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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1087

CENTRAL LINCOLN PEOPLE'S)
UTILITY DISTRICT,)
)
Complainant,)
)
vs.)
)
VERIZON NORTHWEST INC.,)
)
Defendant.)

ORDER

DISPOSITION: MOTION TO CERTIFY GRANTED; MOTION TO COMPEL GRANTED

On May 4, 2004, Central Lincoln People's Utility District (CLPUD) moved to certify Administrative Law Judge (ALJ) Smith's April 26, 2004 ruling to the Commission. The ruling granted a motion to compel CLPUD to answer data requests of Verizon Northwest, Inc. (Verizon) over CLPUD's objections that the material was covered by the attorney-client privilege. On May 19, 2004, Verizon replied that it did not object to the motion to certify but did oppose CLPUD's position on the ruling on the merits. The motion to certify has been granted, and we concur with ALJ Smith's initial ruling.

PROCEDURAL BACKGROUND

On April 1, 2004, Verizon filed the Motion to Compel that is at the root of this dispute. On April 19, 2004, CLPUD filed its opposition, and a ruling was issued on April 26, 2004. On May 4, 2004, CLPUD filed this Motion to Certify the ruling to the Commission for decision. On the same day, Verizon called for a status conference because the hearing was scheduled for May 18 and 19, 2004, and the time for response, ruling, and production would come too close to the hearing dates for the material to be useful. A status conference was held May 6, 2004, in which representatives from

CLPUD and Verizon participated. The parties were asked if the dispute could be narrowed or if there was another way to resolve the dispute, but they stated that they could not reach a mutually acceptable solution. The hearing was canceled, and since the parties could not agree on a hearing date through the end of June, the hearing was not rescheduled. Verizon had stated that it would provide a response by May 13, 2004, but delayed its response until May 19, 2004, in an effort to work out an agreement with CLPUD. Those talks were not successful, so this issue is now before us.

Motion to Certify

A motion to certify an ALJ ruling to the Commission will be granted if the ruling "[m]ay result in substantial detriment to the public interest or undue prejudice to any party." OAR 860-014-0091(1)(a). A motion to certify may also be granted for other reasons. See *In re Qwest Corp.*, UM 1025, Order No. 03-533, at 1 (Aug 28, 2003). Verizon did not oppose the motion to certify. While motions to certify are usually granted by an ALJ, for the sake of efficiency, we grant this motion in conjunction with our decision on the merits.

PARTIES' ARGUMENTS

To fully understand the nature of this procedural dispute, we begin with a brief discussion of the underlying substantive issue raised in this proceeding. In this docket, CLPUD argues that it terminated its contract with Verizon for pole attachments and that no contract is currently in place. CLPUD argues that Verizon's attachments are in violation of ORS 757.271(1) and OAR 860-028-0120(1)(a). In its petition, CLPUD asks for sanctions against Verizon. Verizon replies that the original contract is still in effect, and that the terms of CLPUD's proposed contract are unreasonable.

In support of its petition for removal of pole attachments, CLPUD submitted testimony sponsored by Peter Gintner, who is an attorney with Macpherson, Gintner, Gordon & Diaz, which represents CLPUD in this proceeding. His direct testimony relates to sending the notice of violation to Verizon and further communications, and lack of communications, with representatives of Verizon. His reply testimony discussed communication with Ms. Mahanger, a representative of Verizon, regarding which Oregon Administrative Rule related to the notice of violation.

In response, Verizon issued several data requests seeking information from Mr. Gintner. In Verizon's last filing related to this subject, it narrowed its data requests to the following:

- 3.17. "Please state the date your firm was retained to represent CLPUD in this matter, and explain the nature and scope of your firm's legal

representation of CLPUD in this matter." Verizon states that this information is relevant in light of Verizon's assertion that Mr. Gintner said that CLPUD sought to treat Verizon as a "test case."

- 3.20. "Please provide a copy of your files, or files that are maintained by others under your direction, that relate to both the legal and non-legal services your firm has provided to CLPUD in this matter." Verizon limited the scope of documents sought to documents reflecting, memorializing, or concerning (a) the truth of the facts asserted in Mr. Gintner's correspondence or (b) his negotiation with or other interaction with Verizon personnel.
- 3.23 and 3.28. Both questions relate to documents pertaining to conversations with Verizon employees or representatives. Verizon limited the scope of documents sought to questions six through twelve in Mr. Gintner's opening testimony and questions eight through eleven in his reply testimony.
- 3.25. Description of Mr. Gintner's role in the negotiation of pole attachment agreements between CLPUD and other entities that wish to attach to CLPUD's poles.
- 3.30 and 3.31. Asks whether Mr. Gintner believes that CLPUD had an obligation to bargain in good faith, and if not, why not.

In its motion to compel, Verizon argued that CLPUD was obligated to answer the questions because CLPUD had waived its attorney-client privilege when Mr. Gintner submitted testimony. Verizon cited two provisions of the evidence code in support of its argument: ORS 40.225 (OEC 503(4)(d)), which states that the privilege does not apply "to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;" and ORS 40.280 (OEC 511), which states that the privilege is waived if the "holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication." Further, Verizon argues that the work product doctrine also does not protect any documents sought because Mr. Gintner testified in this proceeding.

CLPUD responded that Mr. Gintner's testimony did not disclose a privileged communication, therefore, he did not waive the attorney-client privilege as to any privileged communications. CLPUD further asserts that the attesting witness exception in Oregon Evidence Code (OEC) 503(4)(d) only applies to an attorney who attests to another's signature, as in a will. It also argues that the work product doctrine

protects an attorney's mental impressions and legal theories, so Mr. Gintner's opinions cannot be the subject of a data request.

The challenged ALJ ruling, issued April 26, 2004, granted Verizon's motion to compel on the basis of OEC 503(4)(d), stating that the privilege did not apply to Verizon's data requests because they sought "communications relevant to an issue" in Mr. Gintner's testimony. The only data request that did not appear relevant was 3.18. Because the analysis stopped at OEC 503(4)(d), application of OEC 511 was not analyzed.

CLPUD moved to certify that ruling to the Commission on the basis that it would unduly prejudice CLPUD to produce the requested information. CLPUD reasserted its arguments related to the attorney-client privilege and work product doctrine, and added "ORS 9.460(3) imposes an affirmative duty on attorneys to protect the confidences and secrets of their clients." It then takes issue with the ruling's application of OEC 503(4)(d) and argues that Mr. Gintner was not an "attesting witness" within the definition of that rule. CLPUD concludes by asserting that the requested information is not discoverable, and is privileged.

Verizon responded by narrowing its data requests to those listed above. It then reiterated its arguments that CLPUD waived the attorney-client privilege when Mr. Gintner submitted testimony. Citing *State v. Sullivan*, 230 Or 136 (1962), Verizon argues that an attorney may properly be cross-examined on communications about which he had not previously testified. Further, Verizon points to treatises on evidence for support of the premise that a lawyer that testifies on behalf of the client should be subject to cross-examination as to "related privileged communications" with that client.¹

DISCUSSION

We agree with CLPUD that the "attesting witness" exception in OEC 503(4)(d) is likely limited. The legislative commentary on OEC 503(4)(d) in the *Oregon Evidence Code Handbook 2000* refers to California Evidence Code section 959. That section makes it clear that an "attesting witness" is one who witnesses another's signature on a document. In that capacity, the attorney is not acting as an attorney, but as a witness, and can testify as to the signer's mental capacity and other matters.

In fact, the revised Oregon Evidence Code does not address the problem of an attorney testifying on behalf of a client. Enacted in 1981, the Oregon Evidence Code outlines the attorney-client privilege, *see* ORS 40.225(2) (OEC 503(2)), and

¹ Additional briefing is not required, as the parties have had numerous opportunities to submit materials. *See In re Qwest Corp.*, UM 1025, Order No. 03-747, at 4 (Dec 18, 2003).

waiver, *see* ORS 40.280 (OEC 511). Oregon court cases interpreting evidence statutes prior to 1981 are not considered to have much weight. *See State v. Ogle*, 297 Or 84, 87-88 (1984). For this reason, there is no relevant Oregon case law on this matter.

Without negotiating the attorney-client privilege as to every disputed data request between Verizon and CLPUD, we address the larger policy question: whether testimony can be fairly considered without allowing discovery and cross-examination on that testimony. It is well established that the testimony of a witness cannot be given much weight without permitting cross-examination.² *See Schacher v. Dunne*, 109 Or App 607, 611 (1991) (purpose of cross-examination is to indicate to fact-finder what weight to give to witness' testimony). Allowing testimony without cross-examination makes it difficult to determine whether the testimony is credible. *See, i.e., Sheedy v. Stall*, 255 Or 594, 596 (1970) ("Hearsay evidence is excluded because of its untrustworthiness. The declarant's accuracy and veracity cannot be tested by cross-examination."), *aff'd, State v. Mendez*, 308 Or 9, 18-19 (1989).

At the May 6, 2004 status conference, CLPUD insisted that this testimony had to be considered as part of its case. CLPUD has already provided some evidence that would permit cross-examination, but Verizon asserts that it needs additional documents to effectively cross-examine Mr. Gintner.

We agree that Verizon must have a response to its limited data requests in order to facilitate cross-examination. *See* Order No. 03-747 at 4 (unless underlying documents are produced, Commission would not consider information that was based on those documents). We are especially concerned because Verizon has argued that Mr. Gintner's testimony is misleading. *Responsive Testimony of Veronica Mahanger*, filed March 1, 2004.³ Discovery and cross-examination on matters related to Mr. Gintner's testimony must be permitted to evaluate his testimony, otherwise it cannot be considered by the Commission.

CLPUD's counsel has repeatedly expressed its concerns about disclosing what it considers to be privileged information. These concerns arise, however, only because CLPUD chose to submit testimony sponsored by its attorney. Oregon courts have recognized the inherent policy problem with allowing an attorney to testify on the

² CLPUD argues that one attorney may be a witness while another attorney in the same firm may argue the case. CLPUD is correct. *See* DR 5-102(C). However, the dual roles still present conflicting interests that diminish the credibility of the witness-attorney's testimony. *See Universal Athletic Sales Co. v. Am. Gym, Recreation & Athletics Equip. Corp.*, 546 F2d 530, 538-40 (3rd Cir 1976), *cert den* 430 US 984 (1978).

³ We acknowledge that some documents may contain both discoverable material and work product. The work product doctrine protects an attorney's theory of the case under litigation, but it only protects documents prepared in anticipation of litigation and not in the regular course of business. *See United Pacific Insurance Company v. Trachsel*, 83 Or App 401, 404 (1987). For that reason, we agree that if CLPUD has a question about whether a document is discoverable under the work product doctrine, it shall submit it to the ALJ to be reviewed *in camera* and redacted if necessary.

client's behalf and then claim privilege on related matters that might not be as favorable to the client. *State v. Sullivan*, 230 Or 136, 139 (1962). While that case was decided under an earlier version of the rules of evidence, the dilemma remains as to how to deal with an attorney who testifies on behalf of a client.

Evidence scholars have reached a similar conclusion as to how to treat attorney-witnesses. McCormick notes that disclosure of part of a privileged communication waives the privilege as to the rest of the communication. *McCormick on Evidence*, vol I, § 93, 375 (1999). McCormick further addresses attorney testimony as to non-privileged matters: "if the client uses the lawyer to prove matter which he would only have learned in the course of his employment this again should be considered a waiver as to related privileged communications." *Id.* (footnote omitted).

We acknowledge that CLPUD's brief cited Disciplinary Rule 4-101(D) as authority for its responsibility to not disclose communications with CLPUD. That rule states, "A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer in connection with the performance of legal services from disclosing or using confidences or secrets of a client." One exception allows production if compelled by a court order, and this admittedly is not a court order. If CLPUD still has those concerns, it has another option: withdraw the testimony of Mr. Gintner and submit substitute testimony by a non-attorney witness, and allow Verizon to submit data requests to that witness. The choice belongs to CLPUD.

ORDER

IT IS ORDERED that:

1. CLPUD shall respond to Verizon's narrowed data requests as set out in its Response to Motion to Certify within 10 days of the date that this order is issued.

2. If CLPUD chooses not to respond to the data requests, CLPUD shall indicate its intention to the Commission whether it intends to submit substitute testimony from another witness within 10 days of the date that this order is issued.

Made, entered, and effective _____.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.