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Client Alert

Global Regulatory Enforcement

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In Re Grand Jury, No. 12-1697 (3d Cir. May 24, 2012)

A federal district court's order that a corporation produce documents to a federal grand jury – despite objections that the materials are protected from disclosure by the attorney-client privilege and the attorney work product doctrine, and that the documents are held by the corporation's outside attorneys – cannot be immediately reviewed by a federal court of appeals, unless the corporation first willfully defies the order by refusing to produce and is held in contempt by the district court. Otherwise, the corporation must wait until a final decision is rendered in the case – often months or years following the grand jury stage of a criminal proceeding, and likely after the privileged content has been produced – before appealing the privilege issue. So ruled the majority of a three-judge panel of the Third Circuit in *In re Grand Jury,* No. 12-1697 (3d Cir. May 24, 2012), available at http://www.ca3.uscourts.gov/opinarch/121697p.pdf. The opinion makes it harder for persons and companies to enlist the federal appellate courts to review prosecutorial challenges to the attorney-client privilege and attorney work product protections.

The opinion also suggests that law firms faced with a subpoena and then a court order to produce privileged material may escape the dilemma of revealing a client's privileged material by returning the documents to the client if they first make arrangements with the government and the district court. The Third Circuit, while expecting law firms to protect their clients' privilege in the first instance by challenging a grand jury subpoena, does not require law firms to defy court orders (and risk a contempt citation) in contravention of the attorney ethics rules, which permit revealing client confidences when so ordered by a court.

The underlying case involved an Eastern District of Pennsylvania grand jury investigation into the criminal tax implications of a corporation's acquisition and sale of certain closely held companies, where the government issued a grand jury subpoena to the corporation for the production of relevant records. After

the corporation refused to accept service of the subpoena, the government subpoenaed two law firms representing the corporation for the records. In response, the law firms produced 24 boxes of documents and a privilege log listing 303 responsive documents that were being withheld on the basis of attorney-client privilege and attorney work product doctrine. Unsatisfied, the government filed an *ex parte* motion to compel production of a portion of the allegedly privileged documents on the basis of the crime-fraud exception. The court granted the motion – finding certain documents to have lost the protection of privilege confidentiality because the advice of counsel had been used to perpetrate an alleged future fraud or crime – and ordered the corporation and the law firms to produce 167 of the documents listed on the privilege log. Within days, the corporation and law firms appealed the order to the Third Circuit Court of Appeals.

In refusing to take up the appeal, the panel's majority explained that federal appellate courts typically possess jurisdiction under 12 U.S.C. § 1291 to review only "final decisions" of district courts: that is, decisions fully resolving all claims presented and leaving nothing further for the district court to do. An order to produce documents to a grand jury – as was faced by the corporation and law firms – is generally not a "final decision," and thus is not immediately appealable. Otherwise, the appellate courts would be flooded with myriad discovery appeals.

This longstanding federal precedent leaves a party opposing production of what it claims to be privileged documents with only one avenue for immediate appellate review: contempt. A contempt order is considered a "final decision" – the contempt proceeding is effectively a new matter, with the court's contempt sanction as its final order – and thus is immediately appealable. The panel stated that contempt has been recognized since at least 1906 as the option for those who seek immediate appellate review of an otherwise not-immediately-appealable district court order. Because the party faces a contempt sanction – including fines and even imprisonment – should the appellate court not grant relief, the severe consequence of failure on appeal effectively serves to limit the contempt route to only those claims that carry a high chance of success.

In the Third Circuit case, the corporation – which had not defied the district court's order prior to the appeal – argued that it could immediately appeal without proceeding along the contempt route because its facts mirrored the Supreme Court's decision in *Perlman v. United States*, 247 U.S. 7 (1918). There, a third party not under the privilege-holder's control was ordered to produce privileged materials to a federal grand jury. The privilege-holder lacked custody of the privileged evidence. Because the party subject to the production order would never choose to suffer contempt on another's behalf, and because the privilege-holder could not withhold the evidence to pursue the contempt route, the

Supreme Court ruled that immediate appeal was available to the privilege-holder. The panel's majority explained that *Perlman* is only available when the contempt route is closed to the privilege-holder, and ruled that the contempt route was open to the corporation because it could simply request custody of the documents from its law firms. Although a law firm in possession of privileged material is technically a third-party custodian, and is not expected to suffer contempt sanctions to protect its client's privilege, the panel's majority nevertheless ruled that *Perlman* does not apply in this context because of the client's ultimate control over the documents.

Dissenting in part, Judge Vanaskie raised practical concerns about the majority's proposed procedure of transferring documents from the law firms – that were named in the court's order to produce – to the corporation. Should the law firms give the documents to the corporation, Judge Vanaskie wrote, they could be held in contempt of the court's order for failing to immediately produce the documents to the grand jury, which is an unsavory position for law firms and is contrary to the professional ethics rules. The majority attempted to assuage any fears by holding that the law firms' relinquishment of custody to the corporation, so the corporation could either produce or pursue the contempt route, would not be contempt or obstruction of justice so long as the transfer is noticed to and arranged with the government and the district court. Judge Vanaskie disagreed, stating that the reasoning in *Perlman* should apply to the portion of the court's order directed at the law firms. Reaching the merits of the appeal, Judge Vanaskie wrote that the ruling on the crime-fraud exception should have been affirmed.