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## Lead Story: Appellate Jurisdiction Over Trial Court Decisions Denying A Claim Of An Evidentiary Privilege

*F*requently a trial court's decision that a particular communication is not privileged places the holder of the privilege in a difficult position. By complying with the disclosure order, the communication will be revealed and cannot later be retrieved. Disobeying the court order and maintaining the confidential communication runs the risk of court sanctions. More importantly, the court's ruling is difficult to challenge and obtain effective appellate review. This Lead Story considers some of the means available to a party to obtain review of an adverse finding against its claim of privilege that would not involve surrendering the allegedly privileged information as a condition of securing appellate review.



Under the final judgment rule, the jurisdiction of the federal courts of appeals extends only to "all final decisions" of the trial courts. 28 U.S.C. § 1291. As a general matter, trial court orders concerning discovery and evidentiary privileges are interlocutory and are not final decisions. *Church of Scientology v. United States*, 506 U.S. 9, 18 n.11 (1992) ("As a general rule, a district court's order enforcing a discovery request is not a 'final order' subject to appellate review. A party that seeks to present an objection to a discovery order immediately to a court of appeals must refuse compliance, be held in contempt, and then appeal the contempt order."). The circuits have identified several alternatives or exceptions to the final judgment rule which allow an appellate court to review the trial court's order compelling disclosure of a matter the holder contends is privileged.

### A. The Problem Of Adverse Privilege Rulings

For claimants of a federal evidentiary privilege, a plethora of options exist when a trial judge decides that the claimant's assertion of the privilege is not meritorious. Each has their own tradeoffs. In the usual course of litigation, normally the party suffering an adverse ruling must wait for a final adjudication of the merits

of the case and then appeal the decision along with any rulings made in the case. However, if a trial court compels disclosure of otherwise privileged information, the party will be without any remedy in protecting the privileged information. For examples of cases that have noted this problem, consider:

❖ *Federal Open Market Committee of Federal Reserve System v. Merrill*, 443

U.S. 340, 356, 60-63 (1979) ("The federal courts have long recognized a qualified evidentiary privilege for trade secrets and other confidential commercial information" and that disclosure of "confidential commercial information" in Federal Reserve Directives in civil litigation was problematic because if mistakenly ordered to be disclosed in the course of getting to final judgment, it could "significantly harm the Government's monetary functions or commercial interests.")

❖ *Agster v. Maricopa County*, 422 F.3d 836, 838-39 (9th Cir.) ("Even if a new trial were ordered at which the material [medical peer review records] found to be privileged was not admissible, it might be impossible to undo the effects of the disclosure with regard to the information in plaintiffs' hands and its effect on their trial strategy" in the course of getting to final judgment; "[R]eview after final judgment may therefore come too late.' Once '[t]he cat is already out of the bag,' it may not be possible to get it back in.") (citations omitted), *cert. denied*, 126 S.Ct. 473 (2005)

❖ *In re Ford Motor Co.*, 110 F.3d 954, 963-64 (3d Cir. 1997) (noting problem in waiting to use normal appellate review process is that "once putatively protected material is disclosed, the very 'right sought to be protected' has been destroyed") (citation omitted)

❖ *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 591 (3d Cir. 1984) ("When a district court orders [the] production of information over a litigant's claim of a privilege not to disclose, appeal after a final decision is an inadequate remedy ... for compliance with the production



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