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Federal Court Practice – Appellate Review of Orders Adverse to Attorney-Client Privilege

By Landis "Lance" V. Curry III

In *Mohawk Industries, Inc. v. Carpenter*,[1] the United States Supreme Court resolved a conflict amongst the Courts of Appeals by holding that prejudgment orders adverse to the attorney-client privilege are not immediately appealable under the collateral order doctrine. The collateral order doctrine includes within the orders immediately reviewable by the Courts of Appeals a "small class" of collateral rulings that do not terminate the action in the district courts.[2] "That small category includes only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action."[3]

In *Mohawk*, the Court concluded that orders adverse to the attorney-client privilege are not effectively unreviewable on appeal from the final judgment.[4] The Court did, however, identify other appellate mechanisms through which litigants may seek review of any such orders that are particularly injurious or novel.[5] This article discusses the Court's decision precluding immediate review under the collateral order doctrine of orders adverse to the attorney-client privilege, and the options remaining to federal court practitioners for seeking appellate review of such orders.

The Collateral Order Doctrine and the Attorney-Client Privilege

Prior to the Court's decision in *Mohawk*, the Courts of Appeal were split as to whether orders adverse to the attorney-client privilege were reviewable under the collateral order doctrine. The Third, Ninth, and D.C. Circuits had permitted collateral appeals of attorney-client privilege rulings.[6] The Second, Third, Seventh, Tenth, Eleventh, and Federal Circuits had, however, found such rulings nonappealable.[7] The courts primarily disagreed on whether the third condition of the collateral order doctrine had been met; that is, whether orders adverse to the attorney-client privilege were effectively unreviewable on appeal from the final judgment.[8]

The collateral order doctrine's third condition focuses on whether delaying review until after the entry of final judgment "would imperil a substantial interest" or "some particular value of a high order."[9] The federal appellate courts do not engage in an individualized jurisdictional inquiry, but rather focus on the "class of claims" for which appellate review is sought.[10] If the class of claims can be adequately vindicated by other

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Appellate Inn of Court in Miami Named for Judge Barkett

By the Honorable Vance E. Salter

JUDGE BARKETT

V. SALTER

A new American Inn of Court, one of over 400 such groups formed by judges, lawyers, law school faculty members, and law students throughout the United States, has been named for Eleventh Circuit Judge Rosemary Barkett. The Inn is based in Miami and will focus on appellate law, procedure, and practice.

Comprising about 90 charter members, the Barkett Inn will feature programs on appellate topics to assist law students and less experienced practitioners. Six teams of experienced practitioners, law school faculty members, less experienced practitioners, and law students will also be encouraged to work together to assist indigent, self-represented parties in civil appeals.

The new Inn's charter was presented at a ceremony on January 19, 2010 in Miami. A special video featuring music and sound clips was prepared for the event by Judge Barkett's niece Leslie, a recent graduate of Harvard College. The video featured highlights of Judge Barkett's early years, first career as teacher and Catholic nun, and later professional life as trial lawyer, circuit judge, state appellate judge, first woman to serve as Justice and as Chief Justice of the Florida Supreme Court, and U.S. Court of Appeals Judge.

In her remarks to Inn members (including 34 law students from the Florida International University, St. Thomas University, and University of Miami law schools), Judge Barkett described American justice as an evolution shaped by lawyers. As one example, she observed that the sequence of Supreme Court opinions in Dred Scott, Plessy v. Ferguson, and Brown v. Board of Education reflects progress, change, and justice forged by lawyers and judges over the course of a century. One of her mentors, the late Chesterfield Smith, always told her that "the right thing to do" is sometimes difficult, but is nonetheless the path to be followed. She closed by expressing her deep appreciation for the use of her name in the Inn's official title and her designation as a role model for members.

The official charter bearing Judge Barkett's name and the new Inn's objectives—the enhancement of professionalism, civility, and ethics in the practice of law—was presented to Inn President Vance Salter, a Judge of the Third District Court of Appeal of Florida. Following the ceremony, Judge Barkett met the law student members and offered to participate in a later program on the "nuts and bolts" of successful appellate practice.

Nationally, the American Inns of Court Foundation (based in Alexandria, Virginia) has over 25,000 active members and over 80,000 alumni. The Foundation modified the principles of apprenticeship and mentoring found in traditional English Inns of Court to conform them to the U.S. legal system.

For more information regarding the new Inn, please contact the Inn Administrator, Mercy Prieto, at BarkettAppellateInn@gmail.com or 2001 S.W. 117 Avenue, Miami, FL 33175.

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means of appellate review, review under the collateral order doctrine is inappropriate.[11]

The *Mohawk* Court rejected the argument that deferring review of rulings adverse to the attorney-client privilege until final judgment so imperils the interests involved as to justify the cost of allowing immediate appeal of these types of orders.[12] According to the Court:

> [P]ostjudgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege. Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence.[13]

Although the Court acknowledged that "an order to disclose privileged information intrudes on the confidentiality of attorney client communications," it concluded that requiring litigants to wait until after final judgment to remedy any alleged intrusion does not meaningfully reduce the incentives for clients and counsel to engage in full and frank consultations.[14] The Court noted that clients and their counsel "are unlikely to focus on the remote prospect of an erroneous disclosure order" when deciding how freely to communicate with one another.[15]

Furthermore, the Court found that most district court rulings involving the attorney-client privilege are unlikely to be reversed because they are based upon the application of settled legal principles to factual determinations, "for which judicial deference is the norm."[16] This finding evidences respect for the district court judges' responsibility to manage the prejudgment tactics of the litigants. Indeed, the Court noted that "[p]erhaps the situation would be different if district courts were systematically underen-

forcing the privilege, but we have no indication that this is the case."[17]

The Court's holding ultimately underscores its preference for preventing piecemeal appeals that would "unduly delay the resolution of district court litigation and needlessly burden the Courts of Appeals."[18] In applying the collateral order doctrine, the Court has stressed that it must "never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered."[19] The Court reiterated that "the class of collaterally appealable orders must remain 'narrow and selective in its membership.'"[20] This is particularly true, the Court stated, given the enactment of legislation designating rulemaking "as the preferred means for determining whether and when prejudgment orders should be immediately appealable."[21] Accordingly, any additional means of appellate review of orders adverse to the attorney-client privilege, other than the established alternative mechanisms discussed below, should be created through the rulemaking process—complete with input from the bench and bar—rather than through judicial decisions.[22]

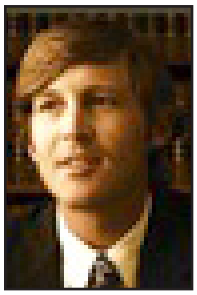
Alternative Appellate Mechanisms for Orders Adverse to Attorney-Client Privilege

Although the Court firmly rejected the notion that prejudgment orders adverse to the attorney-client privilege are immediately appealable under the collateral order doctrine, the Court discussed other review mechanisms (in addition to postjudgment appeals) for "litigants confronted with a particularly injurious or novel privilege ruling."[23] First, the Court stated that a party can ask the district court to certify, and the court of appeals to accept, an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), which requires "a controlling question of law," the resolution of which "may materially advance the ultimate termination of the litigation."[24] The Court stated that if a privilege ruling involves a new legal question or is of special significance, the "district courts should not hesitate to certify an interlocutory appeal in such cases."[25] Second, in extraordinary circumstances, a party may petition the court of appeals for a writ of mandamus.[26] Such extraordinary circumstances include "when a disclosure order 'amount[s] to a judicial usurpation of power or a clear abuse of discretion,' or otherwise works a manifest injustice."[27]

Third, the Court noted that "[a]nother long-recognized option is for a party to defy a disclosure order and incur court-imposed sanctions."[28] Some sanctions (e.g., striking pleadings) will allow a party to obtain postjudgment review without having to reveal the privileged information.[29] If the sanction is contempt of court, the party can "appeal directly from that ruling, at least when the contempt citation can be characterized as criminal punishment."[30]

The *Mohawk* Court concluded that these mechanisms for appellate review "not only provide assurances to clients and counsel about the security of their confidential communications," but also address concerns about litigants experiencing severe hardship by being denied review under the collateral order doctrine.[31] The Court acknowledged that the disclosure of privileged information "may, in some situation, have implications beyond the case at hand."[32] But the Court countered that "the same can be said about many categories of pretrial discovery orders for which collateral order appeals are unavailable."[33] The Court noted that "[a]s with these other orders, rulings adverse to the privilege vary in their significance; some may be momentous, but others are more mundane. Section 1292(b) appeals, mandamus, and appeals from contempt citations facilitate immediate review of some of the more consequential attorney-client privilege rulings."[34] The Court also mentioned that the district courts have the power to enter protective orders to limit the spillover effects of disclosing sensitive information.[35]

Attorneys and litigants considering these alternative mechanisms for appellate review must be mindful of their limited scope as well as their potential repercussions (particularly when pursuing the sanctions alternative). As the *Mohawk* Court mentioned, these alternative mechanisms are appropriate only for reviewing "more consequential attorney-client privilege rulings" that involve a "particularly injurious or novel privilege" determinations.[36] Litigants and their counsel must therefore think long and hard about whether prejudgment disclosure orders are so legally flawed and prejudicial as to justify pursuing the limited prejudgment options that remain.


L. CURRY

Lance Curry *practices commercial litigation and appellate practice at Hill Ward Henderson in Tampa, Florida. Prior to joining Hill Ward Henderson in 2003, Lance served as a staff attorney to Justice Charles T. Wells at the Florida Supreme Court. Lance is an honors graduate of the University of Florida College of Law, where he served as a member of the Florida Law Review.*

Endnotes:

1 *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 603 (2009). Justice Sotomayor wrote the opinion for the Court. Justice Thomas issued an opinion concurring in part and concurring in the judgment.

2 *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). The collateral order doctrine is also known as the "*Cohen* doctrine."

3 *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995).

4 *Mohawk*, 130 S. Ct. at 606. The Court declined to decide whether the other requirements of the collateral order doctrine were met.

5 *Id.* at 607-08.

6 *See In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1087-88 (9th Cir. 2007); *United States v. Philip Morris Inc.*, 314 F.3d 612, 617-21 (D.C. Cir. 2003); *In re Ford Motor Co.*, 110 F.3d 954, 957-64 (3d Cir. 1997).

7 *See Mohawk Indus., Inc. v. Carpenter*, 541 F.3d 1048, 1052 (11th Cir. 2008); *Boughton v. Cotter Corp.*, 10 F.3d 746, 749-50 (10th Cir. 1993); *Texaco Inc. v. Louisiana Land & Exploration Co.*, 995 F.2d 43, 44 (5th Cir. 1993); *Reise v. Bd. of Regents*, 957 F.2d 293, 295 (7th Cir. 1992); *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 162-63 (2d Cir.

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1992); *Quantum Corp. v. Tandon Corp.*, 940 F.2d 642, 643-44 (Fed. Cir. 1991).

8 *See, e.g.*, *Philip Morris*, 314 F.3d at 962-63.

9 *Will v. Hallock*, 546 U.S. 863, 868 (2006).

10 *Mohawk*, 130 S. Ct. at 605.

11 *Id.*

12 *Mohawk*, 130 S. Ct. at 606.

13 *Id.* at 606-07. Interestingly, Florida appellate courts have long held that pre-judgment orders requiring the disclosure of attorney-client privilege can cause "irreparable harm" that warrants immediate certiorari review. *See, e.g.*, *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1100 (Fla. 1987) (characterizing privileged information as "cat out of the bag" material).

14 *Mohawk*, 130 S. Ct. at 607.

15 *Id.*

16 *Id.*

17 *Id.* at 607 n.2.

18 *Id.* at 608.

19 *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) (citation omitted).

20 *Will*, 546 U.S. at 350.

21 *Mohawk*, 130 S. Ct. at 609.

22 *Id.*

23 *Id.* at 607-08.

24 *Id.* at 607.

25 *Id.*

26 *Id.*

27 *Id.* (quoting *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 390 (2004)).

28 *Id.* at 608.

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.* Indeed, as Justice Thomas noted in his concurring opinion, the disclosure order in the *Mohawk* case was likely to affect a separate class action case involving Mohawk Industries, Inc. *Id.* at 611 n.* (Thomas, J., concurring in part and concurring judgment).

33 *Id.* at 608.

34 *Id.*

35 *Id.*

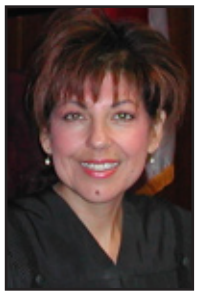
36 *Id.* at 607-08.

The Second District Court of Appeal's Historic First All-Woman Panel

By Anne C. Sullivan

JUDGE KELLY

JUDGE CRENSHAW



JUDGE KHOUZAM

The Second District Court of Appeal's Lakeland headquarters witnessed an historical event on April 28, 2009, when that court's first all-woman panel of three judges heard oral arguments. The panel that memorable day was composed of Judge Patricia J. Kelly, who presided over the arguments, with Judge Marva L. Crenshaw and Judge Nelly N. Khouzam rounding out the group.

As Judge Kelly observed, "It took a little over 50 years [from the court's inception in 1956] for our court to reach this milestone, and I am pleased to have been a member of the panel." Noting that the court currently includes more women jurists than at any time in its history, Judge Kelly added, "I am looking forward to the day that an all woman panel is no longer viewed as something out of the ordinary."

Echoing Judge Kelly's words, Judge Khouzam remarked, looking back on the event, "It was an honor to sit on the first all-woman panel of the Second District. But even more significantly, it is amazing to look at how our profession has changed over the years with more women practicing law, serving in leadership roles in the profession, and sitting on the bench. With the increase in women serving throughout the judiciary, including on appellate courts, there will soon be a time that an all-woman panel will not be considered a rarity."

Judge Kelly's and Judge Khouzam's experiences as staff attorneys at the Second District Court no doubt gave them a unique insight into the workings and history of the court where they, along with Judge Crenshaw (a former state prosecutor and circuit court judge) helped to make a little piece of Florida history in April 2009.

Reflecting on what special or unique attributes or characteristics a woman may bring to the bench, Judge Khouzam put the focus firmly back on the importance of all types of diversity, noting, "Each person's unique experience shapes that individual's perspective and their contribution to the court. Gender is one of the factors that comes into play. Here at the Second District, we are fortunate to have a diverse court. We have former trial judges and judges who came straight from private practice, where they specialized in various areas of the law. This range of experiences contributes positively to a great court."

Judge Kelly remarked in a similar vein that, "I think every judge brings different skills to the job," joking, however, that "being a mother certainly helps to keep you humble, which of course is a desirable quality in a judge."

As for words of advice for practitioners appearing before the court in oral argument, Judge Kelly stressed preparation, candor and flexibility: "Be prepared; know the record; be candid; answer the questions you are being asked by the panel - view the questions as an opportunity to assist the panel in understanding your position; it helps to be flexible because sometimes the things the panel is most interested in are not the things you might expect."

Judge Khouzam, a former circuit court judge, offered these equally invaluable insights into what judges

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