

**From:** Tom Cabral  
**Sent:** Wed 12/7/2016 3:17 PM  
**Gallagher Sharp Newsflash: Orders Requiring Disclosure of Documents Protected by the Attorney-Client Privilege are Subject to Immediate Appeal**

On Wednesday, December 7, 2016, in a split decision, the Supreme Court of Ohio held that an order requiring the production of information protected by the attorney-client privilege is subject to immediate review.

In *Burnham v. Cleveland Clinic*, Slip Opinion No. 2016-Ohio-8000, the Supreme Court of Ohio reviewed whether the Eighth Appellate District erred in dismissing an appeal from an order compelling a hospital to produce an incident report generated after a patient's visitor fell in a hospital room. The hospital argued that the incident report was shielded by various discovery protections, including the attorney-client privilege, because the report had been generated as part of its protocol to notify the legal department of events that might be the basis for legal action. The Eighth Appellate District dismissed the appeal for lack of jurisdiction citing to the Supreme Court of Ohio's prior decision, *Smith v. Chen*, 142 Ohio St.3d 411 (2015).

In reversing the appellate decision, the Court found that the hospital "plausibly alleged that the attorney-client privilege would be breached by the disclosure of the requested materials" and because of that the order compelling disclosure "causes harm and prejudice that inherently cannot be meaningfully or effectively remedied by later appeal." Thus, the Court determined that a discovery order that breaches the attorney-client privilege is a final, appealable order that is subject to immediate review. However, with respect to other discovery protections, such as the attorney work-product doctrine, a showing beyond the mere statement that the matter is privileged may be required to establish a final, appealable order subject to immediate appellate review.

In distinguishing the *Chen* decision, the Court explained that *Chen* involved only the attorney work-product doctrine rather than the attorney-client privilege and therefore did not determine the outcome in *Burnham*. The Court recognized the confusion created by *Chen* and limited it solely to its facts, but did not overrule *Chen* altogether.

The Court emphasized "the attorney-client privilege and the attorney-work-product doctrine provide different levels of protection over distinct interests meaning that orders forcing disclosure in these two types of discovery disputes do not necessarily have the same result that allows an immediate appeal." The Court engaged in a lengthy discussion of the difference between the attorney-client privilege and the work-product doctrine, noting that Civ.R. 26(B)(6) allows the attorney work-product protection to be removed by an opposing party's demonstration of a need for the materials whereas an order compelling production of material covered by the attorney-client privilege is an example of that for which there is no effective remedy other than an immediate appeal as contemplated by R.C. 2505.02(B)(4)(b). "The same guarantee of confidentiality is not at risk with an attorney's work product."

The Court's opinion was written by Justice Lanzinger, with Justices O'Connor and O'Neill joining in the opinion. Justices Kennedy, O'Donnell, and French concurred in judgment only.

The concurring opinion disagreed with the distinctions made regarding attorney-client privilege and attorney work-product and encouraged a holding that an order requiring the release of privileged documents, whether protected by the attorney-client privilege or work-product doctrine, is a final, appealable order because the “proverbial bell cannot be unrung” in either instance. The concurring opinion urged that a reversal of *Smith v. Chen* would restore stability and predictability to Ohio Law.

In the dissenting opinion, Justice Pfeifer argued that this was a “run-of-the-mill, wet-floor, slip-and-fall case” and that the incident report at issue was merely a business record that should not have been found to be privileged. The dissent argued that the trial court’s decision could have been reviewed on appeal after the completion of the case without doing damage to the sanctity of the attorney-client privilege.

In sum, the Court’s decision confirms the importance of asserting the correct privilege and discovery protections applicable to incident reports. When seeking to protect a document from disclosure it is important to assert that the attorney-client privilege will be breached by production of the document when it is plausible to do so.

A full copy of the Supreme Court of Ohio’s opinion may be found at <http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2016/2016-Ohio-8000.pdf>.

If you have any questions, please contact:

Thomas J. Cabral  
General Litigation Practice Group Manager  
Colleen A. Mountcastle  
Appellate Practice Group Manager  
Gallagher Sharp  
Sixth Floor - Bulkley Building  
1501 Euclid Avenue  
Cleveland, OH 44115  
(216) 241-5310  
[tcabral@gallaghersharp.com](mailto:tcabral@gallaghersharp.com)  
[cmountcastle@gallaghersharp.com](mailto:cmountcastle@gallaghersharp.com)  
[www.gallaghersharp.com](http://www.gallaghersharp.com)