Some States Continue to Allow Interlocutory Review of Adverse Privilege Decisions

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In his May 21, 2014 “Privilege Points” release, Tom Spahn discusses the availability of interlocutory review for adverse privilege decisions.

Over the past several years, federal courts have severely curtailed the availability of interlocutory review of district courts' denial of privilege or work product claims. Justice Sotomayor's first Supreme Court opinion eliminated the availability of a collateral order doctrine interlocutory appeal. Mohawk Indus. Inc. v. Carpenter, 558 U.S. 100 (2009). In most situations, federal court litigants ordered to produce protected documents must rely on the rarely-available mandamus procedure to seek interlocutory review.

In contrast, many states continue to allow interlocutory reviews. In Montanez v. Publix Super Markets, Inc., the court granted defendant's petition for writ of certiorari -- interlocutorily reversing a trial court's order compelling plaintiff to produce "her original handwritten responses to [defendant's] interrogatories." Case No. 5D13-3848, 2014 Fla. App. LEXIS 4604, at *6 (Fla. Dist. Ct. App. Mar. 28, 2014). In other states, it seems easier than in the federal courts to obtain mandamus relief. In Seahaus La Jolla Owners Ass’n v. Superior Court, 169 Cal. Rptr. 3d 390 (Cal. Ct. App. 2014), the court issued a writ of mandamus, reversing the trial court's denial of plaintiff homeowners association's privilege claim for communications between the association's lawyers and individual homeowners.

The general unavailability in federal court of interlocutory review dramatically raises the stakes in any trial court privilege or work product dispute. But many states have not followed the federal courts' lead in restricting such review.