

BEFORE THE STATE OF WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND PILOTS,

Respondent.

Docket TP-220513

**RESPONDENT PUGET SOUND
PILOTS' REPLY IN SUPPORT OF
EMERGENCY MOTION IN LIMINE
TO PRECLUDE THE
INTRODUCTION OF ATTORNEY-
CLIENT PRIVILEGED MATERIAL
IN EVIDENCE**

MEMORANDUM

I. INTRODUCTION.

1. At issue is whether the Commission should permit Intervenor Pacific Merchant Shippers' Association ("PMSA") to exploit an improperly obtained memorandum (the "Legal Memorandum") prepared for Respondent Puget Sound Pilots ("PSP") by its retired General Counsel Walt Tabler in response to a request for legal advice regarding the interpretation and implementation of Order 09. The answer to that question is clearly no.
2. Throughout its opposition, PMSA fails to confront the core issue: That the Legal Memorandum contains advice given by an attorney to his client in the course of professional employment and is therefore squarely within the protection of RCW 5.60.060(2)(a). Instead, PMSA's effort to invade PSP's attorney-client privilege is cobbled together from an assortment of red herring arguments and facts that have no legal consequence.
3. For example, the fact that the Legal Memorandum is not on law firm letterhead or does not

"identif[y] the author. . . as an attorney" does not in any way change that Mr. Tabler was, in
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fact, an attorney advising his client when he prepared the Legal Memorandum for PSP in March 2021. Nor does the absence of citations to case law somehow magically strip the Legal Memorandum of its privilege protection. Likewise, PMSA's arguments regarding PSP's accounting of Mr. Tabler's fees, or its reference to Mr. Tabler as a "consultant" are irrelevant to an appropriate application of Washington privilege law.

4. PMSA's reliance on *N. L. R. B. v. Harvey*, 349 F.2d 900, 906 (4th Cir. 1965) for the proposition that the Legal Memorandum does not contain legal advice is also misplaced. Not only is *Harvey* – a nearly 60-year-old labor relations case out of the U.S. Court of Appeals for the Fourth Circuit – irrelevant to interpreting RCW 5.60.060(2)(a), but even that case does not stand for the artificially narrow definition of legal advice advanced by PMSA. Rather, *Harvey* states explicitly that "[t]he mere fact that a person who is not an attorney could have performed the same service is not a ground for requiring a lawyer to disclose communications with his client in discovery proceedings." *N. L. R. B. v. Harvey*, 349 F.2d 900, 905 (4th Cir. 1965).¹
5. Here, PSP hired two attorneys – retired General Counsel Walt Tabler and former rate case attorney Blair Fassburg – to analyze the Commission's adjudicative Order 09 and provide analysis and strategic guidance. The Legal Memorandum contains Mr. Tabler's response to that request for professional advice. The "mere fact" that PSP might conceivably have sought similar services from a non-lawyer does not change the fact that Mr. Tabler's professional advice – prepared by a lawyer for his client – is privileged.

¹ Although PMSA falsely accuses PSP of discovery misconduct, this is not a discovery dispute. Rather, this dispute arose because PSP improperly obtained the Legal Memorandum without authorization, concealed that fact until after PSP filed its rebuttal testimony, then refused to return the Legal Memorandum when PSP demanded that it do so.

6. In short, the Commission should reject PMSA’s misguided attempt to elevate form over substance. Under RCW 5.60.060(2)(a), the attorney-client privilege attaches to advice given to a client in the course of an attorney’s professional employment. Here, Mr. Tabler and PSP have maintained an attorney-client relationship for decades and the Legal Memorandum was prepared at PSP’s request in the course of that relationship. The Legal Memorandum is therefore privileged and inadmissible.

II. ARGUMENT.

A. The Legal Memorandum is Privileged.

7. RCW 5.60.060(2)(a) codifies the attorney-client privilege in Washington and states that “[a]n attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.” Thus, “[t]he attorney-client privilege applies to communications and advice between an attorney and client and extends to documents that contain a privileged communication.” *Dietz v. Doe*, 131 Wash. 2d 835, 842, 935 P.2d 611, 615 (1997).
8. The first step in evaluating a claim of privilege under RCW 5.60.060(2)(a) is determining whether an attorney-client relationship existed. *Id.* at 843. The existence of an attorney an attorney-client relationship turns on the client's reasonable subjective belief based on the circumstances. *State v. Hansen*, 122 Wn.2d 712, 720 (1993).
9. Here, there is no question that an attorney-client relationship existed between PSP and Mr. Tabler at the time he prepared the Legal Memorandum. As PSP President Captain Carlson explains in his declaration, “[i]n connection with both of my requests for analysis from Walt

Tabler and [rate case counsel] Blair Fassburg, I believed I was seeking legal advice on behalf of PSP regarding the implementation of Order 09.” Carlson Decl. ¶ 5.

10. Where Mr. Tabler was at the time a Washington-licensed attorney who had maintained an attorney-client relationship with PSP for decades, including as it’s former in-house general counsel, Captain Carlson’s belief that an attorney-client relationship existed between PSP and Mr. Tabler was plainly reasonable. The reasonableness (and accuracy) of Captain Carlson’s belief is confirmed by Mr. Tabler, who testified in his declaration that “[w]hen I prepared the March 2, 2021 memorandum referenced above, I understood at all times that I was providing legal advice to PSP.”
11. Because an attorney-client relationship existed between PSP and Mr. Tabler, the remaining inquiry under RCW 5.60.060(2)(a) is whether the Legal Memorandum contains advice given “in the course of professional employment.” *Id.* Again, the answer is clearly yes.
12. The Legal Memorandum analyzes and provides guidance in response to Order 09, which is an adjudicative order issued by administrative agency acting in a quasi-judicial capacity. As Captain Carlson explains in his declaration, “[t]o assist PSP in addressing the callback issue, I reached out to former PSP Executive Director and General Counsel Walt Tabler and to UTC rate counsel Blair Fassburg and asked each of these lawyers to prepare a memorandum analyzing what Order 09 meant regarding callbacks, PSP’s options and next steps.” In other words, the Legal Memorandum was prepared by Mr. Tabler for PSP in his professional capacity and based on his experience as the organization’s former general counsel.
13. PMSA focuses on the form of the Legal Memorandum – its title, letterhead, etc. – to argue that it is not privileged. But what matters is the communication’s substance. Because there can be no reasonable dispute that the Legal Memorandum: (1) a communication by an

attorney; (2) made to a client; (3) in the course of the professional relationship; and (4) provides legal analysis of a complex 130-page order, the privilege clearly attaches under RCW 5.60.060(2)(a).

B. PSP Properly Asserted and Did Not Waive the Privilege.

14. PMSA's claim that PSP waived the privilege is wrong. First, this is not a discovery dispute, and the fact that PSP characterized Mr. Tabler as a "consultant" in its discovery responses is irrelevant, does not make PSP's discovery responses "false," and is just another example of PMSA elevating form over substance. *Cf.* PMSA Opposition ¶ 16. What *is* significant is that once it became clear from PMSA's belated discovery requests that it had wrongly come into possession of the Legal Memorandum, PSP promptly and unambiguously asserted the privilege and demanded the memorandum's return.

15. Lastly, PMSA claims halfheartedly "the contents of the Memo have been disclosed; therefore if a privilege had ever been intended or created by the parties, it has been subsequently waived." *Id.* ¶ 2. As explained in PSP's motion, however, that is simply not the case. Rather, PSP had every right to share the Legal Memorandum internally with its members on a confidential basis, and the fact that one member apparently breached their fiduciary duty to PSP by wrongly disclosing the memorandum to PMSA cannot and does not waive PSP's privilege protection.

III. CONCLUSION.

16. PMSA should be ordered to immediately return all copies of the Legal Memorandum to PSP. PMSA should be precluded from introducing, referring to, or relying on documents and information that belong to PSP and are protected by the attorney-client privilege during the upcoming evidentiary hearing.

Respectfully submitted this 3rd day of April, 2023.

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