

Alerts

Ninth Circuit Allows Immediate Appeal of Third-Party Discovery Order Involving Privilege

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Lawyers for the Profession® Alert

U.S. v. Krane, ___ F.3d ___, 2010 WL 4260978 (9th Cir. 2010)

Brief Summary

The U.S. Court of Appeals for the Ninth Circuit held that discovery orders adverse to the attorney-client privilege are immediately appealable when the subject materials are sought from a disinterested third party.

Complete Summary

After two corporate officers were criminally indicted, the government sought to compel production of materials from the former law firm of the officers' corporation. The corporation intervened, asserting that the materials were protected by the attorney-client privilege. The district court granted the government's motion to compel. The corporation immediately appealed that order to the Ninth Circuit.

The Ninth Circuit held that it had jurisdiction to consider the appeal and concluded that an interlocutory appeal was not precluded by the U.S. Supreme Court's 2009 decision in *Mohawk Industries, Inc. v. Carpenter*, ___ U.S. ___, 130 S.Ct. 599. In *Mohawk Industries*, the Supreme Court held that discovery orders adverse to the attorney-client privilege are not immediately appealable under the collateral order doctrine, which is one exception to the general rule that only final judgments are appealable.

The Ninth Circuit noted that a common option for immediately appealing discovery orders is to refuse to comply with them and to appeal the resulting contempt order. Building on that, the court noted another exception to the final judgment rule, articulated in *Perlman v. United States*, 247 U.S. 7 (1918). The Supreme Court held in *Perlman* that, because a disinterested third party (such as the law firm in this case) likely will produce materials rather than subject itself to a contempt order, a discovery order directed at privileged materials in that third party's hands is immediately appealable. The Ninth Circuit held that this rule survives the *Mohawk Industries* decision because the *Perlman* rule is considered separately from the collateral order doctrine at issue in *Mohawk Industries*.

Significance of Opinion

This opinion answers a question left open in *Mohawk Industries* and thereby

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limits the potential reach of that opinion in the Ninth Circuit. The Ninth Circuit recognized the need for immediate appealability in situations where a privilege holder is essentially powerless to otherwise avoid a discovery order when privileged materials are in the possession of a disinterested third party.

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