



1 **APPEARANCES:**

2           **NORMAN E. HORTON, JR. and ALBERT T. GIMBEL,**  
3 **Messer, Caparello, & Self 215 South Monroe Street,**  
4 **Post Office Box 1876, Tallahassee, Florida 32302-1876,**  
5 **appearing on behalf of Transcall America, d/b/a ATC**  
6 **Long Distance.**

7           **WES PARSONS, Ador & Zeder, 2601 South**  
8 **Bayshore Drive, Suite 1600, Miami, Florida 33133**  
9 **appearing on behalf of World Access, teleconferencing**  
10 **from Miami.**

11           **BETH KEATING, Florida Public Service**  
12 **Commission, Division of Legal Services, 2540 Shumard**  
13 **Oak Boulevard, Tallahassee, Florida 32399-0870,**  
14 **appearing on behalf of the Commission Staff.**

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**P R O C E E D I N G S**

(Hearing convened at 1:40 p.m.)

**COMMISSIONER GARCIA:** Are we ready?

**MS. KEATING:** By notice issued July 9th, this time and place have been set for oral argument for Transcall American, Incorporated's motion for protective order.

**COMMISSIONER GARCIA:** We'll take appearances.

**MR. GIMBEL:** Good afternoon, Commissioner. My name is Albert Gimbel. I'm an attorney with Messer, Caparello & Self, appearing on behalf of Transcall. Also with me is Doc Horton, an attorney also in the firm, also on behalf of Transcall.

**MR. PARSONS:** May it please the Commissioner, this is Wes Parsons. I'm the attorney for Telecommunication Services, Inc. in this matter.

**MS. KEATING:** Beth Keating appearing for Commission Staff.

**COMMISSIONER GARCIA:** Okay. All we're considering is Mr. Parsons' motion, correct?

**MS. KEATING:** Actually it's Transcall's motion.

**MR. GIMBEL:** Correct.

**COMMISSIONER GARCIA:** We'll let you start.

1           **MR. GIMBEL:** Commissioner, we're here today  
2 on our motion for protective order to prohibit the  
3 taking of a deposition by TSI of opposing counsel,  
4 Floyd Self, a member of our firm.

5           At the outset, we want to thank you for  
6 scheduling the argument. I know it's an important  
7 matter to the PSC and it's obviously very important to  
8 us. But what we're going to talk about today is a  
9 deposition of an attorney; not just an attorney, but  
10 the deposition of opposing counsel.

11           Now, legal resolution of this issue requires  
12 an understanding of two of the oldest privileges known  
13 to law: The attorney-client privilege and the work  
14 product privilege. In fact, the attorney-client  
15 privilege is the oldest privilege known to law. The  
16 work product privilege is equally important. It's  
17 over 50 years old. And both privileges are important  
18 enough where they are codified; the work product  
19 privilege in the rules of Civil Procedure at Rule  
20 1.280, and the attorney-client privilege in Florida  
21 Statutes, in Section 90.502. Each of these privileges  
22 are not taken lightly and they are zealously guarded  
23 by the courts.

24           The facts. Transcall -- TSI is a long  
25 distance reseller, and Transcall provided long

1 distance services, including billing services, for  
2 TSI. TSI did not pay for those services so Transcall  
3 sued. TSI counterclaimed alleging all kinds of  
4 billing irregularities. And there have been some  
5 confusion as to what the facts are with respect to  
6 TSI's allegations.

7           So let me make it clear, because what is  
8 significant is that there was no company  
9 investigation. Floyd Self was not appointed to  
10 conduct one. No report was made because there was no  
11 investigation. And no memorialisation exists because  
12 there was no investigation.

13           All Floyd Self did was act as counsel. He  
14 did what any other prudent competent lawyer would do.  
15 His efforts were directed toward finding out about the  
16 case, learning about the events that took place  
17 between 1989 and 1992. The strengths of his case,  
18 weaknesses of his case. The things that lawyers do.

19           A fact witness, as you know, is someone who  
20 is present at the time of the events, participated in  
21 the events or was an eyewitness to those events.  
22 Floyd Self was not a participant in any company  
23 activities, he was not an employee, he was not present  
24 at the time of the alleged events and he was not an  
25 eyewitness. Floyd Self's involvement is after the

1 events complained of, after the filing of the lawsuit,  
2 after Tellus, after Transcall.

3 Our firm was not retained, and Floyd didn't  
4 even come into the picture until approximately 1993 in  
5 this matter. So what did Floyd do? Let's talk a  
6 little bit about that because that's important and  
7 there's been some confusion also about that.

8 He basically did two things: He looked at  
9 documents and talked to people, company employees,  
10 about those documents. All of his knowledge comes  
11 from conversations with Mary Jo Daurio -- individuals  
12 like Mary Jo Daurio, Brian Sulmonetti, Dennis Sickle,  
13 Joe Holop, and from discussing with those people  
14 documents that he has reviewed, all of which, I might  
15 add -- documents and people -- have been and are  
16 available to TSI, and most of these people have been  
17 deposed by TSI.

18 Now, I've handed you up there before we  
19 started a privilege log that we prepared months ago  
20 and delivered to opposing counsel when we made our  
21 discovery. We produced about ten boxes worth of  
22 discovery; some file cabinets. And with the  
23 exception -- when I say all documents have been  
24 produced, with the exception of this privilege log,  
25 these nine items. Otherwise, all documents and all

1 witnesses are available to TSI.

2 From all of these things, from all of these  
3 materials, Floyd Self developed his theories, his  
4 strategies, his conclusions and his opinions. All  
5 after the fact and all after the events complained of.

6 Everything he has learned was communicated  
7 to him in privileged conversations or they are  
8 theories, conclusions and opinions reached by him,  
9 himself, based upon those privileged discussions and  
10 communications. And in either case I submit to you  
11 they are not discoverable under the law, and, in fact,  
12 they are protected from disclosure by the law. Let's  
13 talk about the law a little bit.

14 The controlling decision in this matter is  
15 Southern Bell Telephone and Telegraph vs Deason. It  
16 appears at 632 So.2d 1377. It's a Florida Supreme  
17 Court case -- I've also provided it to you -- 1994.

18 In this decision the Supreme Court  
19 articulates a five-part test which is to be applied  
20 when determining whether the attorney-client privilege  
21 protects communications between corporate employees  
22 and corporate counsel.

23 Now, interestingly enough the Deason case  
24 was a consolidation of several cases and it involved  
25 requests for information by the Office of Public

1 Counsel and the PSC.

2           As you know, the PSC has a statutory  
3 obligation to ensure regulatory compliance over those  
4 it regulates, and an incredibly broad corresponding  
5 ability to look at books and records to affectuate the  
6 purposes and policies of its regulatory scheme. And  
7 it has absolute complete authority over those matters  
8 within its exclusive jurisdiction.

9           Despite this pervasive grant of authority  
10 legislatively recorded (sic) to the PSC, the Court  
11 held that the PSC could not exercise its regulatory  
12 power at the expense of destroying the privileges. And  
13 I submit to you, Commissioner Garcia, that if the PSC,  
14 with its expansive powers could not invade the  
15 privileges, that TSI in this case cannot either.

16           Now, the five-part test in Deason appears at  
17 Page 1883 of the decision. And it says -- excuse me,  
18 Page 1383 of the decision. And it says the -- Supreme  
19 Court says "We set forth the following criteria to  
20 judge whether a corporation's communications are  
21 protected by the attorney-client privilege.

22           "One. The communication would not have been  
23 made but for the contemplation of legal services.

24           "Two. The employee making the communication  
25 did so at the direction of his or her corporate

1 superior.

2 "Three. The superior made the request of  
3 the employee as part the corporation's efforts to  
4 secure legal advice for services.

5 "Four. The content of the communication  
6 relates to the legal services being rendered and the  
7 subject matter of the communication is within the  
8 scope of the employee's duties.

9 "Five. The communication is not  
10 disseminated beyond those persons who because of the  
11 corporate structure need to know its contents."

12 Now let's talk about what happened.

13 Our firm was retained as counsel. Floyd  
14 Self, acting as a lawyer, had conversations with  
15 people and employees involved in the case and reviewed  
16 documents with those people.

17 He conducted his own review of documentation  
18 as provided by the company. Those employees were  
19 advised to cooperate by the company. They had the  
20 blessings of the corporation. And they were advised  
21 by Floyd Self that the communications would be  
22 privileged and protected by the attorney-client  
23 privilege.

24 Floyd conducted those conversations and  
25 reviewed those documents with those people like any

1 lawyer would do. And his conclusions, theories,  
2 mental impressions have only been disseminated to  
3 those in the corporation that need to know.

4           So clearly we meet each part of the Deason  
5 test. And what that means is, is that the  
6 communications between Floyd Self and the company  
7 employees are privileged and not discoverable. Simply  
8 put: The information TSI seeks is protected by the  
9 oldest privilege known in law.

10           Even though I've only discussed one case on  
11 attorney-client privilege, that is the case. I  
12 represent to you it's controlling. It's binding.  
13 It's not been modified, overruled or withdrawn in any  
14 way, and it's application to the facts of this case  
15 makes the conversations between Floyd and company  
16 employees confidential and privileged.

17           I need to talk briefly also about work  
18 product. Work product originated in the case of  
19 Hickman v Taylor, 329 U. S. 495. It's a 1947 U. S.  
20 Supreme Court case.

21           Beginning with Hickman and since Hickman  
22 courts have consistently held that statements by  
23 witnesses taken in anticipation of litigation  
24 constitute work product.

25           Now, in this regard the courts have reached

1 a finer delineation when they have drawn a distinction  
2 between fact work product and opinion work product. I  
3 cite the case of State v Rabin, 495 So.2d 257. It's a  
4 Third DCA case, 1986, also provided there to you. And  
5 at Page 262 it says "Work product can be divided into  
6 two categories: Fact work product, which is factual  
7 information which pertains to the client's case, and  
8 is prepared and gathered in connection therewith, and  
9 opinion work product, which is the attorney's mental  
10 impressions, conclusions, opinions or theories  
11 concerning his case."

12 I paraphrase, fact work product is subject  
13 to discovery only upon a showing of need. Opinion  
14 work product is not. And the Florida Rules of Civil  
15 Procedure, Rule 1.280, provides that a party may  
16 obtain discovery of documents and tangible things  
17 prepared in anticipation of litigation by another's  
18 work, i.e., fact work product, upon a showing of need.  
19 However, with respect to mental impressions,  
20 conclusions, opinions or legal theories of an  
21 attorney, i.e., opinion work product, the rule  
22 provides that the Court shall protect against  
23 disclosure.

24 So the cases tell us that there is fact work  
25 product and opinion work product. And hardship is

1 only relevant as to opinion work product -- excuse  
2 me -- as to fact work product.

3 I submit to you, you're going to hear some  
4 arguments today on hardship and not being able to  
5 obtain information or the substantial equivalent. But  
6 I'm telling you that these are red herrings. Why?  
7 Why do I say that? Because as to fact work product in  
8 this case, every document except the nine that's in  
9 that privilege law, have been produced.

10 Witnesses are available to be discussed.  
11 Every document looked at by Floyd Self has been  
12 produced. It's important to remember that TSI has had  
13 access to these same documents and this same  
14 information that Floyd has had. And they've had just  
15 as much time to reach their own mental conclusions and  
16 develop their theories and mental impressions as Floyd  
17 has had.

18 So what does it mean? It means the  
19 information held by Floyd is protected because it's  
20 held in the form of his mental impressions,  
21 conclusions, theories and opinions, or it was obtained  
22 by him pursuant to a communication protected by the  
23 attorney-client privilege. So any testimony given by  
24 Floyd in a deposition would necessarily include  
25 opinion work product testimony and information

1 protected by the attorney-client privilege.

2 COMMISSIONER GARCIA: Couldn't we remove  
3 that? If we took a deposition and just not allow it  
4 in what you didn't want, or what you felt was part of  
5 the attorney-client privilege or work product?

6 MR. GIMBEL: Well, Your Honor, in that  
7 regard there is a case Shelton v American Motors,  
8 which we cited in our motion. It appears at 805  
9 Fed.2d 1323. And if I could respond by reading from  
10 that case -- and the only reason I say that is because  
11 I couldn't say it any better than what the Court says  
12 here, and I quote, at Page 1327. "We view the  
13 increasing practice of taking opposing counsel's  
14 deposition as a negative development in the area of  
15 litigation, and one that should be employed only in  
16 limited circumstances.

17 "Undoubtedly, counsel's task in preparing  
18 for trial would be much easier if he could dispense  
19 with interrogatories, document requests, and  
20 depositions of laypersons, and simply depose opposing  
21 counsel in an attempt to identify the information that  
22 opposing counsel has decided is relevant and important  
23 to his legal theories and strategy. The practice of  
24 forcing trial counsel to testify as a witness,  
25 however, has long been discouraged." It cites Hickman

1 v Taylor. Because ("it causes the standards of the  
2 profession [to] suffer)", and it's "recognized as  
3 disrupting the adversarial nature of our judicial  
4 system ("Discovery was hardly intended to enable a  
5 learned profession to perform its functions \*\*\* on  
6 wits borrowed from the adversary.") Taking the  
7 deposition of opposing counsel not only disrupts the  
8 adversarial system, it lowers the standards of the  
9 profession, and it adds to the already burdensome time  
10 and costs of litigation. It is not hard to imagine  
11 additional pretrial delays to resolve work-product  
12 objections and attorney-client objections, as well as  
13 delays to resolve collateral issues raised by the  
14 attorney's testimony."

15 So the Court in Shelton concludes by saying  
16 that counsel in this case -- let me just tell you a  
17 little bit about Shelton. I forgot to tell you.

18 It's a product liability case. There was an  
19 accident. Someone was killed driving a jeep. So the  
20 allegation was that there was a design defect. And  
21 they sought to depose counsel in that case and they  
2. moved for a protective order.

23 And the Court closes by saying that "Counsel  
24 in this case had nothing to do with this lawsuit  
25 except represent her client. She did not design the

1 jeep." Floyd Self did not design the billing program.  
2 "Or did she have any duties in relation to the design  
3 of the jeep." Floyd Self did not have any functions  
4 at all with respect to the relationship between TSI  
5 and Transcall. "Nor, of course, was she a witness to  
6 the accident." Floyd Self was not a participant or an  
7 eyewitness to any of the events.

8           And they close by saying "The harassing  
9 practice of deposing opposing counsel appears to be an  
10 advisory trial tactic that does nothing for the  
11 administration of justice, but rather prolongs and  
12 increases the cost of the litigation, demeans the  
13 profession, and it constitutes an abuse of the  
14 discovery process."

15           So we believe, Commissioner -- again, we are  
16 not talking about deposing any attorney. We're  
17 talking about deposing your opposing counsel.

18           We believe the information is protected  
19 under the attorney-client privilege as set forth in  
20 Deason. We think it's protected under the work  
21 product privilege as opinion work product. And we  
22 think all of those things mean that Your Honor would  
23 be 100% correct in issuing a protective order  
24 preventing the taking of the deposition of Floyd Self  
25 in this case.

1 I have nothing further at this time. Thank  
2 you.

3 COMMISSIONER GARCIA: Mr. Parsons.

4 MR. PARSONS: Yes, sir.

5 Mr. Commissioner, I think the starting point  
6 is that I am seeking to develop probative evidence  
7 about the billing irregularities.

8 The evidence is evidence that should be  
9 heard by the Commission unless there is some privilege  
10 or other doctrine that precludes it from coming into  
11 evidence.

12 My starting point for developing this  
13 evidence, it's certainly not to take the deposition of  
14 opposing counsel. The starting point is to depose and  
15 look at documents from WorldCom and its predecessors,  
16 and that, indeed, is where I did start.

17 Specifically, one gentleman I deposed was  
18 Mr. Brian Sulmonetti, who was an individual currently  
19 with WorldCom, who was apparently familiar -- had some  
20 background at least on the billing irregularities.

21 Let me read to you, if I could, some of the  
22 questions and answers that went on at the deposition  
23 of Mr. Sulmonetti.

24 I asked Mr. Sulmonetti -- the question was:  
25 "Are you concerned about the allegations in TSI's

1 counterclaim?" He answered, "As with any complaint,  
2 we're always concerned with allegations made by  
3 anybody." I asked, "Although you have not evaluated  
4 the allegation, has anyone at WorldCom evaluated the  
5 allegations?" He answered "Yes. Our legal counsel."

6 "Question: Anyone other than legal counsel?

7 "Answer: Probably our in-house legal counsel  
8 too."

9 Later I asked him "Were you involved in the  
10 investigation of the Dohan case of the nine second  
11 problem?" He answered "I was involved in the case,  
12 yes."

13 "Question: Who headed that investigation?

14 "Answer: Our outside counsel.

15 "Question: Did you have corporate persons  
16 responsible for the investigation?

17 "Answer: I guess I don't understand. I  
18 mean, I dealt with getting any information that legal  
19 counsel needed for Dohan, you know. I guess I don't  
20 understand your question.

21 "Question: Has anyone other than legal  
22 counsel for WorldCom investigated allegations of  
23 overbilling by my client TSI?

24 "Answer: Not that I'm aware.

25 "Question: Was there an investigation

1 directed by counsel of TSI's allegations that  
2 nevertheless involved nonlawyers within WorldCom?

3 "Answer: I don't recall right now.

4 "Question: You don't recall whether there  
5 was or there wasn't?

6 "Answer: Yes.

7 "Question: Who would know other than legal  
8 counsel whether there was such an investigation?

9 "Answer: Just legal counsel.

10 "Question: If there were such an  
11 investigation, would you, as a person responsible  
12 within WorldCom for this lawsuit, know about it?

13 "Answer: No, not -- because I was  
14 responsible for the regulatory aspects of this. But  
15 this is a litigation matter because you had  
16 collections and all these other issues into it.

17 "Question: So you're only responsible for  
18 this case in so far as it involves regulatory matters?

19 "Answer: Yes. Working with the PSC.

20 "Question" -- I'm almost finished.

21 "Question: Is there someone out at WorldCom  
22 that has some other sort of responsibility  
23 nonregulatory for this case?

24 "Answer: I mean our general counsel, but I  
25 mean he has responsibility for all litigation.

1           "Question: Any nonlawyer person?

2           "Answer: Not that I'm aware of."

3           Mr. Commissioner, essentially what I have in  
4 Mr. Sulmonetti's testimony and the testimony of some  
5 of his colleagues, are individuals who cannot provide  
6 information at this point on the billing  
7 irregularities. They point the finger at outside  
8 counsel that did the investigation, and has apparently  
9 prepared, one would assume, some sort of investigative  
10 report. And I understand that gentlemen is Mr. Floyd  
11 Self.

12           When I ask WorldCom to direct me to other  
13 individuals within WorldCom who are fact witnesses,  
14 who might be a better source of information than  
15 Mr. Self, WorldCom could not do so. The one  
16 individual who might have some information along these  
17 lines is Mr. Dan Merit, a witness in Austin, Texas,  
18 and he was able to avoid my subpoena.

19           I am, indeed, going forward under the work  
20 product -- exception to the work product doctrine in  
21 Rule 1.280, which does allow for work product as to  
22 facts to be produced in litigation and certain  
23 circumstances, circumstances of hardship.

24           The hardship in this case is that with these  
25 fact witnesses at this time I'm simply getting

1 nowhere. I'm getting fingers pointed at counsel or to  
2 other witnesses, but no one at this point thinks they  
3 need to testify about billing irregularities at this  
4 time.

5           It's certainly not my first choice to depose  
6 counsel, but counsel did, indeed, apparently do an  
7 investigation. He is the person who has coordinated  
8 the gathering of information. He is the individual at  
9 this point who has made himself a fact witness as a  
10 result of this investigation.

11           Mr. Commissioner, at this point we do not  
12 have a record. I have not asked Mr. Self anything. I  
13 haven't asked him about communications that may be  
14 privileged; I have not asked him about his opinion. I  
15 have not asked him any questions to which a privilege  
16 could be asserted.

17           I would respectfully suggest that we need to  
18 make a record. Mr. Self should answer questions about  
19 his investigation. I will ask him about  
20 communications. I will determine -- it can be  
21 determined whether there was an attorney-client  
22 privilege that did indeed apply and was not waived,  
23 and whether the work product doctrine applied to the  
24 investigation that was done.

25           I will try to phrase the inquiry so as to

1 spare Mr. Self, and for that matter, myself any  
2 embarrassment in connection with attorney-client  
3 matters. But it would seem to me that it is indeed  
4 something that does have to be pursued at this point  
5 to determine if the privileges are available to  
6 Mr. Self.

7 The starting point I mentioned was that this  
8 is probative evidence I'm trying to develop. It is  
9 the burden of WorldCom to show that a privilege  
10 shields it from production.

11 My point now would be that we need to make a  
12 record to determine whether these privileges indeed  
13 shield the evidence from this Commission.

14 And that is my presentation at this point.

15 COMMISSIONER GARCIA: All right. Well, if  
16 there's nothing else to add, I will take it under  
17 advisement and I will issue my decision before the end  
18 of the week.

19 MR. GIMBEL: May I respond?

20 COMMISSIONER GARCIA: Sure.

21 MR. GIMBEL: It's important -- as  
22 Mr. Parsons went through his deposition -- to  
23 understand that there was an investigation into a  
24 particular overbilling problem, which I think you're  
25 aware of. The nine second overbilling problem. That

1 investigation was conducted by Dan Merit. That report  
 2 has been produced. So when he asked Brian Sulmonetti  
 3 has any investigation of the allegations been done  
 4 other than in-house and outside -- and he says "Not  
 5 that I know", he's 100% correct because there was no  
 6 other investigation.

7 Just because Mr. Parsons says there was an  
 8 investigation doesn't -- that's like me trying to  
 9 prove to you, Commissioner Garcia, that an accident  
 10 did not occur. And if it helps, we could provide an  
 11 affidavit from general counsel of the company to that  
 12 effect.

13 COMMISSIONER GARCIA: All right.

14 Mr. Gimbel, Mr. Parsons, is there anything  
 15 else we need to take up? Ms. Culpepper (sic)?

16 MS. KEATING: No, Commissioner, that's it.

17 COMMISSIONER GARCIA: Okay. Well, thank  
 18 you. And you'll hear from me before the end of the  
 19 week.

20 MR. PARSONS: Thank you, Mr. Commissioner.

21 COMMISSIONER GARCIA: Thank you.

22 - - - - -

23 (Thereupon, the hearing concluded at

24 2:05 p.m.)

25 - - - - -

1 STATE OF FLORIDA)  
2 : CERTIFICATE OF REPORTER  
3 COUNTY OF LEON )

4 I, JOY KELLY, CSR, RPR, Chief, Bureau of  
5 Reporting, Official Commission Reporter,

6 DO HEREBY CERTIFY that the Oral Argument in  
7 Docket No. 951232-TI was heard by the Prehearing  
8 Officer at the time and place herein stated; it is  
9 further

10 CERTIFIED that I stenographically reported  
11 the said proceedings; that the same has been  
12 transcribed under my direct supervision; and that this  
13 transcript, consisting of 22 pages, constitutes a true  
14 transcription of my notes of said proceedings.

15 DATED this 21st day of July, 1998.

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JOY KELLY, CSR, RPR  
Chief, Bureau of Reporting  
FLORIDA PUBLIC SERVICE COMMISSION  
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