

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, <u>et al.</u> ,)	
)	No. 1:96CV01285
Plaintiffs,)	(Judge Robertson)
v.)	
)	
DIRK KEMPTHORNE, Secretary of)	
the Interior, <u>et al.</u> ,)	
)	
Defendants.)	
_____)	

**DEFENDANTS’ MOTION IN LIMINE AND FOR AN ORDER TO
RETURN CONFIDENTIAL DRAFT HISTORIAN’S REPORT TO DEFENDANTS**

Pursuant to Rule 104(a) of the Federal Rules of Evidence and Rule 7(b) of the Federal Rules of Civil Procedure, Defendants respectfully move this Court for an order in limine preventing Plaintiffs’ use of a historian’s confidential draft report, prepared at the direction of Treasury agency counsel and inadvertently disclosed to Plaintiffs. In addition, Defendants request that Plaintiffs be precluded from calling the historian, Dr. Terence Kehoe, as a witness. Defendants further move this Court for an order requiring Plaintiffs to return the report to Defendants.¹

INTRODUCTION

On August 31, 2007, Defendants inadvertently produced to Plaintiffs as part of Defendants’ exhibit designations a draft report from Morgan Angel & Associates titled “The Treasury Department’s Role In The Administration of Tribal Trust Funds, 1946-2002.” Treasury counsel had commissioned this draft report to aid in preparation for tribal trust litigation, and as such it constitutes privileged attorney work-product. The draft report also

¹ Plaintiffs’ counsel has stated that Plaintiffs will oppose this motion.

constitutes inadmissible hearsay and should be excluded from the trial set to commence on October 10, 2007. The draft report is of limited relevance to the upcoming trial because the subject matter of the draft report is tribal trust funds. To the extent it addresses tribal trust funds that were placed in individual Indian money (“IIM”) accounts, it is cumulative of other evidence or testimony that may be introduced at the pending trial. Moreover, Plaintiffs cannot use Dr. Kehoe, a consultant, to introduce the document, and his testimony should be precluded. Therefore, the Court should bar Plaintiffs’ use of the draft report, and order its return to Defendants.

FACTS

Treasury counsel commissioned Morgan Angel to draft “The Treasury Department’s Role In The Administration of Tribal Trust Funds, 1946-2002,” and the draft in question is dated April 16, 2004. Declaration of Paul G. Wolfeich, Exhibit 1. Each page of this report is marked “Draft Report/Work Product Privileged - Prepared for Litigation.” *Id.* The report was prepared by Dr. Kehoe as a consultant for Treasury, related to its involvement in tribal trust cases. *Id.* Despite this, litigation counsel from the Department of Justice in this case inadvertently produced the report to Plaintiffs on August 31 as part of Defendants’ exhibit designations.

In a letter delivered to Plaintiffs on September 11, 2007 by facsimile, Defendants requested return of the draft report from Plaintiffs, their clients and contractors, and deletion of all electronic versions of the document in Plaintiffs’ possession. Exhibit 2.² Plaintiffs did not

² The letter also offered Plaintiffs an unencrypted DVD of all Defendants’ proposed trial exhibits, absent the Morgan Angel report.

reply to the September 11 letter. Instead, on September 17, Plaintiffs listed the draft report as one of their “use at trial” exhibits in their Pretrial Statement.

ARGUMENT

I. The Draft Report Is Inadmissible Hearsay

The draft report is clearly hearsay. Hearsay “is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” FED. R. EVID. 801(c). A fact witness cannot cure the hearsay nature of a document by simply testifying that he drafted the hearsay document.³

Generally, an expert may rely upon his expert written report to assist in providing his expert opinion to the Court. However, the expert’s written report is inadmissible hearsay if not testified about by the expert. See United States v. Visinaiz, 428 F.3d 1300, 1314 (10th Cir. 2005), cert. denied, 546 U.S. 1123 (2006) (affirming District Court exclusion of expert’s report on hearsay grounds because expert did not testify); but see Engebretsen v. Fairchild Aircraft Corp., 21 F.3d 721, 728-729 (6th Cir. 1994) (permitting hearsay upon which an expert relies to explain the basis of the expert opinion, but excluding written opinions under Federal Rules of Evidence 702 and 703). Here, Plaintiffs have not designated Dr. Kehoe as a testifying expert. Therefore, they cannot seek to admit his draft report through his testimony.

³ Although there is also authority in this district that if a witness admits to a prior statement on the stand and adopts it, “there is no hearsay problem,” BCCI Holdings (Luxembourg), Societe Anonyme v. Khalil, 184 F.R.D. 3, 6 (D.D.C. 1999) (quoting Fed. R. Evid. 801(c) 1972 advisory committee’s notes), no such “incorporated testimony” would cure the hearsay problem here. Plaintiffs still would not be able to admit the report through Dr. Kehoe because the report itself likely is based on hearsay sources, and Plaintiffs have not designated Dr. Kehoe as an expert witness.

No hearsay exceptions would allow this privileged draft document to be admitted. It is not a party admission. See FED. R. EVID. 801(d)(2). It is a draft, it is from a contractor, and it has not been adopted by the agency. Exhibit 1. Nor is it a prior statement by a witness admissible under Federal Rule of Evidence 801(d)(1) because it does not fit into any of the three categories of that rule.⁴ As a result, the document is inadmissible hearsay and should be excluded from Plaintiffs' exhibit list.

II. The Draft Report Is Of Limited Relevance

The Morgan Angel draft report is of limited relevance to the October trial. As its title suggests, the draft report addresses Treasury's role in administering tribal trust funds. Though some tribal trust funds were placed in IIM accounts and this draft report addresses that, the focus of the October trial - indeed, of the entire Cobell litigation - is on individual Indian monies. Treasury's role in administering tribal trust funds is mostly irrelevant to the upcoming trial.

The draft report is also cumulative of other evidence likely to be introduced. The investment of tribal monies in IIM accounts, to the extent discussed at all during trial, may be elicited through testimony and other exhibits. Plaintiffs, therefore, do not have a need for the report that cannot be met through other evidence already identified by the parties.

III. Plaintiffs Should Be Precluded From Calling Dr. Kehoe To Testify

Even if the Morgan Angel report was not hearsay, Plaintiffs could not seek its admission through Dr. Kehoe's testimony because a party may not call an opposing party's consulting expert as part of its own case absent exceptional circumstances. See FED. R. CIV. P.

⁴ Inconsistent with the declarant's testimony, offered to rebut a charge of recent fabrication, or identification of a person after perceiving the person. FED. R. EVID. 801(d)(2).

26(b)(4)(B); Penn Nat'l. Ins. Co. v. HNI Corp., Nos. 1:05-cv-2096, 4:06-cv-0747, 2007 WL 2602151, *3 (M.D. Pa. Sep. 11, 2007); Cincinnati Ins. Cos. v. Hamilton Beach/Proctor-Silex, Inc., No. 4:05 CV 49, 2007 WL 2609829, *1 (N.D. Ind. Sep. 5, 2007); Plymovent Corp. v. Air Tech. Solutions, Inc., 243 F.R.D. 139, 143 (D.N.J. 2007). Dr. Kehoe is a consultant for Treasury whom neither side has identified as a testifying expert witness in this case. Plaintiffs have demonstrated no exceptional circumstances warranting their taking of his testimony. Therefore, Plaintiffs may not call him as a witness to divulge the results of his confidential, privileged consultations with Treasury regarding tribal trust funds.

IV. In These Particular Circumstances, Return Of The Draft Document Is Just

Morgan Angel prepared its draft report on tribal trust funds at the request of Treasury counsel. Exhibit 1. Each page of the report is marked "Draft Report/Work Product Privileged - Prepared for Litigation." Id. Even though prepared by a non-attorney, the report is nonetheless privileged because it was prepared for an attorney, at the direction of an attorney. See Martin v. Dep't of Justice, 488 F.3d 446, 455 (D.C. Cir. 2006) (memo prepared by FDIC investigator at direction of FDIC attorney protected by work-product privilege); McCready v. Nicholson, No. 01-2219 (RMC), 2007 WL 2669839, *8 (D.D.C. Sep. 13, 2007) (Veteran's Affairs Inspector General report part of litigation file, and thus considered work-product). Even though a factual report, the draft report is privileged because Treasury commissioned it in anticipation of tribal litigation and the collection and organization of facts were required to assist counsel in preparing for that litigation. See Judicial Watch v. Dep't of Justice, 432 F.3d 366, 371 (D.C. Cir. 2005) (work-product doctrine protects any document prepared in anticipation of litigation, not just opinions and legal theories); Tax Analysts v. IRS, 117 F.3d

607, 620 (D.C. Cir. 1997) (work-product doctrine protects not only deliberative materials, but also factual materials prepared in anticipation of litigation).

Defendants recognize that, in this judicial circuit, inadvertent disclosure of work-product routinely waives the work-product privilege for that particular document. United States ex rel Fago v. M&T Mortgage Corp., 235 F.R.D. 11, 17 (D.D.C. 2006); In re United Mine Workers of Am. Employee Benefit Plan Litig., 159 F.R.D. 307, 310 (D.D.C. 1994).

However, the particular circumstances present here merit special consideration by the Court. First, unlike the discovery context of Fago and United Mine Workers, Defendants in this case were under no obligation to produce the Morgan Angel report to Plaintiffs. Moreover, as explained in Rockwell Int'l Corp. v. Dep't of Justice, 235 F.3d 598, 605 (D.C. Cir. 2001) (quoting Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 864 (D.C. Cir.1980)):

The purpose of the privilege, however, is not to protect any interest of the attorney ... but to protect the adversary trial process itself. It is believed that the integrity of our system would suffer if adversaries were entitled to probe each other's thoughts and plans concerning the case.

Here, Plaintiffs' use of the report would provide Plaintiffs insight into Treasury counsel's preparation regarding not this case, but unrelated tribal trust litigation before this Court and others. Moreover, Plaintiffs' use of the report would constitute unfair use by Plaintiffs of a confidential compilation of facts prepared expressly for Treasury counsel in another case by a consultant. For those reasons, Defendants respectfully request that the Court consider the unique circumstances here and, consistent with the purpose of the work-product privilege itself, order the return of the draft report and all copies of it to Defendants.

CONCLUSION

For these reasons, Defendants respectfully ask that the Court grant Defendants' motion in limine and order return of the document. The Court should prevent Plaintiffs from using or referring to the draft report on Treasury's administration of tribal trust funds during the upcoming trial, and preclude Plaintiffs from calling Dr. Kehoe as a witness. The Court should also order Plaintiffs to return the document to Defendants, destroy all copies in their possession, and obtain the report's return from all others to whom Plaintiffs delivered the report.

Dated: September 21, 2007

Respectfully submitted,
PETER D. KEISLER
Assistant Attorney General
MICHAEL F. HERTZ
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director

/s/ Robert E. Kirschman, Jr.
ROBERT E. KIRSCHMAN, JR.
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CERTIFICATE OF SERVICE

I hereby certify that, on September 21, 2007 the foregoing *Defendants' Motion In Limine and for an Order to Return Confidential Draft Historians' Report to Defendants* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

Earl Old Person (*Pro se*)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417
Fax (406) 338-7530

/s/ Kevin P. Kingston
Kevin P. Kingston

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)	No. 1:96CV01285
Plaintiffs,)	(Judge Robertson)
v.)	
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DIRK KEMPTHORNE,)	
Secretary of the Interior, <u>et al.</u> ,)	
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Defendants.)	

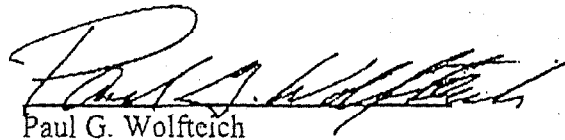
DECLARATION OF PAUL G. WOLFTEICH

I, Paul G. Wolfteich, declare as follows under 28 U.S.C. §1746:

1. I am currently the Chief Counsel for the Bureau of the Public Debt, United States Department of the Treasury. I have been an active participant in the Treasury Department's defense of the Cobell and tribal trust lawsuits since 2003.
2. On August 31, 2007, the Department of Justice produced to the Plaintiffs a draft report prepared by the firm Morgan Angel & Associates entitled "The Treasury Department's Role in the Administration of Tribal Trust Funds, 1946-2002." The Treasury Department's litigation team commissioned this document to assist the team in defending against the tribal trust litigation. I personally reviewed and commented on an earlier draft of this report, as did others on Treasury's litigation team. The document, however, reflects the research, opinions, and judgments of its author, Dr. Terence Kehoe, in his capacity as a consultant to Treasury's litigation team. The Treasury Department has never adopted this report as its own statement about the matters discussed therein.
3. This confidential report was never intended for production to the Plaintiffs, and to the best of my knowledge, has never been disclosed to anyone who did not have a common interest with the United States in the Cobell or the tribal trust litigation. The document is prominently marked as a draft and as privileged work product.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: September 21, 2007


Paul G. Wolfteich



United States Department of Justice
Civil Division
Commercial Litigation Branch

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September 11, 2007

VIA FACSIMILE

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Re: Cobell v. Kempthorne

Dear Messrs. Gingold and Harper:

On August 31, 2007, Defendants submitted to Plaintiffs their potential trial exhibits for the evidentiary hearing commencing on October 10, 2007, in Cobell. Included in that collection was a draft report from Morgan Angel & Associates dated April 16, 2004, entitled "The Treasury Department's Role In The Administration Of Tribal Trust Funds, 1946-2002." That document was provided to you inadvertently. It is not a potential trial exhibit in Cobell. As its title confirms, the subject of the document is Tribal Trust funds, and not the funds of individual Indians. It is a confidential document that was prepared at the request of legal counsel solely in preparation for litigation outside of Cobell and, therefore, is covered by the attorney work product doctrine. In fact, each page of the document is marked "Draft Report / Work Product Privileged - Prepared for Litigation." For these reasons, we request that you return this document and all copies of the document that you, your clients, or your contractors may have in your possession. We also request that you delete all electronic versions of the document you may have generated. We will provide you with an unencrypted DVD that does not contain this document, in exchange for the DVDs that were provided to you on August 31 and September 5, 2007.

Thank you for your prompt attention to this matter.

Very truly yours,

Robert E. Kirschman, Jr.

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 Plaintiffs,)
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 v.)
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 DIRK KEMPTHORNE, Secretary of the Interior,)
et al.,)
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 Defendants.)
_____)

Case No. 1:96CV01285
(Judge Robertson)

ORDER

Having considered *Defendants' Motion In Limine and For An Order to Return Confidential Draft Historian's Report to Defendants*, filed September 21, 2007, and having considered any responses to said Motion as well as the record, it is hereby **Ordered that**:

Defendants' Motion is **GRANTED**. Plaintiffs shall neither use nor refer to the report entitled "The Treasury Department's Role In The Administration of Tribal Trust Funds, 1946-2002" during the October trial. Plaintiffs shall not call Dr. Kehoe as a witness during the October trial. Plaintiffs shall return the document to Defendants, destroy all copies in their possession, and obtain the report's return from all others to whom Plaintiffs delivered the report.

James Robertson
United States District Judge

Date: _____