

**BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001**

Postal Rate and Fee Changes, 2006

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Docket No. R2006-1

**REQUEST FOR EXPEDITED RELIEF
AND
MOTION IN LIMINE OF THE GREETING CARD
ASSOCIATION**

(November 2, 2006)

The Greeting Card Association finds itself in an awkward position. As an outgrowth of the dispute between its witness Dr. James Clifton and his former client in this proceeding, the National Association of Presort Mailers,¹ GCA finds the character of its witness under attack with respect to a dispute collateral to GCA, to this proceeding, and to this Commission. Matters have now reached the point that NAPM Executive Director, an attorney, Joel T. Thomas has filed a declaration containing allegations about NAPM's communications with Dr. Clifton and what NAPM did and did not know about Dr. Clifton's work for GCA.² The upshot of NAPM's accusation and the Thomas Declaration is that Dr. Clifton willfully placed himself in a conflict of interest between his work for GCA and for NAPM. Dr. Clifton denies these accusations.

Dr. Clifton is due to appear for oral cross-examination on Monday, November 6, 2006. GCA is deeply concerned that a one-sided inquiry into the Clifton-NAPM dispute

¹ Dr. Clifton also worked for, and was discharged by the American Bankers Association.

² Declaration of Joel T. Thomas (November 1, 2006) attached to the Answer of Alliance of Nonprofit Mailers and National Association of Presort Mailers To Motion of Dr. James Clifton For Protective Order and Expedited Relief (Nov. 1, 2006).

is potentially damaging to its witness's reputation, violative of GCA's due process rights, and an abuse of the Commission's process. Significantly, there is no conflict issue before the Commission: NAPM and ABA voluntarily withdrew the NAPM/ABA Clifton R2006-1 testimony, and for whatever reason chose not to pursue any claim of conflict in this proceeding.

From Dr. Clifton's perspective, the situation is a Catch-22. As evidenced by his request for a protective order, he does not wish this proceeding to be misused for purposes of the possible (if not likely) arbitration between him and NAPM (and/or ABA). The Commission apparently agrees: in granting a temporary protective order pursuant to Presiding Officer's Ruling No. R2006-1/95, the Commission stated its concern "that its processes not be used solely, or primarily, for the purpose of gaining advantage in a dispute not relating to an issue before the Commission for decision." However, Dr. Clifton cannot properly answer the NAPM accusations, or cross-examination by NAPM (or others), concerning the Clifton-NAPM dispute without providing the very information he seeks to protect.

There are further difficulties. The Thomas Declaration discusses the purported substance of certain NAPM postal litigation communications between Mr. Thomas and Dr. Clifton. As a result of the Thomas Declaration, NAPM has apparently waived all claims of attorney-client privilege or confidential protection concerning all communications between and among Dr. Clifton, NAPM, and its agents. Under the sword-shield doctrine, NAPM cannot interject into a proceeding a selective recounting of what it claims to know and have said as a result of otherwise confidential communications, but then seek to shield disclosure of other allegedly privileged matters.

See, e.g., *Cox v. Administrator United States Steel & Carnegie*, 17 F.3d 1387, 1419 (11th Cir. 1994) (a party “waives the privilege if it injects into the case an issue that in fairness requires an examination of otherwise protected communications.”). However, unless the Commission is prepared to rule on whether NAPM has waived all claims of privilege as relate to its communications with Dr. Clifton, Dr. Clifton is likely put in the untenable position of having to risk disclosing (potentially) confidential matter or to forego answering fully NAPM’s allegations of wrongdoing.

GCA is even further handicapped from protecting its interest in not having its witness’s reputation besmirched. GCA was not a party to the communications between Dr. Clifton and NAPM. Moreover, the attack is one sided: GCA cannot cross-examine attorney Thomas concerning his Declaration (or otherwise), nor has GCA had the right to discover into this matter.

GCA seeks to end this side show before it becomes a circus and to do so in a way to protect GCA’s legitimate interests. GCA seeks an in limine ruling from the Commission that prohibits any oral cross-examination of Dr. Clifton in any way concerning his dealings with NAPM and/or ABA, or relating to the substance of the withdrawn Clifton NAPM/ABA testimony. In addition, GCA asks that the Commission prohibit all participants from briefing these matters in any way. Such a ruling would not preclude or limit inquiry into the bases for Dr. Clifton’s GCA testimony or recommendations, including use in this proceeding of any of the documents that have been produced as to which the requested protective order would apply.

Respectfully submitted,

/s/ James Horwood _____

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Date: November 2, 2006