US Law Week

# INSIGHT: Proffers and Government Reporting—Cause for Comfort and Caution

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Moore & Van Allen PLLC attorneys analyze two court rulings involving the waiver of privilege when making disclosures to the government and they offer guidance to prevent attorney-client privilege and work product protection from being waived.

Two recent decisions—the Fourth Circuit's *In re Fluor Intercontinental Inc*. and one from the U.S. District Court for the District of Columbia (*SEC v. RPM International Inc.*)—provide comfort and cause for real concern for proffers or reports to government.

Subject matter waiver of privilege and work product protection is a constant concern when conducting an investigation that is of interest to the government, which wants visibility into the findings of the investigation. Disclose too little and the government can view you as uncooperative; disclose too much, and you have waived privilege for future proceedings.

The two decisions, with different facts, reach opposite conclusions, and both are informative.

**Fourth Circuit's *Fluor* Decision**

Fluor terminated an employee after an internal investigation found wrongdoing, and Fluor reported the findings pursuant to 48 C.F.R. § 52.203-13(b)(3)(i), which requires a contractor to report when it has credible evidence of a violation of certain federal criminal laws, including the False Claims Act.

The terminated employee sued alleging defamation, negligence in the investigation, and more. The employee sought the files of the investigation. Fluor objected, relying on attorney-client privilege and work product protection. The district court granted the discovery, ruling that Fluor's report went beyond the required minimum, so Fluor had "voluntarily" disclosed legal conclusions about the employee's conduct that revealed attorney-client communications, and thereby, waived privilege and fact work product protection.

Fluor sought mandamus, making the burden of proof on error and the right to relief extraordinarily high, but met the test. The appellate court ruled "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."

The appellate court went on to distinguish its frequently cited 1988 decision *In re Martin Marietta Corp.*, observing there the company had revealed privileged communications and caused a subject matter waiver "[b]y directly quoting and summarizing what employees had said to counsel in the interviews," whereas here, there was no evidence that "Fluor's disclosure quoted privileged communications or summarized them in substance and format."

Rather, Fluor described "general conclusions" about the employee's conduct, from which the Fourth Circuit was unwilling to infer a waiver.

The *Fluor* holding arguably is inconsistent with its precedents that information and materials prepared with the intention that some or all would be "published" may not be privileged from the start. *See United States v. Jones,* 696 F.2d 1069 (4th Cir. 1982) (information provided by an attorney for the tax section of a private placement memo is not privileged); *In re Grand Jury Proceedings*, 727 F.2d 1352 (4th Cir. 1984) (information given by an attorney for preparation and possible publication in securities filing is not privileged).

However, the *Fluor* panel was concerned to protect the investigation processes demanded by statutory and regulatory mandatory disclosure regimes. Waiver as the result of such reporting could significantly chill reporting and cooperation. This concern won the day.

The fact that disclosure was mandatory (as distinguished from the voluntary proffers that are the norm) may have informed the court's reluctance to find "voluntary" waiver.

**Pending D.C. Circuit Case**

On the other end of the cautionary spectrum is *SEC v. RPM International*, now in the D.C. Circuit on a petition for mandamus filed by RPM on March 12.

The trial court gave the SEC access to interview memoranda prepared by the counsel hired to investigate RPM's alleged failure to make timely accruals and disclosures in connection with a False Claims Act investigation and settlement. This despite the SEC having agreed that it would not argue proffers from the investigating counsel to the SEC waived privilege or work product protection.

Instead, the SEC argued, and the trial court agreed, investigating counsel's interview memoranda were *never* protected fact work product because the investigation was conducted not in anticipation of litigation, but to satisfy the company's auditor, which refused to sign the company's Form 10-K without one. Further, the memos merely recorded only what the interviewees had said, not attorney analysis or strategy.

The district court agreed the attorney-client privilege had been waived as to the entire subject matter when summary memoranda prepared by RPM's auditor based upon detailed briefings from the investigating counsel, which allegedly included interviewee details and quotes, had been provided to the SEC after the company's prior review.

On appeal, RPM has sharpened its focus, arguing that the motive and subjective intent of investigating counsel for preparing the interview memoranda controls the "prepared in anticipation of litigation" question, not the company's initial motive for the investigation.

RPM also has stressed that investigating counsel communicated only "non-privileged facts", and the interview memoranda were drafted after the auditor briefings, so neither attorney-client privilege nor work product protection could be waived as to the documents.

**Key Takeaways**

The headline lessons from these two cases are:

- Detail is the enemy of privilege; the more specifics a proffer or a report discloses, the higher the risk of waiver.
- What is in the documents matters; "mere" facts will not get the protection parties might expect.
- Non-disclosure and non-waiver agreements may be traps for the unwary.
- Work product protection cannot be taken for granted—even when government is investigating and an enforcement action seems certain.
- Interactions with auditors must be managed with full awareness that communications may not be protected despite the general rule that such communications do not waive work product protection. And, what happens to that information later matters.
- "Mandatory" disclosures provide some leeway, but be cautious not to exceed a reasonable interpretation of what is mandatory.

*This column does not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owners.*

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