

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' EMERGENCY MOTION
IN LIMINE TO PRECLUDE THE
INTRODUCTION OF
ATTORNEY-CLIENT
PRIVILEGED MATERIAL IN
EVIDENCE**

MOTION

1. Pursuant to WAC 480-07-375 and WAC 480-07-495, Respondent Puget Sound Pilots (“PSP”) moves in limine to preclude Intervenor Pacific Merchants Shippers’ Association (“PMSA”) from introducing, referring to, or relying on documents and information that belong to PSP and are protected by the attorney-client privilege.
2. PSP has conferred with counsel for PMSA regarding the substance of this motion and PMSA refuses to return or commit not to introduce or use the privileged material at issue during the upcoming April 5 evidentiary hearing.
3. Due to the imminent March 29 exhibit submission deadline and the substantial risk that PMSA will attempt to introduce the privileged material at that time, PSP respectfully requests immediate consideration and hearing of this motion.

MEMORANDUM

I. BACKGROUND.

4. This motion is necessitated by PMSA's flagrant misuse of and refusal to return PSP's attorney-client privileged information that is wrongly in PMSA's possession.
5. Walt Tabler served as PSP's General Counsel for more than two decades until his retirement from PSP in 2015. Thereafter, Mr. Tabler continued work as an attorney advising multiple pilot associations on the economic, political, and legal aspects of pilotage and pilotage regulation. Mr. Tabler was a Washington-licensed attorney for more than 40 years until voluntarily surrendering his license in 2022.
6. Following the Commission's adjudication of PSP's inaugural rate case and the entry of Order 09, PSP retained Mr. Tabler as a consulting attorney to analyze certain aspects the Commission's decision and its implications for PSP on a going forward basis. On March 2, 2021, in connection with that assignment and in his role as PSP's retained attorney, Mr. Tabler prepared a memorandum (the "Legal Memorandum") to PSP that provided the requested analysis and resulting strategic recommendations.
7. At some point thereafter, the Legal Memorandum was obtained by PMSA.
8. PSP does not know when PMSA obtained the Legal Memorandum. PSP does not know how or under what circumstances PMSA obtained the Legal Memorandum.
9. PSP did not disclose the Legal Memorandum to PMSA. None of PSP's officers consented to or were aware of the Legal Memorandum's disclosure.

10. PMSA did not notify PSP when it obtained the Legal Memorandum. Instead, on March 15, 2023, PMSA served Data Request No. 658, which quotes directly from the Legal Memorandum and, for the first time, made unambiguously clear that the memorandum was in the possession of PMSA.
11. Promptly upon confirming that the Legal Memorandum was in PMSA's possession, PSP asserted the privilege and demanded its return. PMSA refused.
12. PSP also demanded that PMSA identify the person who disclosed the memorandum. PMSA refused.
13. After initially claiming that the Legal Memorandum was not privileged, PMSA then took the equally untenable position that PSP waived the privilege. A true copy of correspondence among the parties' counsel regarding this issue is attached as Exhibit A.
14. Based on its use of the Legal Memorandum in connection with its data requests to PSP, there is a high risk that PMSA will further violate PSP's attorney-client privilege by relying on the Legal Memorandum during the upcoming evidentiary hearing and potentially even attempting to introduce the document itself into evidence as a cross-examination exhibit.
15. PMSA's apparent intent to breach the privilege, if not enjoined, would fundamentally undermine the fairness of the evidentiary hearing and would be an affront to the most bedrock principles of legal ethics and due process.

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II. LEGAL STANDARD.

16. The attorney-client privilege is “[t]he client's right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney.” PRIVILEGE, Black's Law Dictionary (11th ed. 2019).
17. “The attorney-client privilege exists to encourage free and open attorney-client communication by creating an assurance to the client that his communications will not be disclosed to others.” *Dana v. Piper*, 173 Wash. App. 761, 770, 295 P.3d 305, 310 (2013). “The privilege is imperative to preserve the sanctity of communications between clients and attorneys.” *Dietz v. Doe*, 131 Wash.2d 835, 851, 935 P.2d 611 (1997). The privilege is inextricably intertwined with our adversary system and legal ethics such that “it is futile to envision drastic curtailment of the privilege without substantial modification of the underlying ethical system to which the privilege is merely ancillary.” John W. Strong, McCormick on Evidence § 87, at 121–22 (4th ed. 1992).

III. ARGUMENT.

18. The Legal Memorandum is clearly a privileged attorney-client communication.¹ The Memorandum was prepared by an attorney (PSP’s former general counsel and retained consulting attorney Mr. Tabler) at the request of his client (PSP, through its

¹ In addition and in the alternative, the Legal Memorandum is protected by the work product doctrine. *Hickman v. Taylor*, 329 U.S. 495, 510, 67 S. Ct. 385, 393, 91 L. Ed. 451 (1947) (“Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.”).

President Captain Ivan Carlson) for the purpose of analyzing an adjudicative order and legal opinion (Order 09) and providing PSP with advice regarding the implications and significance of that Order.²

19. The Legal Memorandum was made in confidence and was intended for internal distribution to PSP's members only.³ Based on its contents, character, and purpose, the Legal Memorandum is protected by the privilege and is precluded from use as evidence unless waived.
20. PSP did not waive the privilege. Although PMSA refuses to disclose any details regarding when or from whom it obtained the Legal Memorandum, it claims that the memorandum was disclosed to it by one of PSP's members. Even assuming one of PSP's pilots did disclose the memorandum, however, that disclosure does not waive the privilege because it was not authorized by PSP and the individual pilot's unauthorized disclosure was plainly against PSP's interest.
21. There is no question that wrongful disclosure by a non-managing employee or member of an organization does not waive the attorney-client privilege. In *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348-49 (1985), for example, the Supreme Court explained that "[t]he power to waive the corporate attorney-client

² Due to the exigency of this matter, there was not sufficient time for Mr. Tabler and Captain Carlson to prepare written declarations. Both men, however, are prepared to testify to the character and purpose of the Legal Memorandum and its confidential nature.

³ Although PSP is formally an unincorporated association of independently licensed pilots, it is treated for practical purposes (*e.g.*, taxation) as a partnership wherein the individual member pilots or their respective single-member entities are the partners.

privilege rests with the corporation's management and is normally exercised by its officers and directors," and further, that "[t]he managers, of course, must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals."

22. Likewise, in *Stopka v. All. of Am. Insurers*, No. 95 C 7487, 1996 WL 204324 at *6

(N.D. Ill. Apr. 25, 1996), the court explained:

Any privilege that exists as to a corporate officer's role and functions within a corporation belongs to the corporation, not the officer. *Matter of Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 124 (3rd Cir. 1986) (citing *Weintraub*, 471 U.S. at 348). Based on the evidence submitted in support of the motions to disqualify and to quash, Alliance officers, including Stopka in her role and function as vice president of administration, sought legal advice from defense counsel on behalf of Alliance concerning Alliance employment matters.

Under these circumstances, Stopka may not waive Alliance's attorney-client privilege. Nor is her attempt to waive the privilege consistent with her fiduciary duties to Alliance because the attempted waiver clearly is in her own interests rather than for the benefit of the corporation.

23. The same reasoning applies here. No PSP officer or director disclosed the Legal Memorandum. And its disclosure to PMSA – an opposing party with interests directly adverse to PSP – was plainly against the interest of PSP and its members. This apparent rogue act by a single non-managing pilot, in clear and grievous breach of that individual's fiduciary duty to the organization, cannot and did not waive PSP's attorney-client privilege.

24. A finding of waiver in this circumstance would have profound disruptive consequences. PSP is a highly regulated entity that relies on legal counsel extensively on multiple fronts, including in connection with proceedings before this Commission

and the Board of Pilotage Commissioners. PSP management's ability to share legal advice obtained from counsel on a confidential basis with its members is critical to PSP's operations and ability to generate candid input and discourse from pilots that affect the association's decision-making. That process will be entirely cut off if a single pilot acting in breach of the member's fiduciary duty has the power to sabotage PSP by unilaterally waiving its privilege without permission and against the association's interests.

25. The apparent anonymous and unauthorized disclosure of the Legal Memorandum to PMSA was deplorable act. Worse, however, is PMSA's attempt to exploit that bad act and its refusal to respect PSP's attorney-client privilege by immediately returning the Legal Memorandum to PSP. PMSA's attempt to undermine the fair adjudication of this proceeding must be immediately and sternly rejected by the Commission.

IV. CONCLUSION.

26. 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

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documents and information that belong to PSP and are protected by the attorney-client privilege during the upcoming evidentiary hearing.

Respectfully submitted this 28th day of March, 2023.

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