

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

Postal Rate and Fee Changes,
2006

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Docket No. R2006-1

**ANSWER OF ALLIANCE OF NONPROFIT MAILERS
AND NATIONAL ASSOCIATION OF PRESORT MAILERS
TO GREETING CARD ASSOCIATION MOTION IN LIMINE
(November 3, 2006)**

The Alliance of Nonprofit Mailers (“ANM”) and National Association of Presort Mailers (“NAPM”) hereby respond to the “Request For Expedited Relief And Motion In Limine” filed by the Greeting Card Association (“GCA”) on November 2, 2006. The GCA Motion In Limine asks the Commission to “prohibit any oral cross-examination” of GCA witness Clifton “in any way concerning his dealings with NAPM and/or ABA, or relating to the substance of the withdrawn Clifton NAPM/ABA testimony,” and to forbid any party from “briefing these matters in any way.” Motion in Limine at 3.

If GCA is proposing to take these matters off the table in this case, we concur. The circumstances surrounding the withdrawal of Dr. Clifton’s testimony by NAPM and ABA are not germane to the merits of this case; and the actions of GCA and Dr. Clifton to inject this “collateral dispute” (GCA’s own term) into the proceeding were inappropriate. So was GCA’s publication of Dr. Clifton’s allegations concerning the professionalism and integrity of ANM, NAPM, ABA, their members, and their counsel

and consultants.¹ Hence, GCA's professed desire to "end this side show before it becomes a circus" (Motion in Limine at 3) is welcome, if a bit late.

ANM and NAPM do not intend to cross-examine Dr. Clifton about these matters. Nor, we are authorized to state, does the Postal Service, the only other participant that has filed a notice of intent to cross-examine Dr. Clifton. Accordingly, ANM and NAPM have no objection to the issuance of a Commission ruling formally excluding these issues from further consideration. If the Commission issues such a ruling, however, we respectfully ask the Commission to clarify the following:

(1) Any restrictions imposed on the scope of cross-examination and briefing should apply to Dr. Clifton's testimony as well. If the circumstances surrounding the withdrawal of his testimony for NAPM and ABA are off-limits for the rate case participants, Dr. Clifton should be prohibited from opining on this subject in his oral testimony, any subsequent rebuttal testimony, and any future Rule 20b comments or letters to the Commission.

(2) At the same time, however, the Commission should refrain from barring examination of particular issues addressed in Dr. Clifton's testimony for GCA, merely because the same issues also were addressed by Dr. Clifton's now-withdrawn testimony for NAPM and ABA. The proper line can be drawn by allowing examination of

¹ See Letter from William C. Davis III on behalf of Dr. Clifton to The Hon. Steven Williams, Secretary of the Commission (Oct. 4, 2006); Request For Expedited Relief And Motion of The Greeting Card Association On Behalf Of Dr. James Clifton For Protective Order Concerning GCA Production In Response To ANM/GCA-1 (Oct. 27, 2006), Clifton Decl. ¶¶ 4, 7 and 8 (alleging various improprieties by NAPM and ABA); *id.*, Exh. 1 (republishing Davis letter).

issues raised in the GCA testimony, while forbidding any use of, or reference to, the former NAPM/ABA testimony.

For example, questions about the factual bases for Dr. Clifton's assumptions concerning the relative volumes of presorted First-Class, single-piece First-Class and Standard Mail entered by the banking industry are clearly relevant to the financial effect of GCA's proposal on a major segment of "business mail users," 39 U.S.C. § 3622(b)(4), and to the weight that should be given to Dr. Clifton's judgment as an econometrician and analyst of postal industry data. See Presiding Officer's Ruling No. R2006-1/97 (granting DMA motion compel GCA to produce information on this issue). Any questions that ANM and NAPM pose to Dr. Clifton will concern his discovery responses and other public documents. ANM and NAPM do not intend to ask any questions about privileged communications between Dr. Clifton and his former clients.

(3) The Commission should decline GCA's invitation to find a waiver of attorney-client privilege or work product protection for NAPM's communications with Dr. Clifton before his termination as a witness. *Cf.* Motion in Limine at 2-3. The "shield-sword doctrine" invoked by GCA does not apply here. NAPM has studiously avoided injecting any issue into the case that might offer Dr. Clifton a pretext for claiming waiver of privilege. When NAPM and ABA withdrew Dr. Clifton's testimony and workpapers on September 25 and 29, the two parties refrained from any comment on Dr. Clifton's motives, integrity or professionalism.² When Dr. Clifton's personal attorney nonetheless

² See Notice of ABA and NAPM of Withdrawal of Direct Testimony of James A. Clifton (Sept. 25, 2006); Notice of Withdrawal of Workpapers of James A. Clifton (ABA-NAPM-LR-1) by ABA and NAPM (Sept. 29, 2006).

submitted a letter to the Commission on October 4 characterizing the withdrawal notices as “factually inaccurate,” and alluding to privileged communications between Dr. Clifton and his former clients,³ NAPM and ABA did not respond. Even after GCA republished the October 4 letter in its October 27 motion for a protective order, NAPM refrained from quoting any of Dr. Clifton’s e-mail correspondence, or otherwise responding at a level of specificity greater than Dr. Clifton’s allegations.⁴

The “shield-sword doctrine” provides that a party waives privilege when it “injects into the case an issue that in fairness requires an examination into otherwise protected communications.” *Cox v. Administrator, U.S. Steel & Carnegie*, 17 F.3d 1386, 1419 (11th Cir.), *on rehearing*, 30 F.3d 1347 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110 (1995) (cited in GCA Motion in Limine at 3). The doctrine applies, however, only if the assertion of the privilege was the result of “some affirmative act” by the holder of the privilege that raises *new* legal or factual issues in the case, such as asserting an affirmative defense to a complaint (including the defense of reliance on the advice of counsel), as opposed to a mere denial of an adversary’s allegations.⁵ It certainly does

³ Letter from William C. Davis III, *supra*, at 1 (last paragraph); *id.* at 2 (first paragraph); *id.* at 3.

⁴ ANM/NAPM Answer to Motion for Protective Order (Nov. 1, 2006) at 22-23; *id.*, Thomas Decl. ¶¶ 14-16.

⁵ *See, e.g., In re Grand Jury Proceedings*, 219 F.3d 175, 182-183 (2d Cir. 2000) (the “quintessential example” of the applicability of the sword-shield doctrine is the defendant who asserts an advice-of-counsel defense; defendant is thereby deemed to have waived privilege as to the advice that he received); *Lorenz v. Valley Forge Ins. Co.*, 815 F.2d 1095, 1098 (7th Cir. 1987) (in order for sword-shield doctrine to apply, “a defendant must do more than merely deny a plaintiff’s allegations. The holder must inject a new legal or factual issue into the case. Most often, this occurs through the use of an affirmative defense”); *Baker v. General Motors Corp.*, 197 F.R.D. 376, 388 (W.D. Mo. 1999) (sword-shield, or implied waiver, doctrine applies when “the litigant asserting the privilege [has] placed[d] the allegedly privileged communication at issue through an

(footnote continued on next page)

not allow a party that does *not* hold the privilege to inject summaries of privileged communications into a proceeding, and then bootstrap its adversary's mere denials into a supposed waiver of privilege for the actual communications themselves.⁶

(4) Grant of the relief sought by GCA in its Motion in Limine would render moot one of the two grounds offered by Dr. Clifton for a protective order: the supposed risk of

affirmative act such as an affirmative defense, thereby making the protected communication relevant and necessary to the original claim of the adversary"); *Pyramid Controls, Inc. v. Siemens Industrial Automations, Inc.*, 176 F.R.D. 269 (N.D. Ill. 1997) (waiver can occur "when a party voluntarily injects either a factual or legal issue into the case"); *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975) (doctrine applies when "assertion of the privilege was the result of some affirmative act, such as filing suit, by the asserting party," and defendants in lawsuit therefore waived privilege by raising an affirmative defense that placed directly in issue the advice they received from counsel).

⁶ See e.g., *Ross v. City of Memphis*, 423 F.3d 596, 605 (6th Cir. 2005) (city, which asserted attorney-client privilege as to content of conversations between its former police director and various attorneys employed by city, did not waive privilege as result of director's decision to raise advice of counsel as part of his defense in lawsuit; because city – not director – was the holder of the privilege, fairness to plaintiff did not require denying city, which had not asserted advice-of-counsel defense, its ability to assert privilege; "If anything, [finding a waiver would] prejudice[] the City, which loses the attorney-client privilege because of the litigation strategy deployed by its former employee"); *Fraser v. Major League Soccer*, 284 F.3d 47, 63 (1st Cir. 2002) (District Court did not err by allowing defense witness to testify about legal opinion defendants had received, while shielding opinion from discovery or questioning; plaintiffs' questions to witness arguably "opened the door" to witness's response, which included only "brief references" to legal opinion, and plaintiffs "could not use their own conduct to force the waiver"); *Lorenz, supra*, 815 F.2d at 1098 (defendant did not waive privilege when it responded to plaintiffs' allegation that settlement offer had been made in bad faith by denying allegation and adding that the concept of the offer had originated with plaintiffs' attorney; defendant did not inject a new issue into the case, but was simply offering "a new form of evidence to counter an issue injected by the plaintiffs"); *Case v. Unified School District # 233, Johnson County, Kansas*, 1994 WL 358198, at *6-7 (D. Kan., June 2, 1995) (defendants had not waived privilege "merely by defending the suit" or by noting their "legitimate role" in determining school library content "to illustrate their denial of unconstitutional intent"). Compare, e.g., *Cox*, 17 F.3d at 1418-1419 (holding that party waived privilege when it did not merely deny adversary's allegation of scienter, but asserted defense that it believed its policy to be lawful).

damage to Dr. Clifton's position in a "possible (if not likely) arbitration between him and NAPM (and/or ABA)."⁷ If the parties do not argue or brief the merits of this dispute to the Commission, the Commission obviously has no reason to render an opinion on the matter. Hence, the Commission's ultimate findings in this proceeding should not affect Dr. Clifton's position in any subsequent arbitration over the withdrawal of his testimony.⁸

Dr. Clifton's alternative ground for protective conditions—that disclosure of his March 2006 study for GCA would deprive him of potential revenue from reselling portions of the study to other buyers—obviously would be unaffected by grant of the Motion in Limine. As ANM and NAPM demonstrated in their November 1 Answer, however, Dr. Clifton's "conclusory statements" in support of this alternative ground do not begin to establish the "clearly defined and serious injury" from disclosure that is required for issuance of a protective order. ANM/NAPM Answer (Nov. 1, 2006) at 18-19, 24-25.

⁷ Motion in Limine at 2; *accord*, Request for Expedited Relief and Motion of the Greeting Card Association on Behalf of Dr. James Clifton for Protective Order Concerning GCA Production in Response to ANM/GCA-1 (Oct. 27, 2006), Clifton Decl. ¶ 7.

⁸ While the relief sought in the motion in limine would not eliminate any risk to Dr. Clifton's position from admissions arguably made in his March 2006 report to GCA, that risk, whether large or small, is inherent in the document itself, and would not be reduced by the issuance of a protective order. See ANM/NAPM Answer to Motion for Protective Order (Nov. 1, 2006) at 23; *id.*, Thomas Decl. ¶¶ 31, 33.

Respectfully submitted,

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