, 716, 601 S.E.2d 25, 36 (2004). This Court has reached its conclusion that the crime-fraud exception applies without addressing the issue of whether Mr. Kaminski knew of Mr. Pilcher's fraudulent conduct. The issue of Mr. Kaminski's knowledge is the subject of the pending motion for sanctions and will be addressed at the appropriate time. Nothing in this Order shall be construed as a finding that Mr. Kaminski acted inappropriately or had prior knowledge of Mr. Pilcher's fraudulent conduct.

Mr. Kaminski's legal bills are not privileged

Even if there were an attorney-client relationship between Mr. Twist and Mr. Kaminski in this case, the attorney-client privilege were not already waived, and the crime-fraud exception did not apply, Mr. Kaminski's legal invoices submitted to Mr. Twist are still not privileged. That is because legal invoices that describe the work performed in general terms are not protected by the attorney-client privilege under West Virginia law. Chesapeake & Ohio Ry. Co. v. Kirwan, 120 F.R.D. 660, 665 (S.D.W. Va. 1988).

The Rules of Professional Conduct do not bar disclosure in this case

Mr. Kaminski claims that he cannot provide the requested information due to the confidentiality requirements set forth in the Rules of Professional Conduct. The Rules of Professional Conduct do not apply to this case. There are two related bodies of law which embrace the principle of confidentiality. They are the ethical duty of confidentiality and the evidentiary attorney-client privilege. Lawyer Disciplinary Board v. McGraw, 194 W.Va. 788, 461 S.E.2d 850 (1995). However, the evidentiary privilege exists apart from, and is not coextensive with, the ethical confidentiality precepts. Id.

Thus, "the [evidentiary] attorney client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client." Id. at 859. "In contrast, the lawyer's broader ethical duty of confidentiality, embodied in Rule 1.6, applies in situations *other than those where evidence is sought from the lawyer through compulsion of law.*" Id. at 860. (emphasis added). Since this matter involves the disclosure of information from Mr. Kaminski through the compulsion of law, the attorney-client privilege applies and the Rules of Professional Conduct do not.

Mr. Kaminski's Rule 11 argument is without merit

Mr. Kaminski claims that the Plaintiffs' subpoena does not seek information related to any potential claims or defenses in this case. Therefore, he argues that since the federal version of Rule 11 prohibits "satellite litigation" of claims unrelated to the case, the state version must also prohibit such litigation. As such, he claims that the Plaintiffs cannot pursue their subpoena without leave of court and without a showing of exceptional circumstances.

First, this Court cannot locate a single instance of West Virginia courts ever applying the federal position on this issue. Second, while Mr. Kaminski limits his analysis of the subpoena to Rule 11, the Plaintiffs did not so limit their motion for sanctions. The motion was brought pursuant to Rule 11, Rule 16 and Rule 37. The motion was not limited to Rule 11. Therefore, even if Mr. Kaminski's argument were correct, it only addresses one of the three rules under which the Plaintiffs brought their motion. As such, the Plaintiffs would still be able to proceed on their subpoena under the other two rules.

However, the most compelling reason why this argument must fail is because the subpoena is seeking documents that are critical to the Plaintiffs current claims and defenses, as well as additional claims against additional parties. This is a very important fact because, while Mr. Kaminski has disavowed all discovery responses in this case, the pleadings still stand. Those pleadings include denials of the Plaintiffs' claims, a counterclaim, as well as a motion for summary judgment. Therefore, the Plaintiffs still have viable claims against A.I.O., and A.I.O. still has a counterclaim against the Plaintiffs. The evidence sought by the subpoena is seeking information that

will help Plaintiffs prevail on those claims against A.I.O., as well as defend against the counterclaim in the event a settlement is not reached.

The subpoena is not only seeking documents to defend against these claims, it is seeking documents to support claims against additional individuals and entities. The Plaintiffs believe that Mr. Twist, Mr. Pilcher and others engaged in a pattern of fraud that has caused significant damage to the Plaintiffs. That pattern of fraud includes leasing the gas wells and continuing to produce gas under the claim that the wells are shut-in. It includes transferring the interest in the Plaintiffs' lease in order to protect assets from collection. It also includes hiring counsel for the nominee party and steering the litigation in a manner to hide the above mentioned fraud. Not only did the Plaintiffs' suffer damages from the manner in which the wells were operated, they have nearly depleted their retirement accounts in order to fund this litigation. They have spent their savings litigating a case that has turned out to be a sham.

The Plaintiffs have issued the subpoena in part to determine just how extensive Mr. Twist and his related entities are involved in this fraud. It is also important to see to what extent Mr. Twist was in fact communicating with Mr. Kaminski regarding this case since it was represented that there were no communications for the first two years. While this information may also implicate Mr. Kaminski, it's more important use is to document show whether Mr. Twist was personally involved in the fraud and directed the litigation.

Therefore, the information sought by the subpoena is not intended for the sole use of supporting the motion for sanctions against Mr. Kaminski. The primary purpose of the subpoena is to seek documents to support a claim against the individuals that

have been perpetrating a fraud against the Plaintiffs for over four years now. These documents go to the very heart of this matter. As such, Mr. Kaminski's claim that Plaintiffs are simply engaging in satellite litigation is unfounded and does not warrant quashing the subpoena.

Finally, the sought after discovery also appears to seek information relevant to the court's inherent authority under Rule 37, WVRCivP, to determine the appropriateness of sanctions that are consistent with the public interest in the fair administration of justice.

For the above following reasons, this Court denies Mr. Kaminski's Motion to Quash and directs him to provide any responsive documents to the Plaintiffs within fourteen (14) days of the entry of this order.

ENTERED: October 29, 2015



Thomas C. Evans, III, Circuit Judge