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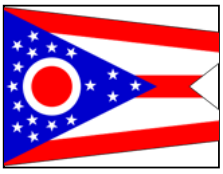
32 Law. Man. Prof. Conduct 710

Confidentiality

Adverse Privilege Ruling Is Immediately Appealable



By Samson Habte

Dec. 7 — A litigant may immediately appeal a discovery order compelling the disclosure of materials the litigant believes to be protected by the attorney-client privilege, but the same isn't true of the work-product protection, a divided Ohio Supreme Court ruled Dec. 7 (*Burnham v. Cleveland Clinic*, 2016 BL 406203, Ohio, No. 2015-1127, 12/7/16).

The decision adds to a growing body of conflicting authority on whether a litigant who loses a discovery fight involving allegedly privileged documents can seek immediate review of that adverse ruling or must instead wait until after the trial to challenge the order.

Courts are also divided on a related question—whether such an order can be immediately appealed if the materials are allegedly protected by the attorney work-product doctrine. See 31 Law. Man. Prof. Conduct 254.

Snapshot

- Orders to produce materials allegedly protected by attorney-client privilege are "final," immediately reviewable
- Same doesn't hold true for orders to produce allegedly protected attorney work-product

"[A]n order requiring the production of information protected by the attorney-client privilege causes harm and prejudice that inherently cannot be meaningfully or effectively remedied by a later appeal."

Those questions are significant because, as Roy D. Simon, professor emeritus at Hofstra University law school,has noted, "An adverse ruling on your client's claim of attorney client privilege or your firm's claim of work product protection can irreparably damage your case."

In this case, the court held that orders compelling the production of allegedly privileged attorney-client communications are subject to immediate review. But over the objections of three concurring justices, the court refused to revisit a 2015 decision in which it declined to hold that the same is true with respect to adverse discovery rulings that involve attorney work product.

The decision will allow the Cleveland Clinic to seek interlocutory review of a discovery ruling that ordered the hospital to turn over an "incident report" that was created after Darlene Burnham, the plaintiff in a personal injury suit, allegedly slipped and fell while visiting her sister's hospital room.

Privilege vs. Work Product

"We hold that an order requiring the production of information protected by the attorney-client privilege causes harm and prejudice that inherently cannot be meaningfully or effectively remedied by a later appeal," the majority declared in an opinion by Justice Judith Ann Lanzinger.

"Thus, a discovery order that is alleged to breach the confidentiality guaranteed by the attorney-client privilege satisfies [Ohio Rev. Code §] 2505.02(B)(4)(b) and is a final, appealable order that is potentially subject to immediate review," Lanzinger wrote, citing the provision in the Ohio code that identifies the types of court orders that are deemed "final" and thus immediately reviewable.

But although the court found that a party may immediately appeal discovery orders that impinge on the attorney-client privilege, it declined an invitation to overrule *Smith v. Chen*, 31 N.E.3d 633, 2015 BL 112556, 31 Law. Man. Prof. Conduct 253 (Ohio 2015), which reached a different decision regarding the reviewability of adverse discovery rulings that involve materials allegedly protected by the work product doctrine

"The attorney-client privilege and the attorney-work-product doctrine provide different levels of protection over distinct interests, meaning that orders forcing disclosure in these two types of discovery disputes do not necessarily have the same result that allows an immediate appeal," Lanzinger wrote.

Whereas attorney-client privilege promotes "full and frank communication between attorneys and their clients," which advances the public interest in the justice system, the work-product doctrine is intended to protect an attorney's efforts from being exploited by someone else, the court said, citing case law.

"Other discovery protections that do not involve common law, constitutional, or statutory guarantees of confidentiality, such as the attorney work-product doctrine, may require a showing under [Section] 2505.02(B)(4)(b) beyond the mere statement that the matter is privileged," Lanzinger said. "Our holding in *Chen* is limited to the latter context."

Chief Justice Maureen O'Connor and Justice William M. O'Neill joined the majority opinion in full.

'Incomplete and Disingenuous.'

Justice Sharon L. Kennedy, joined by two other members of the court, said she concurred in the judgment—that the underlying discovery order was final and appealable—but couldn't endorse the majority's "incomplete and disingenuous" analysis.

Kennedy said the "myopic" distinction the majority drew between the attorney-client privilege and the work-product doctrine failed to "recognize the common-law origins of the work-product doctrine" and "elevates statutory privileges over the work-product doctrine," which is set forth in the rules of civil procedure that the supreme court promulgates pursuant to its constitutional authority.

She added that she would overrule *Chen* to "restore stability an predictability to Ohio law."

"I would hold that an order requiring the release of privileged documents, whether protected by the attorney-client privilege or work-product doctrine, is a final, appealable order because the 'proverbial bell cannot be unrung,'" Kennedy wrote.

Justices Terrence O'Donnell and Judith L. French joined the concurrence.

Dissent: Mop & Glo?

In a solo dissent, Justice Paul E. Pfeifer said the hospital incident report wasn't covered by the attorney-client privilege at all—it was simply a business record.

"I dissent from elevating the incident report in this case to the exalted status of being the product of attorney-client privilege, requiring the immediate intervention of the appellate court to protect the Cleveland Clinic from what exactly—the disclosure of its top-secret ratio of water to Mop & Glo?" Pfeifer wrote.

Alexander L. Pal and Thomas J. Silk of Obral, Silk & Associates LLC, Cleveland, represented Burnham. Bret C. Perry and Jason A. Paskan of Bonezzi Switzer Polito & Hupp LPA, Cleveland, represented the defendants.

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For More Information

Full text at
http://www.bloomberglaw.com/public/document/Burnham_v_Cleveland_Clinic_No_20151127_2016_BL_406203_Ohio_Dec_07.

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