Third Circuit Restricts Interlocutory Appeals of Unfavorable Privilege Rulings

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 February 6, 2013 “Privilege Points” release, Tom Spahn discusses the timing of appeals of rulings on the privilege:

Appellate courts traditionally allowed several options for seeking interlocutory appeals of trial court rulings ordering the disclosure of privileged communications or documents. Those courts recognized the "cat out of the bag" impact of such rulings, which usually cannot be fully remedied in a normal post-trial appeal. However, in 2009 the United States Supreme Court signaled disapproval of such interlocutory appeals, by eliminating the "collateral order" type of interlocutory appeals on such privilege issues. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009).

In *In re Grand Jury*, Nos. 12-1697 & -2878, 2012 U.S. App. LEXIS 25318 (3d Cir. Dec. 11, 2012), the Third Circuit continued this trend. It analyzed another route to an interlocutory appeal, called the *Perlman* doctrine. *Perlman v. United States*, 247 U.S. 7 (1918). Under that approach, the privilege's owner can file an interlocutory appeal if a court orders disclosure of the owner's privileged communications that are in a third party's possession – under the theory that the third party will not be inclined to ignore the order and be held in contempt (which normally can be immediately appealed). In *Grand Jury*, the documents were in the possession of the company's outside law firms (including Blank Rome). Relying on the client's power to retrieve its documents from its lawyers, the Third Circuit held that the company could obtain its documents from Blank Rome, ignore a trial court order requiring their production, and then immediately appeal the resulting contempt order.

Although ignoring a court's order to disclose privileged documents normally makes an interlocutory appeal available, that route has obvious atmospheric and public relations drawbacks.