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March 5, 2010

11-AP-F

10-CV-A

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

Re: Suggestion and Recommendation

Dear Mr. McCabe:

Pursuant to the Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, I am writing to make a suggestion and recommendation with respect to the Federal Rules of Civil Procedure. This suggestion and recommendation would require an amendment to Federal Rule of Civil Procedure 37 to authorize discretionary interlocutory appeals from a district court's order granting or denying a motion to compel discovery of information claimed to be protected by the attorney-client privilege.

On December 8, 2009, the Supreme Court decided *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009). In that case, the Court held that disclosure orders adverse to the attorney-client privilege do not qualify for immediate appeal under the collateral order doctrine because postjudgment appeals, together with other review mechanisms, suffice to protect the rights of litigants and preserve the vitality of the attorney-client privilege. *Id.* at 603. The Court bolstered its conclusion with reference to Congress's amendment in 1990 of the Rules Enabling Act, 28 U.S.C. §§ 2071-2077, to authorize the Court to adopt rules "defin[ing] when a ruling of a district court is final for the purposes of appeal under section 1291," *id.* 2072(c), and its subsequent enactment of 28 U.S.C. § 1292(e), which empowered the Court to prescribe rules in accordance with the Rules Enabling Act to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under Section 1292. Indeed, this is the *only* portion of the opinion in which Justice Thomas joined. *See id.* at 609-10.

In 1998, the Supreme Court employed the rulemaking authority in Section 1292(e) in promulgating Federal Rule of Civil Procedure 23(f). Rule 23(f) permits an interlocutory appeal from an order granting or denying class certification at the sole discretion of the court of appeals. The current version of Rule 23(f), which was amended in December of 2009, provides that a petition for permission to appeal must be filed with the circuit clerk within fourteen days after the order is entered. An appeal does not stay proceedings in the district court absent an order to that effect entered either in the district court or court of appeals.

Note that also in 1998, Federal Rule of Appellate Procedure 5, which governs appeals by permission, was similarly amended to accommodate new rules such as Rule 23(f) authorizing additional interlocutory appeals. Rather than add a separate rule governing each such appeal, it was believed preferable to amend Rule 5 so that it would govern all such appeals.

Please consider my suggestion and recommendation to promulgate an amendment to Rule 37 to add a new subsection similar to the amendment in Rule 23(f) permitting an interlocutory appeal from a district court's order granting or denying a motion to compel discovery of information claimed to be protected by the attorney-client privilege at the sole discretion of the court of appeals, and providing that a petition for permission to appeal must be filed with the circuit clerk within fourteen days after the order is entered. Similar to the practice under Rule 23(f), an appeal under any amendment to Rule 37 should not stay proceedings in the district court absent an order to that effect entered either in the district court or court of appeals.

Thank you for your attention to this matter.

Very truly yours,

Amy M. Smith

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