SEC v. RPM International — A Cautionary Case Study on the Limits of Attorney-Client Privilege and Work-Product Protection

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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 whittle down the scope of protection afforded by the attorney-client privilege and the work-product doctrine in the context of internal investigations. The case also presents a cautionary case study for companies and counsel trying to achieve the delicate balance of satisfying auditors' and regulators' requests for information without waiving the company's privileges.

In *Securities and Exchange Commission v. RPM International, Inc.*, the U.S. District Court for the District of Columbia took the extreme step of ordering defendant RPM International (RPM) to turn over to the SEC 19 witness interview memoranda that were prepared by Jones Day, the outside counsel for RPM's audit committee.[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 district court held that the memoranda were not protected by the work-product doctrine. This was because Jones Day was initially hired at the request of RPM's auditor, Ernst & Young (EY), to investigate the timing of the accruals in RPM's financial statements, rather than to represent RPM in litigation.

The court also found that RPM had waived the protection of the work-product doctrine and attorney-client privilege by sharing certain information learned during the interviews with EY, which then summarized the information in memoranda and notes that EY subsequently produced to the SEC. Although Jones Day divulged only facts learned from four of the interviews and did not disclose the interview memoranda themselves to either EY or the SEC, the court ultimately found that RPM had effected a broad waiver of the attorney-client privilege and the work-product doctrine and ordered the company to produce all 19 interview memoranda to the SEC.

After the district court ordered the production of the memoranda, RPM filed a petition for a writ of *mandamus* in the U.S. Court of Appeals for the District of Columbia. On May 1, 2020, the D.C. Circuit summarily denied RPM's petition.[2]

The district court's order took a narrow view of the protections afforded by the work-product doctrine and the attorney-client privilege in several significant respects and sends a strong message to counsel conducting investigations that they must exercise extreme caution in discussing the substance of investigative interviews with a company's auditors and regulators.

Background and District Court Decision

The *RPM* case stems from an SEC inquiry into the timing of RPM's public disclosures and accruals in connection with a False Claims Act (FCA) investigation conducted by the Department of Justice (DOJ). RPM had publicly disclosed the investigation and recorded a $69 million accrual in its third quarter earnings release for FY 2013. After the SEC announced in July 2014 that it was launching a formal investigation into the timing of the disclosure and accruals, EY informed RPM that it would not sign off on the company's Form 10-K for 2014 "in the absence of a special investigation" addressing the SEC's concerns.

[1] *SEC v. RPM Int'l, Inc.*, No. 1:16-cv-01803-ABJ, Minute Order (D.D.C. Feb. 12, 2020).
[2] *In re RPM Int'l Inc.*, No. 20-5052, Dkt. No. 1840933, Order (D.C. Cir. May 1, 2020) (May 1, 2020 Order).

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In response, RPM's audit committee hired Jones Day to conduct an internal investigation focused on the disclosure and accrual issues. During the course of its investigation, Jones Day interviewed 23 witnesses over 10 days, including RPM executives, employees and counsel. At the direction of the audit committee, Jones Day provided regular updates to EY "on the progress of the investigation," including summaries of key facts learned during the witness interviews. At the conclusion of its investigation, RPM restated the company's financials by recording portions of the third-quarter accruals in the first and second quarters of 2013. Jones Day thereafter prepared formal interview memoranda, memorializing the interviews it conducted, which it did not share with anyone, including EY or RPM. Pursuant to a request from the SEC, EY produced documents regarding the accruals and the restatement, including notes and a memorandum from an EY auditor summarizing Jones Day's presentations to the auditor and EY's analysis of Jones Day's investigation.

Two years later, on September 9, 2016, the SEC filed a complaint against RPM and its general counsel, Edward W. Moore, in federal district court, alleging 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 conducted by RPM's Audit Committee, including all interview notes and memoranda. RPM objected to this request, after which the SEC moved to compel.

On February 12, 2020, U.S. District Judge Amy Berman Jackson of the U.S. District Court for the District of Columbia granted the SEC's motion from the bench and ordered RPM to produce all 19 interview memoranda. The court held that the Jones Day memoranda did not constitute work-product because the law firm was hired "to conduct an independent investigation into the timing of the disclosure and accruals" rather than to defend RPM in the SEC action, and therefore the interview memoranda were not prepared in anticipation of litigation.[3] The court further held that even if the memoranda constituted work-product, RPM had waived work-product protection when it allowed EY to produce its own memoranda and notes — which summarized Jones Day's presentations to EY — to the SEC. The court focused in particular on its finding that the EY documents reflected "the substance of the [witness] interviews with the SEC."[4] Finally, the court ruled that although attorney-client privilege protected 16 of the Jones Day memoranda from disclosure, RPM had waived privilege over those documents by disclosing summaries of four of the witnesses' statements to EY, which RPM then permitted EY to disclose to the SEC in the form of EY's notes and memoranda.

RPM moved the District Court to certify the order for interlocutory appeal, which was denied on March 5, 2020. The company then sought a writ of *mandamus* in the D.C. Circuit. On March 5, 2020, the D.C. Circuit summarily denied RPM's petition in a short *per curiam* opinion, which held that RPM had "not shown that it has a 'clear and indisputable right' to the relief requested."[5]

Discussion

The district court's order raises several issues for counsel conducting internal investigations. First, the court adopted an extremely narrow and constricted view of the scope 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 action6 stands at odds with prevailing case law. Under the test adopted by most circuits, including the D.C. Circuit,[7] 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 o*f the prospect of litigation," not the purported purpose for which the attorney was engaged.[8] 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.[9] 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.[10]

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

[4] (*Id.* at 10:23-24)

[5] May 1, 2020 Order.

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

[7] *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). The Ninth Circuit has adopted the same "because of" test as the D.C. Circuit. *See In re Grand Jury Subpoena*, 357 F.3d 900, 907 (9th Cir. 2004).

[8] *See Nat'l Ass'n of Criminal Def. Lawyers v DOJ*, 844 F.3d 246, 251 (D.C. Cir. 2016) (emphasis added) (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.

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

[10] *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)).

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In *RPM*, the Jones Day partner leading the investigation believed from the outset of the audit committee's investigation that litigation or other enforcement proceedings by the SEC "were reasonably foreseeable," which should have been more than sufficient to establish work product protection.[11] 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 attorney-client privilege and the work-product doctrine by providing summaries of certain witness interviews to EY and then letting EY produce notes and memoranda summarizing those reports to the SEC also raises issues for companies and law firms conducting internal investigations.

First, the court took an aggressive view of waiver. Although RPM claimed that it had only disclosed "facts" from its witness interviews to EY — and ultimately, via EY's notes and memoranda, to the SEC — the district court noted that, in a few instances, Jones Day had "disclosed the specific statements made during the interviews." *Id.*, Tr. at 15:16-17 (providing examples from EY's memoranda and notes, relaying what specific witnesses purportedly said). 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 to its auditors, the SEC may sue the company for omitting to disclose material facts to its auditors in violation of 17 C.F.R. § 240.13b2-2(a). On the other hand, if that company errs on the side of disclosing more facts to its auditors in the interest of transparency, the SEC may claim that the company has broadly waived both the work-product doctrine and attorney-client privilege.

The district court's determination that — even if the interview memoranda constituted work-product — RPM waived this protection by permitting EY to produce its memoranda and notes to the SEC without first requiring EY to redact any references to the interview summaries that Jones Day provided to EY, also is concerning. The work-product doctrine generally protects only documents and tangible things reflecting an attorney's thoughts or mental impressions, not communications or facts that are memorialized in a document created *after* the purported waiver.[12] In this case, Jones Day did not draft the interview memoranda until weeks after it provided summaries to EY. Nonetheless, the district court concluded that RPM waived work-product protection over the interview memoranda as a result of EY's disclosure to the SEC, even though the Jones Day interview memoranda did not even exist at the time Jones Day debriefed EY.

Even if there were a sound basis for a privilege waiver, the court applied an overly broad, sweeping view of the waiver. Pursuant to Federal Rule of Evidence 502, the court is supposed to apply a detailed fairness analysis to determine the proper scope of any waiver.[13] As ruled upon in previous cases,[14] voluntary disclosure "generally results in a waiver only of the communication or information disclosed; 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." 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]

In *RPM*, the court found a broad subject matter waiver over all 19 interview memoranda even though Jones Day disclosed only short summaries of the interviews of four out of the approximately 20 witnesses who were interviewed. 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 the 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 agency. Rather, Jones Day's disclosures were made in order to provide transparency to RPM's auditors to assist in their review of a sensitive financial restatement, all of which calls into question the court's finding of a broad subject-matter waiver.

[11] *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).

[12] *Deloitte*, 610 F.3d at 134.

[13] *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).

[14] *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).

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

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Key Takeaways

While several of the court's rulings in *RPM* seem open to challenges based on available case law, and it is too early to tell whether the case will be considered an outlier limited to its facts or followed by other courts, the case provides valuable guidance 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, even to the company's auditors. To manage these risks, it may be helpful to simply summarize counsel's findings and determinations with respect to the key facts from the investigation. It's 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, as well as redact any potential privileged or work-product materials. As at least this one case suggests, failure to do so can lead to an unexpectedly broad waiver of sensitive information.