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 OF DRI— THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI—the Voice of the Defense Bar is an international organization that includes more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the availability, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys and the civil justice system, and to promote the role of the defense attorney in that system. DRI has long been a voice in the ongoing effort to protect the right to counsel and to make the civil justice system more fair and efficient.

Preservation of the attorney-client privilege is one of DRI's greatest concerns. That privilege is absolutely necessary to facilitate frank and open communications between attorney and client, and to ensure zealous and effective representation. It has become even more important in recent years, as attorneys have assumed greater responsibility for advising on complex legal issues and investigating possible violations. The privilege is essential not only to the adversarial process, but to the judicial and regulatory system as a whole.

That system is threatened by the judgment below. The court of appeals held that a party whose claim of

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* DRI states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have received notice of *amicus curiae*'s intent to file this brief and have consented to the filing of this brief in letters on file with the Clerk's office.

privilege is incorrectly rejected has no immediate recourse, but must—if it wishes to avoid a contempt citation—disclose the information and forever relinquish its confidentiality. Pet. App. 10a-11a, 13a. This rule will undermine confidence in the privilege and cause individuals and corporations to withhold information from their counsel and to refrain from investigating or reporting potential regulatory violations. By denying a right to immediate appeal, the decision below undercuts the interests the privilege is intended to serve.

DRI submits this brief in support of a vigorous attorney-client privilege, consistent with the long tradition of protecting confidential communications from disclosure in all but the most extreme situations. To preserve the privilege, and to support the adversarial process and the administration of justice, this Court should reverse the judgment below and hold that rulings denying a party's privilege claim are subject to immediate appeal.

SUMMARY OF THE ARGUMENT

The collateral order doctrine permits immediate appeal of decisions which, among other things, address issues of importance. *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). The issue here, the scope of the attorney-client privilege, undoubtedly qualifies as "important."

The privilege is critical to the judicial system. Attorneys can represent clients effectively only when they are made aware of *all* relevant information—good and bad—and clients will be willing to share this information only if they are confident that their communications will remain confidential. It is for this reason that the attorney-client privilege for centuries has been treated as sacrosanct and

fundamental to the adversarial process. *E.g.*, *Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888).

The privilege has only gained in importance in recent years, as the regulatory requirements imposed on corporations have expanded. Government officials cannot themselves monitor and report on every corporation (much less every corporate division); rather, they must rely on information provided by corporations themselves, often developed through internal investigations by corporate counsel. A corporation will be willing to authorize these investigations, and disclose the results to a government agency, only if it is assured that the findings and conclusions will be maintained in strict confidence, and will not be subject to disclosure to third parties in the normal litigation process.

This case presents a stark example. Mohawk Industries, Inc., conducted an internal investigation following a report of possible violations of federal immigration law. Pet. App. 5a. That investigation resulted in the termination of an employee who may have facilitated the violations, as well as a denial of employment to an applicant who could not produce proof of citizenship. *Id.* These matters were obviously sensitive—particularly given the pendency of a class action alleging that Mohawk itself conspired to hire illegal aliens—but Mohawk could proceed with the investigation, and take corrective action, with confidence that the findings and results would be protected from disclosure under the attorney-client privilege.

The decision below undermines that confidence. By precluding immediate appeal from adverse privilege rulings, the decision virtually guarantees that the privilege will be improperly denied—and forever lost—in some cases. Unlike rulings on other

discovery or evidentiary issues, which can be corrected after final judgment, an order rejecting a claim of privilege and directing disclosure of confidential materials has immediate and irrevocable consequences. Once confidentiality is lost, it cannot be regained, even if the materials themselves are later returned. And an incorrect privilege holding in *any* case, if it results in disclosure of confidential communications, will necessarily reduce confidence in the privilege generally, inducing other clients and counsel to limit their communications and forgo internal investigations. The result would be a breakdown not only in attorney-client relations, but in the regulatory system that Congress envisioned and the Executive adopted.

Interests in finality do not counsel against immediate appeal. There is no evidence that courts which allow these appeals have been flooded with claims, or that adjudications have been deferred or delayed. There is, in fact, every reason to believe that permitting immediate appeal will conserve resources, by ensuring that the improper disclosure of confidential information does not infect an entire proceeding and prevent (or prolong) trial or re-trial.

The attorney-client privilege is the bulwark of our adversarial system and regulatory structure. *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981) ("[The privilege] promote[s] broader public interests in the observance of law and the administration of justice."). There can thus be no doubt of its "importance," both to the judicial system and to society as a whole. Adverse privilege rulings should, for that reason, be immediately appealable under the collateral order doctrine, before confidentiality is lost and irrevocable damage—both to the client and to the system—is done.

ARGUMENT

Orders of a district court are normally appealable only after final judgment, when all matters can be brought to the attention of the appeals court concurrently. *Sell* v. *United States*, 539 U.S. 166, 176 (2003). An exception exists for a limited class of orders which are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred." *Cohen*, 337 U.S. at 546. These "collateral orders," subject to immediate appeal, are distinguished by three characteristics: (1) they "'conclusively determine[ ] the disputed question,'" (2) they "'resolve[ ] an important issue completely separate from the merits of the action,'" and (3) they are "'effectively unreviewable on appeal from a final judgment.'" *Sell*, 539 U.S. at 176 (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)).

The parties are well-positioned to address the first and third prongs, as well as the "separateness" factor. Pet. Br. 18, 20-27. The "importance" factor, however, transcends this particular case. Whether an issue is "important" for these purposes requires a qualitative evaluation of the issue—here, the scope of the attorney-client privilege—to determine whether the benefits of immediate appeal outweigh the interests served by the final judgment rule. *E.g.*, *Digital Equip. Corp.* v. *Desktop Direct*, *Inc.*, 511 U.S. 863, 879 (1994).

There can be little doubt as to the outcome of this weighing process here. The attorney-client privilege is fundamental both to the adversarial system and to the administration of justice. *Upjohn*, 449 U.S. at 389. It is the *sine qua non* of the attorney-client relationship and effective representation, and promotes corporate self-governance and regulatory

goals by ensuring that corporations have the incentive and ability to conduct internal investigations and report potential issues to the government. *Id*. at 392. To preserve these benefits, questions concerning the scope of the privilege must be deemed "important," and decisions rejecting the privilege should be subject to immediate appeal as collateral orders.

I. THE ATTORNEY-CLIENT PRIVILEGE IS FUNDAMENTAL TO THE ADVERSARIAL PROCESS.

The attorney-client privilege lies at the "heart of the adversary system." *Kelly* v. *Ford Motor Co. (In re Ford Motor Co.)*, 110 F.3d 954, 961 (3d Cir. 1997). That system depends upon effective legal advocacy, and effective legal advocacy in turn depends upon open and confidential communications between client and counsel. *Upjohn*, 449 U.S. at 389. For this reason, the privilege has for centuries been recognized as integral to the adversarial process. See, *e.g.*, *Hunt*, 128 U.S. at 470.

1. The adversarial system is built upon the attorney-client relationship. See, *e.g.*, Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 Cal. L. Rev. 1061, 1061-62 (1978). Representation by an attorney, well-versed in the law and knowledgeable of the facts, has long been deemed essential for enabling a client to plead and prove, or oppose and defend, claims before a court. *E.g.*, *Hunt*, 128 U.S. at 470 (noting "the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice"). Only when each side is represented by a capable attorney does the adversarial system function as intended, distilling the relevant facts and producing the proper result. *Ford*, 110 F.3d at 961-62 ("[C]ompetition between

vigorous and effective advocates . . . will help produce the best legal result in any given litigation."). When the right to an attorney is denied, or the relationship between client and counsel is impeded, presentation of the case suffers, and the adversarial process breaks down. See *id.*

Confidentiality of attorney-client communications sustains this process. *Upjohn*, 449 U.S. at 389. For an advocate to understand and prepare the client's case, the client "must be free to disclose everything, bad as well as good." Hazard, *supra*, at 1061; see also *Chase Manhattan Bank* v. *Turner & Newall, PLC*, 964 F.2d 159, 165 (2d Cir. 1992) ("[A] client's full disclosure to an attorney is a necessary predicate to skillful advocacy and informed legal advice."). The client must be assured that the attorney will not disclose the information voluntarily (something usually precluded by rules of professional responsibility), and also will not be obliged to do so by subpoena or court order. See *Restatement (Third) of the Law Governing Lawyers* § 68, cmt. c (2002) ("[C]onfidentiality enhances the value of client-lawyer communications and hence the efficacy of legal services."). Likewise, to represent a client's interests effectively, an attorney must be able to manage when (and what) information is withheld, and when (and how) it is disclosed. See *id.* The attorney-client privilege makes all of this possible, drawing a veil over attorney-client communications, removing the "apprehension of compelled disclosure," and granting client and attorney the ability to decide upon the timing and extent of any disclosure. 8 John Henry Wigmore, *Evidence* § 2291 (McNaughton rev. 1961). The privilege also fosters an important sense of loyalty between attorney and client, by assuring the client that the attorney will not—even under

subpoena—be required to disclose any confidences. John W. Strong, *McCormick on Evidence* § 87 (5th ed. 1999); see also *Ford*, 110 F.3d at 961.

Beyond advancing the attorney-client relationship, the privilege affirmatively "promotes . . . compliance with the law." *United States* v. *Doe (In re Grand Jury Investigation)*, 399 F.3d 527, 531 (2d Cir. 2005). By protecting attorney-client communications from disclosure, the privilege encourages parties to step forward and seek legal advice before engaging in a particular course of conduct. See *Upjohn*, 449 U.S. at 392. This allows them to avoid potential legal violations, or at least to correct violations quickly. See *id.* Denial of the privilege has the opposite effect, discouraging parties from seeking legal counsel and thereby increasing the risk that a violation will occur and go unremedied, particularly as the complexity of the regulatory system grows. See, *e.g.*, Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (and Why It Is Misguided)*, 48 Vill. L. Rev. 469, 479-80, 486 (2003). A robust privilege protects the adversarial process, and also enables clients to avoid becoming embroiled in that process in the first place.

These considerations are equally true when the client is a corporation, rather than an individual. Paul R. Rice, *Attorney-Client Privilege in the United States* § 2.3 (2d ed. 1999). Corporations have long been considered "persons" in the eyes of the law, and they are entitled to the assistance of counsel to advise them on their legal rights and obligations. *Upjohn*, 449 U.S. at 390 (citing *United States* v. *Louisville & Nashville R.R.*, 236 U.S. 318, 336 (1915)); see also *Restatement (Third) of the Law Governing Lawyers* § 73. No less than a natural person, a corporate client requires the protection of the attorney-client

privilege to ensure effective and zealous representation within the adversarial system. *E.g.*, *Upjohn*, 449 U.S. at 390.

2. These benefits explain why the attorney-client privilege has been recognized, in some form, for nearly as long as there has been litigation. *Swidler & Berlin* v. *United States*, 524 U.S. 399, 403 (1998) ("The attorney-client privilege is one of the oldest recognized privileges for confidential communications."); see also Rice, *supra*, §§ 1.1-1.13. Many sources date the privilege to Roman law, which barred advocates from testifying against their clients on the ground that such testimony constituted an immoral breach of duty and was therefore "unworthy of belief." Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 Notre Dame L. Rev. 157, 160 (1993). The privilege appeared in English courts at least as early as the Elizabethan Era. 8 Wigmore, *supra*, § 2290. Similar to its Roman forebear, this conception of the privilege was tied to a code of honor, under which a barrister could not be required to reveal a client's secrets, so as to protect the barrister's reputation. Strong, *supra*, § 87.

The privilege was adopted early in American jurisprudence, and was soon acknowledged as fundamental to the attorney-client relationship. 8 Wigmore, *supra*, § 2290; see also Rice, *supra*, §§ 1.1-1.13; Hazard, *supra*, at 1087-91. It was explicitly recognized by this Court in the nineteenth century, see *Hunt*, 128 U.S. at 470, and has since been adopted by all jurisdictions in the United States. *Ford*, 110 F.3d at 962. Indeed, the attorney-client privilege is the *only* communications privilege that is uniformly recognized across the country. See Stewart E. Sterk, *Testimonial Privileges: An Analysis of*

Horizontal Choice of Law Problems, 61 Minn. L. Rev. 461, 463 n.8 (1977).[2]

* * * *

Only when communications between counsel and client are privileged from disclosure can the attorney-client relationship flourish and the adversarial process function. *Restatement (Third) of the Law Governing Lawyers* § 68, cmt. c; see also Cole, *supra*, at 479-80. That privilege is not simply "important" to our system—it is absolutely fundamental.

II. THE ATTORNEY-CLIENT PRIVILEGE IS FUNDAMENTAL TO THE ADMINISTRATION OF JUSTICE.

The attorney-client privilege is also critically important to the administration of justice, particularly our corporate regulatory structure. That structure has grown increasingly reliant on reports from corporate counsel resulting from internal investigations. These investigations can occur only because of the protections offered by the attorney-client privilege.

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[2] *See also, e.g.*, *Wesp* v. *Everson*, 33 P.3d 191, 201 (Colo. 1991) ("The goal of the [attorney-client] privilege is to encourage clients to confide all pertinent information in their attorneys to ensure the orderly administration of justice."); *People* v. *Knuckles*, 650 N.E.2d 974, 983 (Ill. 1995) ("The 'centrality of open client and attorney communication to the proper functioning of our adversary system of justice' requires the recognition that the attorney-client privilege must prevail despite its effect of withholding relevant information from the fact finder.") (quoting *United States* v. *Zolin*, 491 U.S. 554, 562 (1989)); *Suffolk Constr. Co.* v. *Div. of Capital Asset Mgmt.*, 870 N.E.2d 33, 36 (Mass. 2007) ("[T]he attorney-client privilege is a fundamental component of the administration of justice.").

1. Corporations across this country conduct thousands of internal investigations each year. See Louis M. Brown et al., *The Legal Audit: Corporate Internal Investigation* §§ 1.1-1.10, 2.1-2.25 (2006). These may be small inquiries, following up on a discrete complaint, or massive undertakings, assessing systemic breakdowns in policy or violations of law. *Id.*; see also Dan K. Webb et al., *Corporate Internal Investigations* (1993). But they almost all share a common denominator: involvement of an attorney. See Brown et al., *supra*, §§ 4.1-4.34. Consultation with an attorney is the first, and often the last, step in any internal investigation. *Id.*; see also Webb, *supra*, § 4.03.

The early and continuing involvement of counsel is critical precisely because of the attorney-client privilege. Internal investigations are, by their nature, sensitive affairs that carry risks of embarrassment or civil or criminal liability. Brown et al., *supra*, §§ 2.1-2.25; Webb, *supra*, at v. It is for that reason essential, from the corporation's point of view, that they be conducted in the utmost secrecy. A corporation would have no incentive to conduct an investigation into its own affairs—and in fact would be positively disinclined to do so—if the process and results would be made public. See Cole, *supra*, at 486 ("Failing to afford the protection of the attorney-client privilege to communications between business entities and their legal counsel would have a chilling effect on internal investigations of corporate activities.").

These considerations supported this Court's decision in *Upjohn* to uphold the privilege as applied to communications between corporate employees and counsel during an internal investigation:

> In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, "constantly go to lawyers to find out how to obey the law," particularly since compliance with the law in this area is hardly an instinctive matter. . . . [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.

449 U.S. at 392-93 (citations omitted). Corporations *must* conduct investigations if they are to monitor their own conduct, and they will do so only if communications and results from the investigations may be held in confidence. *Upjohn* recognized this fact, and largely for that reason upheld the corporation's privilege claims. *Id.* at 391-92.

2. Internal investigations are important for the corporation itself, as *Upjohn* acknowledged. *Id.* at 391. But they are now increasingly important to our entire regulatory structure. This is demonstrated most clearly by two recent measures: the Sarbanes-Oxley Act of 2002 (and implementing regulations), and corporate prosecutorial directives issued by the Department of Justice.

a. Sarbanes-Oxley represented a significant shift in corporate regulation and, particularly, the relationship of corporate counsel to government. The Act directed the Securities and Exchange Commission to impose a duty on corporate counsel "to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof" to the company's chief legal or executive officer and, if an "appropriate[ ] respon[se]" is not forthcoming, to report the violation

to the audit committee of the company's board of directors or the board itself. 15 U.S.C. § 7245. The SEC responded by promulgating rules requiring corporate attorneys (whether in-house or outside) to report "material violation[s]"—defined as violations that an objective, prudent attorney would view as a material violation of federal or state law—"up the ladder" to the chief legal counsel, the chief executive officer, and finally the board of directors. 17 C.F.R. § 205.3(b)(1). Those rules also allow (but do not mandate) an attorney who does not receive an "appropriate respon[se]" to withdraw from representing the corporation and to "reveal to the Commission, *without the issuer's consent*, confidential information related to the representation" in order to prevent or rectify a violation. *Id.* § 205.3(d)(2) (emphasis added).

These rules arguably place corporate attorneys in a new role: investigator for the United States. See, *e.g.*, Robert A. Del Giorno, *Corporate Counsel as Government's Agent: The Holder Memorandum and Sarbanes-Oxley Section 307*, Champion, Aug. 2003, at 22-26. Counsel may now have responsibility not only to the corporation, but to the public. *Id.*

The rules also increase the importance of internal investigations. They assume that corporations will continue to conduct them and that counsel will thereby be able to learn of (and report) violations. William R. McLucas et al., *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 J. Crim. L. & Criminology 621, 635 n.58 (2006). But, of course, corporations will be willing to continue this practice only if they are assured of some control over the results. See Cole, *supra*, at 486. That control must be found in the attorney-client privilege.

b. The importance of internal investigations, and of the privilege, was further highlighted by a series of

prosecutorial directives issued by the Department of Justice in 1999, 2003, and 2006. Those directives allowed federal prosecutors investigating a "corporate target" to consider, in assessing the target's "cooperation" for purposes of deciding whether to prosecute and what charges to bring, whether the corporation had waived its attorney-client privilege and agreed to disclose confidential materials.[3]

Those directives, much like the Sarbanes-Oxley regulations, seemingly "deputized" corporate counsel as investigators for the government. Colin P. Marks, *Thompson/McNulty Memo Internal Investigations: Ethical Concerns of the "Deputized" Counsel*, 38 St. Mary's L.J. 1065, 1066 (2007). Corporate attorneys may be well aware when conducting internal investigations that their findings and conclusions could later be disclosed to federal officials in order to demonstrate "cooperation" and avoid prosecution—particularly since indictment is often the death knell for a corporation. Webb, *supra*, §§ 16.01-16.15; see also Michael L. Seigel, *Corporate America Fights Back: The Battle Over Waiver of the Attorney-Client Privilege*, 49 B.C. L. Rev. 1, 26 (2008); cf. Timothy P. Harkness & Darren LaVerne, *Lying to In-House Counsel May Lead to Prosecution*, Nat'l L.J., July 27, 2006 (noting cases in which corporate employees were

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[3] Memorandum from Eric H. Holder, Jr., Deputy Attorney General, to Heads of Department Components and United States Attorneys, Bringing Criminal Charges Against Corporations (June 16, 1999); Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003); Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006); *see also infra* note 5 (describing fourth DOJ memorandum).

successfully prosecuted for obstruction of justice based on misstatements to *corporate counsel* during internal investigations). Corporate counsel in this situation are thus arguably serving the interests of both the client and the government.[4]

These developments render the attorney-client privilege all the more important. Assertion of the privilege serves as the corporation's most significant—if not its only—protection in dealing with prosecutors.[5] See, *e.g.*, Webb, *supra*, §§ 16.01-16.15. And the availability of the privilege is the only reason, in this environment, that a corporation would conduct an internal investigation. Without the privilege, a corporation's findings would be open to prosecutors upon a simple subpoena, leaving no incentive for prosecutors to seek corporate cooperation or for corporations to conduct internal investigations in the first place.

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Preservation of the attorney-client privilege is necessary to advance not only the corporation's

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[4] Numerous authorities have commented on the conflicts of interest and other problems these directives create. *See generally* Marks, *supra*.

[5] It is unclear whether federal prosecutors are still permitted to request waivers of the attorney-client privilege, in light of a DOJ memorandum issued on August 28, 2008. *See* Memorandum from Mark Filip, Deputy Attorney General, to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008). That memorandum prohibits prosecutors from asking for waivers of the privilege as applied to "core" attorney-client communications. *Id.* at 9. However, it does not define "core" and may be read to allow prosecutors to seek waivers of privilege for "non-core" attorney-client communications (whatever those may be). *Id.* at 8-9.

interests, but also the overall administration of justice. Corporations can hardly be expected to investigate internal wrongdoing if their findings will be subject to immediate disclosure, and they can hardly be expected to share those findings with enforcement authorities unless they have some incentive to do so. Maintenance of a full and robust privilege ensures that corporations will have the protection and the motivation to investigate possible wrongdoing and to report potential violations to the government.

III. THE BENEFITS OF PROTECTING THESE IMPORTANT INTERESTS BY ALLOWING IMMEDIATE APPEAL OF ADVERSE PRIVILEGE DECISIONS OUTWEIGH THE INTEREST IN FINALITY.

There can be little question, in light of the foregoing, that preservation of the attorney-client privilege is "important." No federal court has held otherwise—even those that have refused to permit immediate appeal, see, *e.g.*, Pet. App. 11a-12a—and this Court itself has characterized the privilege as "important" and necessary to the "'administration of justice.'" *Upjohn*, 449 U.S. at 386, 389 (quoting *Hunt*, 128 U.S. at 470). The same reasoning supports a right to immediate appeal from adverse privilege rulings.

1. This Court said in *Upjohn* that "[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." *Id.* at 393. Refusing to allow immediate appeal from adverse privilege rulings results in precisely this uncertainty. Only if review is immediately available can a consistent and effective privilege be ensured.

The most obvious reason for immediate appeal is that, once rendered and enforced, an adverse privilege ruling cannot be rectified. These orders typically arise during discovery, and a district court that finds the privilege inapplicable will often direct that the requested information be disclosed forthwith or by a date certain. See, *e.g.*, *Ford*, 110 F.3d at 957. Without a right to immediate review, a party subject to such an order (and that wishes to avoid contempt) has no choice but to comply and produce the information. Pet. App. 11a-12a. And, once produced, confidentiality is forever lost. *Ford*, 110 F.3d at 964. Produced documents can be returned, but the information will never again be private. *Id.*

This illustrates the flaw in the reasoning of the court below. The court of appeals found that post-judgment appeal of adverse privilege rulings was adequate to protect the privilege because an appellate court could order the return of documents and, if necessary, a new trial at which those documents could not be introduced. Pet. App. 13a-14a. But the privilege does not merely shield documents from introduction at trial; it ensures that the confidences reflected in them will not be exposed to the opposing party, much less to the public at large. See Brown et al., *supra*, §§ 4.1-4.34; see also *Upjohn*, 449 U.S. at 386-89; 8 Wigmore, *supra*, § 2291. That damage is done once the documents are disclosed, and it cannot be undone by ordering a new trial.

2. The practical consequences of allowing an adverse privilege ruling to stand, without immediate appeal, can be severe for clients. Many clients may prefer—or be forced—to settle a case rather than comply with a disclosure order. Cf. *Tenet* v. *Doe*, 544 U.S. 1, 11 (2005) ("Forcing the Government to litigate these claims [by former covert agents] would also

make it vulnerable to 'graymail,' *i.e.*, individual lawsuits brought to induce the CIA to settle a case (or prevent its filing) out of fear that any effort to litigate the action would reveal classified information that may undermine ongoing covert operations."). Privileged materials are by their nature sensitive and confidential, and their disclosure—even under a protective order—may risk a company's profitability, or in some circumstances even its viability. The only choice that a company may have, when presented with an order compelling disclosure of sensitive information, is simply to give up its defense and settle the claims, even if those claims are baseless and stand little or no chance of success. These compelled settlements already occur with some regularity, as DRI's members well know, and they will only increase if an opportunity for immediate appeal is wholly foreclosed.

It is no answer to point, as some have, to a contempt citation as an avenue for appellate review. For one thing, a civil contempt citation is not subject to interlocutory appeal. *E.g.*, *Powers v. Chi. Transit Auth.*, 846 F.2d 1139, 1141-42 (7th Cir. 1988) (citing *Fox* v. *Capital Co.*, 299 U.S. 105 (1936), and *Doyle* v. *London Guar. & Accident Co.*, 204 U.S. 599 (1907)). This means that the cited party must endure the sanctions imposed by the court throughout the course of litigation, a burden which may be impossible for individuals and companies to bear—particularly when the sanction includes (as it often will) a fine that accrues on a daily basis. *E.g.*, 15B Charles Alan Wright et al., *Federal Practice & Procedure* § 3917 (2d ed. 1992). Moreover, a party that willfully disobeys a disclosure order runs the risk of being found in *criminal* contempt, and potentially subject to even harsher sanctions. See *In re Sealed Case*

No. 93-3077, 151 F.3d 1059, 1065 (D.C. Cir. 1998) (per curiam); see also 15B Wright, *supra*, § 3914.23. Those sanctions will stand even if the disclosure order is later found—on appeal from the final judgment—to be invalid. See *Sealed Case*, 151 F.3d at 1065; see also 15B Wright, *supra*, § 3914.23.

Many companies will be unable or unwilling to bear these sanctions, or the stigma attached to a finding of contempt. Again, they will instead choose simply to settle the claims, because the dangers posed by disclosure outweigh the company's interest in the litigation.

It cannot be that a party must accept sanctions and a contempt citation, or abandon a meritorious defense, as the inherent cost of preserving the confidentiality of attorney-client communications. See *United States* v. *Philip Morris Inc.*, 314 F.3d 612, 620 (D.C. Cir. 2003). A rule conditioning appellate rights on willful disobedience of a court order, beyond its inherent unseemliness, carries the same risk to the privilege as a wholesale prohibition on appeal and cannot serve as a substitute for a right to immediate appellate review.

3. The ramifications of an incorrect privilege ruling, if not corrected, extend well beyond the parties and proceedings in a particular case. The corporation subject to the ruling, which had taken all appropriate steps to maintain the confidentiality of its investigation, will limit future investigations to avoid documenting or discussing confidential information, or may dispense with investigations altogether. Other corporations will be on notice that the federal courts cannot be relied upon to enforce the privilege consistently, and those corporations will therefore also be less willing to engage in

investigations, of any type. The result will be a wide-scale decrease in internal investigations.

The risk of incorrect decisions is significant. District courts often must address hundreds of issues in a single case, preventing them from devoting substantial time to any individual question. The sheer volume of litigation at the trial level, with the variety and number of issues presented in each case, virtually ensures that mistakes will be made in privilege determinations.

These risks are not nearly so prevalent at the appellate level. Caseloads at the courts of appeals are smaller than at the district courts, and appellate courts are able to give questions of privilege the consideration they deserve—particularly when those questions are presented alone in the context of a collateral order appeal. This increased focus ensures greater consistency and certainty in privilege rulings. And, as this Court has noted, consistency and certainty are vital to a viable privilege. See *Upjohn*, 449 U.S. at 393.

The availability of immediate appeal reduces the possibility that an incorrect ruling will go uncorrected, and reduces the risks to corporations from conducting internal investigations. Indeed, only with this assurance will corporations be sufficiently protected and induced to continue the corporate investigations that have become an integral part of the regulatory structure.

4. No other interests outweigh these concerns. Indeed, the interest in finality—the most relevant countervailing consideration in assessing "importance" under the collateral order doctrine, see *Digital Equip.*, 511 U.S. at 879—supports immediate appeal.

One of the primary arguments against recognizing a right to immediate appeal is that it will result in a flood of new appeals, inundating appellate courts with discovery issues. *E.g.*, Pet. Resp. 23. There is, however, no evidence to support this fear. Circuits that allow such appeals have not reported a flood of filings, and a review of reported decisions suggests that privilege issues constituted a roughly equivalent share of these circuits' dockets both before and after those appeals were first allowed. In fact, the three circuits that permit immediate appeal of adverse privilege rulings actually experienced a net *decrease* in the number of reported cases raising privilege issues in the two years after those appeals were first allowed, as compared to the preceding two-year period.[6] Moreover, the number of reported privilege cases in any one of these years, which never exceeded ten, represented an extraordinarily small percentage of the more than 1,000 total filings in each of the circuits (with more than 10,000 in the Ninth Circuit).[7]

Nor is there any reason to believe that the interest in finality, concerned principally with the avoidance

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[6] A total of 24 appeals raising privilege issues were reported in these circuits in the two-year period before immediate appeals were first allowed, while only 22 such appeals were reported in the two-year period thereafter. These appeals were identified through a search of Westlaw for decisions using the phrase "attorney-client privilege" more than once.

[7] Statistics compiled by the Administrative Office of the U.S. Courts indicate that, for the year in which each circuit issued its decision permitting immediate appeals, there were 3,458 total filings in the Third Circuit (in 1997), 1,121 filing in the D.C. Circuit (in 2003), and 12,549 filings in the Ninth Circuit (in 2007). *See* Admin. Office of U.S. Cts., *Federal Court Management Statistics* (last visited Apr. 29, 2009), *at* http://www.uscourts.gov/fcmstat/index.html.

of "piecemeal" litigation, would be undercut by permitting immediate appeal. Disputed privilege issues do not arise in every case, or apparently with substantial frequency, and in any event appeals would be allowed only in cases in which the district court ruled *against* recognition of the privilege (since a decision upholding the privilege would pose none of the risks justifying immediate appeal of an adverse ruling). And, even in those cases, district court proceedings could continue while these issues are addressed at the appellate level, meaning that there would be little—if any—diminution of trial court efficiency.

5. Judicial administration and efficiency may in fact be advanced by permitting immediate appeals. The impact of an incorrect privilege ruling is not limited to introduction of a particular document at trial. The information obtained by opposing counsel may lead to the discovery of other information, and perhaps to a whole new theory of liability. See *Chase*, 964 F.2d at 165 ("[Disclosure of privileged] documents may alert adversary counsel to evidentiary leads or give insights regarding various claims and defenses."). That information can also be used by other parties, and may be publicly disclosed if the matter goes to trial. The effects of disclosure may extend far beyond the particular case, affecting future proceedings and even a client's ability to compete in the marketplace.

These effects may be impossible to remedy after final judgment. There is no way that an appellate court can restore the confidentiality of information once disclosed, see *id.* ("[A]ttorneys cannot unlearn what has been disclosed to them in discovery."), and the impact of disclosure on trial will often be unclear, see *id.* ("Some of the economies gained by the practice

of pre-adjudication disclosure may thus be offset by later proceedings seeking to unscramble the effects of the disclosure of materials subsequently held to be privileged."). This means that traditional doctrines such as harmless error, used to avoid addressing issues whose resolution played no substantive role in the judgment, are largely useless: if a court cannot identify the precise impact of an incorrect ruling, it cannot decide whether that ruling was or was not material to the ultimate decision. See *id.* The only option in this circumstance is to remand the case for a new trial. But, on remand, the trial court will have to try to identify and exclude any evidence or information discovered as a result of the mistaken ruling, which—as discussed—may be impossible. *Id.*

Far from serving the interest in finality, the lack of a right to immediate appeal from an adverse privilege ruling may actually prolong litigation or even preclude its resolution. In any event, any possible benefits from prohibiting immediate appeal are plainly outweighed by the importance of the privilege issue.

* * * *

The attorney-client privilege is critical both to the adversarial system and to the administration of justice. An incorrect ruling concerning privilege has substantial adverse ramifications not only for the parties to the case—forced to disclose confidential information—but also for others who rely on the inviolability of the privilege in conducting their affairs. Whatever limited burdens may arise from immediate appeals in this situation are plainly outweighed by the dangers of allowing incorrect decisions at the trial level to stand. Only the option of immediate appeal can provide the consistency and certainty necessary to preserve and protect the

privilege, and ensure that its benefits to clients and society are retained.

CONCLUSION

For these reasons, and those stated in petitioner's brief, the judgment of the Eleventh Circuit should be reversed and this case should be remanded for further proceedings.

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