DOCKET SECTION

PRESIDING OFFICER'S
RULING NO. R97-1/121

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268

Postal Rate and Fee Changes

Docket No. R97-1

PRESIDING OFFICER'S RULING ON MOTION OF POSTAL SERVICE TO STRIKE DOCUMENT AND QUESTIONING OF WITNESS PORRAS FROM EVIDENCE AND TRANSCRIPT

(April 6, 1998)

BACKGROUND

This dispute arises out of the admission into evidence of a Postal Service document. On March 9, 1998, the Postal Service submitted the rebuttal testimony of Witness Richard Porras, Controller of the Postal Service (USPS-RT-11) to the Postal Rate Commission. The Postal Service filed the testimony in "hard copy" form (i.e. paper), but as is customary in proceedings before this Commission, the Postal Service provided the Commission with electronic versions of the testimony. The electronic files make it much easier for participant and Commission analysts to use the data in spreadsheets which often comprise the workpapers of witnesses. The Commission also followed its normal procedure with respect to the electronic versions of Mr. Porras' testimony and immediately made the electronic files available on its website so that interested parties could download the files.

The diskette provided by the Postal Service with Mr. Porras' rebuttal testimony contained seven files: Porras.doc, Exh11a.xls, Exh11b&c.xls, Exh11d.xls, Exh11e.xls Exh11f.xls, Exh11g.xls. The "xls" files are Microsoft Excel files with exhibits containing revenue and cost data which document Mr. Porras' written testimony.

The file "Exhb&c.xls" contained USPS RT-11 Exhibit B in the first spreadsheet and USPS-RT-11 Exhibit C in the second spreadsheet. The file's third spreadsheet contained the disputed document, entitled "Docket R97-1 Revenue Requirement Updating Strategy for Rebuttal Testimony."

On March 19, witness Porras made himself available at the Commission for cross-examination. The Presiding Officer received the document into evidence, subject to a Postal Service objection. Counsel for the Postal Service, Mr. Reiter, and witness Porras both stated that they had not seen the document before. Tr. 35/18725; Tr. 35/18721. Mr. Porras was asked questions concerning the document and the Postal Service's approach to providing updated numbers to the Commission.

The text on the third spreadsheet outlines strategies that would enable the Postal Service to maintain the revenue requirement contained in its original filing. In the first paragraph, labeled "1," the document says "[p]rovide updated test year cost *changes* for known, quantifiable, actual events that have been raised on the record." (emphasis added). The second paragraph begins "provide updated information on cost *increases* to offset the decreases included under number 1." (emphasis added). Paragraph 2 ends with the suggestion that "[i]n order to balance back to the original revenue requirement an argument will be made for an increase in the contingency from 1.0% to 2.0%." Paragraph 3 discusses the methodological impediments to updating cost and revenue data and concludes that "[a] complete revenue requirement update would be time consuming and would probably result in a further reduction in test year costs."

On March 24, 1998, the Postal Service filed a more detailed objection to the receipt into evidence of the text document, as well as all questioning of Mr. Porras concerning the document.[1] Participants were given until March 30, 1998, to respond to

[1] Restatement of Objection and 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, filed March 24, 1998, (Motion).

the Service's Motion. P.O. Ruling R97-1/115. The Office of Consumer Advocate and the Alliance of Nonprofit Mailers filed responses opposing the Motion.[2]

DISCUSSION

The Postal Service raises three arguments in its Motion. First, the Service contends the proper foundation was not laid for this document to be received into evidence. Second, the Service argues that this document is protected by the work product doctrine pursuant to FED R. CIV. P. 26(b)(3) and that the privilege was not waived by inadvertent disclosure. Third, Postal Service suggests that use of the document would be inconsistent with due process as the Commission has acted improperly by not notifying the Postal Service and returning the document. OCA and ANM contest each of these points. The arguments shall be addressed in the order in which the Postal Service presents them.

Authentication. The Postal Service asserts that the document must be "authenticated by evidence sufficient to support a finding that the document is what the proponent claims it to be. Such support can be established through testimony of a witness with knowledge." Motion at 2 (citations omitted). The Service asserts that no testimony established the authenticity of the document, nor was there any "corroborating evidence" or foundation for the admission of the document into evidence. *Id.*

The Postal Service also points out that the document was not part of the exhibits it intended to file with the Commission. "The document at issue, although found on sheet 3 of the electronic file, is in no way linked to or referenced in sheets 1 and 2,

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[2] 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 (OCA Opposition); Opposition of Alliance of Nonprofit Mailers to Motion of the United States Postal Service to Strike Postal Service Strategy Document and Related Questioning (ANM Opposition).

which form the complete electronic version of Exhibits B and C to witness Porras' testimony. It is quite clear that it was not intentionally submitted...."

ANM believes the Postal Service's Motion admits facts sufficient to provide a foundation for the document to be admitted into evidence. ANM Opposition at 2. ANM observes that the Postal Service has not denied that it was the source of the document or alleged that someone planted the document in the Commission's files. *Id.* The Postal Service's work product argument assumes, ANM also points out, that it is a Postal Service document, and thus it is admissible as an admission by a party-opponent pursuant to FED. R. EVID. 801(d)(2)(D). *Id.* at 3.

The Postal Service is correct that some authentication of a document is required before it should be received into evidence. However, the Service's Motion implies that a witness must vouch for the authenticity of the document. This is not the case. Proof of authenticity may be either by direct or circumstantial evidence. "Appearances, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances" may establish authenticity. FED. R. EVID. 901(b)(4). *See also U.S. v. Fike,* 82 F.3d 1315,1329 (5th Cir. 1996) ("The authentication requirement is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Such evidence can include circumstantial evidence, the document's own distinctive characteristics and the circumstances surrounding its discovery.") (citation omitted); *U.S. v. Natale*, 526 F.2d 1160, 1173 (2nd Cir. 1975), *cert. denied* 425 U.S. 950 (1976) ("Proof of the connection of an exhibit to the defendants may be made by circumstantial, as well as direct, evidence. The prosecution need only prove a rational basis from which the jury may conclude that the exhibit did, in fact, belong to the appellants.")

Moreover, "[t]he burden of proof for authentication is slight. 'All that is required is a foundation from which a fact-finder could legitimately infer that the evidence is what the proponent claims it to be.'" *U.S. v. Reilly,* 33 F.3d 1396, 1404 (3d Cir. 1994)

(quoting *Link v. Mercedes-Benz of N.A., Inc.*, 788 F.2d 918, 927 (3d Cir. 1986) (citation omitted).

There is ample circumstantial evidence that the disputed document is a Postal Service document, and as ANM notes, the Postal Service does not claim otherwise. ANM Opposition at 2. First, the Postal Service does not dispute that the diskette containing the file with the document came directly from the Postal Service. The location and source of a document can be evidence of authenticity. *See Burgess v Premier Corp.*, 727 F.2d 826, 835 (9th Cir. 1984) ("The district court could properly have found that all of the exhibits were adequately authenticated by the fact of being found in Premier et al.'s warehouse.").

Furthermore, the Postal Service does not deny that the file containing the document, "Exhb&c.xls," is a Postal Service file that contains genuine Postal Service exhibits as well as the disputed document. Its Motion, at 2, acknowledges the document at issue is found on sheet 3 of the electronic file it provided to the Commission. The files on the disk contain rebuttal testimony concerning the update of the revenue requirement, just as the text document concerns the update of the revenue requirement. The location of the document and circumstances surrounding its discovery are evidence of its authenticity. *Id.*; *U.S. v. Arce*, 997 F. 2d 1123, 1128 (5th Cir. 1993) (government may authenticate document with circumstantial evidence, including document's own distinctive characteristics and circumstances surrounding its discovery). File Exhb&c.xls also has encoded information indicating it was last saved by someone in the Law Department and was authored by someone in the Finance Department.

The contents of the disputed document serves as further evidence of authenticity. "Appearances, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances" may establish authenticity. FED. R. EVID. 901(b)(4). *See also McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 929 (3d Cir. 1985) ("[T]he contents of the documents tend to support their claim to

authenticity."). The purported Postal Service document shows a sophisticated understanding of the process followed in constructing the Postal Service's revenue requirement.

> In order to accurately determine the impact of changing the base to FY 1997, all cost factors would have to be updated and the rollforward model would have to be re-run. ... Changing the base without changing the cost change factors would result in erroneous and understated test year costs. FY 98 program cost factors were zero based relative to estimated FY 97 costs and they do not relate logically to FY 1997 actual costs. Servicewide personnel cost change factors were developed using computer models which project from FY 96 actual data as the base. FY 98 change factors for these costs do not relate logically to FY 97 actual costs.

It is highly unlikely that someone outside of the Postal Service, let alone outside of the Finance or Law Departments, would understand this information.

More importantly, only the Postal Service would know of the existence of some of the information contained in the document. This is further reliable evidence that the document is what it purports to be. *See U.S. v. Eisenberg*, 807 F.2d 1446, 1552-53 (8th Cir. 1986). The disputed document states that "[a]lthough *not currently on the record*, the impact of the following actual information has been reflected [in Porras' testimony]: 1) actual January 1998 health benefit premiums, 2) the FY 1998 reduction in the FERS contribution rate, 3) actual January 1998 health benefit premiums on annuitant health benefits and, 4) actual FY 1997 non-personnel cost inflation indices." (emphasis added). In fact, these items were included in witness Porras' testimony. No one outside of the Postal Service would know this before the Postal Service filed the testimony.

In general, witness Porras' testimony appears to closely track the strategy outlined in the document; one could even conclude that the document was a blueprint for his testimony. Witness Porras provides the data for updating based on actual

information. He next includes offsetting cost increases in order to balance back towards the original revenue requirement. Finally, Porras makes a case for increasing the contingency to 1.5 percent. The increase from 1.0 percent to 1.5 percent is sufficient to inflate the revenue requirement to within $35.1 million of the original filing. *See* USPS-RT-11c. That witness Porras' testimony is consistent with the document's strategy is additional support for concluding that the document is authentic.

For all of these reasons, it is virtually certain that the document is a Postal Service document prepared by someone with knowledge and understanding of the Postal Service's revenue requirement strategy. The document was properly authenticated based upon its contents and source, a Postal Service file.

Work Product Privilege. The Postal Service also argues that the document is protected by the work product privilege and that the privilege was not waived by inadvertent disclosure. The work product doctrine "protect[s] against disclosure of the mental impressions, conclusions opinions, or legal theories of an attorney or other representative of a party concerning the litigation." FED. R. CIV. P. 26(b)(3).

The OCA and ANM both contend that the Postal Service has failed to meet its burden of showing that the document is protected. ANM Opposition at 4; OCA Opposition at 3-4. Both note that the Postal Service has not even identified the author or purpose of the document. *Id.*

Certainly, these participants are correct in their assertion that the Postal Service bears the responsibility of demonstrating that the privilege protects the document. *See U.S. v. Aramony,* 88 F.3d 1369, 1389 (4th Cir. 1996); *Motley v. Marathon Oil Co.,* 71 F.3d 1547, 1550 (10th Cir. 1995); *U.S. v. Blackman,* 72 F.3d 1418, 1423 (9th Cir. 1995). Furthermore, "[if] we have not been provided with sufficient facts to state with reasonable certainty that the privilege applies, this burden is not met." *F.T.C. v. TRW, Inc.,* 628 F.2d 207, 213 (D.C. Cir. 1980). To meet this burden, the Postal Service only offers its conclusions:

> This document was clearly subject to protection within the work product privilege. The document was never intended by the Postal Service to be filed as evidence or as documentation having any status whatsoever in Docket R97-1. Rather, it is labeled as a strategy document, and from its title and contents, obviously prepared in anticipation of litigation in this docket.

Motion at 4. The Postal Service does not attempt to demonstrate that the document contains mental impressions, conclusions, opinions, or legal theories. Nor does the Postal Service identify the author of the document. This may be insufficient because the document must reflect the thought processes of "an attorney or other representative of a party." FED. R. CIV. P. 26(b)(3). Nonetheless, the title of the document, "Docket R97-1 Revenue Requirement Updating Strategy for Rebuttal Testimony" suggests that the document contains opinions and therefore contains work product. As noted previously, it is almost certain that the document was prepared in the Postal Service's legal or financial section, and thus the document appears to be work product.

The next issue, as the Postal Service observes, is whether inadvertent disclosure waives the privilege. The Postal Service suggests that the "preferred view is that inadvertent disclosure of privileged materials does not give rise to waiver." Motion at 4. However, the OCA points out that the Postal Service presents a misleading picture of the law on inadvertent waiver.

> 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.' The *Parkway* court in fact ruled that inadvertent disclosure waived the privilege.

OCA Opposition at 10. Regardless of the merits of the Postal Service's citations to case law, the Service inadequately addresses the issue of waiver in its Motion.

The Postal Service's Motion does not offer any reason for adopting a particular approach to inadvertent waiver, yet the federal courts divide into three camps on the

issue. *See Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993) (noting that there is no consensus as to the effect of inadvertent disclosure of confidential communications); *McCormick on Evidence* § 93 at 131 (4th ed. 1992) (stating that "a question of great practical importance today is whether a voluntary or inadvertent disclosure should result in waiver.").

Some courts utilize a complex balancing test and weigh factors such as (1) the reasonableness of the precautions to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of discovery or volume of documents produced; (4) the extent of the disclosure; and (5) issues of fairness. *See Alldread v. City of Grenada,* 988 F.2d 1425, 1433 (5th Cir. 1993); *U.S. v. Pepper's Steel & Alloys, Inc.*, 742 F. Supp. 641, 643 (S.D. Fla. 1990); *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co.*, 132 F.R.D. 204, 208-9 (N.D. Ind. 1990); *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985); *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985); *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 116 F.R.D. 46, 50 (M.D.N.C. 1987).

Many courts, using the *per se* approach, hold that the privilege is always waived despite the inadvertent nature of the disclosure. *See Genentech, Inc. v. U.S. Int'l Trade Comm'n.*, 122 F.3d 1409, 1415 (Fed. Cir. 1997); *Texaco Puerto Rico, Inc. v. Dept. of Consumer Affairs*, 60 F.3d 687, 883-84 (1st Cir. 1995); *Carter v. Gibbs*, 909 F.2d 1450, 1451 (Fed. Cir. 1990), *cert. denied,* 498 U.S. 811 (1990); *In re Sealed Case,* 877 F.2d 976, 980 (D.C. Cir. 1989); *In re Grand Jury Proceedings*, 727 F.2d 1352, 1356 (4th Cir. 1984); *Federal Deposit Ins. Corp. v. Singh,* 140 F.R.D. 252, 253 (D. Me. 1992); *International Digital Sys. Corp. v. Digital Equip. Corp.*, 120 F.R.D. 445, 449-50 (D. Mass. 1988).

A few courts, as the Postal Service notes, have held that there should be no waiver. *See Transamerica Computer Corp. v. IBM, Corp.*, 573 F.2d 646, 647 (9th Cir. 1978); *U.S. v. Zolin,* 809 F.2d 1411, 1417 (9th Cir. 1987), *aff'd in part and vacated in*

part, 491 U.S. 554 (1989); *Mendenhall v. Barber-Greene Co.,* 531 F. Supp. 951, 955 (N.D. Ill. 1982).

While it is obvious that under the *per se* standard any privilege is waived, the OCA and ANM argue persuasively that even under the balancing test, the privilege should be waived. OCA Opposition at 13-14; ANM Opposition at 7. First, ANM points out that "the Postal Service has made no showing that it established any systematic mechanism for screening the Porras workpapers for privileged items." ANM Opposition at 7. Surely, the Postal Service could have at least followed the common practice of identifying its privileged documents with the legend "Privileged and Confidential" or "Attorney Work Product."

Moreover, the Postal Service also was slow to rectify the error, according to the OCA, and only filed its Motion five days after it was apprised of the document's disclosure. OCA Opposition at 13. As for the scope of discovery, the OCA observes that disclosure was not the result of massive discovery of documents in this case, and the document's production was not compelled. *Id.* Hence, the burden to avoid disclosure was light. The OCA and ANM also argue that the wide disclosure of the document weighs heavily against holding the document still privileged as the document was distributed to participants at the hearing and previously disseminated via the internet. *Id. See also* ANM Opposition at 7.

Addressing the issue of fairness, OCA directs our attention to a highly relevant discussion in a recent case, *Draus v. Healthtrust, Inc.*, 172 F.R.D. 384, 389 (S.D. Ind. 1997), in which the court observed:

> 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.

As in *Draus,* the disputed document is highly relevant to a central issue in this case, the Postal Service's revenue requirement.

On this issue of fairness, ANM argues that the document evidences an intent to mislead the Commission by overstating the Service's revenue needs. It thus falls within the fraud exception to the work product rule which has been extended to "communications made in furtherance of misleading or unethical conduct that falls short of a crime or tort." ANM Opposition at 7 (citations omitted). Application of the work product rule to a document which evidences lack of candor towards the Commission would be inappropriate. *Id.* Thus, the importance of the document and the Postal Service's apparent effort to mislead the Commission weigh heavily in favor of waiver.

After reviewing all the factors, it is clear that under the balancing test as well as the *per se* standard, the privilege is waived. Nonetheless, the privilege is probably not waived under the Ninth Circuit's no waiver approach, so consequently, the Commission still must decide which line of authority to follow.

The Commission, as a federal agency, generally follows D.C. Circuit precedent. First, both the Postal Service's headquarters and the Postal Rate Commission are located in the District of Columbia. A majority of intervenors in this case either have offices or counsel in the District of Columbia or its suburbs. *See* R97-1 Service List (available at www.prc.gov). And in past years, the D.C. Circuit has most frequently heard appeals of the Commission's Recommended Decisions. *See Mail Order Ass'n of America v. U.S. Postal Service,* 986 F.2d 509 (D.C. Cir. 1993); *Governors of the U. S. Postal Service v. U.S. Postal Rate Comm.,* 654 F.2d 108 (D.C. Cir. 1981); *Nat'l Ass'n of Greeting Card Publishers v. U. S. Postal Service,* 607 F.2d 392 (D.C. Cir. 1979).

Moreover, it is now less likely that an aggrieved party will be able to avoid litigating in the most logical forum, the D.C. Circuit, and obtain review in a more "friendly" court of appeals. Congress eliminated the "first to file" rule in 1988. 28 U.S.C. § 2112(a) 1994; Pub.L. 100-236, Jan. 8, 1988, 101 Stat. 1731. This change makes it difficult for a party to engage in forum shopping, and more certain that the most

convenient and expert court on postal issues, the D.C. Circuit Court of Appeals will hear an appeal of a Postal Rate Commission recommended decision. *See generally* Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* 2d § 3944 (1996) (discussing transfer of administrative appeals and 1988 amendment to "first to file rule").

The Postal Service has not argued that the Commission should not follow D.C. Circuit precedent on the waiver issue, nor is there any principled reason not to do so. We will, therefore, abide by the D.C. Circuit's teachings on this issue. The D.C. Circuit follows a strict responsibility approach to waiver, consistently holding that inadvertent disclosure of materials protected either by the attorney-client or work product privilege waives the privilege. *In re Sealed Case,* 877 F.2d 976 (D.C. Cir. 1989); *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1372 (D.C. Cir. 1984); *In re Grand Jury Investigation of Ocean Transp.,* 604 F.2d 672, 674 (D.C. Cir.), cert. denied, 444 U.S. 915 (1979); *In Re United Mine Workers of American Employee Benefit Plans Litigation,* 159 F.R.D. 307,310 (D.D.C. 1994); *Wichita Land & Cattle Co. v. American Fed. Bank,* 148 F.R.D. 456, 457 (D.D.C. 1992); *Chubb Integrated Sys. Ltd. v. National Bank of Washington,* 103 F.R.D. 52, 63 (1984). Consequently, any privilege protecting the disputed document has been waived.

OCA also raises the issue of "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." OCA Opposition at 15. There is clear authority in the D.C. Circuit on this waiver issue as well. Directly addressing the issue of subject matter waiver, Judge Hogan ruled that there is no subject matter waiver when documents protected by work product privilege are disclosed. *In Re United Mine Workers*, 159 F.R.D. at 310-12. As OCA observes, this is the majority rule, OCA Opposition at 16, and there is no apparent reason to depart from it.

Due Process. Turning to the Postal Service's last argument, the Service objects to the use of the document on ethical and moral grounds. According to the Service,

"the use or reliance upon the document would be inconsistent with due process and principles guiding conduct in litigation." Motion at 5. The Service contends that upon receipt of the document the Commission should have advised the Postal Service that the Commission had received a privileged document and offered to return it to the Postal Service. As authority for this position, the Postal Service relies on an American Bar Association advisory ethical opinion. "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 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." ABA Formal Opinion 92-368.

Commenting on this argument, ANM observes that the "Service fails to explain why due process would be violated by giving the document evidentiary status in a manner consistent with the Federal Rules of Evidence and Civil Procedure." ANM Opposition at 10. ANM also observes that Opinion 92-368 is a "prophylactic measure to prevent prejudice to the party ... until the privileged or non-privileged status of the document can be resolved." *Id.* As the document has been widely disclosed, Opinion 92-368 is "by its terms inapposite here." *Id.* ANM and OCA both point out that the ABA Opinion was rejected as a basis for maintaining privilege in *In Re United Mine Workers of American Employee Benefit Plans Litigation,* 156 F.R.D. 507, 511-12 (D.D.C. 1994). ANM Opposition at 10; OCA Opposition at 18-19.

While the principles espoused in the ABA Opinion are not disputed, for several reasons, the use of the document poses no ethical problem. First, in seeking to rely on ABA Formal Opinion 92-368, the Postal Service incorrectly assumes that the Commission could have acted to prevent the dissemination of the document and maintain its confidentiality. No responsible agent of the Commission reviewed the document until several days after it was received by the Commission and distributed to the public via the internet. At this point, the file containing the document had

undoubtedly been downloaded and was likely to be viewed by interested parties, and the Commission was not in a position to protect the confidentiality of the document.

More importantly, the Postal Service's contention that the ABA Opinion applies to the facts of this case is misplaced. Motion at 5. The Service suggests that the document "appears on its face to be confidential," and "the circumstances made clear that it was not intended for the Commission or participants." *Id.* Consequently, the Service, invoking the authority of ABA Formal Opinion 92-368, believes the Commission should not have examined it. Motion at 5-6.

But the circumstances did *not* make it clear that it was sent inadvertently. The document outlines and explains the revenue requirement testimony and was included in a file with other revenue requirement testimony. The Postal Service makes much of the fact that the document was titled "Docket R97-1 Revenue Requirement Updating Strategy for Rebuttal Testimony." Still, the document appeared to be just one of numerous documents explaining the derivation of Postal Service's revenue requirement. Some attorneys at the Postal Service may recall that in R94-1, the Commission *returned* a document to the Postal Service that was labeled "confidential" and that the Commission believed had been inadvertently produced.

The document appear does not "on its face" to be confidential or privileged. It is not labeled "confidential," "attorney-client privileged" or "attorney work product." The Postal Service now claims upon reflection that the document is obviously confidential or privileged, yet Postal Service attorneys, when presented with the document in the hearings, did not suggest that this was the case. Tr. 35/18720-30. *See also* OCA Opposition at 18 ("Postal Service lawyers did not respond with alacrity at the hearing once the document was marked as an exhibit ....").

Hence, the instant situation more closely resembles the facts described in a Philadelphia Bar Association Ethics Opinion that discusses ABA Formal Opinion 92-368: "Opinion 92-368 is based an the assumption that the documents were 'on their face' privileged or subject to work product and that the documents were received 'under

circumstances when it is clear they were not intended for the receiving lawyer.' Those are not the facts here. In your instance, you had to read the document before you could determine whether it was 'privileged' or 'work product.'" Guidance Opinion Number 94-3 (June, 1994) at 2. The Philadelphia Bar Association then found that there was no duty to return the document. *Id.* The D.C. Bar also believes there is a valid distinction between these two situations. *See* D.C. Ethics Op. 256 (1995) (Opinion states that a lawyer who receives confidential documents inadvertently released to him by opposing counsel may retain and use the documents if he has already reviewed them before learning they were not intended to be given to him. "Lawyers, like anyone else, should be able to presume that materials delivered in the ordinary course of business were delivered intentionally." If however, he learns before looking at the document that their release was unintentional, he may not review or use them, and must return them to opposing counsel.).

At least one court has recognized that the ABA opinion will generally have limited application. In *Kondakjian v. Port Authority of New York and New Jersey,* 1996 WL 139782 at *6 (S.D.N.Y. 1996) the court generally agreed with the ABA's position but noted that "[o]ften, the receiving attorney will not realize the document was missent until he or she has read it. Under these circumstances, a rule prohibiting the receiving attorney from examining the document would make little sense; the document has been reviewed (or partially reviewed) and it is not reasonable to believe the information could be ignored."

Besides the doubtful application of the ABA opinion to the facts of this case, the public disclosure of a work product document does not raise the same ethical issues that prompted the ABA Standing Committee on Ethics and Professional Responsibility to draft their Opinion. The ABA Opinion relies on the importance of maintaining the confidential relationship between an attorney and his client. "As the Committee examines the potentially competing principles, we conclude that their importance pales in comparison to the importance of maintaining confidentiality." ABA Formal Opinion

92-368 at 3. *See also Opinions of the Committee on Professional Ethics,* 79 L.Mass Rev. 89, 90 (1994) ("ABA Formal Opinion 92-368 ... focused on the importance of confidentiality and the lack of any important principle supporting an alternative result ....").

However, the confidentiality of attorney-client communications is not at risk when a document only protected by the work product doctrine is made public. "[T]he work product privilege does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent." *U.S. v. Gulf Oil Corp.*, 760 F.2d 292, 295 (Temp. Emer.Ct.App. 1985). *See also In Re United Mine Workers*, 159 F.R.D. at 312 ("The attorney work product privilege exists to 'promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent.' The attorney-client privilege, on the other hand, exists to protect a confidential relationship.") (citation omitted). Because of this distinction between the work product and attorney-client privileges, the policy (protecting client confidentiality) underlying the ABA opinion does not apply as forcefully to protecting work product. Consequently, even if the document were work product "on its face," it might may still be appropriate for the Commission to use *this* document in *this* litigation.

It is not clear that the Commission, as an adjudicator, is in the same position and is subject to the same balance of obligations, as a party in litigation. Unlike most private litigation, this case concerns not individual interests, but postal rates and fees that virtually every U.S. citizen and business must pay. This is a matter of considerable importance and public concern.

The document at issue could be interpreted to suggest that the Postal Service was selectively furnishing cost information to the Commission and clinging to its original revenue requirement estimate despite mounting evidence that its Request had overstated its revenue needs. In this context, it was very important that witness Porras be asked about the document to determine if the Postal Service was presenting a

balanced picture of its costs. "The strategy document is likely to be the only [document] where a Postal Service representative admits to knowing that the requirement has been overstated." ANM Opposition at 9. Particularly on an issue that can have a substantial impact on rates mailers pay, the Commission has an obligation to build as complete a record as possible. Accordingly, paramount public policy concerns require that this document remain in the record along with the questioning of witness Porras.

Both as an evidentiary and ethical matter, there is insufficient basis for removing the document and the associated questioning from the record.

RULING

The Motion of the Postal Service to strike the document and questioning of witness Porras from the record and transcript is denied.

Edward J. Gleiman
Presiding Officer