Two Circuit Courts Continue the Trend Against Allowing Interlocutory Appeals of Privilege Issues

Thomas E. Spahn (tspahn@mcguirewoods.com) is a partner with McGuireWoods LLP in Tysons Corner, Virginia. Tom practices as a commercial litigator and regularly advises clients on ethics issues including conflict of interest, confidentiality, and dealing with corporate wrongdoing. He is a frequent lecturer on legal ethics and privilege issues, and among numerous other publications is the author of The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide published by the Virginia Law Foundation. Tom has spoken at more than 1,000 CLE programs throughout the United States and in several foreign countries, and has served on the ABA Standing Committee on Ethics & Professional Responsibility.

In his July 25, 2012 “Privilege Points” release, Tom Spahn discusses the timing of appeals on privilege issues:

Courts generally dislike interlocutory appeals, because they delay litigation and increase appellate courts' workloads. Courts traditionally have taken a more forgiving approach to interlocutory appeals of lower court orders requiring the production of privileged communications or work product – because of the "cat out of the bag" effect. However, in recent years federal courts have been retreating from this forgiving approach. Most notably, in 2009 the United States Supreme Court held that litigants could no longer rely on the collateral order doctrine to seek an immediate appeal of such orders. Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599 (2009).

In Ott v. City of Milwaukee, 682 F.3d 552 (7th Cir. 2012), the Seventh Circuit held that the Mohawk case mentioned above applied with equal force to non-parties subject to discovery under Rule 45. Five days earlier, in In re Grand Jury, 680 F.3d 328 (3d Cir. 2012), the Third Circuit focused on the Perlman doctrine, under which the privilege's owner can immediately appeal an order requiring a third party to produce the owner's privileged communications. The Perlman doctrine rests on the assumption that the third party would not want to risk contempt as a vehicle for interlocutory appeal, because it does not own the privilege. The Third Circuit held that the Perlman doctrine does not apply if (1) the privilege's owner was ordered to produce the communications, and (2) the owner could obtain possession of the privileged communications from the third party (in this case, a law firm which was ethically obligated to hand privileged documents back to its client).

Appellate courts' hostility to interlocutory appeals raises the stakes in any privilege fight at the trial court level – because a litigant losing a privilege fight might have to produce privileged communications during the litigation, and wait until a final order is issued before seeking appellate relief (which by then is largely useless).