In In re Fluor Intercontinental, Inc., 2020 WL 1487700, (4th Cir. March 25, 2020), the U.S. Court of Appeals for the Fourth Circuit held that third-party disclosure of information covering the same topic as an internal investigation and made pursuant to the advice of counsel did not mean that a party waived the attorney-client privilege over the underlying communications with counsel.

In this employment dispute litigation, plaintiff sued his former employer claiming, among other things, wrongful termination, defamation and negligence. According to an internal investigation by defendant, plaintiff had inappropriately engaged in conduct exposing defendant to liability under the False Claims Act, which was the reason for his dismissal. *Id.* at *1.

During discovery, plaintiff sought copies of defendant's files from the internal investigation. Defendant refused to produce those files, claiming that they were protected by the attorney-client privilege. After a series of motions, recommendations by the magistrate judge and orders, the district court found that defendant had waived its attorney-client privilege and ordered defendant to produce the internal investigation files. *Id.* at *2. The district court held that defendant had voluntarily disclosed the results of its internal investigation in sending a summary of its internal investigation to the government pursuant to the Code of Federal Regulations. The summary included statements about plaintiff's alleged misconduct and how those actions implicated the False Claims Act. The district court observed that the summary "revealed 'legal conclusions which characterize [plaintiff's] conduct in a way that reveals attorney-client communications.'" *Id.* (citation omitted).

Defendant sought a writ of mandamus from the Fourth Circuit for relief from the district court's order to produce its internal investigation files.

The panel first determined that mandamus was appropriate because the defendant had no other adequate means to attain the relief sought. Plaintiff argued that defendant had three alternative options: "(1) disobey the district court's order, be found in contempt, and appeal the contempt order; (2) seek certification of an interlocutory appeal under 28 U.S.C. § 1292(b); and (3) appeal after final judgment." *Id* at *2. The panel held that appealing from a contempt order was not an adequate remedy as a civil contempt order is not immediately appealable and the decision to impose a civil versus a criminal contempt order is up to the district court judge. Similarly, seeking an interlocutory appeal under § 1292(b) would be futile because the district court had already considered factors similar to those for the § 1292(b) analysis and had made an adverse determination.

In rejecting the possibility of appealing after a final order, the panel concluded that this was an extraordinary circumstance working a manifest injustice. The panel recognized that ordinarily, post-judgment appeals are an "adequate means of relief from disclosure orders adverse to attorney-client privilege." *Id.* at *3. Where, however, there are

"'extraordinary circumstances,' such as 'when a disclosure order ... works a manifest injustice,' a party may still 'petition the court of appeals for a writ of mandamus.'" *Id.* (quoting *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009)). Here, the panel concluded that the district court's order worked a manifest injustice because it was clearly incorrect, it implicated important principles underlying the attorney-client privilege and defendant made its disclosure pursuant to a regulatory scheme.

According to the panel, simply because a disclosure is made "pursuant to the advice of counsel doesn't mean that privileged communications themselves were disclosed." Wavier of the attorney-client privilege requires disclosure of the communication or information covered by the privilege. But the court "will not infer a waiver merely because a party's disclosure covers 'the same topic' as that on which it had sought legal advice." In determining whether there has been a disclosure, courts must make distinctions between "disclosures based on the advice of an attorney, on the one hand, and the underlying attorney-client communication itself, on the other." *Id.* at *4. A summary of privileged material can waive the privilege on the summarized communication. But there is no waiver where a summary merely describes general conclusions about an investigation and does not quote or summarize the substance of the privileged communications. *Id.* at *5.

The panel concluded that defendant had not waived the attorney-client privilege. As an initial point, the panel noted that whether statements involve legal conclusions only a lawyer could make is "not the test for whether waiver of attorney-client privilege has occurred." *Id.* at *4. The panel explained that defendant had not quoted or summarized privileged material in the summary it submitted. *Id.* at *5. "Rather, the statements do no more than describe [defendant's] general conclusions about the propriety of [plaintiff's] conduct." The panel announced that it was "unwilling to infer a waiver of privilege on these facts."

The panel also noted that defendant made its disclosure pursuant to federal regulation. Where disclosure is prescribed by regulation, the court indicated its aversion to holding that the disclosure would, as a matter of course, sacrifice the attorney-client privilege. Finding waiver in these circumstances would be "patently at odds with the policy objectives of the regulatory disclosure regime."