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Expert Witness Issues in the Delaware Bankruptcy Court: The *Teleglobe* Decision Proceedings

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The road taken by an attorney in working with an expert witness is one that inevitably leads to the same forks: which, if any, aspects of the attorney's own evaluation of the case should be shared with the expert? How much input should counsel have in editing the expert's report? And, the report having been revised, must the expert retain all prior drafts? These and related issues arise whenever an expert is used in any federal court litigation, and litigation in bankruptcy cases is, of course, no different because the same Federal Rules of Civil Procedure and Federal Rules of Evidence govern. But, that said, courts have divided on how the rules apply to these types of questions concerning expert witnesses. In a relatively recent decision, *Teleglobe U.S.A., Inc. v. BCE, Inc.* (*In re Teleglobe Communications Corp.*), 392 B.R. 561 (Bankr. Del. Aug. 7, 2008), Bankruptcy Judge Mary F. Walrath of the Delaware bankruptcy court provided some answers that will assist attorneys litigating in the Delaware bankruptcy courts in navigating the forks in the expert witness road.

Background

In *Teleglobe*, the bankruptcy court, on remand from the United States Court of Appeals for the Third Circuit, was faced with a number of discovery issues that were complicated by the corporate relationships of the parties. The defendant, BCE, Inc. ("BCE"), is the parent company of the wholly owned subsidiary Teleglobe ("Teleglobe"). Teleglobe is the Canadian parent company of eleven wholly owned subsidiaries. Teleglobe and its eleven subsidiaries jointly filed for bankruptcy protection under Canadian law; the subsidiaries also filed voluntary petitions in the United States under chapter 11, although Teleglobe did not. In the chapter 11 cases, the subsidiaries then joined with the creditors' committee as Plaintiffs in filing suit against BCE and certain of its officers and directors asserting, among other claims, breach of contract and breach of fiduciary duties.

Discovery commenced, and Plaintiffs filed a motion to compel production of thousands of documents, many of which Defendants alleged were protected under the attorney-client privilege and attorney work product protection. The attorney-client privilege claim was premised in the joint representation by counsel of BCE and Teleglobe. This dispute was referred to a special master ("Special Master"), who reviewed certain of the allegedly privileged documents *in camera*. Defendants then withdrew their assertions of privilege on some of the documents, while the Special Master found that privilege had been improperly asserted on others. This led to further inspection of documents and Defendants' further withdrawal of privilege claims with respect to thousands of pages. The Special Master ultimately ordered production of all the documents as a sanction for Defendants' over-designation of privilege.[2] *Teleglobe*, 392 B.R. at 569. The district court adopted the conclusions of the Special Master, No. 02-11518 (D. Del. June 2, 2006), and ordered production of the withheld documents, but the Third Circuit reversed and remanded. 493 F.3d 345 (3d Cir. 2007). The district court then referred the matter to the bankruptcy court. *Teleglobe*, 392 B.R. at 569.

In preparation for the hearing before the bankruptcy court, the parties engaged in a new round of discovery, including discovery of expert witnesses. In that regard, Defendants filed a motion contending that Plaintiff's experts destroyed notes, drafts of their reports, and other information that the experts had arguably considered in forming their opinions. Defendants sought to exclude

the experts' respective testimony as a sanction for spoliation of evidence. The bankruptcy court denied the motion, but compelled production of notes of a meeting between Plaintiffs' counsel and experts, as well as records of comments or information provided by counsel to the experts for use in forming opinions. Ultimately, Plaintiffs did not produce any notes regarding this meeting, although eleven boxes of recorded communications were produced. *Id.* at 569-71.

Production of Draft Expert Reports

Defendants argued, in connection with their spoliation motion, that Plaintiffs had intentionally destroyed draft expert reports that should have been produced. The argument hinged on Federal Rule of Civil Procedure 26(a)(2)(B), which mandates disclosure of a report from any expert likely to testify, including:

> (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
> (ii) the data or other information considered by the witness in forming them;
> (iii) any exhibits that will be used to summarize or support them;
> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
> (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
> (vi) a statement of the compensation to be paid for the study and testimony in the case.

In 1993, subsection (ii) of the rule was amended to require disclosure of data or other information *"considered*" by an expert in forming an opinion, from the prior requirement of disclosure of information *"relied upon*" by an expert in forming an opinion. Courts interpreting the revised rule soon split on the issue of whether draft expert reports are to be preserved and produced pursuant to Rule 26(a)(2)(B).[3] *Id.* at 571-72.

The *Teleglobe* bankruptcy court sided with the courts that found that draft reports need not be produced. The court provided both a textual and a policy justification for its holding. *Id.* at 572-73. First, according to the court, the language of the rule does not expressly indicate that draft reports should be disclosed, and thus the court found it "[il]logical that the Rule would require" production of a final written report that would "include a list of all the drafts of that report." The court disagreed with Defendants' argument that prior draft reports were "considered" by an expert in reaching the expert's opinions, finding that the expert "considers" only underlying data and that "the prior drafts are simply preliminary iterations of his opinion." *Id.*

Second, as a matter of policy, the court held that production of draft reports would be "a completely unworkable reading of the rules" that "would mire the courts in battles over each draft of an expert's report." Specifically, the court worried that the mechanics of modern computer word processing programs render it nearly impossible to determine what would qualify as a "draft" to be preserved. Arguably, any change of "a section, a paragraph, a sentence, or even a word" would qualify as a new draft to be preserved so it could be produced. *Id.* at 573. The bankruptcy court found this unreasonable and therefore concluded that drafts of an expert's report are not required to be produced pursuant to Rule 26(a)(2)(B).

Production of Attorney Work Product Provided to an Expert Witness

Defendants also argued in their spoliation motion that Plaintiff's experts' opinions were influenced by comments and information provided to them by counsel and the other expert. According to Defendants, the experts "considered" within the meaning of Rule 26(a)(2)(B)(ii) such comments in rendering their opinions and, accordingly, such information should be produced regardless of any privilege or protection from disclosure that might otherwise apply to such information. *Id.* at 574. This issue, too, had produced a split in the courts as to whether the "considered" language of

Rule 26(a)(2)(B)(ii) mandates production of otherwise protected attorney work product if that work product is "considered" by an expert in preparing her or his opinion. *Id.* at 574-76. The courts mandating production in such cases view the sharing with an expert of otherwise protected work product as a waiver. *See, e.g., Regional Airport Auth. v. LFG, LLC*, 460 F.3d 697, 716-17 (arguing that this is the "'overwhelming majority'" approach) (citation omitted); *In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d 1370, 1375-76 (Fed. Cir. 2001) (viewing policy as squarely on the side of finding waiver); *Dyson Tech. Ltd. v. Maytag Corp.*, 241 F.R.D. 247, 248-51 (D. Del. 2007) (finding waiver); *B.C.F. Oil Refining, Inc. v. Consolidated Edison Co.*, 171 F.R.D. 57, 66-67 (S.D.N.Y. 1997) (focusing on policy supporting disclosure of work product in such cases).

Other courts declined to find a waiver, tending instead to maintain the protections of the attorney work product doctrine in the absence of particular authority mandating that result. *See, e.g., Moore v. R.J. Reynolds Tobacco Co.*, 194 F.R.D. 659, 663-64 (S.D. Iowa 2000) (finding no waiver due to "the rule in this Circuit that opinion work product has nearly absolute immunity from discovery, and such work product can be discovered only in very rare and extraordinary circumstances"); *Magee v. The Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 641-43 (E.D.N.Y. 1997) (adopting the "view that Rule 26(a) should not be construed as vitiating the attorney work product privilege, and the laudable policies behind it, in the absence of clear and unambiguous authority under the Federal Rules of Civil Procedure"); *Hayworth v. Herman Miller, Inc.*, 162 F.R.D. 289, 294-96 (W.D. Mich. 1995) ("For the high privilege accorded attorney opinion work product not to apply would require clear and unambiguous language in a statute. . . . No such language appears here.") (citation omitted).

The bankruptcy court agreed with the courts that limited the reach of Rule 26(a)(2)(B)(ii) and maintained the protections of the work product doctrine. The court noted that those courts finding a "waiver" relied on the Advisory Committee's Notes accompanying the 1993 Amendment to Rule 26:

> The report is to disclose the 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 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.

Rule 26, subdivision (a) ¶ 2 (1993). The bankruptcy court concluded that the Advisory Committee Note did not support a waiver because the initial use of the term "data or other information" implies that "only factual data and information must be produced, not legal theories or other attorney work product." *Teleglobe*, 392 B.R. at 575.

The court also held that maintaining the work product protection was consistent with controlling Third Circuit case law. In *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587 (3d Cir. 1984), a case decided prior to the amendment of Rule 26(a)(2)(B), the Third Circuit held that information protected by the work product doctrine need not be disclosed even though such information was provided to a testifying expert witness. Subsequently, in *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658 (3d Cir. 2003), the Third Circuit cited *Bogosian* with approval and held that Rule 26 disclosures regarding consulting experts did not "trump" Federal Rule of Civil Procedure 26(b)(3) and the protections it provides for attorney work product. 392 B.R. 577, citing *Cendant*, 343 F.3d at 665. Reversing its own preliminary ruling, the bankruptcy court concluded that it was bound by the *Cendant* and *Bogosian* decisions of the Court of Appeals and that the work product doctrine is not "trumped by the need to disclose information contained in other provisions of" Rule 26. *Id*. at 577. According to the bankruptcy court, the language describing the work product doctrine in Rule 26 "and a more thorough reading of the relevant cases convinces the [c]ourt that attorney work product continues to be protected by Rule 26 even if it is shared with a testifying expert." *Id.*

The court made clear that any "factual data and information" that is given by an attorney to an expert must be disclosed if it is considered by that expert in the preparation of an opinion. Indeed, even draft reports of experts would be subject to production if they were provided to and "considered" by another expert in preparing that expert's final report. However, under the court's holding, the portions of any communication or draft report that reflect legal strategy and legal theories — core work product — remain protected by Rule 26(b)(3) of the Federal Rules of Civil Procedure and need not be disclosed pursuant to Rule 26(a)(2)(B)(ii). *Id.* at 576-78.

Sanctions

Notwithstanding its holding that the draft expert reports were not subject to production and thus that their destruction was not improper, the court addressed in detail the appropriateness of the sanctions sought by Defendants. The court applied the test established by the Third Circuit in *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F. 3d 76, 79 (1994) in determining "whether the extreme sanction of barring an expert's report and testimony because of the spoliation of evidence is warranted…." *Id.* at 579. The first *Schmid* factor, the degree of fault of the party who destroyed evidence, was found by the court to be lacking:

> It would be impossible for the Court to require that all "drafts" of expert reports be produced because it might require that an expert retain and print his report every time a single change was made to it. This is not required to understand the basis for an expert's opinion and would impede rather than aid cross-examination of the expert.

Id. at 580. Next, applying the second *Schmid* factor, the court held that any prejudice sustained by Defendants from the alleged spoliation was "limited" because Defendants "had all the data which the Plaintiff's experts considered save possible comments to their draft reports…." *Id.* at 581. Finally, the court found, applying the last *Schmid* factor, that a more appropriate and "sufficient" sanction was production by Plaintiff and their counsel of additional notes and documents underlying the experts' opinion. *Id.* at 582.

Conclusions

The *Teleglobe* decision provides some helpful guidelines for litigators and their experts appearing in the Delaware bankruptcy court. Significantly, testifying experts should not need to preserve "draft" reports, which, of course, obviates the need for counsel to ensure that such documents are preserved. *Teleglobe* also provides important guidance concerning counsel's communications with experts. When counsel (or other experts) have any communications with experts that do not "reflect the attorney's mental impressions and trial strategy," those communications are subject to disclosure because they may be found to have been "considered" by the expert in forming his or her conclusions. But, when communications solely reflect mental impressions and trial strategy, they should not be subject to discovery. *See id.* at 576-77. Although *Teleglobe* provides well-reasoned precedent for protecting such information from disclosure, courts have vast discretion in resolving these types of discovery issues. Indeed, a district court in the Eastern District of California recently rejected the *Teleglobe* reasoning as a "minority" view.[4] The prudent litigator remains best served by limiting the core work product provided to testifying experts.

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[2] The mandated production of all documents was later ruled to be excessive: "The [c]ourt agrees that, even if the Defendants were at fault in their discovery conduct, the remedy should be limited to monetary sanctions." 392 B.R. at 582-85.

[3] Interpreting the revised rule, courts across the country have concluded that "[c]onsidered . . . clearly invokes a broader spectrum of thought than the phrase 'relied upon', which requires dependence on the information." *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 282-83 (E.D. Va. 2001). Courts have split, however, as to whether an expert "considers" her own draft reports, *i.e*. whether any non-final "drafts" of an expert report need to be preserved and produced, pursuant to Rule 26(a)(2)(B). At least one court has held that draft reports need not be preserved by experts, but that they need to be produced if preserved. *Adler v. Shelton*, 778 A.2d 1181, 1192 (N.J. Super. Ct. Law Div. 2001) (routine destruction of draft reports by experts not forbidden, even if done to preempt later production). Some courts have required preservation and production of draft reports, at least when counsel or another expert saw a copy of the draft and commented on it. *See, e.g., Trigon*, 204 F.3d at 283 & n.8 (admitting that "cogent reasons militate against a requirement" to preserve and produce "drafts prepared solely by that expert while formulating the proper language in which to articulate that expert's own, ultimate opinion arrived at by the expert's own work or those working at the expert's personal direction"); *Semtech Corp. v. Royal Ins. Co.*, No. 03-2460 (C.D. Cal. Oct. 24, 2007) (citing cases for the proposition that preservation and production ensure that counsel do not sanitize expert reports by removing all unhelpful conclusions). Finally, other courts and the American Bar Association have argued against a requirement of mandatory preservation or mandatory production. *See, e.g., University of Pittsburgh v. Townsend*, No. 3:04-cv-291 (E.D. Tenn. Mar. 30, 2007) (qualifying that "draft reports are certainly discoverable"); ABA Recommendation and Report No. 120A, at 1 (Aug. 7-8, 2006).

[4] In *South Yuba River Citizens League v. National Marine Fisheries Serv.*, No. 06-2845, 2009 BL 98797 (E.D. Cal. May 6, 2009), the court considered and rejected the holding of *Teleglobe* and other "minority rule" decisions. *Id .* According to the *South Yuba* court, which focused on the high degree of deference juries tend to give the opinions of expert witnesses, a party should have the opportunity to discover communications that might show how the opinion of an expert was shaped by an non-expert advocate for the opposing party. *Id.* The court similarly rejected the *Teleglobe* holding that drafts of expert reports prepared solely by the expert should not be discoverable, reasoning that even if such drafts were not "considered" by an experts, they were still discoverable under Rule 26(b)(4) and thus subject to production. *Id.*