

Mohawk: Limited Interlocutory Review of Federal Court Orders to Disclose Potentially Privileged Attorney-Client Information

[Karen S. Precella](#), HAYNES & BOONE, LLP, Fort Worth

[Ryan Paulsen](#), HAYNES & BOONE, LLP, Dallas

INTRODUCTION

The United States Supreme Court recognizes the attorney-client privilege as “one of the oldest recognized privileges,” meant to encourage attorneys to “provide candid advice and effective representation” and to further “broader public interests in the observance of law and administration of justice.” *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 606 (2009) (internal quotations omitted). In spite of the privilege’s pedigree, however, the proper method for immediate appeal of a federal court order requiring disclosure of information potentially protected by that privilege had not been as well-settled. The Supreme Court recently decided that review is not available under the *Cohen* collateral order doctrine, and, unlike Texas state courts, mandamus review of such disclosure orders has been traditionally unavailable. This article explores the contrast between state and federal law, the options available in the face of a federal court order to disclose potentially privileged attorney-client information, and open questions as to whether *Mohawk* applies in other privilege contexts.

I. THE TEXAS APPROACH

In the early 1990s, the Texas Supreme Court confirmed the inability to cure discovery errors is one circumstance that is often sufficiently “extraordinary” to justify mandamus relief. See *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding). “This [inability to cure the error] occurs when the trial court erroneously orders the disclosure of privileged information which will materially affect the rights of the aggrieved party, such as documents covered by the attorney-client privilege or trade secrets without adequate protections to maintain the confidentiality of the information.” *Id.* at 843. Similarly, an erroneous ruling that precludes the “missing” discovery from being made part of the appellate record may also be sufficiently extraordinary to justify interlocutory relief by mandamus. *Id.* at 843-44. For example, a protective order that precludes a deposition or prevents production of documents such that the evidence will not become part of the record. *Id.* By interlocutory review of erroneous disclosure and overbroad protective orders, a balance is struck between protecting privileged information and ensuring adequate discovery.

Recent cases indicate the Texas Supreme Court continues to review erroneous disclosure orders by mandamus. See, e.g., *In re Weekley Homes, L.P.*, 295 S.W.3d 309

(Tex. 2009) (orig. proceeding) (harm from order to produce hard drives for forensic search for deleted emails could not be remedied on appeal); *In re Jorden*, 249 S.W.3d 416 (Tex. 2008) (orig. proceeding) (depositions precluded by statute cannot be “untaken” or cured on appeal); *In re Ford Motor Co.*, 211 S.W.3d 295, 298 (Tex. 2006) (orig. proceeding) (“[W]e have repeatedly held [an] appeal is inadequate when a trial court erroneously orders the production of confidential information or privileged documents”). In addition, an agreed interlocutory appeal might be available if the district court enters an order for interlocutory appeal and: (1) the parties agree that the underlying order involves a controlling question of law to which there is a substantial ground for difference of opinion; and (2) an immediate appeal may materially advance the ultimate termination of the litigation. TEX. CIV. PRAC. & REM. CODE § 51.014(d).

II. THE BUILD-UP TO THE *MOHAWK* CIRCUIT SPLIT

In the federal system, the review of erroneous disclosure orders has been less clear. As in state court, the courts of appeals have jurisdiction over “final decisions of the district courts.” 28 U.S.C. § 1291. Discovery orders generally are not reviewable until final judgment. *See Church of Scientology of Ca. v. United States*, 506 U.S. 9 (1992) (holding discovery order not appealable absent defiance resulting in contempt order from which appeal may be taken).¹ Under the collateral order doctrine, however, important prejudgment orders that are collateral to the main action may be reviewed under section 1291, even though they do not technically constitute final decisions. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Given the difficulty of other avenues of interlocutory review in federal court, parties often sought interlocutory review of an order mandating disclosure of potentially privileged information under the collateral order doctrine. A Circuit split resulted. Three Circuits held that rulings on the attorney-client privilege are reviewable under section 1291.² Five other Circuits reached the opposite conclusion.³

FN1. Certain types of federal discovery orders may be considered final and appealable, particularly when the proceeding is *only* for discovery. *See, e.g., Phillips v. Beierwaltes*, 466 F.3d 1217 (10th Cir. 2006) (orders under 28 U.S.C. section 1782 on application for discovery in this country for proceeding in another country “are considered final and appealable); *Ash v. Cort*, 512 F.2d 909 (3d Cir. 1975) (holding order of deposition to perpetuate testimony under Rule 27 final and appealable); *United States v. McWhirter*, 376 F.2d 102 (5th Cir. 1967) (discovery in aid of execution under Rule 69 considered final and appealable).

FN2. See *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1087-88 (9th Cir. 2007); *United States v. Phillip 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).

FN3. See *Boughton v. Cotter Corp.*, 10 F.3d 746, 749-50 (10th Cir. 1993); *Texaco Inc. v. La. Land & Exploration Co.*, 995 F.2d 43, 44 (5th Cir. 1993); *Reise v. Bd. of Regents of Univ. of Wis. Sys.*, 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. 1992); *Quantum Corp. v. Tandon Corp.*, 940 F.2d 642, 643-44 (Fed. Cir. 1991).

III. **MOHAWK**

An employment dispute case from Georgia presented the Supreme Court with the opportunity to resolve the split. See *Mohawk*, 130 S. Ct. at 603. In the middle of class action litigation in the hiring of undocumented workers, Mohawk Industries received an email from Norman Carpenter, a shift supervisor in its Georgia plant, concerning the employment of such workers. *Id.* Company officials arranged a meeting between Carpenter and outside counsel in the class action suit, where Carpenter alleges he was pressured to disavow his allegations. *Id.* Carpenter refused and was subsequently terminated by the company. *Id.* Carpenter responded by suing Mohawk in federal court, alleging wrongful termination under federal and state law. *Id.*

The meeting between Carpenter and Mohawk’s outside counsel quickly became the subject of both lawsuits. *Id.* at 603-04. Responding to Carpenter’s discovery requests, Mohawk asserted the attorney-client privilege. *Id.* at 604. But in response to the class action plaintiffs, Mohawk claimed that the meeting was part of an investigation into Carpenter’s “misconduct” in wrongfully employing undocumented workers in violation of Mohawk policy. *Id.* at 603-04. The judge presiding over Carpenter’s suit interpreted these representations as a waiver of the privilege and granted Carpenter’s motion to compel disclosure. *Id.* at 604.

Mohawk sought appellate review of the order, but the Eleventh Circuit dismissed the appeal for lack of jurisdiction, holding that the discovery ruling did not qualify as a collateral order under *Cohen*. *Id.* The court of appeals likewise denied Mohawk’s contemporaneously filed mandamus petition. *Id.*

IV. **RESOLVING THE SPLIT: NO SECTION 1291 JURISDICTION OVER ATTORNEY-CLIENT PRIVILEGE RULINGS**

Focusing on the third prong in *Cohen*—whether the order at issue is reviewable—the Supreme Court affirmed, concluding “collateral order appeals are not necessary to

ensure effective review of orders adverse to the attorney-client privilege.” *Id.* at 606. In so doing, the Court acknowledged the importance of the privilege, but gave greater attention to the “crucial question”: whether deferred review “so imperils the interest as to justify the cost” of immediate appeal. *Id.*

The Court expressed concern over the potential “institutional costs” that would flow from extending appellate review to attorney-client privilege rulings, including increased delay of district court proceedings and added caseload burdens for appellate courts. *Id.* at 608. In contrast, the Court discounted the likelihood that attorneys and their clients would be chilled by the “remote prospect of an erroneous disclosure order, let alone [by] the timing of a possible appeal.” *Id.* at 607. Instead, the “breadth of the privilege and the narrowness of its exceptions” outweigh “the small risk that the law will be misapplied.” *Id.* And, even in such circumstances, the Court expressed its confidence in the ability of appellate courts to “remedy the improper disclosure of privileged material” on postjudgment appeal “in the same way they remedy a host of other erroneous evidentiary rulings.” *Id.* at 606-07. Notably, however, review on appeal may be hindered by a lack of prejudice, mootness, or harmless error hurdle to relief.

V. THE POST-MOHAWK LANDSCAPE

In addition to available remedies for improper disclosure, the Court was influenced by the availability of alternative avenues of review when needed in special circumstances. Thus, although it closed the door on appellate review under the collateral order doctrine, the Court identified and left open several other alternatives for special circumstances:

- **Certified Interlocutory Appeal**—As the Court recognized, Section 1292(b) allows district courts to certify for appellate review interlocutory orders involving “a controlling question of law” whose resolution would “materially advance the ultimate termination of the litigation.” *Id.* at 607. Where a privilege ruling involves “a new legal question or is of special consequence,” the Court encouraged district courts “not [to] hesitate” in certifying the appeal. *Id.* But even where a district court certifies an appeal, the court of appeals has discretion to refuse to hear the appeal. 28 U.S.C. § 1292(b) (“The Court of Appeals . . . may thereupon, *in its discretion*, permit an appeal to be taken”) (emphasis added). The district and appellate court must agree on the “new legal question” or “special consequence.”

- **Mandamus Petition**—Under similarly unusual circumstances, for instance where a disclosure order amounts to a clear abuse of discretion or results in manifest injustice, mandamus review may be available. *Mohawk*, 130 S. Ct. at 607. As the Fifth Circuit has recognized, however, obtaining mandamus relief from privilege orders is difficult. *See, e.g., In re Occidental Petroleum Corp.*, 217 F.3d 293, 295-96 (5th Cir. 2000) (mandamus relief requires a showing of “clear and indisputable error” that is “irremediable on ordinary appeal”). A dispute over the trial court’s factual determinations in reviewing the privilege, untethered to any dispute over the law applied, will generally not be enough. *Id.* at 296; *see also In re Whirlpool Corp.*, 597 F.3d 858 (7th Cir. 2010) (mandamus standards not lessened merely because collateral order appeal unavailable after *Mohawk*). *But cf. In re United States*, 590 F.3d 1305 (Fed. Cir. 2009) (citing *Mohawk* but exercising mandamus jurisdiction, although upholding trial court’s disclosure order).
- **Defy the Court Order**—Alternatively, attorneys and clients can protect privileged information by defying a court order. To the extent the court responds with a criminal contempt order, immediate review of the disclosure order will then become available. *Mohawk*, 130 S. Ct. at 608. This review may come at too high a price, however, for most attorneys and their clients.
- **Obtain Protective Orders**—Under Federal Rule of Civil Procedure 26(c), a court can restrict the disclosure of the privileged material to “limit the spillover effects of disclosing sensitive information.” *Id.* But if the court did not consider the information privileged, the court may be disinclined to enter such an order.

In addition to these avenues recognized by the Court in *Mohawk*, litigants facing an adverse ruling on the attorney-client privilege should also consider the following:

- **Federal Rule of Evidence 502(a)**—If the adverse privilege ruling is based on a finding of waiver, Rule 502(a) protects communications that remain undisclosed unless the waiver is intentional and the undisclosed matter relates to the same subject and should be considered together with the disclosed matter. FED. R. EVID. 502(a); *see Ronald J. Hedges and Jeane A. Thomas, Mohawk Industries and E-Discovery, in Digital Discovery & E-Evidence Report* (Jan. 1, 2010) [hereinafter *Mohawk Industries and E-Discovery*].

- **Federal Rule of Evidence 502(d)**—Before complying with a disclosure order, litigants should seek a nonwaiver order under Rule 502(d) to protect against a finding of waiver based on compliance with the court order. FED. R. EVID. 502(d); see *Mohawk Industries and E-Discovery, supra*.

VI. OPEN QUESTIONS AFTER *MOHAWK*

Although collateral order review is unavailable in most attorney-client disclosure order contexts, the Court postponed the resolution of several open questions, including:

- **Other Common-Law or Rule-Based Privileges**—The Court inquired at oral argument why anti-disclosure policies were more important for the attorney-client privilege as compared to trade secrets, work product or other privileges. *Mohawk* Transcript 2-3, 5, 11, 17, 23. Indeed, some Circuits have applied the *Cohen* doctrine to other privilege issues. See, e.g., *Agster v. Maricopa County*, 422 F.3d 836 (9th Cir. 2005) (allowing collateral order appeal related to discovery for which county invoked state statutory peer review privilege); *In re Carco Elecs.*, 536 F.3d 211 (3d Cir. 2008) (recognizing collateral order appeal of trade secrets disclosure order). Although the Court was careful to restrict its analysis in *Mohawk* to the attorney-client privilege, if that beneficial and longstanding privilege does not qualify for review under the collateral order doctrine, other common-law or rule-based doctrines are unlikely to either, at least absent a showing of a unique need for protection. See *United States v. Textron, Inc.*, 577 F.3d 21 (1st Cir. 2009) (*en banc*), cert. denied, ___ U.S. ___, 2010 WL 2025148 (May 24, 2010) (refusing to review First Circuit holding that tax workpapers were not privileged); *Hernandez v. Tanninen*, No. 09-35085, 2010 WL 1882304, at *1 (9th Cir. May 12, 2010) (“The reasoning of *Mohawk* . . . applies likewise to appeals of disclosure orders adverse to the attorney work product privilege.”). Thus, *Mohawk* may lead to predominant resolution of the most common privilege questions at the district court level with interlocutory appellate involvement only in extraordinary circumstances.
- **Constitutional or Statutory Rights and Privileges**—Whether the *Mohawk* bar to collateral order appeal applies to constitutional-based rights or privileges may be an open question. See *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994)

(“Where statutory and constitutional rights are concerned, ‘irretrievabl[e] los[s]’ can hardly be trivial, and the collateral order doctrine might therefore be understood as reflecting the familiar principle of statutory construction that, when possible, courts should construe statutes (here Section 1291) to foster harmony with other statutory and constitutional law.”). At least one court recognized *Mohawk* left an open question in the First-Amendment-privilege context, but relied on its mandamus jurisdiction to resolve the issue. See *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010) (noting that some of *Mohawk*’s reasoning carries over to First Amendment privileges, but citing several differences such as its constitutional grounding).

- **Governmental Privileges**—Similarly, in its *amicus* brief, the United States argued the collateral order doctrine should apply to certain governmental privileges due to “their structural constitutional grounding under the separation of powers,” their “relatively rare invocation,” and their “unique importance to governmental functions.” *Mohawk*, 130 S. Ct. at 609 n.4. In other words, unlike the routine, “every day” attorney-client privilege issues, these governmental privileges—such as the Presidential communications or state secrets privileges—rise to the level of special circumstances by the very nature of the subject. The Court declined to reach the issue. *Id.*
- **Nonparties**—One court recently noted “a division in the circuits on the question of a nonparty’s right to immediately appeal a discovery order. It is unclear whether our circuit’s approach to this question [that allows immediate review] . . . survives the holding and rationale of *Mohawk Industries*.” *Sandra T.E. v. S. Berwyn Sch. Dist.*, 600 F.3d 612, 618 (7th Cir. 2010) (involving attorney-client privilege and work-product doctrine as to nonparty). The court highlighted the issue for the future but did not resolve it. *Id.* Cf. *Sec. & Exch. Comm’n v. Merrill Scott & Assocs., Ltd.*, 600 F.3d 1262 (10th Cir. 2010) (allowing collateral order appeal of modification of protective order as to nonparty when no showing that right to post-judgment appeal was available).
- **Rules Change**—With its very last sentence, the Court left the door (slightly) open for the possibility of expanded appellate review in the future: “Any further avenue for immediate review of such

rulings should be furnished, if at all, through rulemaking, with the opportunity for full airing it provides.” *Id.* at 609. The April 2010 Agenda Materials for the Advisory Committee on Rules of Appellate Procedure included a discussion of whether any rulemaking response to *Mohawk* was appropriate by defining the decision as final or providing for interlocutory appeals, but the committee concluded that too little empirical data yet exists to determine the need for and impact of broadening an immediate right of appeal.

CONCLUSION

The contrast between available interlocutory review of erroneous orders of disclosure of potentially privileged information in state and federal court is stark. In Texas, mandamus jurisdiction (and agreed interlocutory appeal in some cases if necessary) is generally available to correct an erroneous order to disclose privileged information of various types, including attorney-client or trade-secret information. In federal court after *Mohawk*, however, interlocutory review under the collateral order doctrine is unavailable in the attorney-client privilege context, and mandamus review is generally difficult (although some circuit courts troubled by the disclosure may invoke their mandamus jurisdiction). The reach of *Mohawk* in other contexts is not clear, but it may ultimately include other common-law or rules-based privileges or doctrines including trade secrets and work product, may not reach constitutional or statutory based privileges or orders applied to nonparties. As a result, practitioners in federal court should make careful use of protective and nonwaiver orders in the district court, and appellate practitioners should bear in mind these distinctions when assessing the availability of or crafting briefing in an interlocutory appeal of disclosure orders or when making a record of harm for ordinary appeal to complain of the erroneous production of privileged information.