How Sausage Is Made: The Latest Judicial Takes on Privilege and Work Product

By C. Evan Stewart

Readers of this distinguished journal have frequently been cautioned that litigating attorney-client privilege and work product issues is tricky enough when you handle the process correctly; handling the process incorrectly and then expecting a court to do somersaults to misapply the law to help you and your client out of self-imposed jams is likely to be asking too much.[1] Three recent federal court decisions in this space will test that proposition, and a review of them (in chronological order) should be helpful for litigators addressing these important matters.

SEC v. RPM International

In 2016, the Securities and Exchange Commission sued RPM International and its general counsel in federal court in the District of Columbia for failing to accrue and disclose properly for a DOJ False Claims Act Investigation.[2] Six years earlier, in 2010, an individual had filed a sealed *qui tam* complaint against RPM. In March of 2011, the Department of Justice told RPM about the complaint, sent along a copy of it, and advised the company to treat the matter confidentially. Over the course of the next year RPM attempted to resolve the matter with DOJ. In January of 2013, RPM offered $28.3 million; two months later DOJ countered with $71 million. On April 1, 2013, RPM (for the first time) recorded on its books a contingency reserve of $68.8 million to cover the matter. And three days later, RPM disclosed publicly the DOJ investigation and the company's financial accrual.[3]

On January 27, 2014, the SEC informed RPM that it had begun an investigation into the timing of RPM's accrual and disclosure. In July of the same year, the company's outside auditor, EY, informed RPM that it would not sign off on an upcoming 10-K unless the Audit Committee hired an independent law firm to investigate the matter. As a result, the committee hired Jones Day, which then proceeded to conduct 19 interviews of in-house and outside lawyers, RPM executives, and three EY auditors. On August 10, 2014, Jones Day made an oral presentation of its findings and conclusions to EY; thereafter, the lead EY partner prepared a written memorandum summarizing Jones Day's presentation. (Jones Day had also provided updates to EY over the course of its investigation, and the same EY partner wrote some memoranda on those updates.) In addition, Jones Day lawyers had prepared draft memoranda covering the 19 interviews.

On August 21, Jones Day provided to the SEC an oral summary of its investigation, subject to a non-waiver agreement.[4] Later in 2014, EY, in response to an SEC document request, produced, *inter alia,* the lead partner's memoranda reflecting Jones Day's presentations. Before they were sent to the SEC, RPM reviewed those documents and requested limited redactions; it did not object to EY producing the materials.

More than four years later, as the SEC was about to conclude discovery in federal court, the commission demanded disclosure of the Jones Day interview memoranda. RPM resisted, citing attorney-client privilege and work product. On February 12, 2020, Judge Amy Berman granted the SEC's motion to compel.

With respect to the work product argument, Judge Berman rejected it on two separate grounds. First, the memoranda were not prepared "because of" litigation;[5] rather they were part of the effort to satisfy EY in order to get an approved 10-K. Second, the documents did not constitute opinion work product because they were "completely devoid of legal opinions, thoughts, or mental impressions" and "contain[ed] no analysis whatsoever." As to any company claim of attorney-client privilege, the judge ruled that RPM had waived the privilege by orally sharing the contents of the memoranda with a third party.[6]

Putting aside public hand wringing and anguished cries from the usual suspects,[7] Judge Berman—in my view—got it right. The hiring of Jones Day by the Audit Committee had no contemporaneous recordings of litigation (anticipated or otherwise) having anything to do with the law firm's mandate. Big mistake. And interview memos by lawyers that are merely verbatim recountings of what witnesses said are, by definition, *not* opinion work product. Another mistake. As far as waiver by Jones Day disclosing actual witness statements (in quotes) to EY, lawyers need to remember that this is an area where there is a key difference between the privilege and work product. Lawyers can share work product with third parties (like accountants) working in unison with/under the direction of lawyers; but sharing client confidences with the same third parties kills the privilege. And, of course, here RPM went one waiver bridge further: it approved the EY documents with the "privileged" quotes going over to the SEC. Oy![8]

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In re Fluor International

In 2017, Fluor instituted an internal investigation growing out of the conduct of an employee with respect to military contracts in Afghanistan. The matter was handled by inside counsel and it ultimately led to (i) the employee being terminated, and (ii) the company reporting the investigation's findings to the government, as is required when a government contractor has "credible evidence" that certain federal laws have been violated, including the False Claims Act.[9]

The employee thereafter brought suit against Fluor in federal court, asserting multiple claims, including wrongful termination, defamation, and negligence resulting from Fluor's investigation and disclosure thereof to the government. The employee sought Fluor's investigatory files in discovery, which the company resisted, citing attorney-client privilege and work product. The magistrate sided with Fluor, but the federal district judge disagreed. The judge ruled that four statements in the disclosure made to the government revealed "legal conclusions which characterize [the employee's] conduct in a way that reveals attorney-client communications." As a result, there had been a waiver of privilege as to the statements, and other communications on the same matters, as well as factual work product relating thereto.

With disclosure mandated by the court, Fluor brought a petition for a writ of mandamus to the Fourth Circuit on March 2, 2020. That petition was granted on March 13, and the appellate court ruled on March 25 (in an unpublished opinion).[10]

From a procedural standpoint, this is a problematic ruling. The Fourth Circuit, clearly emboldened by a demonstrably wrongly decided set of earlier decisions by the D.C. Circuit,[11] went against directly on point precedent by the U.S. Supreme Court in granting the writ of mandamus. As the Supreme Court has made crystal clear (I thought): "an interlocutory appeal is *not available* in attorney-client privilege cases."[12] The Fourth Circuit went on to poo-poo the efficacy of Fluor taking a contempt citation, although such a route is in fact the proper way to get interlocutory appellate review of such matters.[13] The circuit court ultimately justified its grant of the petition to the fact that "the district court's decision has potentially far reaching consequences for companies subject to [the applicable, government] disclosure requirements…. [C]ompanies would err on the side of making vague or incomplete disclosures, a result patently at odds with the policy objectives of the regulatory disclosure regime at issue in this case."[14]

On the substantive side, the decision fares better. The district court judge focused on four statements as constituting the waiver: (1) the plaintiff "appears to have inappropriately assisted . . ."; (2) "Fluor considers [that] a violation. . . . "; (3) the plaintiff "used his position . . . . to pursue [improper opportunities] and . . . to obtain and improperly disclose nonpublic information. . . "; and (4) "Fluor estimates that there may have been a financial impact. . . . [as a result of] improper conduct." According to the district judge, because these four statements were "conclusions which only a lawyer is qualified to make," they revealed privileged communications and thereby the privilege had been waived.

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The circuit court found that determination to be clear error, ruling "the fact that Fluor's disclosure covered the same topic as the internal investigation or that it was made pursuant to the advice of counsel doesn't mean that privileged communications themselves were disclosed." That was a correct determination of privilege law. Indeed, the Fourth Circuit's prior precedent mandated that conclusion. In *In re Grand Jury Subpoena*,[15] the same court had ruled that a party's statement on a public document—based upon the advice of counsel—did not waive underlying privileged communications regarding the document or its contents. As the court had previously noted, to rule otherwise "would lead to the untenable result that any attorney-client communications relating to the preparation of publicly filed legal documents—such as court pleadings—would be unprotected."[16]

The Fourth Circuit also rejected the district court's imaginative argument regarding "legal conclusions that only a lawyer could make." That is *not* the standard for whether a waiver has occurred; rather, "to find waiver, a court must conclude that there has been disclosure of *protected communications*" (emphasis added by the court).

Finally, the Fourth Circuit made quick work of the district court's reliance on *In re Martin Marietta Corp*.[17] In that earlier Fourth Circuit case, the company's disclosure to the government included direct quotes from witness interviews that were memorialized in lawyers' notes and memoranda. That is nowhere near what happened in this case; the four "statements do no more than describe Fluor's general conclusions about the propriety of [the employee's] conduct."

United States v. Sanmina

This litigation arose from a $503 million stock deduction claim by Sanmina that was challenged by the IRS. In support of its claim, Sanmina had provided the tax agency with a valuation report prepared by a law firm (DLA Piper) at the time the deduction was asserted. In the DLA Piper report there was a footnote referencing two memoranda prepared by the company's in-house tax counsel (without revealing the contents of those documents), and DLA Piper represented that it had relied upon the in-house counsel's work in reaching its conclusions. Sanmina also shared the in-house counsel's documents with two accounting firms, both of which had weighed in on the deduction. Not surprisingly, the IRS demanded that the in-house documents be turned over; equally not surprisingly, Sanmina refused, citing privilege and work product.

The district court, after an *in camera* review, found the memoranda were privileged and work product, but rejected Sanmina's arguments for confidentiality, finding a waiver by the company's conduct in sharing the documents with DLA Piper. The district court, as an alternative justification for its ruling, found the DLA Piper report's citation to and reliance upon the documents constituted a waiver under the "fairness" considerations underlying Section 502 of the Federal Rules of Evidence.

On appeal to the Ninth Circuit, that court affirmed the lower court in part and reversed in part, finding a waiver of the privilege, but *not* a waiver of work product.[18] As to privilege, the Ninth Circuit ruled that DLA Piper had not been retained for purposes of giving legal assistance, and thus the law firm should be deemed a third party, with any privileged information conveyed thereto as being waived.[19] According to the Ninth Circuit, DLA Piper's role was to prepare a *non-legal* valuation analysis, and the presumption that a person hires a lawyer for legal advice is rebutted when the lawyer is "employed without reference to his knowledge and discretion in the law."[20] Notwithstanding substantial evidence in the record that Sanmina and its law firm (DLA Piper) obviously thought they had a client-attorney relationship,[21] the Ninth Circuit deferred to the district court's determination that DLA Piper's role/purpose was non-legal, finding that determination was not "clearly erroneous" because it was not "illogical, implausible, or without support in the record."[22] Admittedly, the retention agreement and DLA Piper's report could have been better written to address the issue (especially given the obvious likelihood of the IRS's unfavorable reaction to the report and to Sanmina's deduction), but this ends-oriented outcome does not accord with well-established privilege law.[23] Moreover, clearly the sharing of the in-house memoranda with the two accounting firms *did* constitute a waiver of the privilege, but for some reason that evident, self-imposed blunder by Sanmina went without mention.

With respect to work product, the Ninth Circuit got to the right result, but by a *very* curious route. First off, the court looked at whether disclosure of the in-house documents to the company's law firm, DLA Piper, constituted a "disclosure to an adversary"! While it concluded it did not, query why the court even went there? (Indeed, the court acknowledged that the IRS was not contending there was such an adversarial relationship.)[24] The court next discussed whether there was an intent to selectively disclose (to DLA Piper, but not the government), but then deflected that issue by musing that obviously Sanmina intended for DLA Piper to assist the company in its anticipated litigation with the IRS (thereby undermining the court's earlier "analysis" of the law firm's role for purpose of the privilege).

As a final matter, the Ninth Circuit turned to whether giving the IRS the DLA Piper report with the footnote reference to the in-house memoranda created a subject matter waiver vis-a-vis those two documents. This part of the decision was primarily addressing the lower court's alternative concern about "fairness." Ultimately, because the IRS—based upon the same facts that Sanmina and DLA Piper possessed—could reach its own conclusions regarding the claimed deduction, there was no basis for providing the "mental impressions, conclusions, opinions or legal theories" of Sanmina's in-house lawyers.[25] As such, "fairness" only mandated the production of those portions of the in-house documents with factual, non-opinion work product.

Conclusion

The three decisions discussed above (and in the footnotes) demonstrate that the principal concerns set out in the introduction of this article continue to be the case: lawyers and clients still do not always correctly handle privilege and work product issues, and neither do courts. Caveat counselors!

Endnotes

1. *See, e.g., The D.C. Circuit: Wrong and Wronger!* NY Business Law Journal (Winter 2015*); Exes and the Attorney-Client Privilege*, NY Business Law Journal (Summer 2017); *Mom (as Always) Was RIght: Don't Talk to Strangers.* NY Business Law Journal (Summer 2018).
2. 16 - cv - 1803 (ABJ) (D.D.C.) (Sept. 16, 2016).
3. In August 2013, RPM settled with DOJ for $61 million.
4. Non-waiver agreements seldom are bulletproof. In addition, handling oral summaries of this sort with the government can be a very sticky wicket. *See SEC v. Herrara,* 2017 WL 60417 (S.D. Fla Dec. 5, 2017); *Mom (as Always) Was Right: Don't Talk to Strangers*, *supra* note 1.
5. *See U.S. v. Adlman*, 134 F.3d 1194 (2d Cir. 1998); *FTC v. Boehringer Ingelheim Pharmacy, Inc.*, 778 F. 3d 142 (D.C. Cir. 2015).
6. Hoping to follow the legally flawed path earlier used by Kellogg Brown & Root to get a writ of mandamus, RPM sought a writ, first from Judge Berman and then from the D.C. Circuit. The company even employed the services of the U.S. Chamber of Commerce, which had been of such assistance to Kellogg Brown & Root before

the same court. Fortunately, unlike in the Kellogg Brown & Root litigation (see 756 F. 3d 754 (D.C. Cir. 2014) and 796 F. 3d 137 (D.C. Cir. 2015), this time the law was appropriately followed and a writ was not issued. *See The D.C. Circuit: Wrong and Wronger! supra* note 1.

7. *E.g.*, the U.S. Chamber of Commerce, the Association of Corporate Counsel. *See i.d*. *See also* the amicus brief on RPM's behalf on the Chamber's website.
8. Ultimately, RPM and its general counsel reached a settlement with the SEC in December 23, 2020. *See* SEC Litigation Release No. 24994. RPM paid a $2 million fine; the general counsel agreed to a permanent books and records injunction and paid a $22,500 fine.
9. *See* 48 S.F.R. § 52.203-13(b)(3)(i).
10. *In re Fluor Intercontinental, Inc*., (1:19 - cv - 00289 - LO - TCB) No. 20-1241 (4th Cir. March 25, 2020) (per curiam).
11. These, of course, are the wrongly decided D.C. Circuit cases involving Kellogg Brown & Root. *See supra* notes 1 & 6. The Fourth Circuit expressly embraced these flawed precedents.
12. *Mohawk Industries v. Carpenter*, 558 U.S. 100 (2009); incredibly, the D.C. Circuit, in wrongly deciding the issue, actually cited this precedent as seemingly binding upon it, 756 F. 3d at 761 (emphasis added) (as did the Fourth Circuit). *See also Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004) (also cited by the Fourth Circuit!).
13. *See In re Murphy*, 560 F. 2d 326 (8th Cir. 1977).
14. For the maraschino cherry on top of its policy rationale for directly flouting Supreme Court precedent, the Fourth Circuit then cited (what else) the Supreme Court's timeless observation that "[a]n uncertain privilege… is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).
15. 341 F. 3d 311 (4th Cir. 2003).
16. *Id.* at 336.
17. 856 F. 2d 619 (4th Cir. 1988).
18. *U.S. v. Sanmina Corp*., 986 F. 3d 1107 (9th Cir. Aug. 7, 2020).
19. The Ninth Circuit enunciated an eight-step process for the privilege to attach. As readers of this distinguished journal will remember, this author prefers a simpler five-step process: the 5 C's. *See The D.C. Circuit: Wrong and Wronger! supra* note 1.
20. Quoting *United States v. Chen*, 99 F. 3d 1495, 1501 (9th Cir. 1996).
21. *See, e.g.*, footnotes 2 & 3 of *U.S. v. Sanmina, supra* note 18.
22. Quoting *United States v. Graf*, 610 F. 3d 1148, 1157 (9th Cir. 2010). The Ninth Circuit's deferral to the district court seems, in large measure (or more), to be based upon its extended discussion of whether to adapt a "dual purpose," "primary purpose," or "because of" test to determine whether a lawyer's services were retained to render legal advice (ultimately it chose not to adopt any of them). Regardless, none of these tests is appropriate in the context of privilege (vs. work product). Indeed, that is the only thing the D.C. Circuit got right in its two Kellogg Brown & Root disasters. That court rejected the district court's "but for" test, correctly observing that such a test "is not appropriate for [an] attorney-client privilege analysis;" and that court was also correct that there is "no Supreme Court or Court of Appeals decision that has adopted a test of this kind in this context," 756 F. 3d at 758-60. *See The D.C. Circuit: Wrong and Wronger!* (& note 8 therein), *supra* note 1.
23. *See id.*
24. In concluding it did not, the Ninth Circuit cited *United States v. Deloitte LLP*, 610 F. 3d 129 (D.C. Cir. 2010) (disclosure of work product to an independent auditor does not waive work product).
25. Citing the seminal Supreme Court case on work product: *Hickman v. Taylor*, 329 U.S. 495, 508 (1947).

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