

Can You Appeal Adverse Privilege Rulings In Discovery?

BY ROY SIMON

Preserving the attorney client privilege and work product protection is one of the most important tasks you must perform during discovery. Preserving privileges is not just strategically wise; it is also an ethical obligation, because a lawyer has an ethical duty to protect and preserve confidential documents. As Ethical Consideration 44 of the New York Code of Professional Responsibility says, "A lawyer should endeavor to act in a manner which preserves the evidentiary [attorney client] privilege"

Conversely, stripping away privilege and work product protection is one of your adversary's main goals during discovery. Privileged documents and work product papers often provide a road map for discovery and damning evidence against your client. Stripping away privilege and work product from key documents is therefore as important and damaging as stripping away a quarterback's football. Waiving privilege through inadvertent disclosure of privileged materials or through careless reliance on privileged documents can lead to a disaster in court and to a suit by your own client alleging that you committed malpractice and breached your fiduciary duty of confidentiality. Consequently, discovery disputes over whether a privilege applies and whether it has been waived are frequent and hotly contested.

What happens if the trial court judge rules against your client on a privilege or work product claim? Can you appeal immediately, or do you have to wait for a final judgment? This article addresses that question, both in New York state courts and in federal courts around the country. (For convenience, I will use the term "privilege" to refer both to the attorney client privilege and to work product protection.)

Interlocutory Appeals in New York State Courts

New York state courts take a liberal approach to interlocutory appeals. CPLR § 5701(a)(2)(v) provides that an appeal may be taken to the Appellate Division "as of right" from any order by the supreme court or a county court where the order deciding a motion was made upon notice and the order "affects a substantial right." This provision has often been invoked to permit parties to bring interlocutory appeals regarding adverse rulings on privilege. In *Surgical Design Corp. v. Correa*, 727 N.Y.S.2d 462 (2d Dept. 2001), for example, the Second Department granted the plaintiff leave to appeal from the trial court's ruling that a letter attached to the defendant's motion papers was not privileged. In *Hoopes v. Carota*, 531 N.Y.S.2d 407 (3d Dept. 1988), the defendant refused to answer various deposition questions on grounds of privilege, and plaintiff moved to compel. The trial court granted the motion to compel but the defendant appealed the ruling. The plaintiff argued that the ruling was not appealable, but the Third Department (which allowed the appeal on grounds of novelty and importance) said in dicta, "it is highly arguable that an order overruling a claim of statutory privilege 'affects a substantial right (CPLR 5701[a][2][v]) and is, therefore, directly appealable even in the context of discovery proceedings"

Even if adverse rulings on privilege are not appealable as of right, they may be appealable by permission. CPLR § 5701(c) provides that an appeal from any supreme court or county court order that is not appealable as of right may nevertheless be taken to the Appellate Division "by permission of a judge who made the order granted." And if the trial judge denies permission to appeal, the aggrieved party may still appeal by obtaining permission from a justice of the appropriate Appellate Division.

In sum, under CPLR § 5701, litigants may take any of several routes to appeal adverse privilege rulings in New York State courts.

Interlocutory Appeals in Federal Courts

Interlocutory appeals in federal courts are a completely different story. In federal courts, jurisdiction over appeals is governed by the nearly ironclad final judgment rule, codified at 28 U.S.C. § 1291, which provides that the federal circuit courts of appeal (with some exceptions not relevant here) "shall have jurisdiction of appeals from all final decisions" of federal district courts. In *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521 (1988), the United States Supreme Court explained that for purposes of § 1291, a final decision is generally regarded as a decision by the district court that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."

The final judgment doctrine rests on sound policies. Permitting easy appeals from district court rulings short of final judgment would (a) diminish respect for district courts, since their rulings would not be truly final; (b) slow the pace of litigation while district courts waited for appellate rulings on crucial issues before moving forward at full throttle; (c) increase the cost of litigation as appeals multiplied; (d) overwhelm the appellate courts with multiple prejudgment appeals during a case instead of a single appeal at the end of a case, and (e) flood appellate courts with appeals that might become unnecessary due to a final judgment in appellant's favor, or impossible due to a pretrial settlement. Consequently: "Despite the continued assaults of many litigants, the rule remains settled that most discovery rulings are not final." WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2d § 3914.23 at 123 (Thomson West).

A ruling on privilege during discovery obviously does not fall within the definition of a final judgment as stated in *Van Cauwenberghe v. Biard* because a ruling on privilege does not end the litigation on the merits. However, Congress and the courts have created four narrow avenues around the final judgment rule: (1) the collateral final order doctrine; (2) interlocutory appeals under 28 U.S.C. § 1292(b); (3) mandamus; and (4) contempt proceedings. I will discuss each of these in turn.

The Collateral Final Order Doctrine

More than fifty years ago, in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the United States Supreme Court recognized an exception to § 1291's final judgment rule. The exception has come to be known as the "collateral order doctrine." Under the collateral order doctrine, appeal will lie from a "small class" of prejudgment orders that "finally determine claims of right separable from, and collateral to, rights asserted in the action" and that are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

In *RichardsonMerrell Inc. v. Koller*, 472 U.S. 424 (1985) the case holding that an order disqualifying counsel in a civil case was not an immediately appealable collateral order the Court elaborated on the *Cohen*

language by stating that an order could qualify for the collateral order exception to the final judgment rule only if it satisfied three conditions. The order must: (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) "be effectively unreviewable on appeal from a final judgment." Does an order denying a claim of privilege satisfy these three conditions?

Intuitively, the answer would seem to be yes. An order holding that a document (or multiple documents) is not protected by the attorney client privilege, and therefore must be turned over in discovery, conclusively determines the privilege issue, is separable from the merits of the underlying action, and is "effectively unreviewable" on appeal from a final judgment because the privileged cat is already out of the bag. But that intuitive answer has received a cold reception from most courts, including the Second Circuit. In *Xerox Corp. v SCM Corp.*, 534 F.2d 1031 (2d Cir.1976), for example, the district court had ruled that certain documents withheld on grounds of privilege were not in fact privileged and must be turned over in discovery. Xerox appealed, claiming that the order was immediately appealable under the collateral order doctrine. The Second Circuit disagreed and dismissed the appeal, saying that the court had "repeatedly sought to make clear that in the absence of a certification pursuant to 28 U.S.C. § 1292(b) or of a showing of 'persistent disregard of the Rules of Civil Procedure,' or of 'a manifest abuse of discretion' on the part of the district court, no jurisdictional basis exists for interlocutory review of pretrial discovery orders of the type here presented." Similarly, in *American Express Warehousing, Ltd. v. Transamerica Insurance Co.*, 380 F.2d 277 (2d Cir.1967), where the district court had ordered American Express to produce reports that American Express said were protected as work product, the Second Circuit said, "[W]e refuse to extend the *Cohen* doctrine to cover an appeal by a party from a discovery order based upon assertion of a work product immunity." See also *United States v. International Business Machines Corp.*, 480 F.2d 293 (2d Cir.1973) ("a discovery order involving the scope of an attorney's work product in the so called 'big case' is not appealable under the *Cohen* rule").

Most other circuits agree with the Second Circuit that adverse rulings on privilege questions are not appealable under the collateral order doctrine. See, e.g., *Boughton v. Cotter Corp.*, 10 F.3d 746 (10th Cir.1993); *Texaco Inc. v. Louisiana Land & Exploration Co.*, 995 F.2d 43 (5th Cir.1993); *Quantum Corp. v. Tandon Corp.*, 940 F.2d 642 (Fed.Cir.1991). *Quantum Corp. v. Tandon Corp.*, 940 F.2d 642, 643 (Fed.Cir.1991). See generally, PAUL R. RICE, 2 ATTORNEYCLIENT PRIVILEGE IN THE UNITED STATES § 11:36 (Thomson West 2d ed.) ("Courts have consistently held that disclosure orders are neither too important nor too independent of the cause of action itself to justify immediate appellate consideration."). In *Simmons v. City of Racine, PFC (Police and Fire Com'n)*, 37 F.3d 325 (7th Cir.1994.), the court explained why adverse privilege rulings seldom qualify under the collateral order doctrine:

[D]iscovery orders in particular, are not appealable despite their irreversible costs. Because almost all interlocutory appeals from discovery orders would end in affirmance (the district court possesses discretion, and review is deferential), the costs of delay via appeal, and the costs to the judicial system of entertaining these appeals, exceed in the aggregate the costs of the few erroneous discovery orders that might be corrected were appeals available.

Nevertheless, some federal circuit courts have permitted privilege rulings to be appealed under the collateral order doctrine. The first such decision was *In re Ford Motor Company*, 110 F.3d 954 (3d Cir.1997), in which Ford appealed from a district court order requiring it to disclose minutes of a meeting with the company's attorneys. Carefully analyzing each of the three elements of the collateral order doctrine, the

Third Circuit held that "there is no effective means of reviewing after a final judgment an order requiring the production of putatively protected material," and concluded that "the strictures of the collateral order doctrine" had been met in the case before it.

More recently, in *United States v. Phillip Morris Inc.*, 314 F.3d 612 (D.C. Cir.2003), the District of Columbia Circuit held that the collateral order doctrine gave it jurisdiction to hear an appeal from the district court's discovery orders requiring a tobacco company to produce an allegedly privileged document. Explaining the policy rationale supporting the court's decision, Judge Sentelle said:

The attorney client privilege rests at the center of our adversary system and promotes "broader public interests in the observance of law and administration of justice" and "encourage[s] full and frank communication between attorneys and their clients." The privilege promotes sound legal advocacy by ensuring that the counselor knows all the information necessary to represent his client. Only by ensuring that privileged information is never disclosed will these important interests be advanced. Even though enforcement of the privilege often results in the suppression of probative evidence, our jurisprudence has determined that its value outweighs these costs. Similarly, we today conclude that the institutional benefits of allowing interlocutory review of attorney client privilege claims outweigh the costs of delay and piecemeal review that may result.

Thus, the collateral order doctrine may provide an avenue for appealing adverse rulings on privilege questions in some jurisdictions.

28 U.S.C. § 1292(b): A "Controlling Question" of Law

Where the collateral order doctrine is not available or cannot be satisfied in a particular case, lawyers can in theory consider the exception to the final judgment rule in 28 U.S.C. § 1292(b), which permits an interlocutory appeal when (1) a district judge certifies in writing that (a) an otherwise unappealable order involves a "controlling question of law as to which there is substantial ground for difference of opinion," and (b) "an immediate appeal from the order may materially advance the ultimate termination of the litigation," and (2) the court of appeals, "in its discretion," permits the appeal. Thus, the issue for appeal must present a "controlling question of law," and both the district court and the court of appeals must agree that the interlocutory appeal should be heard.

This trifecta is as unlikely to happen at the courthouse as it is at the racetrack. The first obstacle is that district courts are reluctant to supply the necessary certification. *See, e.g., Xerox Corp. v. SCM Corp.*, 534 F.2d 1031 (2d Cir.1976), and *Isacson v. Keck, Mahin & Cate*, 875 F. Supp. 478 (N.D. Ill.1994). Even if the district court certifies the question for appeal, courts of appeal turn down the majority of appeals certified under § 1292(b). *See, Michael Solomine, Revitalizing Interlocutory Appeals in the Federal Courts*, 58 Geo. Wash. L. Rev. 1165 (1990) (reporting that during an average year in the 1980's, out of 40,000 total appeals per year, district courts certified only 300 appeals under § 1292(b) and the appellate courts accepted only 100 of those). Thus, the § 1292(b) route is not likely to be available, and an extended discussion of § 1292(b) in the context of privilege rulings is not warranted.

Mandamus

A petition for mandamus is technically not an appeal but rather an original proceeding in the appellate court seeking to compel the district court judge to perform an act required by law. However, a writ of mandamus may be a way around the final judgment rule when a district court orders a party to turn over documents that the party considers to be privileged. In *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159 (2d Cir.1992), a case in which defendants sought review of a pretrial discovery order regarding allegedly privileged documents, the Second Circuit said: "Unlike other circuits, we have rarely used the extraordinary writ of mandamus to overturn a discovery order involving a claim of privilege." But, relying on *In re von Bulow*, 828 F.2d 94 (2d Cir. 1987) the first case in which the Second Circuit had ever issued a writ of mandamus to review a discovery order rejecting a claim of attorney client privilege the court granted the writ in the case before it. Summing up its mandamus doctrine, the *Chase Manhattan* court said that it would "exercise mandamus review of discovery orders relating to claims of privilege where: (i) an issue of importance and of first impression is raised; (ii) the privilege will be lost in the particular case if review must await a final judgment; and (iii) immediate resolution will avoid the development of discovery practices or doctrine undermining the privilege."

Other circuits have also occasionally granted mandamus to review discovery orders rejecting claims of attorney client privilege. See, e.g., *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 599 (8th Cir.1977), *modified in banc*, 572 F.2d 606 (8th Cir.1978); *Sanderson v. Winner*, 507 F.2d 477, 479 (10th Cir.1974) (per curiam), *cert. denied*, 421 U.S. 914 (1975); *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 492 (7th Cir.1970) (per curiam), *aff'd mem. by an equally divided court*, 400 U.S. 348 (1971). But the mandamus route is not reliable, even in the Second Circuit. In *In re Weisman*, 835 F.2d 23 (2d Cir. 1987), decided the same year as *In re von Bulow*, the court denied a writ of mandamus where it concluded that the case did not present a legal question of first impression of "extraordinary significance" and that no "extreme need for reversal" existed. Those are tough standards to meet, and no lawyer can count on satisfying them.

Contempt

No lawyer likes to be held in contempt, but on rare occasions it may be the only way to obtain interlocutory appellate review of a privilege ruling. In *International Business Machines Corp. v. United States*, 480 F.2d 293 (2d Cir.1973), a majority of the en banc Second Circuit denied IBM the right to appeal from an order requiring IBM to turn over documents as to which IBM claimed privilege, but Judge Timbers was flabbergasted by the decision to deny the appeal and his dissenting opinion offered some advice: "One way to obtain prompt appellate review of the basic claim of attorney client privilege," he said, would be for an appropriate officer or employee of IBM respectfully to refuse to comply with the district court's order. "Direct appeal could then be taken to this Court from the district court's ensuing civil contempt order." Judge Timbers immediately took "judicial notice" that "such course of procedure would not be pleasant, especially from the standpoint of the alleged contemnor even when represented by distinguished and effective counsel."

If all else fails, therefore, the contempt avenue remains viable and available. Indeed, in the famous case of *Hickman v. Taylor*, 329 U.S. 495 (1947), which first articulated the work product doctrine in federal courts, the interlocutory appeal was heard only because the appellants (who became respondents in the Supreme Court) had been adjudged in contempt for refusing to obey the district court's order to produce certain witness statements.

Ordinarily, DR 7106(A) prohibits a lawyer from disregarding (or advising a client to disregard) a ruling of a tribunal, but the rule adds that the lawyer "may take appropriate steps in good faith to test the validity" of the ruling. If contempt is the only way to test a ruling, it seems to me that a brave lawyer could engage in civil disobedience (i.e., contempt) by lying down on the tracks in front of an onrushing train without violating DR 7106(A).

Interlocutory Appeals in Other State Courts

A comprehensive review of the law governing interlocutory appeals in states other than New York is beyond the scope of this article, but a quick KeyCite check of some New York state and federal cases revealed that several state high courts have grappled with interlocutory appeals of adverse privilege rulings. A particularly helpful opinion is found in *Abrams v. Cades, Schutte, Fleming & Wright*, 88 Haw. 319 (1998). The trial court had ordered the plaintiff, Cades, to produce a letter despite his claim that the letter was protected by the attorney client privilege, and the plaintiff filed an interlocutory appeal. In the course of a decision dismissing the appeal for lack of jurisdiction, the Hawaii Supreme Court thoughtfully surveyed the relevant state (and federal) case law regarding the collateral order doctrine and the writ of mandamus in the context of privilege rulings.

Conclusion

An adverse ruling on your client's claim of attorney client privilege or your firm's claim of work product protection can irreparably damage your case. In the courts of New York State, an interlocutory appeal to prevent any damage will often be available under CPLR § 5701. In federal courts, however, most district court rulings on privilege are not appealable. Congress and the courts have carved out a few narrow exceptions to the final judgment rule that may persuade a federal court of appeals to hear an appeal from a privilege ruling, but no litigator should count on obtaining an audience before an appellate court unless the litigator is willing to risk contempt by disobeying the district court's order in order to lay the foundation for an immediate appeal.

A better course of action is to avoid adverse privilege rulings in the first place by guarding privileged and work product materials like crown jewels, and to respond to adverse privilege rulings by working hard to settle the case before the crown jewels must be turned over to the other side. But in case that doesn't work, it is a good idea to be prepared for an adverse ruling by knowing the various (but precarious) routes to the appellate courthouse.

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