Parties May Appeal Discovery Orders Immediately in Some Situations

Focus Column

By Robert Holland and Michelle Fowler

Discovery rulings are not "final" judgments or orders and, therefore, generally are not immediately appealable. Nevertheless, there are at least four ways that aggrieved parties effectively may obtain immediate appellate review of discovery orders under limited circumstances: an appeal under the collateral-order doctrine, discretionary certification of an interlocutory appeal, a petition for writ of mandamus, or a refusal to comply with a discovery order and the appeal of any resulting contempt order.

First, the collateral-order doctrine, recognized in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), permits federal court appeals from a "small class" of orders that "finally determine claims of right separable from, and collateral to, rights asserted in the action."

In the recent case of Osband v. Woodford, 290 F.3d 1036 (9th Cir. 2002), the 9th U.S. Circuit Court of Appeals relied on the collateral-order doctrine to permit an immediate appeal of a discovery order. A magistrate judge in a habeas corpus proceeding allowed the state of California to discover materials that otherwise would have been protected by the attorney-client privilege, ruling that the petitioner had waived the privilege by asserting an ineffective assistance of counsel claim.

However, the magistrate entered a protective order allowing use of the materials only in the habeas proceeding and prohibiting the use of the documents on retrial in state court and the disclosure of the documents to third parties. The District Court denied the state's motion to reconsider the order.

The 9th Circuit concluded that the denial of the motion to reconsider satisfied the three requirements of the collateral-order doctrine. First, although the magistrate could modify the protective order on a subsequent motion by a party, the denial of the motion to reconsider conclusively determined important legal issues separate from the merits, including that the magistrate had the power to issue the order and that the petitioner's ineffective assistance claim was not an unqualified waiver of the attorney-client privilege.

The District Court's ruling also was effectively unreviewable on appeal from the final judgment because, if the petitioner won habeas relief, the protective order's prohibition against sharing the documents with third parties

effectively would prevent the state from offering critical testimony from the underlying criminal prosecution regarding how the documents would have altered the outcome of the habeas proceeding in the state's favor. Thus, the state would be unable to show the prejudice that would be necessary to obtain relief on appeal from the final judgment.

Collateral-order review is not available for discovery orders in California state court. Although the collateral-order doctrine was recognized in Sharon v. Sharon, 67 Cal. 185 (1885), the California Supreme Court held in Southern Pacific Co. v. Oppenheimer, 54 Cal.2d 784 (1960), that discovery is not "collateral" to the main action and that discovery orders are not immediately appealable under this doctrine.

Second, a party may seek certification of a discovery order for interlocutory appeal under 28 U.S.C. Section 1292(b). The aggrieved party first must request the trial court to certify in writing that the order involves a controlling question of law, that there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation.

The trial court has discretion in whether to grant the request. If the trial court certifies the order, the petitioner must file in the Court of Appeals a similar request, which is within the appellate court's discretion to grant or deny.

In Tennenbaum v. Deloitte & Touche, 77 F.3d 337 (9th Cir. 1996), the 9th Circuit reviewed a District Court's order requiring the plaintiff to answer deposition questions that asked him to reveal privileged communications. The District Court had concluded that the plaintiff waived his right to claim the privilege as to the questions by agreeing in a settlement of a related state court action that he would waive the attorney-client privilege as to certain communications.

The 9th Circuit found jurisdiction based on Section 1292(b). There is no counterpart to Section 1292(b) in California state court.

Third, writ review may be available for a discovery order. A writ is an order issued by an appellate court directing (mandamus) or prohibiting (prohibition) a lower court to act in a particular manner. A writ is an extraordinary exercise of jurisdiction. Writ review is wholly discretionary, and most petitions for writs of mandamus to review discovery orders are denied.

According to the 9th Circuit in Bauman v. United States District Court, 557 F.2d 650 (9th Cir. 1977), the factors that determine whether a writ of mandamus should issue are the following: The party seeking the writ has no other adequate means to obtain direct relief; the petitioner will be damaged or prejudiced in a way not correctable on appeal; the District Court's order is clearly erroneous as a matter of law; the District Court's order is a repeated error or manifests a disregard for the federal rules; and the District Court's order raises new and important questions or issues of law.

Applying these factors, the 9th Circuit occasionally has granted writ review of discovery orders, particularly when they involve claims of privilege. For example, in Admiral Insurance Co. v. United States District Court, 881 F.2d 1486 (9th Cir. 1988), and United States v. Amlani, 169 F.3d 1189 (9th Cir. 1999), the 9th Circuit granted writ review of orders compelling production of evidence assertedly protected by the attorney-client privilege.

Similarly, in SG Cowen Securities Corp. v. U.S. District Court, 189 F.3d 909 (9th Cir. 1999), the 9th Circuit granted writ review of a discovery stay regarding claims under the Private Securities Litigation Reform Act of 1995.

However, the grant of writ review does not necessarily mean that the order will be overturned. In Amlani, for example, the 9th Circuit affirmed the discovery order on the merits.

In California state court, a writ petition must demonstrate that the petitioner has no other adequate remedy at law. Additionally, the complaining party must demonstrate how and why the court abused its discretion. The writ petition is unlikely to be granted unless the petitioner demonstrates immediate and irreparable injury resulting from the order below.

Courts have recognized that an order to produce assertedly privileged documents may satisfy the immediate, irreparable injury requirement because, although discovery orders may be reviewed on appeal from a final judgment, there may be no way to undo the harm caused by the disclosure itself.

Indeed, Roberts v. Superior Court of Butte County, 9 Cal.3d 330 (1973), established and Titmas v. Superior Court, 87 Cal.App.4th 738 (2001), reaffirmed that, although a general rule disfavors writ review of routine discovery matters, such review is appropriate when a petitioner seeks relief from an order that may undermine a privilege.

Finally, counsel may refuse to comply with a court's discovery order and invite a contempt order. As explained in United States v. Ryan, 402 U.S. 530 (1971), and In re Grand Jury Subpoenas Dated Dec. 10, 1987, 926 F.2d 847 (9th Cir. 1991), counsel may challenge the validity of the discovery order by seeking appellate review of the resulting contempt order.

However, counsel should keep in mind that only "criminal" contempt orders are immediately appealable. As explained in UMW v. Bagwell, 512 U.S. 821 (1994), and Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468 (9th Cir. 1992), a contempt order is "criminal" if it punishes past defiance of the court's authority or is imposed for a definite amount or definite period without regard to the party's future conduct.

A contempt order that coerces the party to comply with the court's order or compensates the complainant for losses sustained is "civil" and, therefore, generally not immediately appealable.

Nevertheless, the 9th Circuit has reviewed civil

contempt orders as part of appeals from other interlocutory orders that are otherwise appealable. Thus, in Diamontiney v. Borg, 918 F.2d 793 (9th Cir. 1990), the 9th Circuit reviewed a civil contempt order as part of an appeal from a preliminary injunction.

California Code of Civil Procedure Section 904.1 allows immediate appeal of orders imposing sanctions exceeding $5,000 to a party or an attorney. The California Court of Appeal held in Rail Transport Employees Ass'n v. Union Pacific Motor Freight, 46 Cal.App.4th (1996), that this provision applies to discovery sanctions.

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