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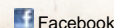
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The Legal Intelligencer | December 13, 2011

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Howard Bashman

Attorneys and judges are perhaps more familiar than anyone with the value and importance of the attorney-client privilege. Among other things, the attorney-client privilege and the related work-product doctrine may protect certain information from disclosure to one's adversary in litigation. But what if a trial judge rejects a party's claim that information should be protected from disclosure under the attorney-client privilege or work-product doctrine? What appellate review, if any, can be immediately obtained?

In 2009, the U.S. Supreme Court issued a decision in a case captioned *Mohawk Industries Inc. v. Carpenter*, holding that a federal district court's rejection of a party's argument that information is privileged from disclosure to the opposing party under

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the attorney-client privilege is not subject to immediate interlocutory appeal under the so-called collateral order doctrine. In so ruling, the U.S. Supreme Court disagreed with a 3rd U.S. Circuit Court of Appeals ruling from 1997 in a case captioned *In re Ford Motor Co.*

The U.S. Supreme Court's ruling in *Mohawk Industries* recognized that, although an immediate interlocutory appeal as of right would not be available to review the denial of the attorney-client privilege to preclude the disclosure of information, the party asserting the privilege could still seek to appeal immediately by means of either an interlocutory appeal by permission or a writ of mandamus. The Supreme Court further explained that, even in the absence of immediate appellate review, the party asserting the privilege could refuse to disclose the information in question, suffer the consequences, and then appeal following a final decision in the case. If the party opposing disclosure wins that appeal, then a new trial could be ordered at which either the privileged material would be excluded (if it was previously turned over) or no sanctions for refusing to turn over the privileged material would be imposed.

Relying on the 3rd Circuit's ruling in *In re Ford Motor Co.*, the Pennsylvania Supreme Court ruled in 1999, in a case captioned *Ben v. Schwartz*, that an immediate collateral order appeal as of right could be taken in Pennsylvania state court from a trial court's refusal to shield information from disclosure under the attorney-client privilege. In the aftermath of the U.S. Supreme Court's ruling in *Mohawk Industries* overruling the 3rd Circuit's decision in *In re Ford Motor Co.*, appellate mavens in Pennsylvania began to wonder whether the state Supreme Court would abandon its holding in *Ben v. Schwartz* allowing collateral order appeals of decisions that required disclosure of materials claimed to be covered by the attorney-client privilege.

Only five months after the U.S. Supreme Court issued its ruling in *Mohawk Industries*, the Pennsylvania Supreme

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Court agreed to decide whether to continue to allow collateral order appeals in Pennsylvania that are now precluded in federal court under the *Mohawk Industries* decision. Pennsylvania's highest court announced its answer to that question last month in a case captioned *Commonwealth v. Harris*.

In its ruling in the *Harris* case, the state Supreme Court explained that it disagreed with the rationale of the U.S. Supreme Court's decision in *Mohawk Industries* and that, as a result, collateral order interlocutory appeals as of right would continue to remain available in the Pennsylvania state court system of orders to turn over material that the appealing party claims should be immune from disclosure under the attorney-client privilege.

In explaining its reasoning for reaching a result in conflict with the U.S. Supreme Court's decision in *Mohawk Industries*, the state Supreme Court wrote that interlocutory appeals by permission and mandamus review are not as readily available under Pennsylvania law as they may be under federal law. Pennsylvania's highest court also disagreed with the U.S. Supreme Court's view that postponing appellate review of orders to disclose privileged information until final resolution of the entire case would not threaten to inhibit otherwise confidential exchanges of information between clients and attorneys.

I was surprised by the U.S. Supreme Court's ruling in *Mohawk Industries* prohibiting collateral order appeals as of right from trial court decisions ordering the production of materials claimed to be protected from disclosure under the attorney-client privilege. I thus believe that the state Supreme Court reached the correct result in its recent ruling in *Commonwealth v. Harris*, refusing to follow the U.S. Supreme Court's holding in *Mohawk Industries*.

Nevertheless, whether to allow an immediate interlocutory collateral order appeal as of right from an order requiring the production of material claimed to be covered by the attorney-client privilege is a difficult question to answer categorically. In cases where a trial court has committed reversible error in ordering the disclosure of materials that should be protected from disclosure under the attorney-client privilege, allowing an immediate collateral order appeal as of right will vindicate very important interests.

By contrast, in a case in which the claim of attorney-client privilege is obviously insubstantial, or the trial court's ruling rejecting the claim of privilege is clearly correct, allowing an immediate interlocutory collateral order appeal as of right only serves to impose substantial additional expense and approximately one year's worth of additional delay, if not more, on the otherwise orderly resolution of a case in the trial court. Thus, in Pennsylvania, the appellate courts should consider making available some sort of initial expedited review where the party that won in the trial court contends either that the claim of privilege is insubstantial or that the trial court's decision is obviously correct and thus not deserving of full-blown appellate review.

It's not every day that the Pennsylvania Supreme Court chooses to take advantage of the opportunity to have the last word in disagreement with the U.S. Supreme Court. On the issue of allowing immediate collateral order interlocutory appellate review as of right for orders mandating disclosure of information claimed to be protected under the attorney-client privilege, I believe that the state Supreme Court reached the correct result. It would be even better, however, if the costly and time-consuming collateral order review could somehow be limited only to those cases where a potentially valid claim of privilege is at stake and the appeal is not being taken simply for delay and to increase the cost of obtaining a final resolution of the entire case.

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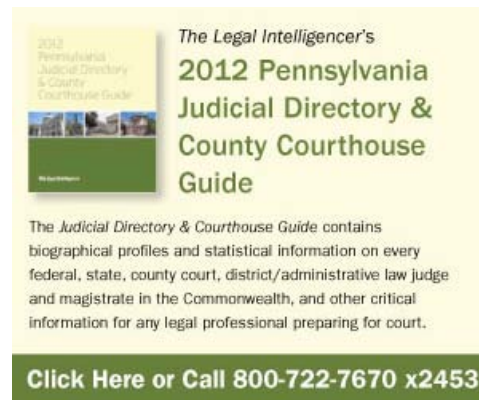
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