

RE: attorney-client privilege claim

TP-220513

DeLappe, Michelle <MDeLappe@foxrothschild.com>

Tue 3/28/2023 7:18 AM

To: Michael Haglund <MHaglund@hk-law.com>

Cc: SeaSalt <SeaSalt@Foxrothschild.com>; Ivan Carlson - President <president@pspilots.org>; Eric Klapperich <eklapperich@pspilots.org>; ccostanzo@pspilots.org <ccostanzo@pspilots.org>; Walt Tabler <wtabler@outlook.com>; Eric J. Brickenstein <EBrickenstein@hk-law.com>

Hello Mike,

We have no obligation to provide the information you are demanding.

Best regards,
Michelle**Michelle DeLappe**

Partner

Fox Rothschild LLP[Bio](#) | [Firm Website](#) | [LinkedIn](#)

1001 Fourth Ave., Suite 4400, Seattle, WA 98154

(206) 389-1668 - direct

Seattle State and Local Tax Team: seasalt@foxrothschild.comReceived
Records Management
Mar 28, 2023

From: Michael Haglund <MHaglund@hk-law.com>**Sent:** Monday, March 27, 2023 8:38 AM**To:** DeLappe, Michelle <MDeLappe@foxrothschild.com>**Cc:** SeaSalt <SeaSalt@Foxrothschild.com>; Ivan Carlson - President <president@pspilots.org>; Eric Klapperich <eklapperich@pspilots.org>; ccostanzo@pspilots.org; Walt Tabler <wtabler@outlook.com>; Eric J. Brickenstein <EBrickenstein@hk-law.com>**Subject:** [EXT] Re: attorney-client privilege claim

Michelle,

We disagree entirely with your analysis and demand to know who provided the Tabler memo to PMSA. Mike

From: "DeLappe, Michelle" <MDeLappe@foxrothschild.com>**Date:** Monday, March 27, 2023 at 7:17 AM**To:** 'Mike Haglund' <MHaglund@hk-law.com>**Cc:** SeaSalt <SeaSalt@Foxrothschild.com>; Ivan Carlson - President <president@pspilots.org>; Eric Klapperich <eklapperich@pspilots.org>; charles costanzo <ccostanzo@pspilots.org>; Walt Tabler <wtabler@outlook.com>; "Eric J. Brickenstein" <EBrickenstein@hk-law.com>**Subject:** RE: attorney-client privilege claim

Good morning, Mike:

Thank you for additional information regarding this document. Even assuming every fact you allege as true, including with a declaration by Capt. Carlson, and that those facts created a basis of privilege here, we do not follow to your conclusion.

You say, "PSP is not an entity but instead an unincorporated association of state-licensed pilots, every one of whom was receiving legal advice from Mr. Tabler pursuant to the attorney-client relationship between him and each of its member pilots." In that case, whatever privilege may have existed was waived by the individual pilot client of Mr. Tabler's who disclosed the memorandum. Since the disclosure was not inadvertent and was done by someone you would view as one of the clients, there certainly is no duty to return the memorandum to PSP.

If you have a different view of this, I welcome a response on this point prior to PSP's filing on this matter.

In the meantime, I would ask that you dial down the tone of the conversation. Obviously we disagree with the claims that somehow our conduct is "outrageous," "groundless," "suspect," "gamesmanship," or "worthy of sanctions." It is simply an evidentiary dispute between parties regarding an assertion of privilege. PSP asserting a privilege against this document should be viewed no differently than PMSA asserting a privilege in response to PSP DRs 1-8. Such matters should be decided on the basis of the law, without inflammatory language. These issues are of course important and need to be resolved, but there is no need to escalate this question beyond the limited dispute about the presentation of evidence that it is.

Best regards,
Michelle**Michelle DeLappe**

Partner

Fox Rothschild LLP[Bio](#) | [Firm Website](#) | [LinkedIn](#)

1001 Fourth Ave., Suite 4400, Seattle, WA 98154

(206) 389-1668 - direct

Seattle State and Local Tax Team: seasalt@foxrothschild.com

From: Michael Haglund <MHaglund@hk-law.com>**Sent:** Sunday, March 26, 2023 11:33 AM**To:** DeLappe, Michelle <MDeLappe@foxrothschild.com>**Cc:** SeaSalt <SeaSalt@Foxrothschild.com>; Ivan Carlson - President <president@pspilots.org>; Eric Klapperich <eklapperich@pspilots.org>; ccostanzo@pspilots.org; Walt Tabler

<wtabler@outlook.com>; Eric J. Brickenstein <EBrickenstein@hk-law.com>

Subject: [EXT] RE: attorney-client privilege claim

Michelle,

PMSA's position is outrageous. When the memorandum at issue first fell into the hands of PMSA, no doubt under suspicious circumstances, you should have called me to inquire whether it was privileged and, upon learning that PSP considered it privileged, returned it immediately. Instead, you and your client have engaged in gamesmanship through the Data Request process in an effort to exploit obviously privileged information in this rate case. PSP's position in its response to DR 572 on January 23 that a memorandum from former General Counsel Walt Tabler, an active member of the Washington State Bar when the memo was drafted, was considered legal advice should have ended the matter. Instead, PMSA pursued a second attempt to violate PSP's attorney-client privilege with its DR 658 seeking admissions regarding statements in that legal memo. And now, your evening email on March 24 tries to recharacterize Mr. Tabler as a consultant whose memorandum was not marked as confidential, contained no legal advice and was addressed to members of PSP as opposed to PSP.

Your client's position is wrong on all counts. In fact, given the adverse outcome on the callbacks issue in Order 09, PSP's leadership requested legal opinions from both Walt Tabler and UTC rate counsel Blair Fassburg on this issue. Both memoranda were then transmitted by email to the entire pilot corps by Capt. Carlson in advance of all-pilot virtual meetings to discuss the memoranda and to present questions to both lawyers. Whether an attorney-client relationship exists turns on the client's reasonable subjective belief based on the circumstances. *State v. Hansen*, 122 Wn.2d 712, 720 (1993). In essence, the inquiry simply depends on "whether the attorney's assistance or advice is sought and received on legal matters." *In re Discipline of Egger*, 152 Wn.2d 393, 410 (2004). Once a relationship is formed, which in this case dates back 30 years to 1991, the attorney-client privilege extends to any information generated by a request for legal advice, and courts look to the purpose of the communication rather than its form. *Doehne v. EmpRes Healthcare Mgmt., LLC*, 190 Wn. App. 274, 281 ¶ 16, 282 ¶ 19 (2015). Capt. Carlson is prepared to sign a declaration that he sought legal advice – not consulting – from Mr. Tabler.

Further, your suggestion that the attorney-client privilege extends only to the Puget Sound Pilots Association and not to its members is groundless. PSP is not an entity but instead an unincorporated association of state-licensed pilots, every one of whom was receiving legal advice from Mr. Tabler pursuant to the attorney-client relationship between him and each of its member pilots.

Finally, the memorandum clearly contained legal advice regarding interpretation of a 130-page UTC order, its impacts on PSP operations and potential next steps. Indeed, Mr. Tabler's memorandum notes that, since retiring from PSP in 2015, he regularly consulted with West Coast pilot groups on administrative, political and legal matters.

PSP will not run the risk that PMSA will recklessly file an attorney-client privileged memorandum as a cross-examination exhibit on March 29. Unless you and your client return all copies of Mr. Tabler's memorandum to the PSP office by 5 PM on Monday, March 27, and confirm in writing that this document or its contents will not be used or referred to in any fashion at the upcoming evidentiary hearing, we will file a motion in limine on Tuesday, March 28, to preclude the PMSA from utilizing this privileged document in any manner. As part of that motion, given the outrageous character of what your client is attempting to do, we will seek an award of sanctions for all legal fees associated with enforcing PSP's rightful privileges in this proceeding.

Michael E. Haglund
Haglund Kelley LLP
2177 SW Broadway
Portland, Oregon 97201
Phone: 503-225-0777 Ext. 129
Fax: 503-225-1257
kmceachern@hk-law.com

From: DeLappe, Michelle <MDeLappe@foxrothschild.com>
Sent: Friday, March 24, 2023 5:12 PM
To: Michael Haglund <MHaglund@hk-law.com>
Cc: SeaSalt <SeaSalt@Foxrothschild.com>
Subject: attorney-client privilege claim

Mike:

I have been traveling and am heading into an out-of-state board meeting that will have me tied up for a few days, but I wanted to get back to you regarding the PSP request for a response by the end of this week regarding PMSA DR 658.

Assuming we are referring to the same document, the grounds for your claim of attorney-client privilege is not clear to us. The memo involved is from a consultant, does not contain any legal advice, is not labeled as legal advice, is not marked confidential or privileged, and is not even specifically addressed to PSP, the entity claiming the privilege here. To consider your request, we need additional information on why you believe attorney-client privilege applies here.

If you could provide that information by email, I will forward it to my client for consideration, or I'm happy to further discuss the issue by phone on Wednesday when I am back in the office. We do not believe it would be appropriate to bring any sort of a motion before making a good-faith effort to resolve the matter by providing sufficient information for us to evaluate your claim of privilege.

Best regards,
Michelle

Michelle DeLappe
Partner
Fox Rothschild LLP
[Bio](#) | [Firm Website](#) | [LinkedIn](#)
1001 Fourth Ave., Suite 4400, Seattle, WA 98154
(206) 389-1668 - direct
(206) 389-1708 - fax
MDeLappe@foxrothschild.com
Seattle State and Local Tax Team: seasalt@foxrothschild.com

RANKED IN

Chambers

**USA
2022**

Michelle DeLappe

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