Hogan Lovells

Protecting attorney work product in internal investigations: A cautionary tale

May 2020

Overview

On May 1, 2020, the D.C. Circuit denied RPM International's petition for a writ of mandamus to vacate a district court order compelling disclosure of interview memoranda prepared by outside counsel to the Securities and Exchange Commission (SEC).[1] The interview memoranda were drafted following an internal investigation conducted on behalf of RPM's Audit Committee to address issues that RPM's independent auditors flagged and, RPM argued, in anticipation of potential litigation with the SEC. The substance of those interviews had been shared with RPM's independent auditors during the course of the investigation. The auditors later produced their notes from their discussions with RPM's outside counsel to the SEC. The district court rejected RPM's argument, and found that outside counsel's memoranda were not created in anticipation of litigation and thus, the work product protection did not apply.[2]

A writ of mandamus "is a drastic and extraordinary remedy reserved for really extraordinary causes,"[3] and thus, it is hardly surprising that the D.C. Circuit denied RPM's petition. Its brief order, however, is a missed opportunity to provide guidance in an area of law fraught with uncertainty.

Public companies must be able to run thorough investigations into allegations of fraud or other misconduct. During the course of an investigation, a company's outside counsel may routinely request information from the company's outside auditors and also share information with outside auditors to get a complete picture of the potential issues when assessing any allegation of wrongdoing, and to ensure that the company can file its periodic reports with the outside auditor's sign-off. This does not mean the outside auditors are a part of the investigation team. The remit and responsibilities of independent auditors require them to look beyond the results of an internal investigation and to assess the processes and, in some cases, the underlying evidence and analysis to come to their own conclusion.

While the need to share information with independent auditors is understandable, it opens the door for governmental agencies or plaintiffs to seek production of materials otherwise protected by the attorney work product doctrine. There is no foolproof way to preserve attorney work product when sharing information with independent auditors, but there are steps companies can take—particularly before an investigation begins—to minimize the risk of being ordered to disclose work product in future government investigations or litigation.

---

1 *See* Per Curiam Order, *In re RPM Int'l Inc.*, No. 20-5052 (D.C. Cir. May 1, 2020). Document No. 1840933.
2 *See* Order, *SEC v. RPM Int'l, Inc.*, No. 16-cv-01803-ABJ, (D.D.C. Mar. 5, 2020) , ECF No. 86 at 4-5.
3 *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380, 124 S. Ct. 2576, 2586, 159 L. Ed. 2d 459 (2004) (internal quotations omitted).

Between a Rock and a Hard Place

As the D.C. Circuit previously recognized, "independent auditors have significant leverage over the companies whose finances they audit."[4] When an auditor refuses to sign off on a company's public filing without reviewing an otherwise protected document, companies find themselves having to choose between bad and worse. They can provide the requested information or risk becoming delinquent filers, facing loss of SEC registration, de-listing from stock exchanges, as well as other potential legal consequences. Confronted with these options, companies often are compelled to provide auditors with the information they claim to need to render an unqualified opinion on their financial statements.

Legal Landscape

It is well-settled that disclosure of information protected by the *attorney-client privilege* is waived when shared with third parties, whether independent auditors or anyone else. That privilege serves a specific purpose: the attorney-client relationship. As such, voluntary disclosure waives the attorney-client privilege over the subject matter disclosed because it is inconsistent with the confidential nature of the attorney-client relationship.[5]

But voluntary disclosure does not automatically waive the *attorney work product* doctrine.[6] Rather, courts generally find a waiver of the work product doctrine only if the disclosure substantially increases the opportunity for potential adversaries to obtain the information.[7] For example, voluntary disclosure to the court[8] or to an opposing party during settlement negotiations[9] could waive the protection against other adversaries. Most courts find that an outside auditor's role in assisting companies with auditing their financial statements does not necessarily constitute an adversarial relationship contemplated by the work product doctrine for purposes of determining whether work product protections are waived.[10] However, in practice, these are fact specific inquiries that we explore in more depth below.[11]

If independent auditors are not necessarily adverse, why is it so risky to share attorney work product with them? The answer lies in the interpretation of what constitutes work product. In order to assert attorney work product protection, the party seeking protection must show that the materials were prepared in *anticipation of litigation*.

The majority of courts rely on the "because of" test in order to determine whether materials were prepared in anticipation of litigation. Under this factual analysis, "[w]here a document was created because of anticipated litigation, and would not have been prepared in substantially similar form but

---

4 *United States v. Deloitte LLP*, 610 F.3d 129, 143 (D.C. Cir. 2010).

5 See, e.g., *id.* at 139.

6 *See, e.g., id.*; *see also California Sportfishing Prot. All. v. Chico Scrap Metal, Inc.*, 299 F.R.D. 638, 646 (E.D. Cal. 2014) ("The great weight of authority holds that disclosure of work product to individuals who share a common interest with the disclosing party does not constitute waiver."); *United States v. Ghavami*, 882 F. Supp. 2d 532, 540 (S.D.N.Y. 2012) ("As with the attorney-client privilege, work product protection can be forfeited, but not simply by disclosure to a third person.").

7 *See, e.g.*, *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 237 F.R.D. 176, 183 (N.D. Ill. 2006).

8 *See Fox v. Taylor Diving & Salvage Co.*, 694 F.2d 1349, 1356 (5th Cir. 1983) ("A claim of work product immunity is lost when the attorney discloses the information to the court voluntarily.").

9 *See In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.2d 844, 846 (8th Cir. 1988) (finding Chrysler waived work product protection by voluntarily disclosing computer tape to class action plaintiffs during the due diligence phase of settlement negotiations).

10 *See, e.g., id.*; *see also Deloitte*, 610 F.3d at 143 ("Deloitte's independent auditor obligations do not make it a conduit to Dow's adversaries"); *but see Medinol, Ltd. v. Boston Sci. Corp.*, 214 F.R.D. 113, 116-117 (S.D.N.Y. 2002) (finding that disclosures to E&Y did not serve the privacy interests that the work product doctrine was intended to protect).

11 *See Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 229 F.R.D. 441, 446 (S.D.N.Y. 2004) ("These cases turn on their facts.").

for the prospect of that litigation, it falls within Rule 26(b)(3)."[12] Importantly, litigation need not have been the sole reason for the document. For example, the Ninth Circuit found that documents created by an investigator hired "because of" an impending litigation were protected despite the government's contention that they would have otherwise been created in substantially similar form, where "their litigation purpose so permeated any non-litigation purpose that the two purposes could not be discretely separated from the factual nexus as a whole."[13]

Some courts, however, apply more stringent tests. The Fifth Circuit considers whether the "primary motivating purpose" behind the document was to aid in possible future litigation.[14] The First Circuit articulated the standard as being a determination of whether the document was "prepared for use in litigation."[15]

Even under the more lenient "because of" test, courts have found—particularly in the accounting and restatement context—that internal investigations led by outside counsel were conducted for a business purpose, rather than in anticipation of litigation. In *RPM*, for example, the district court found that under the "because of" standard, interview memoranda were not created in anticipation of litigation where the investigation was conducted at the request of the company's auditors to gain confidence in issuing the company's 10-K.[16] The court stated that its ruling that the interview memoranda were not created in anticipation of litigation "has no implications for ordinary internal investigations[,]" although it did not define in the opinion what those ordinary internal investigations might be. Accordingly, companies and audit committees must face this risk head on in order to minimize the threat that they will be ordered to turn over investigation materials to third parties.

Practical tips to protect attorney work product

Companies and their counsel can take practical steps to protect attorney work product both before and during an internal investigation.

First, the legal team should counsel the client on any potential litigation or government enforcement exposure, including considerations relating to self-disclosing problematic findings to relevant government agencies. In *RPM*, the chairman of the audit committee testified that "[t]he assignment to Jones Day was to conduct a thorough investigation based on . . . the scope that EY felt was necessary to get them to a comfort level where they would be able to sign the [Form 10-K] . . . . .[C]learly, we wanted to be able to address EY's concerns."[17] This led the court to find that the investigation was limited to accounting or business related issues, and not in anticipation of litigation. When issues arise as to whether an independent auditor can sign a company's Form 10-K, the company is, in most cases, also concerned about potential government investigation or litigation exposure. To the extent that an internal investigation is, in fact, being conducted with potential litigation or government enforcement exposures in mind, the client must understand those aspects and be able to articulate them.

---

12 *United States v. Adlman*, 134 F.3d 1194, 1195 (2d Cir. 1998); *see also Deloitte*, 610 F.3d at 137 ("Like most circuits, we apply the 'because of' test").

13 *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)*, 357 F.3d 900, 910 (9th Cir. 2004).

14 *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir.1981) (finding that workpapers to aid in preparing tax returns were not protected by the work product doctrine because they were not prepared primarily to help litigate over those returns, but concluding that "litigation need not necessarily be imminent . . . as long as the primary motivating purpose behind the creation was to aid in possible future litigation").

15 *United States v. Textron Inc. & Subsidiaries*, 577 F.3d 21, 29 (1st Cir. 2009) ("From the outset, the focus of work product protection has been on materials prepared for use in litigation, whether the litigation was underway or merely anticipated.").

16 *RPM Int'l*, ECF No. 86 at 4.

17 Opposition of the S.E.C.to Petitioner's Petition for Writ of Mandamus and Emergency Motion for Stay, *In re RPM Int'l Inc.*, No. 20-5052 (D.C. Cir. Mar. 26, 2020). Document No. 1835540 at 38.

Second, engagement letters, work plans, and other scoping documents should memorialize all of the purposes of the internal investigation, including potential litigation and enforcement risks. This provides written evidence that the investigation is being conducted, in part at a minimum, in anticipation of litigation, enforcement proceedings, or other adversarial proceedings.

Third, during the course of the investigation, the independent auditors may ask company counsel to share with them what witnesses said during interviews or other findings. Under most situations, companies will agree to allow their outside counsel to provide information regarding the investigation to their outside auditors in order to be able to file their periodic reports with the SEC. That said, attorneys should not provide auditors with any written work product, but rather, provide oral briefings, without reading memoranda verbatim, avoiding direct quotations, and focused only on non-privileged, raw facts. Any information protected by the attorney-client privilege (*e.g.*, statements describing legal advice of counsel) should not be shared with independent auditors.

Fourth, all attorney work product should be labeled carefully with details setting forth why the document is protected. For example, interview memoranda should include the following points: (1) the memorandum represents the attorney's thoughts, impressions, and analysis, and constitutes opinion work product; (2) the memorandum is not a verbatim recording of what a witness said during the interview; (3) the attorney determined what information is germane and the manner in which to record it; and (4) the attorney prepared the memorandum in anticipation of litigation and for the purpose of advising the client in connection with the ongoing internal investigation. Further, interview memoranda should not be written in transcript form.

Ultimately, regardless of how attorneys conduct themselves during the course of an investigation, if the client and legal team are not aligned on the purpose of the investigation—and if the scope is not properly documented—there is a significant risk that courts will find that no attorney work product protections exist. With increased counseling on litigation and enforcement risks and proper documentation of the investigation's scope, clients and counsel can work together to minimize this risk.

Authors

Stephanie Yonekura
Head of Investigations, Americas,
Partner, Los Angeles
T +1 310 785 4668
stephanie.yonekura@hoganlovells.com

Jonathan Diesenhaus
Partner, Washington, D.C.
T +1 202 637 5416
jonathan.diesenhaus@hoganlovells.com

Ann C. Kim
Partner, Los Angeles
T +1 310 785 4711
ann.kim@hoganlovells.com

Jennifer Brechbill
Senior Associate, Washington, D.C.
T +1 202 637 3281
jennifer.brechbill@hoganlovells.com