

No. 08-678

IN THE
Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,
Petitioner,

v.

NORMAN CARPENTER,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit**

**BRIEF *AMICUS CURIAE* OF
THE AMERICAN BAR ASSOCIATION
IN SUPPORT OF PETITIONER**

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***INTEREST OF AMICUS CURIAE*¹**

Pursuant to Supreme Court Rule 37.3, the American Bar Association (the “ABA”), as *amicus curiae*, respectfully submits this brief in support of Petitioner. The ABA asks that this Court hold that a

¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

party to a federal civil case may take an immediate appeal from a decision of a district court holding that the party has waived the attorney-client privilege and compelling disclosure of otherwise privileged communications.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's membership of more than 400,000 spans all 50 states and other jurisdictions, and includes attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors, and law students.²

Throughout its history, the ABA has taken a keen interest in attorney-client confidentiality, which is directly affected by determinations of the scope of the attorney-client privilege. The ABA has developed standards governing the preservation of client confidences,³ and it has participated before this and other

² Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the American Bar Association. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor was it circulated to any member of the Judicial Division Council before filing.

³ In 1908, the ABA adopted its CANONS OF PROFESSIONAL ETHICS. In 1928, the ABA added Canon 37, which specifically stated, “[i]t is the duty of a lawyer to preserve his client’s confidences,” and that this duty “outlasts the lawyer’s employment.” The ABA’s MODEL CODE OF PROFESSIONAL RESPONSIBILITY, adopted in 1969, similarly provided that “[a] lawyer shall not knowingly . . . reveal a confidence or secret of a client.” Disciplinary Rule 4-101(B)(1). The ABA’s current MODEL RULES OF PROFESSIONAL CONDUCT, adopted in 1983 and amended periodically, address the duty to preserve client confidences in Model

courts as *amicus* in cases involving the privilege and the related work-product doctrine.⁴ The ABA does so, believing that preservation of client confidences promotes “full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and the administration of justice.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

In 2004, concerned by the adoption by the Department of Justice and other federal agencies of policies requiring waiver of the attorney-client privilege as a precondition of a determination that a party was cooperating with a government investigation, the ABA established a Task Force on the Attorney-Client Privilege to assess the impact of these policies. After considerable study, the Task Force presented three “bedrock principles” to the ABA’s House of Delegates, which were unanimously adopted as ABA policy in August 2005.⁵ The first states:

Rules 1.6 (“Confidentiality of Information”) and 1.9 (“Duties to Former Clients”).

⁴ The ABA’s *amicus* briefs on attorney-client privilege and work-product doctrine issues include those filed in *Hickman v. Taylor*, 329 U.S. 495 (1947); *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Swidler & Berlin v. United States*, 524 U.S. 399 (1998); and *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337 (Fed. Cir. 2004).

⁵ The ABA’s House of Delegates (“HOD”), with more than 500 delegates, is the ABA’s policymaking body. Recommendations may be submitted to the HOD by ABA delegates representing states and territories, state and local bar associations, affiliated organizations, sections and divisions, ABA members, and the Attorney General of the United States, among others. Recommendations that are adopted by the HOD become ABA policy. See ABA General Information, available at <http://www.abanet.org/leadership/delegates.html>.

RESOLVED, that the American Bar Association supports the preservation of the attorney-client privilege and work-product doctrine as essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal matters fully and candidly with their counsel so as to (1) promote compliance with the law through effective counseling, (2) ensure effective advocacy for the client, (3) ensure access to justice and (4) promote the proper and efficient functioning of the American adversary system of justice[.]

ABA 2005 Report with Recommendation #111 (Policy adopted Aug. 2005).⁶

Subsequently, in February 2009, and shortly after this Court granted certiorari in this case, the ABA House of Delegates elaborated on the ABA's commitment to the attorney-client privilege by adopting the following policies, which address precisely the question presented:

RESOLVED, that the American Bar Association supports the right of participants in federal proceedings to take an immediate appeal from an order that rejects a claim of attorney-client privilege and on that basis requires the production of information or materials for which the privilege has been claimed;

FURTHER RESOLVED, that the American Bar Association believes that the right to pursue such an immediate appeal will help to preserve the attorney-client privilege;

⁶ Available from the ABA.

FURTHER RESOLVED, that the American Bar Association concludes that [such an order] should be immediately appealable as a collateral final decision under the doctrine set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

ABA 2009 Report with Recommendation #301 (Policy adopted Feb. 2009).⁷

The ABA adopted these policies and submits this *amicus* brief because the ABA believes that denying the opportunity for an immediate appeal from a district court's decision holding that the attorney-client privilege has been waived and compelling production of otherwise privileged communications would significantly impair the attorney-client privilege and the important goals it serves.

SUMMARY OF ARGUMENT

There should be a right to an immediate appeal under *Cohen* when a court rules that the attorney-client privilege has been waived and compels production of attorney-client communications, because of the importance of the attorney-client privilege and the importance of maintaining the appropriate balance between the public interests embodied in the privilege and in the principle that the public has a "right to every man's evidence." *Trammel v. United States*, 445 U.S. 40, 50 (1980).

In interpreting the privilege's scope, the courts are guided by "the principles of common law . . . in the light of reason and experience." Fed. R. Evid. 501. The decisions of the lower courts, however, have not

⁷ Available from the ABA.

always been correct, and “[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.” *Upjohn*, 449 U.S. at 393.

To maintain the appropriate balance between the public interests served by the privilege and the competing interest in access to evidence, a balance that is directly implicated by rulings regarding the scope of the privilege, decisions that the privilege has been waived and compelling production of otherwise privileged information should be included in that “small class” of orders immediately appealable under *Cohen*. The third prong of *Cohen’s* test, which the ABA submits is the only prong in dispute in such rulings, is satisfied because “the legal and practical value of [the privilege] would be destroyed if it were not vindicated before trial.” *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 499 (1989). Further, the costs that can result when review of an erroneous ruling must await a final judgment (or in many cases not occur at all) make these orders “sufficiently important to overcome the policies militating against interlocutory appeals.” *Id.* at 503 (Scalia, J., concurring).

ARGUMENT

I. THERE SHOULD BE AN IMMEDIATE APPEAL UNDER *COHEN* WHEN A COURT RULES THE ATTORNEY-CLIENT PRIVILEGE HAS BEEN WAIVED AND COMPELS DISCLOSURE.

In *United States v. Louisville & Nashville Railroad Co.*, 236 U.S. 318 (1915), this Court stated:

The desirability of protecting confidential communications between attorney and client as a

matter of public policy is too well known and has been too often recognized by text-books and courts to need extended comment now. If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance.

Id. at 336, citing *Conn. Mut. Life Ins. Co. v. Schaefer*, 94 U.S. 457, 458 (1876); *Blackburn v. Crawford*, 3 Wall. 175 (1865). See also *Chirac v. Reinicker*, 24 U.S. 280, 294 (1826) (the attorney-client privilege “is indispensable for the purposes of private justice”).

Just as well known, however, is the principle that “[t]estimonial exclusionary rules and privileges contravene the fundamental principle that the public . . . has a right to every man’s evidence.” *Trammel*, 445 U.S. at 50 (ellipsis in original; internal quotation marks omitted); see also *Jaffee v. Redmond*, 518 U.S. 1, 19 (1996) (Scalia, J., dissenting) (“the particular value the courts are distinctively charged with preserving—justice—is severely harmed by contravention of ‘the fundamental principle that the public . . . has a right to every man’s evidence’”) (quoting *Trammel*, 445 U.S. at 50) (internal quotation marks omitted)).

It is because of the tension between the public interests embodied in the attorney-client privilege and in the “right to every man’s evidence,” the ABA submits, that the contours of the attorney-client privilege are often unclear. This tension is documented in treatises and scholarly works on the privilege’s exceptions, intricacies, and areas of ambiguity.⁸

⁸ See, e.g., EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: EVIDENTIARY PRIVILEGES* (2002).

It is also documented in case law, in which the lower courts have debated the scope of the privilege and, the ABA submits, based on the importance of the privilege, have too frequently been incorrect in determining the appropriate balance between these public interests.

The ABA accordingly asserts that there should be a right to immediate appeal under the collateral order doctrine when a court rules that the attorney-client privilege has been waived and compels production of attorney-client communications. That is, such orders necessarily “fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.” *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

A. The Necessity To Maintain the Appropriate Balance Between the Privilege and the “Right to Every Man’s Evidence” Is the Result of the Privilege’s Ongoing Common Law Development.

The attorney-client privilege “is the oldest of the privileges for confidential communications known to the common law.” *Upjohn*, 449 U.S. at 389, citing 8 WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961).⁹ Nevertheless, the appropriate balance between the privilege and the right to “every man’s evidence” is continually being debated because a court’s

⁹ In fact, the attorney-client privilege “goes back to the reign of Elizabeth I, where the privilege already appears as unquestioned.” 8 WIGMORE, EVIDENCE § 2290, at 542.

“interpretation of the privilege’s scope is guided by ‘the principles of the common law . . . as interpreted by the courts . . . in the light of reason and experience.’” *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (ellipses in original) (quoting Fed. R. Evid. 501 and citing *Funk v. United States*, 290 U.S. 371 (1933)).

Rule 501 provides authority for the federal courts to pursue an “evolutionary development,” *Trammel*, 445 U.S. at 47, of testimonial privileges, including the attorney-client privilege.¹⁰

In this ongoing “evolutionary development,” however, the decisions of the lower courts have not

¹⁰ Rule 501 states: “[T]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.” *See also* S. REP. NO. 93-1277, at 11 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7051, 7058 (reflecting congressional intent that questions of privilege, including attorney-client privilege, in federal proceedings be decided under “federally developed common law based on modern reason and experience”). This Court has considered federal and state case law, *see, e.g., Upjohn*, 449 U.S. at 389–93; scholarly commentary, *see, e.g., Trammel*, 445 U.S. at 50 & n.11; and “consensus among the States,” *Jaffee*, 518 U.S. at 13 (States’ policy decisions, as reflected in court decisions and legislation, bear on questions of federal courts’ recognition of new privileges or amendment to existing ones).

This Court has also considered accepted norms of professional conduct, including ABA standards. *See, e.g., Upjohn*, 449 U.S. at 390–91 (to give sound legal advice, lawyer must ascertain factual background and sift through facts), citing ABA MODEL CODE OF PROF’L RESPONSIBILITY, Ethical Consideration 4-1; *Jaffee*, 518 U.S. at 10 & n.9, 13 n.12 (relying in part on professional organizations’ ethical standards, in recognizing psychotherapist-patient privilege).

always been correct. For example, the lower courts spent at least twenty years addressing the scope of the attorney-client privilege and the work-product doctrine in the corporate context, to determine when an employee was sufficiently identified with the corporation for the privilege to attach. Over this time, two generally competing tests were used. One was the “control group” test.¹¹ The other was the “subject matter” test.¹² Still other courts used various “hybrids.”¹³

¹¹ The “control group” test considered whether an individual was within the group that could take a substantial part in making the decision for which an attorney’s advice was sought. A chronological sampling of cases applying this test includes *United States v. Aluminum Co of America*, 193 F. Supp. 251 (N.D.N.Y. 1960); *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962), *mandamus and prohibition denied sub. nom. General Elec. Co. v. Kirkpatrick*, 312 F.2d 742 (3d Cir. 1962); *Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397 (E.D. Va. 1975); and *SEC v. Canadian Javelin Ltd.*, 451 F. Supp. 594 (D.D.C. 1978).

¹² The “subject matter” test contained several components, including whether the person making the communication was an employee of the corporation, whether the decision was made at the instance of the employee’s superior, and whether its subject matter was within the employee’s duties. A chronological sampling of cases applying this test includes *Leve v. General Motors Corp.*, 43 F.R.D. 508 (S.D.N.Y. 1967); *Hasso v. Retail Credit Co.*, 58 F.R.D. 425 (E.D. Pa. 1973); *Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp.*, 62 F.R.D. 454 (N.D. Ill. 1974); *Hercules Inc. v. Exxon Corp.*, 434 F. Supp. 136 (D. Del. 1977); and *In re Grand Jury Subpoena dated July 13, 1979*, 478 F. Supp. 368 (E.D. Wis. 1979).

¹³ See, e.g., *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (en banc) (five-prong test).

When this Court granted certiorari in *Upjohn*, the lower court had used the “control group” test.¹⁴ This Court concluded:

The narrow scope given the attorney-client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client’s compliance with the law.

Upjohn, 449 U.S. at 392. However, this Court declined to set out the test to be used by the lower courts and, instead, stated: “Any such approach would violate the spirit of Federal Rule of Evidence 501. While such a ‘case-by-case’ basis may to some slight extent undermine desirable certainty in the boundaries of the attorney-client privilege, it obeys the spirit of the Rules.” *Id.* at 396–97 (citations omitted).

The wisdom of this approach has been continually reaffirmed as new issues have developed in the legal landscape. However, the ABA submits that this approach also counsels that, for the “small class” of orders in which a court rules that the attorney-client privilege has been waived and compels production,

¹⁴ The ABA was among the *amici* and urged that the “control group” test “could seriously undermine the vitality of the socially beneficial practice of corporate self-inquiry.” Brief of the American Bar Association as *Amicus Curiae*, *Upjohn* (No. 79-886), 1980 WL 339283, at *15–16. The ABA also urged that the Court’s decision would “significantly affect the ability of lawyers to provide responsible, effective legal representation and to give informed guidance necessary to ensure compliance with the law.” *Id.* at *2. The ABA submits that issues of corporate self-inquiry are similarly important in the present case.

there should be a right to immediate appeal. As this Court stated in *Upjohn, id.* at 393:

[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

B. The Importance of Maintaining Appropriate Balance Between the Public Interests Counsels that the “Small Class” of Orders Appealable Under *Cohen* Should Include Rulings that the Privilege Has Been Waived and Compelling Production.

The importance of maintaining the appropriate balance between the public interests that are served by the attorney-client privilege and by the “right to every man’s evidence” counsels that orders finding waiver of the privilege and compelling production should be included in the “small class” of orders that are immediately appealable under *Cohen*.

These orders, the ABA submits, necessarily satisfy *Cohen*’s three-prong test, in that they will always “conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). *See also United States v. Philip Morris*, 314 F.3d 612, 620 (D.C. Cir. 2003) (order is appealable under *Cohen* “if it meets the three prong test of conclusiveness,

separability and importance, and effective unreviewability”).

As to the first and second *Cohen* prongs, the Eleventh Circuit, in the decision now before this Court, stated that the challenged order left “no room for the district court to further consider whether the information at issue is protected,” and “we agree that the attorney-client privilege is important and that the district court can resolve [whether the communications must be produced] without deciding the merits of the case.” Pet. App. 8a.

Likewise, each of the circuit courts cited by the Eleventh Circuit as having addressed whether such an order was immediately appealable under *Cohen*, see Pet. App. 9a–10a, and regardless of their ultimate rulings about the applicability of *Cohen*, concluded that the first and second prongs were met, or their analyses are otherwise distinguishable.¹⁵

¹⁵ The cases cited by the Eleventh Circuit in which jurisdiction was found, and accordingly, the first and second *Cohen* prongs were deemed met, are *Philip Morris*, 314 F.3d at 617–21; *Kelly v. Ford Motor Co. (In re Ford Motor Co.)*, 110 F.3d 954, 957–64 (3d Cir. 1997); and *In re Napster, Inc. Copyright Litigation*, 479 F.3d 1078, 1087–89 (9th Cir. 2007) (even while noting, for second prong, potential overlap of privilege question and underlying suit). Cf. *F.D.I.C. v. Ogden Corp.*, 202 F.3d 454, 459 (1st Cir. 2000) (permitting client that was a party to take immediate appeal from order directed to nonparty law firm, because compliance would “render[] an end-of-case appeal nugatory” and “immediate appeal offers the only vehicle by which [the client] can gain effective review of the [attorney-client] privilege issue”); *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159 (2d Cir. 1992) (granting writ of mandamus based on consideration of goals of attorney-client privilege and adverse effects of disclosure of privileged documents to opposing counsel, after brief discussion of *Cohen* that relied on

As for the third prong, however, the Eleventh Circuit concluded that such an order was not effec-

Second Circuit decisions deeming “discovery orders” not to be appealable; not analyzing whether the three prongs of the collateral-order doctrine would justify a different treatment of orders involving claims of attorney-client privilege).

While the Tenth Circuit in *Boughton v. Cotter Corp.*, 10 F.3d 746, 749 (10th Cir. 1993), found no jurisdiction, that court nevertheless stated that the order “arguably meets the first and second prongs of the [*Cohen*] test.” In *Reise v. Board of Regents of University of Wisconsin System*, 957 F.2d 293, 295 (7th Cir. 1992), the Seventh Circuit, in considering an order compelling a mental examination, noted that “even orders to produce information over strong objections based on privilege are not appealable.” However, one year after *Reise*, the Seventh Circuit cited *Boughton* with approval in a case involving an informer’s privilege. *Simmons v. City of Racine, PFC*, 37 F.3d 325, 327 (7th Cir. 1994), citing *Boughton*, 10 F.3d at 749–50.

In *Texaco Inc. v. Louisiana Land and Exploration Co.*, 995 F.2d 43, 43–44 (5th Cir. 1993), the Fifth Circuit dismissed an interlocutory appeal from an order rejecting a claim of attorney-client privilege, but did so not based on an assessment of whether such an order satisfies the three prongs of *Cohen*, but based on Fifth Circuit precedent that, except where governmental privilege is involved, discovery orders in general are not appealable under *Cohen*.

Finally, the remaining case cited by the Eleventh Circuit, *Quantum Corp. v. Tandon Corp.*, 940 F.2d 642 (Fed. Cir. 1991), is readily distinguishable, in that it involved the “dilemma” of whether an alleged patent infringer should be “forced to choose between waiving the [attorney-client] privilege in order to protect itself from a willfulness finding . . . and maintaining the privilege.” *Id.* at 643–44. The Federal Circuit later overruled all precedent authorizing an adverse inference of willfulness in *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337 (Fed. Cir. 2004), explaining: “[T]he inference that withheld opinions are adverse to the client’s actions can distort the attorney-client relationship, in derogation of the foundations of that relationship.” *Id.* at 1344.

tively unreviewable, stating that if, on appeal from a final judgment, it was determined that the privileged information had been wrongly turned over, “we could reverse any adverse judgment and require a new trial, forbidding any use of the improperly disclosed information, as well as any documents, witnesses, or other evidence obtained as a consequence of the improperly disclosed information.” Pet. App. 8a–9a.

With respect, the ABA asserts that this reasoning is contrary to “the principles of the common law as . . . interpreted by the courts . . . in the light of reason and experience,” Rule 501, which have consistently protected against disclosure—and not simply use—of privileged communications. As this Court stated in *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888):

The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.

See also Swidler & Berlin, 524 U.S. at 408.

Further, a new trial will not cure the damage caused by an erroneously compelled disclosure. To the contrary, allowing an adversary to see privileged documents that are later held inadmissible at retrial “may alert adversary counsel to evidentiary leads or give insights regarding various claims and defenses. Moreover, attorneys cannot unlearn what has been disclosed to them.” *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 165 (2d Cir. 1992). *See also Philip Morris*, 314 F.3d at 619 (“It

would be impossible for a court to sort out and redress the harm caused by the incorrect disclosure.”); *In re England*, 375 F.3d 1169, 1176 (D.C. Cir. 2004) (“Disclosure followed by appeal after final judgment is obviously not adequate in [privilege] cases—the cat is out of the bag.”) (quoting *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998) (alteration in *England*)).

Finally, an erroneous privilege ruling may ultimately evade appellate review after judgment. The producing party may prevail in the litigation, or the threat of production may induce settlement. Even if not disclosed in the original action, nonparties could demand production of the privileged communications based on rulings for which an appeal was never available.

The Eleventh Circuit’s reasoning is not consistent with this Court’s determination that an order is effectively unreviewable if it “involves an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.” *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 499 (1989) (internal quotation marks omitted).

In *Lauro Lines*, this Court concluded that an order concerning a forum selection clause did not involve such a right. *Id.* at 501. *See also id.* at 502–03 (Scalia, J., concurring) (although “the ‘right not to be sued elsewhere than in Naples’” is “positively destroyed” if trial occurs in the United States, the right not to be tried in a particular court—even when established by Congress or international treaty—is not sufficiently important to overcome the policies militating against interlocutory appeals”).

Unlike review of a ruling concerning a forum selection clause, when review of an erroneous ruling compelling production of attorney-client communications must occur if at all only after a final judgment, the privilege as to the communications is destroyed. More important, the ABA submits, is the harm to the privilege itself:

As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer

Fisher v. United States, 425 U.S. 391, 403 (1976). See also *In re England*, 375 F.3d at 1175–76 (“‘important institutional interests’ [of encouraging full and frank communication between attorneys and their clients and promoting the broader public interests in the administration of justice embodied in the attorney-client privilege] would be ‘eviscerate[d] by an erroneous privilege ruling, underscoring the importance of interlocutory review’”) (quoting *Philip Morris*, 314 F.3d at 618) (first alteration added). Compare *Chase Manhattan Bank*, 964 F.2d at 165 (granting writ of mandamus with respect to attorney-client privilege issue because assurance that communications “will not be admissible as evidence at trial . . . will not suffice to ensure free and full communication by clients who do not rate highly a privilege that is operative only at the time of trial”).

This is also true where the order concerns an issue of waiver.¹⁶ As the District of Columbia Circuit stated in *Philip Morris*, 314 F.3d at 618:

A decision defining the contours of a waiver of privilege is no less “important” for *Cohen* purposes than a ruling on the contours of the privilege itself. An erroneous finding of waiver, like an erroneous ruling denying a claim of privilege, eviscerates the same important institutional interests in preserving information, and derivatively, full and frank communication between client and attorney.

When the efficiency interests that underlie finality, including the costs of piecemeal review, are weighed against the costs that can result when review of an erroneous ruling compelling production of privileged communications must await a final judgment, the attorney-client privilege, the ABA submits, is “sufficiently important to overcome the policies militating against interlocutory appeals.” *Lauro Lines*, 490 U.S. at 503 (Scalia, J., concurring).

¹⁶ For a discussion of the growing importance of the issue of waivers, see, e.g., I EDNA S. EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 392 (ABA Sec. of Litigation 5th ed. 2007) (“The expansion of all types of waivers in the last twenty years or so of privilege jurisprudence is stunning in its extent and scope. On occasion one wonders if the multiple types of possible waivers are not about to swallow the privilege whole.”). See also Fed. R. Evid. 502 (“Attorney-Client Privilege and Work Product; Limitations on Waiver”) (limiting when disclosure in court proceeding or to federal office or agency constitutes waiver of privilege, and when such waiver extends to undisclosed communications or information) (effective Sept. 19, 2008).

C. Orders Ruling that the Privilege Has Been Waived and Compelling Production Should Be Appealable Under *Cohen* Because Questions as to the Appropriate Balance of the Public Interests Must Be Answered Correctly.

District court orders ruling that the attorney-client privilege has been waived and compelling production should be appealable under *Cohen* because questions as to the appropriate balance between the public interests embodied in the attorney-client privilege and the “right to every man’s evidence” will continue to be asked and, the ABA submits, must be answered correctly if the privilege is to retain its vitality.

As shown in the discussion of *Upjohn, supra*, there have been profound differences of opinion in the lower courts as to the scope of the attorney-client privilege. Differences of opinion are also found in this Court’s decisions. For example, in *Swidler & Berlin*, 524 U.S. at 402, this Court considered whether the attorney-client privilege should survive the client’s death when, in connection with a criminal investigation of the client, subpoenas were issued to an attorney and his law firm. The lower court had concluded that a balancing test should be used because a risk of posthumous revelation confined to the criminal context would have little to no chilling effect on client communication, and the costs of protecting communications were high. *Id.*¹⁷

¹⁷ In its *amicus* brief, the ABA urged that the lower court’s decision was a substantial departure from the “principles of common law” as historically interpreted by the courts, citing Rule 501, and would result in conscientious attorneys advising—regardless of whether death were imminent—that clients should assume their communications would not remain con-

In reversing, this Court concluded that “[b]alancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege’s application.” *Id.* at 409, citing *Upjohn*, 449 U.S. at 393, and *Jaffee*, 518 U.S. at 17–18.

Justice O’Connor, joined by Justices Scalia and Thomas, dissented, asserting that “an invocation of the attorney-client privilege should not go unexamined ‘when it is shown that the interests in the administration of justice can only be frustrated by [its] exercise.’” 524 U.S. at 412 (quoting *Cohen v. Jenkintown Cab Co.*, 357 A.2d 689, 693–94 (Pa. Super. 1976) (alteration in *Swidler & Berlin*)).

The ABA submits that *Swidler* illustrates the profound differences of opinion that arise among judges as to the appropriate balance that should be maintained between the attorney-client privilege and the “right to every man’s evidence.” When an alleged waiver is at issue, the differences of opinion are equally profound. Because “[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all,” *Upjohn*, 449 U.S. at 393, questions of waiver must be answered correctly if the privilege is to retain its vitality.

Accordingly, the ABA submits that when production of privileged communications is compelled based on a court’s order that the privilege has been waived, such orders should fall within that “small class” of

fidential after death. Brief of the American Bar Association as Amicus Curiae in Support of Petitioners, *Swidler & Berlin* (No. 97-1192), 1998 WL 208818, at *3.

orders for which there is a right to an appeal under *Cohen*.

CONCLUSION

For the foregoing reasons, *amicus curiae* the American Bar Association requests that the judgment of the Eleventh Circuit be reversed.

Respectfully submitted,

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