

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

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Postal Rate and Fee Changes, 1997)

Docket No. R97-1

OFFICE OF THE CONSUMER ADVOCATE
OPPOSITION TO MOTION TO STRIKE THE TRANSCRIPTION,
ACCEPTANCE INTO EVIDENCE, AND QUESTIONING OF WITNESS PORRAS
CONCERNING, THE PURPORTED STRATEGY DOCUMENT FOUND WITHIN
ELECTRONIC VERSION OF EXHIBITS VOLUNTARILY PROVIDED
TO THE COMMISSION
MARCH 30, 1998

On March 24, 1998, the Postal Service served a document entitled "Restatement of Objection by the United States Postal Service and Motion to Strike the Transcription, Acceptance into Evidence, and Questioning of Witness Porras Concerning, [sic] the Purported Strategy Document Found Within Electronic Version of Exhibits Voluntarily Provided to the Commission." The Postal Service states that "it hereby restates its objection made orally during rebuttal hearings on the testimony of Postal Service rebuttal witness Porras on March 19. Tr. 35/18728."¹ It moves that the transcribed document and related questioning of the witness about the document be stricken from the record. In addition, the Postal Service states that no foundation has been laid for its admission, and the document is subject to protection under the work product privilege. Presiding Officer's Ruling No. R97-1/115 set the date of March 30, 1998,

¹ This is inaccurate in the sense that Postal Service counsel objected to the document's introduction, but did not give any reason for the objection. See Tr. 35/18728, lines 15-16. The claim of work product privilege was not made until the subject motion, five days after the March 19 hearing.

for responses to the Postal Service motion.

OCA opposes the motion on two main grounds.² The first ground deals with sufficiency of the privilege claim. Briefly stated, neither the parties (other than the movant) nor the Commission know anything about the origin (including authorship), purpose and actual use of the document. Simply because a document seems to be a strategy document does not mean it qualifies as privileged (i.e., it reflects an attorney's mental impressions). A party seeking to claim privilege must provide a clear explanation as to why the privilege applies. The Commission should thus deny the Postal Service motion. If the Postal Service then wants to reintroduce the motion, with appropriate explanation, it can make privilege arguments to which parties may respond. It may even be appropriate for the Commission to permit parties to cross-examine the document writer to determine whether or not the privilege should apply. Then, if the privilege does not apply, the parties should be permitted to cross-examine the writer on the meaning of the document.

The second ground for denying the Postal Service motion is that it waived the privilege by transmitting the document. Although courts are split on the issue of whether inadvertent submittal waives the work product privilege, a substantial number in fact hold to a *per se* rule that even inadvertent waiver will defeat a privilege claim. Other courts use a test that involves balancing equitable factors, with "fairness" being

² OCA will not address at length the Postal Service's "foundation" argument. Clearly, the Postal Service can determine who wrote the document, and it is almost certain that Postal Service counsel knows the authorship of the document by now. The Postal Service's "foundation" arguments disappear once the witness is produced to be cross-examined about the document.

an overriding factor. Under this middle ground test, the privilege claim also fails, as discussed below.

SUFFICIENCY OF THE PRIVILEGE CLAIM

In addressing the overall sufficiency of the privilege claim, OCA first addresses the factual issue of what the (non-Postal Service) parties know about the document. This is important because the proponent of a privilege claim has the burden of showing that the privilege applies, and the work-product privilege contains certain factual prerequisites. A typical formulation of this burden follows:³

The burden of proving the attorney-client or work-product privileges rests on the party claiming the privilege. The mere allegation that a document or group of documents constitutes work product is insufficient.

As shall become evident from the legal discussion of privilege and its waiver herein, questions that need to be answered before a proper assessment of the privilege claim can be made include: (1) Who wrote the document? (2) Why did the author write it, i.e., what was its intended use? (3) What was its actual use? (4) Did any attorney on the Postal Service team see it? (5) What use did any Postal Service attorney make of the document, e.g., did he direct that it be followed by a testifying expert? (6) Did any expert to be called at trial (including employees in the regular employ of the Postal Service) consult the document?

Parties outside the Postal Service know precious little about the document. Counsel for the Postal Service stated he had never seen the document before it was

³ *Hisaw v. Unisys Corp.*, 134 F.R.D. 151, 153 (W.D. La. 1991).

disclosed by the Presiding Officer.⁴ That is a curious statement given that the purpose of the motion to strike is said to be to protect “against disclosure of the mental impressions, conclusions, opinions, or legal theories⁵ of any attorney or other representative of a party concerning the litigation.”⁶

How, then, can the Commission properly rule on this assertion given the lack of knowledge we have about the document? Indeed, there is a curious lack of identity of the document throughout the Postal Service motion, i.e., why it was created, and how it was used, including by the Postal Service’s legal team. How can one say that the privilege lies when the document may not even represent any attorney’s (or his representative’s) mental impressions? According to one treatise on the federal rules, “[t]he decision in *Hickman v. Taylor* [the landmark case in this area of law] is based in large measure on protecting the thought processes of lawyers.”⁷ As the Supreme Court stated in that case: “Proper preparation of a client’s case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.”⁸ In short, who was sifting through this document, and for what purpose?

The work-product privilege is not an absolute one. Fed. R. Civ. P. Rule 26(b)(3) is bifurcated. As the wording of Rule 26(b)(3) indicates, documents not constituting an attorney’s “mental impressions,” etc., can be obtained upon a showing of “substantial

⁴ Tr. 35/18725.

⁵ For the sake of brevity, OCA shall refer to “mental impressions, conclusions, opinions, or legal theories” by the single term “mental impressions.”

⁶ Motion at 3, citing Fed. R. Civ. P. 26(b)(3).

⁷ Wright, Miller & Marcus, 8 Federal Practice and Procedure 398.

⁸ *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947).

need” and “undue hardship.” And not all attorney writings constitute “mental impressions, etc.” As the D.C. Circuit has noted, the Supreme Court in *Upjohn Co.*⁹ “did not decide whether factual elements embodied in [an attorney’s] notes should be accorded the virtual absolute protection that the privilege gives to the attorney’s mental processes.”¹⁰ In reaching the conclusion that purely factual material “should be reachable when true necessity is shown”¹¹ the court observed that in the case it was considering, “[o]ur brief review of the documents reveals portions containing factual material that could be classified as opinion only on a virtually omnivorous view of the term.”¹²

We also need to know who wrote the document and whether or not testifying experts examined the document. In this regard, the federal rules are relevant, because such rules as Fed. R. Civ. P. 26(b)(4)(A) and Fed. R. Civ. P. 26(a)(2)(B) make expert witnesses subject to wide discovery. Thus, an expert witness (which includes any regular employee of a party whose duties include providing expert testimony), must file a disclosure report, including “the data or other information considered by the witness in forming the opinions.” Fed. R. Civ. P. 26(a)(2)(B). The advisory committee notes to the rule state:

The report is to disclose data and other information considered by the expert and any exhibits or charts that summarize or support the expert’s opinions. Given this obligation of disclosure, litigants

⁹ *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981) is a landmark privilege case.

¹⁰ *In re: Sealed Case*, 124 F.3d 230, 236 (1997).

¹¹ *Ibid.*

¹² *Id.* at 236-37. For a discussion of fact work-product (which is reachable through a showing of substantial need and undue hardship) and opinion work product (which is almost never reachable) see *In re Grand Jury Proceedings*, 102 F.3d 748, 750 (4th Cir. 1996).

should no longer be able to argue that materials furnished to their experts to be used in forming their opinions – whether or not ultimately relied upon by the expert – are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.¹³

This statement from the advisory committee indicates that if any Postal Service expert examined the document in question, *no privileges apply*.

A good general discussion of the extent to which documents consulted by an expert are discoverable is contained in two recent cases, the first being *U.S. v. City of Torrance*.¹⁴ The court there found, for example, that “[w]hen counsel forwards documents prepared by a non-testifying consultant to a testifying expert, they become discoverable. Any protection the documents may have had no longer applies. ‘In general, the work-product privilege has been held not to apply to opinions and documents generated or consulted by an expert retained to testify at trial.’”¹⁵ It further held: “[A]bsent an extraordinary showing of unfairness that goes well beyond the interest generally protected by the work product doctrine, written and oral communications from a lawyer to an expert that are related to matters about which the expert will offer testimony are discoverable, even when those communications would be deemed work product.”¹⁶

B.C.F. Oil Ref., Inc., v. Consolidated Edison Co., 171 F.R.D. 57 (S.D.N.Y. 1997), a second case giving considerable thought to the scope of the work product doctrine, holds that in light of the 1993 amendments to the federal discovery rules *any material*

¹³ 1993 Advisory Committee Comments.

¹⁴ 163 F.R.D. 590 (C.D. Cal. 1995). See also *Kam v. Ingersoll Rand*, 168 F.R.D. 633, 639-641 (N.D. Ind. 1996).

¹⁵ 163 F.R.D. at 593.

given by an attorney to an expert is discoverable, even if it includes the attorney's mental impressions. Id. at 63-66. The court considered documents "reviewed by plaintiff's expert which contain the mental impressions, opinions, and , in some cases, litigation strategies of plaintiff's attorneys." Id. at 63. Noting that prior to the 1993 amendments there was a split of authority on whether attorney opinion (e.g., mental impressions) work product was discoverable when given to an expert, *ibid.*, the court stated that the 1993 amendments to Rule 26 were "quite significant" Id. at 65. The court cited *Kam v. Rand*, 168 F.R.D. 633 (N.D. Ind. 1996), which reached a similar result, for the important policy consideration that obtaining such information "is critical if an adverse party is to determine the extent to which the opinion of the expert was influenced by counsel." Id. at 66.

Thus, we need to know what use was made of the document in question because

Discovery of documents shown to an expert assures the "independence of the expert's thinking, both her analysis and her conclusions. The risk is that the lawyer will do the thinking for the expert, or, more subtly, that the expert will be influenced, perhaps appreciably, by the way the lawyer presents or discusses the information." [citation omitted] "What the [Advisory] Committee sought to promote [in the 1970 amendments to Rule 26] was a fair opportunity to expose whatever weaknesses, unreliabilities, or biases might infect the opinions of testifying experts"¹⁷

Another reason we need to know more about the document in question is that the work-product privilege does not operate to protect documents prepared by a non-

¹⁶ *Ibid.*

¹⁷ *Ibid.*

attorney who did not work for any lawyer, even if the work product “may have been, and probably was, used by lawyers”¹⁸

The identity and purpose of the document writer are thus important to know because of the privilege’s qualifications. As noted, the party asserting work product privilege has the burden of establishing that the doctrine applies.¹⁹ A mere allegation that the work product rule applies is insufficient to invoke its protection.²⁰ Also, as noted above, the privilege is qualified. If the material in question does not relate to the disclosure of the attorney’s mental impressions, etc., the material may be discovered. And, “[i]n general, the work-product privilege has been held not to apply to opinions and documents generated or consulted by an expert retained to testify at trial.”²¹ Fed. R. Civ. P. 26(b)(5) is relevant in this regard, since the party claiming privilege must give sufficient description to “enable other parties to assess the applicability of the privilege or protection.” The Postal Service clearly has failed to meet this obligation.

WAIVER OF THE PRIVILEGE

A second general issue is whether or not the privilege can be waived if disclosure was inadvertent. There are three distinct lines of authority regarding

¹⁸ *In re Grand Jury Proceedings, supra*, 102 F.3d at 752.

¹⁹ Moore’s Federal Practice (3rd ed.) at 26-219.

²⁰ *Ibid*.

²¹ *County of Suffolk v. Long Island Lighting Co.*, 122 F.R.D. 120, 122 (E.D.N.Y. 1988). Rule 26(b)(4) “has been broadly interpreted to authorize disclosure of both expert opinions and ‘all the documents the expert generated or examined in the process of forming those opinions.’” *Ibid*.

unintended disclosure.²² One line, using a *per se* standard, holds that the inadvertent nature of the disclosure does not matter – the privilege is lost. The second line says the privilege is not lost – the Postal Service characterizes this as the “preferred view,” but as we shall see many courts, including federal appeals courts, plainly disagree.²³

Indeed, the United States Court of Appeals for the District of Columbia Circuit has adopted a *per se* approach to the issue of inadvertent waiver of privilege:²⁴

The courts will grant no greater protection to those who assert the privilege than their own precautions warrant. We therefore agree with those courts which have held that the privilege is lost ‘even if disclosure is inadvertent.’ *In re Grand-Jury Proceedings*, 727 F.2d 1352, 1356 (4th Cir. 1984) . . . [other citations omitted] In other words, if a client wishes to preserve the privilege, it must treat the confidentiality of the attorney-client communications like jewels – if not crown jewels. Short of court-compelled disclosure [citation omitted] or other equally extraordinary circumstances, we will not distinguish between various degrees of ‘voluntariness’ in waivers of the attorney-client privilege.²⁵

Other circuits have adopted the *per se* approach, in what appears to be a modern trend. The First Circuit did so in *Texaco Puerto Rico, Inc., v. Department of Consumer Affairs*, 60 F.3d 867, 883-84 (1st Cir. 1995). The Eighth Circuit followed this approach in *Lutheran Med. Ctr. v. Contractors Health Plan*, 25 F.3d 616, 622 (8th Cir. 1994). The *per se* approach also is followed by the Federal Circuit. See *Carter v. Gibbs*, 909 F.2d 1450, 1451 (Fed. Cir. 1990). Granting a motion to strike (where a government attorney inadvertently appended an internal memorandum to another filing)

²² Moore’s Federal Practice (3rd ed.), 26-156-57; Wright, Miller & Marcus, 8 Federal Practice and Procedure 237 *et seq.*

²³ Wright, Miller & Marcus, 8 Federal Practice and Procedure 241.

²⁴ *In re: Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989).

would, in that court's words, "do no more than seal the bag from which the cat has already escaped." *Id.* at 1451. A sampling of lower courts adopting the *per se* approach includes *FDIC v. Singh*, 140 F.R.D. 252, 253 (D. Me. 1992); and *International Digital Sys. Corp. v. Digital Equip. Corp.* 120 F.R.D. 445, 449 (D. Mass. 1988).

The Postal Service argues in its Motion: "That the document was inadvertently disclosed does not constitute waiver of its privileged status."²⁶ Unfortunately for the Postal Service, its case citations are not persuasive or are inapposite. It cites *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 116 F.R.D. 46, 50-52 (M.D.N.C. 1987) for the proposition that "limited inadvertent disclosure will not necessarily result in waiver" ²⁷ The *Parkway* court in fact ruled that inadvertent disclosure waived the privilege. The court followed the balancing approach discussed in the next section, and specifically found for the party seeking the inadvertently waived documents.²⁸ It is correct that in dicta it stated that "[i]nadvertent disclosure of an otherwise privileged document does not as a matter of law preclude a finding of waiver."²⁹ However, the court noted that "[b]ecause the attorney-client privilege is itself strictly construed, the Court will likewise stringently apply the above [balancing test] factors in deciding whether inadvertent disclosure amounts to a waiver of the privilege."³⁰ It continued: "Mere inadvertence, standing alone, is not sufficient to

²⁵ *In Re United Mine Workers of America Employee Plans*, 156 F.R.D. 507, 508 (D.D.C. 1994) explains that the *Sealed Case* ruling extends to attorney work product as well.

²⁶ Postal Service Motion at 4.

²⁷ Postal Service Motion at 5.

²⁸ 116 F.R.D. at 52: "Finally, the Court sees no special circumstance which justifies relieving defendant from its error."

²⁹ 116 F.R.D. at 50.

³⁰ 116 F.R.D. at 51.

counter the *strong policy that disclosure constitutes waiver*.³¹ As discussed below, the Postal Service claim falls even if one uses the middle ground balancing test.

The Postal Service also cites *Transamerica Computer Co. v. International Bus. Mach. Corp.*, 573 F.2d 646, 650-52 (9th Cir. 1978) for the proposition that “(privilege waived only if privilege holder voluntarily discloses communication).”³² There are several problems with this citation. First, the Ninth Circuit subsequently ruled in *Weil v. Investment/Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 24-25 (9th Cir. 1981) that under federal common law, waiver can result from inadvertent disclosure. In the civil case under consideration the Ninth Circuit, noting that the party claiming privilege must prove “that it has not waived the privilege,”³³ found that the privilege was lost because the party claiming the privilege had only made a “bare assertion that it did not subjectively intend to waive the privilege”³⁴ In this docket we have nothing more than a “bare assertion” of inadvertence. We do not know, for example, whether the Postal Service has thoroughly investigated the matter internally. Also, the Ninth Circuit in *Transamerica* specifically did not rule on the issue of inadvertent disclosure in the context of the factual situation in this docket. The Ninth Circuit stated:³⁵

We do not decide, however, whether this sort of “inadvertent” disclosure constitutes a waiver of the attorney-client privilege, for we believe that this case is properly decided upon the basis of a legal principle upon which the parties are in complete accord. Specifically, IBM asserts, and TCC concedes, that a party does not

³¹ *Ibid.* [emphasis added]

³² Postal Service Motion at 4.

³³ 647 F.2d at 25. After *Weil*, courts in the 9th circuit in civil cases seem to apply the balancing approach discussed *infra*. See *In Re Sause Bros. Ocean Towing*, 144 F.R.D. 111, 114 (D.Or. 1991), and cases cited therein.

³⁴ *Ibid.*

³⁵ 573 F.2d at 650-51.

waive the attorney-client privilege for documents which he is *compelled* to produce.³⁶

In this docket, the document was not compelled, even under a constructive theory. The filing in which the document was contained was not filed pursuant to a discovery request or order. Rather, it was submitted voluntarily to support the Postal Service's rebuttal case. No one forced the Postal Service to make the filing at all, and the Postal Service was the one controlling the length and breadth of its exhibits.

Another line of cases concerning inadvertent disclosure uses a balancing approach that examines the issue on a case-by-case basis. See, e.g., *Draus v. Healthtrust, Inc.*, 172 F.R.D. 384 (S.D. Ind. 1997). Factors a court may examine include³⁷ reasonableness of the efforts to avoid disclosure, delay in rectifying the error, scope and burden of discovery, and extent of disclosure. However, "the courts using this middle test consider the 'overriding issue of fairness.'"³⁸ It should be noted that the court in *Draus v. Healthtrust* was of the opinion that

As a practical matter, the balancing approach and the strict accountability approach will nearly always produce the same result – a finding of waiver – where there has been an actual (not constructive) disclosure³⁹

These are the cases where the bell cannot be unrung⁴⁰

³⁶ The issue turned upon whether or not a massive document response compelled under accelerated discovery amounted to IBM having been compelled to turn over the documents. The court noted the case presented "unique circumstances" 573 F.2d at 648. IBM had to examine 17 million pages of documents during an accelerated production schedule. *Ibid.*

³⁷ *Id.* at 243.

³⁸ *Id.* at 245.

³⁹ 172 F.R.D. at 389.

⁴⁰ *Ibid.*

In the event the Commission were to adopt this balancing approach, OCA next applies the factors used in this approach to the facts in this case. OCA first addresses the delay in correcting the error.⁴¹ Was it reasonable this late in a proceeding, when parties are within a few days of having to submit briefs, to wait five days after the hearing to move that the introduction of a single piece of paper should be objected to on privilege grounds?⁴² OCA thinks not. Indeed, parties' brief writing has been complicated by this five day lapse. If release of the document was that important, a motion could have been filed the next day.

A second factor courts examine when employing the balancing approach is to evaluate the scope and burden of discovery. As noted, there was no "burden of discovery" on the Postal Service. The document was filed as part of an exhibit in support of the Postal Service's rebuttal case. The filing of the exhibit was entirely

⁴¹ Without more specific knowledge about what precautions were taken regarding inadvertent disclosure, and whether or not the disclosure was in fact inadvertent (i.e., someone leaked the information) OCA cannot at this time comment on the factor regarding reasonableness of efforts to avoid disclosure. OCA would note, though, that if someone from inside the Postal Service leaked the information, the privilege would be lost under the rationale set forth in *United Mine Workers v. Arch Mineral Corp.*, 145 F.R.D. 3, 6 (D.C.D.C. 1992). "Although the Court declines to speculate on how these documents came into plaintiffs' hands, the record as it currently stands is consistent with the conclusion that the documents were leaked. Whether that conclusion is true or not, however, the Court is satisfied that, under the standards applied in this circuit, Arch waived attorney-client privilege when it failed to maintain the confidentiality of these memoranda" *Id.* at 6. It must be noted that the proponent of the waiver claim must prove that it intended the disclosed documents to be confidential. *Ibid.* It has not been established, for example, that the document was not intentionally disclosed, e.g., leaked. Postal Service counsel was unable to say at the hearing how the document was placed in the electronic version. Tr. 35/18725, lines 12-17. The Postal Service Motion at 2 attempts to show how the document does not fit into the remainder of the exhibits, but that is contradicted by the sequential number "3" on the exhibit sheet. At any further hearing on the subject, the Postal Service should be made to prove actual inadvertence of disclosure.

voluntary. In addition, the Postal Service employs a work force approaching the one million mark. Surely it can afford an adequately staffed legal department to respond to such important issues as how much money it will be allowed to make. As more than one court has noted, though, it "is difficult for a party to show that it took reasonable precautions to prevent production of privileged documents where those precautions obviously failed."⁴³ Even lengthy production will not vitiate the privilege. As the court noted in *Draus v. Healthtrust*, "[t]he document production at issue involved about 2,400 pages in ten binders. That may seem like quite a lot of paper to those not familiar with modern litigation, but it is by no means a huge volume."⁴⁴

Another consideration under the balancing approach is whether disclosure already has occurred. Here, the disclosure already has been made, which strongly militates against applying the privilege.⁴⁵ As the court noted in *Draus v. Healthtrust*, "[T]he disclosure of that document was utterly complete . . . [t]he disclosure of the Dickerson letter is a bell that has already been rung. The court cannot unring it . . ."⁴⁶ Note that even the generalized objection made concerning introduction of the document did not occur until well into questioning about the document. The Presiding Officer marked the document for identification at Tr. 35/18720, line 7. The witness said he had read the relevant portions of the document at 35/18721, line 6. Indeed, it was the Presiding Officer that first noted he would "entertain a motion" from the Postal Service

⁴² No mention of the work-product privilege claim was made at the hearing.

⁴³ *Draus v. Healthtrust*, *supra*, 172 F.R.D. at 388.

⁴⁴ 172 F.R.D. at 388.

⁴⁵ *FDIC v. Marine Midland Credit Corp.*, 138 F.R.D. 479, 483 (D.C. Va. 1991); *U.S. v. Keystone Sanitation Co.*, 885 F. Supp. 672 (D.C. Pa. 1994).

⁴⁶ *Draus v. Healthtrust*, *supra*, 172 F.R.D. at 389.

about the document, at Tr. 35/18725, lines 21-25. Even at that point, the witness (Mr. Porras) continued to answer questions about the document. Indeed, the Presiding Officer finished his questions about the document. Postal Service counsel did not object to the document being entered into evidence until Tr. 35/18728 lines 15-16. Finally, the disclosed document still exists in electronic form on the world wide web, which one can verify by going to the Commission's website. In short, the world has already seen the document. Ding dong.

Courts using the balancing test also examine fairness issues. One court has noted that "[i]t is seldom 'fundamentally unfair' to allow the truth to be made public"⁴⁷ The Court in *Draus v. Healthtrust, supra*, noted:⁴⁸

If the court had any doubts about finding waiver based on the first four factors, the "overriding issue of fairness" would resolve such doubts in favor of a finding of waiver here. The Dickerson letter is relevant to some of the core issues in this case Plaintiff describes the document as a "smoking gun." While plaintiff's assessment may be overstated, the letter is certainly highly relevant. It appears to contradict directly several of defendants' contentions that are central to their motion for summary judgment.

The subject document, while not perhaps a smoking gun, is at least highly relevant to the issue of the Postal Service's cost and revenue projections and contingency needs.

SCOPE OF THE WAIVER

The next issue for discussion is whether or not the inadvertent disclosure of a document opens up the disclosing party to further discovery of privileged material covering the same subject matter. This is germane should the Commission consider

⁴⁷ *FDIC v. Marine Midland Realty Credit Corp., supra*, 138 F.R.D. at 483.

whether it wants to seek additional documents discussing litigation strategy, financial projections, etc.

Although courts are split on the issue, and the majority rule appears to be that inadvertent waiver is limited to the document(s) disclosed,⁴⁸ there is important and recent precedent for the proposition that “a waiver premised on inadvertent disclosure will be deemed to encompass all other such communications on the same subject.”

This was the rule adopted by the First Circuit in *Texaco Puerto Rico, Inc., v.*

Department of Consumer Affairs, 60 F.3d 867, 883-84 (1st Cir. 1995). The D.C. Circuit

also has adopted this expansive view. In *In re Sealed Case*, 877 F.2d at 980-81, the

D.C. Circuit noted:

To hold, as we do, that an inadvertent disclosure will waive the privilege imposes a self-governing restraint on the freedom with which organizations such as corporations, unions, and the like label documents related to communications with counsel as privileged. To readily do so creates a greater risk of “inadvertent” disclosure by someone and thereby the danger that the “waiver” will extend to all related matters, perhaps causing grave injury to the organization. But that is as it should be. Otherwise, there is a temptation to seek artificially to expand the content of privileged matter. * * *

Appellant would confine the waiver to the one document, but, as we have previously said, a waiver of the privilege in an attorney-client communication extends ‘to all other communications relating to the same subject matter.’

⁴⁸ 172 F.R.D. at 389.

⁴⁹ *Draus v. Healthtrust, supra*, 172 F.R.D. at 390.

FAILURE OF THE PRESIDING OFFICER TO RETURN THE DOCUMENT

Given the views expressed in this pleading, the Postal Service statement on page 5 of its Motion that “[i]n fact, in the context of litigation, retention and use of such inadvertently disclosed material would be considered improper” is unwarranted. The Postal Service cites ABA Formal Opinion 92-368:

A lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer, and abide the instructions of the lawyer who sent them.

The Postal Service then verbally chastises the Presiding Officer:⁵⁰

As indicated above, the Presiding Officer clearly understood that this appeared to be a litigation strategy document, which is privileged. Moreover, the circumstances made clear that it was not intended for the Commission or participants, but rather was inadvertently provided as part of the electronic version of Exhibits B and C. In the interest of due process and consistent with the ABA opinion, the appropriate practice would have been to notify Postal Service counsel at the time a responsible agent of the Commission became aware of the inadvertent disclosure of the document clearly labeled “strategy for rebuttal testimony.”

There are a number of serious problems with the Postal Service inference of unethical practice. First, the ABA opinion is directed at lawyers in an adversarial context. The Presiding Officer was here acting in a *judicial* capacity, with the legal authority to rule on the document’s admissibility. Second, it is not at all obvious that the document is privileged, or indeed what the document is. Indeed, it is OCA’s position

⁵⁰ Postal Service Motion at 5-6.

that the Postal Service has not sustained its burden of showing that a privilege applies. It should be noted that the Postal Service lawyers did not respond with alacrity at the hearing once the document was marked as an exhibit; as Postal Service insiders, they were in the best position to know the document's significance. Even now the parties do not know what the document really is. Third, the ABA opinion is of doubtful validity. In the D.C. Circuit, a possible locale for any appeal of the general rate proceeding, even inadvertent disclosure waives the privilege.⁵¹ In that respected circuit's view, the inadvertent disclosure of the document at issue in this motion would be seen as simply a case of not properly safeguarding the "crown jewels."⁵² Fourth, it is elementary privilege law that how a document is labeled or titled does not determine its privilege status. Thus, in *Draus v. Healthtrust, supra*, the privilege was deemed waived even where the inadvertently supplied letter bore "the clear legend, underlined, in capital boldface letters:

'PRIVILEGED AND CONFIDENTIAL/ATTORNEY-CLIENT PRIVILEGED.'⁵³

A recent district court opinion discusses the ABA Opinion in a way that may provide added insight as to its questionable value. The court noted that "cases subsequent to *In re Sealed Case* [referring specifically to 877 F.2d 976] indicate that absent 'extraordinary circumstances,' the release of privileged documents destroys their privileged nature irrespective of how the opposing party gains access to the

⁵¹ *In re Sealed Case*, 877 F.2d at 980.

⁵² *Ibid.*

⁵³ 172 F.R.D. at 385.

documents.”⁵⁴ As to the ABA opinion, the judge in dicta commented: “This Court is aware of no case that has adopted the ABA position.”⁵⁵ In noting that the D.C. Circuit precedent compelled a result conflicting with the ABA Opinion, he observed that the latter “carries no precedential weight.”⁵⁶

RECOMMENDATION

The Commission has multiple ways to deal with the Postal Service motion to strike. It should deny the motion to strike, given that the work product privilege has not been shown to exist by its proponent. The denial may be without prejudice, permitting the Postal Service to refile the motion with complete information, enabling an assessment by the Commission and the parties as to whether or not the privilege may legitimately be claimed. Upon any resubmittal of the motion, the Postal Service should be required to produce relevant witnesses, including the document author, to offer testimony about the origin, purpose and use of the document, and be cross-examined thereto.

Alternatively, the Commission may find that even if the work product privilege attached to the document at one time, inadvertent disclosure waives the privilege. This result follows from application of the *per se* test adopted by the D.C. Circuit and the First Circuit. The *per se* approach seems especially reasonable here since the document was part of an evidentiary exhibit the Postal Service chose to file. It was not

⁵⁴ *In re United Mine Workers of America Employee Plans*, *supra*, 156 F.R.D. 507 at 510.

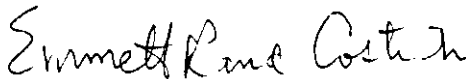
⁵⁵ *Id.* at 511, n.4. The judge expressed regard for the ABA opinion but noted its philosophy was not followed by the court’s higher court. *Id.* at 511.

⁵⁶ *Id.* at 512.

compelled discovery. It also would follow from application of the balancing approach favored by many courts.


The Commission also has the authority to determine the scope of the waiver, and may properly demand production of all documents related to the subject matter of the document under scrutiny here, whether or not such documents originally would have been privileged.

Respectfully submitted,


Emmett Rand Costich
Assistant Director
Office of the Consumer Advocate

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the rules of practice.


EMMETT RAND COSTICH
Attorney

Washington, D.C. 20268-0001
March 30, 1998