RPM Internal Probe Case Brings Privilege Lessons For Attys

By **Matthew Sloan and Danielle Dankner** (July 7, 2020, 5:37 PM EDT)

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While much of the corporate legal world has been focused on the effects of the COVID-19 pandemic, a little-noticed case working its way through the federal courts in Washington, D.C., threatens to narrow the scope of protection afforded by the attorney-client privilege and the work-product doctrine in the context of internal investigations.

The case presents a cautionary lesson for companies and counsel alike trying to achieve the delicate balance of satisfying an auditor's request for information without waiving the company's privileges.

In U.S. Securities and Exchange Commission v. RPM International Inc., the U.S. District Court for the District of Columbia granted the SEC's motion to compel defendant RPM International to turn over 19 witness interview memoranda prepared by Jones Day, the outside counsel for RPM's audit committee, during an internal investigation.[1] Although Jones Day was hired after the SEC initiated a formal investigation of RPM, and the firm recognized that an SEC enforcement action was likely when the interviews were conducted, the court held that the memoranda were not protected by the work-product doctrine.

The court also found that, even if the memoranda constituted work product, RPM waived protection of any privilege by sharing certain information learned during interviews with the company's auditor, Ernst & Young LLP, now known as EY, which then produced detailed summaries of Jones Day's presentation to the SEC. Although Jones Day only divulged limited facts from four of its approximately 20 interviews to EY, and did not disclose the memoranda itself, the court ultimately found that RPM had effected a broad waiver of the attorney-client privilege and the work-product doctrine.

The district court's opinion took an extremely narrow view of the work-product doctrine and sends a strong message to counsel that they must exercise extreme caution in discussing the substance of investigative interviews with a company's auditors.

Background and District Court Decision

The RPM case stems from an SEC inquiry into the timing of RPM's public disclosures and accounting accruals in connection with a False Claims Act investigation conducted by the U.S. Department of Justice. Following the SEC's announcement that it was launching an investigation into the timing of the accruals in the company's financial statements, EY indicated that it would not sign off on RPM's 2014 Form 10-K "in the absence of a special investigation" addressing the SEC's concerns.

RPM's audit committee hired Jones Day to conduct the investigation. Jones Day ultimately interviewed 23 witnesses, including RPM executives, employees and counsel, and provided regular updates to EY "on the progress of the investigation," including summaries of key facts learned during the interviews. At the conclusion of the investigation, after meeting with EY and the SEC, Jones Day

prepared formal memoranda memorializing the interviews, which it did not share with anyone, including RPM.

Pursuant to a request from the SEC, EY produced documents related to the investigation. RPM's litigation counsel reviewed the EY materials for privilege, and made redactions, but determined that the materials produced were not privileged.

Two years later, on Sept. 9, 2016, the SEC filed a complaint against RPM and its general counsel in federal district court, alleging that RPM negligently violated federal securities laws by failing to timely record its accruals for the expected resolution of the FCA case. The SEC subsequently requested that RPM hand over all documents relating to the 2014 investigation. After RPM objected, the SEC moved to compel.

On Feb. 12, 2020, Judge Amy Berman Jackson of the U.S. District Court for the District of Columbia granted the SEC's motion and ordered RPM to produce all 19 interview memoranda. The court held that the memoranda did not constitute work-product because Jones Day was hired "to conduct an independent investigation into the timing of the disclosure and accruals," and therefore the memoranda were not prepared in anticipation of litigation.[2]

The court further held that even if the memoranda constituted work-product, RPM had waived such protection when it allowed EY to produce its own memoranda to the SEC, reflecting Jones Day's presentations to EY. Finally, the court ruled that although attorney-client privilege protected 16 of the Jones Day memoranda, RPM had waived that privilege by disclosing summaries of four of the witnesses' statements to EY, which RPM then permitted EY to disclose to the SEC.

After the district court rejected RPM's request to certify the order for interlocutory appeal, the company sought a writ of mandamus in the U.S. Court of Appeals for the D.C. Circuit. On May 1, the D.C. Circuit summarily denied RPM's petition in a short per curiam opinion, holding that RPM had "not shown that it has a 'clear and indisputable right' to the relief requested."[3]

Discussion

The district court's order raises several concerns for counsel conducting internal investigations.

First, the court adopted an extremely constricted view of the work-product doctrine. The court's holding that the memoranda were not prepared "in anticipation of litigation" because Jones Day was hired "to investigate the timing" of RPM's accruals rather than to represent the company in the SEC enforcement action[4] stands at odds with prevailing case law. Under the test adopted by most circuits, including the D.C. Circuit,[5] the determination of whether a document constitutes work product turns on whether "the document can fairly be said to have been prepared or obtained because of the prospect of litigation," not the purported purpose for which the attorney was engaged.[6]

Indeed, the D.C. Circuit has expressly held that documents that are prepared for multiple purposes can satisfy the "because of" test and qualify as work product, as long as one of the motivating factors was an anticipated litigation.[7] The D.C. Circuit has expressly rejected the requirement adopted by some courts that the anticipation of litigation must be the "primary motivating purpose" behind the document's creation.[8]

In RPM, the Jones Day partner leading the investigation believed from the outset that enforcement proceedings by the SEC "were reasonably foreseeable," which should have been more than sufficient to establish work-product protection.[9] Significantly, Jones Day did not even begin drafting the interview memoranda until after RPM had already restated its financial statements and the SEC had requested Jones Day to brief it on the investigation. Therefore, it seems clear that a significant consideration in drafting the memoranda was to prepare for potential securities litigation.

The district court's determination that RPM waived both attorney-client and work-product privileges by providing summaries of certain witness interviews to EY and then letting EY produce its memoranda summarizing those reports to the SEC also raises significant concerns for counsel.

First, the court took an aggressive view of waiver. Although RPM claimed that it had only disclosed

facts it learned in interviews to EY — and ultimately, via EY's memoranda, to the SEC — the district court noted that in a few instances, Jones Day had "disclosed the specific statements made during the interviews."[10] As RPM argued in its briefs, however, punishing a company for disclosing too many facts to its auditors during the course of an investigation into alleged accounting misstatements threatens to put companies in a perverse Catch-22.

If a company discloses too few facts, the SEC may sue the company for omitting to disclose material facts to its auditors in violation of Title 17 of the Code of Federal Regulations, Section 240.13b2-2(a). If the company errs on the side of disclosing more facts to its auditors in the interest of transparency, however, the SEC may claim that the company has broadly waived both work-product protection and attorney-client privilege.

Also concerning is the court's determination that RPM waived work-product protection over Jones Day's interview memoranda by permitting EY to produce its memoranda to the SEC without first requiring EY to redact any references to the interview summaries that Jones Day provided to EY.

The work-product doctrine protects documents and tangible things reflecting an attorney's thoughts or mental impressions; numerous courts have held this generally covers counsel's accounts of witness interviews like the 19 interview memoranda at issue here.[11] In this case, Jones Day did not draft the memoranda until weeks after it made its reports to EY, so it is not clear how RPM could have waived work product over those yet-to-be-prepared documents.

Even if there were a sound basis for a privilege waiver, the court applied an overly broad and sweeping view of the waiver.

Pursuant to Federal Rule of Evidence 502, courts should apply a detailed fairness analysis to determine the proper scope of any waiver.[12] Voluntary disclosure "generally results in a waiver only of the communication or information disclosed;[13] a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary."[14]

Accordingly, "subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner."[15] There was no evidence of such calculated conduct in RPM. The court nevertheless found a broad subject matter waiver over all 19 interview memoranda even though Jones Day disclosed only short summaries of portions of four interviews to EY.

There is no indication in the record of a careful analysis to determine the proper scope of the waiver. Nor is there any indication that Jones Day disclosed facts gleaned from its witness interviews to EY or affirmatively "permitted" EY to disclose those facts to the SEC in a selective, misleading or unfair manner in order to gain some tactical advantage in litigation with the commission. Rather, Jones Day's disclosures were made to provide transparency and to assist RPM's auditors in their review of a financial restatement.

Key Takeaways

While several of the court's rulings in RPM seem open to challenge based on available case law, and it is too early to tell whether the case will be considered an outlier or followed by other courts, the case provides valuable lessons for counsel conducting internal investigations, especially those involving independent auditors.

First, while counsel must always be mindful of providing accurate disclosures to auditors and regulators, to avoid waiving privilege counsel should carefully consider the potential risks of providing detailed summaries of what company witnesses have told counsel in the course of an investigation.

To reduce these risks, it may be helpful simply to summarize counsel's findings and determinations with respect to the key facts from the investigation rather than provide a "he said, she said" type of account. It is also important to remember that courts have generally found that work product may be shared with a company's auditors in most situations without waiving protection, but privileged communications cannot be shared with any third parties, including auditors.

Second, where counsel discloses potential work product to a company's auditors, they should make sure to carefully vet any materials that the auditors subsequently produce to the SEC, DOJ or any other third parties, and redact any potentially privileged or work-product materials. Failure to do so can lead to an unexpectedly broad waiver of sensitive information.

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[1] SEC v. RPM Int'l, Inc., No. 1:16-cv-01803-ABJ, Minute Order (D.D.C. Feb. 12, 2020).

[2] (Dkt. No. 1833317 ("Tr.") Feb. 12, 2020 Tr. at 6, 8:13-14)

[3] In re RPM Int'l Inc., No. 20-5052, Dkt. No. 1840933, Order (D.C. Cir. May 1, 2020) (May 1, 2020 Order).

[4] (Tr. at 7:15-8, 10)

[5] See United States v. Deloitte LLP, 610 F.3d 129, 136-37 (D.C. Cir. 2010) (listing circuits that look to whether the documents were created "because of" the anticipation of litigation to determine whether they qualify for work-product).

[6] See Nat'l Ass'n of Criminal Def. Lawyers v. DOJ, 844 F.3d 246, 251 (D.C. Cir. 2016) (citation omitted). The court also noted that the memoranda did not qualify as work-product because Jones Day was "not RPM's SEC reporting counsel" and had not provided legal advice to RPM in the course of the SECs investigation." (Tr. at 9:5). RPM was represented by two other law firms in the SEC's enforcement action.

[7] Deloitte, 610 F.3d at 138 (stating that "a document can contain protected work-product material even though it serves multiple purposes") (emphasis added).

[8] Id. at 136-37 (rejecting the Fifth Circuit's holding to that effect in United States v. El Paso Co., 682 F.2d 530, 542 (5th Cir. 1982)).

[9] See NACDL, 844 F.3d at 251 (to satisfy "because of" standard, the author of document must have a "subjective belief that litigation was a real possibility" and that belief must be "objectively reasonable") (citation omitted).

[10] Id., Tr. at 15:16-17 (providing examples from EY's memoranda and notes, relaying what specific witnesses purportedly said).

[11] See, e.g., Deloitte, 610 F.3d at 134; see also In re Sealed Case, 856 F.2d 268, 273 (D.C. Cir. 1988) (citing Hickman v. Taylor, 329 U.S. 495, 510, 67 S.Ct. 385, 393, 91 L.Ed. 451 (1947)) ("[T]he Supreme Court held that work product immunity extended to oral statements made by witnesses to attorneys 'whether presently in the form of mental impressions or memoranda.'"

[12] See Fed. R. Evid. 502 (providing that scope of waiver depends on a careful analysis of whether the disclosed and undisclosed information concern the same subject matter and whether they ought in fairness be considered together).

[13] See Fed. R. Evid. 502 advisory committee explanatory note revised November, 28, 2007 (citations omitted). See, e.g., In re: United Mine Workers of Am. Emp. Benefit Plans Litig., 159 F.R.D. 307, 312 (D.D.C. 1994) (waiver of work-product limited to materials actually disclosed because the party did not deliberately disclose documents in an attempt to gain a tactical advantage).

[14] Fed. R. Evid. 502 advisory committee note.

[15] Fed. R. Evid. 502 advisory committee note.