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UNITED STATES OF AMERICA, Plaintiff, Appellee, v. JOHN W. BILLMYER,
 ET AL., Defendants, Appellees. AMERICAN HONDA MOTOR COMPANY, INC.,
 Appellant. UNITED STATES OF AMERICA, Plaintiff, Appellee, v. JOHN W.
BILLMYER and DENNIS JOSLEYN, Defendants, Appellees. Appellant.

No. 95-8026, No. 95-1393

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

57 F.3d 31; 1995 U.S. App. LEXIS 14625

June 14, 1995, Decided

PRIOR HISTORY: **[**1]** APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE. Hon. Joseph A. DiClerico, Jr., U.S. District Judge.

COUNSEL: Steven M. Gordon with whom Shaheen, Cappiello, Stein & Gordon, Richard A. Gargiulo, Gargiulo, Rudnick & Gargiulo, Peter G. Callaghan, Richard J. Inglis and Marielise Kelly were on brief for appellant American Honda Motor Company, Inc.

Jeremiah T. O'Sullivan with whom Christopher H.M. Carter, Nancy W. Geary and Choate, Hall & Stewart were on brief for appellant Lyon & Lyon.

Paul Twomey with whom Mark L. Sisti was on brief for defendant, appellee Dennis Josleyn.

JUDGES: Before Boudin, Circuit Judge, Bownes, Senior Circuit Judge, and Stearns, * District Judge. * Of the District of Massachusetts, sitting by designation.

OPINION BY: BOUDIN**OPINION**

[*33] BOUDIN, *Circuit Judge*. Two former employees of American Honda Motor Company, defendants John Billmyer and Dennis Josleyn, have been on trial in the district court charged with RICO, conspiracy and mail fraud violations arising from an alleged commercial bribery scheme involving Honda dealers. The defendants were indicted by a federal grand jury on March 11,

[2]** 1994, and trial began in February 1995. About three weeks into the trial, Josleyn served a subpoena duces tecum on American Honda, pursuant to *Fed. R. Crim. P. 17(c)*. It is this demand that gave rise to the present proceeding in this court.

The Josleyn subpoena demanded that American Honda produce *inter alia* a file maintained by Sherry Cameron, an American Honda vice president, that consists largely of information received from the company's outside counsel, notes taken by her during conversations with counsel and memoranda reflecting such information. American Honda moved to quash the subpoena on attorney-client privilege and work-product grounds. Its former law firm, Lyon & Lyon, joined the motion, asserting that certain of the documents were its work product and protected under the work-product doctrine.

The district court found that Josleyn had made the threshold showing required under *United States v. LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988), to warrant *in camera* review of the documents in the Cameron file. After some wrangling, American Honda submitted the file to the district court, but appealed the court's *LaRouche* ruling. This Court dismissed **[**3]** that appeal on April 4, 1995, on the ground that the district court's order was not final. *United States v. Billmyer*, No. 95-1324, 95-1325, slip op. at 1 (1st Cir., Apr. 19, 1995). We recognized that American Honda might have difficulty appealing any subsequent orders rejecting its privilege claims because it would no longer have possession of the files and could not automatically provoke a contempt proceeding. *Id.*

The district judge then conducted an in camera review of the Cameron file and issued a 40-page order appraising the documents page by page. Although he found much of the file to be protected either by attorney-client privilege or as work product, the judge found that some of the documents were unprotected, either because neither doctrine applied or because the privilege had been waived. American Honda then moved for the return of the sealed documents, so that it could test the rulings in a contempt proceeding, but the district court denied the motion and made ready to reveal the disputed materials to the defendants.

American Honda and Lyon & Lyon then filed immediate appeals, challenging the proposed disclosure of the documents; in the alternative, writs [**4] of mandamus were sought if the appeal were dismissed. American Honda objected to all of the disclosures while Lyon & Lyon restricted its claim to one document. At appellants' request, this court on April 19, 1995, stayed the district court's order pending expedited review. The district court then suspended the criminal trial, awaiting a ruling by this court. Briefs were filed here on April 28, 1995, and oral argument was heard on May 1, 1995.

On May 4, 1995, this court decided the case and released a brief order in advance of this opinion, so that the recessed criminal trial could be resumed immediately. Our order stated that the district court's order directing [**34] disclosure of the disputed materials did not qualify for review either under the collateral order doctrine or through mandamus. We directed entry of judgment, issuance of the mandate forthwith, and dissolution of the April 19 stay. This opinion is to explain the reasons for our dismissal of the appeals and denial of mandamus.

The first question is whether American Honda and Lyon & Lyon may appeal from the discovery order. Surprisingly, the law in this area is more tangled than one would expect, given the recurring nature [**5] of the problem. From the standpoint of the proceeding itself--a criminal trial--there is no "final decision" until the trial ends. *Corporacion Insular de Seguros v. Garcia*, 876 F.2d 254, 256 (1st Cir. 1989) ("*Garcia*"). But the collateral order doctrine recognized in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949), provides one means for examining issues that arise in the course of a continuing proceeding; failing that, mandamus remains a possibility. Appellants invoke both concepts in this court.

At the threshold Josleyn urges dismissal because a non-party normally cannot appeal an order enforcing a subpoena but must provoke a contempt order as the basis for an appeal. *United States v. Ryan*, 402 U.S. 530, 29 L. Ed. 2d 85, 91 S. Ct. 1580 (1971). That path is no longer open to American Honda and may never have been

available to Lyon & Lyon. Given the judicial interest in allowing a trial court to inspect disputed documents *in camera*, we decline to hold that a holder of documents forfeits appeal rights otherwise available by allowing such an inspection.

Conversely, we do not think that the district court's discovery order becomes a "final decision" under 28 U.S.C. [**6] § 1291 simply because contempt is not available as a vehicle for review. *Perlman v. United States*, 247 U.S. 7, 13, 62 L. Ed. 950, 38 S. Ct. 417 (1918), and *Cobbledick v. United States*, 309 U.S. 323, 84 L. Ed. 783, 60 S. Ct. 540 (1940), might once have lent some support to such a theory; but *Cobbledick* was cited by the Supreme Court in adopting the collateral order doctrine, *Cohen*, 337 U.S. at 546, and the *Perlman-Cobbledick* line of authority appears to have been absorbed into the collateral order doctrine. *Garcia*, 876 F.2d at 258 n.3. ¹ See also *In re Oberkoetter*, 612 F.2d 15, 17-18 (1st Cir. 1980).

1 The Fifth Circuit has so held in circumstances very similar to our own case, *In re grand Jury Proceedings*, 43 F.3d 966, 969-70 (1981), although the Third Circuit some years before treated *Perlman-Cobbledick* as a separate doctrine. *United States v. Cuthbertson*, 651 F.2d 189, 194 (3d Cir.), cert. denied, 454 U.S. 1056 (1981). Further uncertainty is added by a brief and ambiguous reference in *Church of Scientology v. United States*, 121 L. Ed. 2d 313, 113 S. Ct. 447, 452 n.11 (1992), not cited to us by anyone.

[**7] We turn now to the collateral order doctrine as the primary basis for possible jurisdiction in this case. In this circuit, to qualify for immediate appeal as a collateral order, an order must involve

(1) an issue essentially unrelated to the merits of the main dispute, capable of review without disrupting the main trial; (2) a complete resolution of the issue, not one that is 'unfinished' or 'inconclusive'; (3) a right incapable of vindication on appeal from final judgment; and (4) an important and unsettled question of controlling law, not merely a question of the proper exercise of the trial court's discretion.

United States v. Sorren, 605 F.2d 1211, 1213 (1st Cir. 1979). In addition, the Supreme Court has warned that interlocutory appeals "are especially inimical to the effective and fair administration of the criminal law."

Abney v. United States, 431 U.S. 651, 657, 52 L. Ed. 2d 651, 97 S. Ct. 2034 (1977).

The instant appeal meets the first three listed requirements. The privilege and work product issues posed by the discovery order have little to do with the guilt or innocence of Billmyer and Josleyn; and the district court's order is a complete resolution of those issues. As [**8] to the third prong, any disclosure that occurs now will be virtually unreviewable after a final judgment. In the case of an acquittal, no appeal can ensue, and in the case of a conviction, any appeal would be [*35] taken by defendants who either sought or acquiesced in the disclosure.

The remaining, and most daunting, question is whether this case presents a distinct and important legal issue. Although not all circuits employ such a test, it enjoys considerable support. See, e.g., 15A C. Wright, A. Miller & G. Cooper, *Federal Practice and Procedure* §§ 3911, 3911.5 (2d ed. 1992) (citing case law); see also *National Super Spuds, Inc. v. New York Mercantile Exchange*, 591 F.2d 174, 180 (2d Cir. 1979) (Friendly, J.). Ordinarily, a discovery order will meet the legal-importance test only if it presents a claim of clear-cut legal error and not merely a challenge to the district judge's factual determinations or the application of a settled legal rule to the particular facts.

The requirement of an important legal issue rests in part on the increased likelihood that such an appeal may be fruitful; legal rulings are reviewed *de novo*, while more deferential standards of [**9] review apply to factual findings or application of known legal rules to specific facts. See *In re Extradition of Howard*, 996 F.2d 1320, 1327-28 (1st Cir. 1992). It is not easy to justify the interruption of an ongoing proceeding, especially a criminal trial, where affirmance is very likely because the issues are ones where the district court is reviewed only for clear error or abuse of discretion.

In addition, where the appeal occurs during a criminal trial, a mistrial may result if the appeal process is prolonged, raising both speedy trial and double jeopardy concerns. *United States v. Horn*, 29 F.3d 754, 768 (1st Cir. 1994). Were every factual dispute or law application issue posed by a privilege claim open to interlocutory review in mid-trial, it could take weeks to secure the necessary transcripts, learn background facts that the trial judge has absorbed over many months, and then replicate and review district court rulings.

Admittedly, this collateral order test does create a possibility that disclosure of documents may be ordered based on a mistake of fact or a misapplication of settled law, and the error may escape review. But litigation is full of such instances: [**10] a temporary restraining order may cause irreparable harm; burdensome discovery

may be compelled before review can be secured; a witness whose claim of privilege is overruled may answer rather than risk contempt. The finality rule reflects a compromise among competing interests. Given the protection afforded by the collateral order doctrine and mandamus, we think that there is little chance of any grave miscarriage of justice.

No one can make a seamless web out of all of the decisions on collateral orders. The circuits are not unanimous in every nuance, see 15A Wright, *supra*, § 3911, and even within circuits, a wider scope of review may be available for some interlocutory orders, such as an order denying a claim of immunity or an order imposing sanctions on a non-party for contempt. E.g., *Lowinger v. Broderick*, 50 F.3d 61, 64 (1st Cir. 1995) (immunity). But we have set forth the collateral order doctrine in this circuit as it applies to discovery orders, and must respect our own precedents.

Turning to the merits, we conclude that the claims made in these attempted appeals do not reveal any clear error of law. The district judge at the outset accurately laid [**11] out the rules applicable to the attorney-client privilege and work-product protection, including the pertinent exceptions and waiver. He reviewed the documents virtually line by line, finding some pages or portions to be protected from disclosure and some unprotected. Most of the arguments raised on appeal are patently attacks on factual findings or on the application of legal standards to those facts. To review each ruling would require a time-consuming effort and entail a delay all out of proportion to any likelihood of a reversal.

But American Honda does raise one issue that involves an arguable claim of legal error. In examining the Cameron "legal file," the district judge concluded that, as to certain portions of the materials protected by attorney-client privilege, American Honda had waived the privilege. American Honda says that the district judge misunderstood the legal standard for an implied waiver of the privilege. Specifically, the district court found that

[*36] American Honda has disclosed to the United States government considerable portions of the information acquired through internal investigation into the conduct comprising the charges against the defendants in [**12] this case. . . . In light of American Honda's disclosure of information acquired through internal investigation, the court finds that American Honda has waived the attorney-client privilege with respect to documents containing information acquired through internal investigation.

The court then listed the portions of the materials as to which American Honda had waived the privilege. American Honda now contends that waiver results only when the client reveals privileged communications to a third party, not when the client reveals "the information" contained in privileged communications. American Honda argues that the district court clearly erred by finding a waiver from the company's disclosure to the government of *facts*, not of privileged *communications*. *E.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 395, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1980).

The district judge may have meant that privileged *communications* were disclosed to the government and therefore privilege as to those topics was waived. On the other hand, the judge twice referred to American Honda's disclosure of "information," and did not indicate that any specific privileged documents had been disclosed. So the judge may [**13] have found waiver because the substance of the communications had already been revealed to the government by American Honda. If the court's ruling embraced this latter theory, we agree that a legal issue is raised, but do not agree that such a theory constitutes legal error.²

2 In noting the ambiguity, we intend no criticism. The district judge's careful analysis, detailed order and document-by-document review--undertaken in the middle of a complex trial--were altogether admirable.

To put the matter in context, we note that the documents as to which waiver was found appear to be pages or portions of pages setting forth information gathered by Lyon & Lyon at the behest of American Honda from sources whose identity is not revealed. The information consists importantly of allegations or evidence as to payments made by Honda dealers to Honda employees. The documents, prepared by Lyon & Lyon, Cameron or others, reflect the communication of these allegations or evidence to Cameron or other executives of American [**14] Honda.

It is fair to read the district court's order as a finding that the same allegations or evidence were thereafter disclosed by American Honda to government investigators. The district court does not describe means of disclosure; appellants' briefs shed no light upon the matter, but also do not contest the finding that such a disclosure occurred. We thus take the case as one in which American Honda received factual information from its counsel, disclosed those facts to the government, and now seeks to withhold the documents that reflect the original communication of that information to American Honda.

One might ask why there is any basis for a claim of privilege in the first instance, since the privilege is primarily designed to protect communications *by the client* to the lawyer in order to procure legal advice. *See* VIII J. Wigmore, *Evidence* § 2320, at 628-29 (J. McNaughton, ed. 1961). Possibly some of the information was provided to the law firm by American Honda employees. Or the district court may have deemed the material privileged (aside from waiver) because the lawyer's communications to the client are secondarily protected as needed to prevent inferring what [**15] the client said to the lawyer. *Id.*

In all events, the question here is the effect of American Honda's disclosure of this information to the government. Wigmore tells us that "judicial decision gives no clear answer to the question" of what constitutes "a waiver by implication," and that only a few general instances are well settled. Wigmore, *supra* § 2327, at 635. For example, a client's offer of his own *testimony* as to specific facts does not waive the privilege as to his communications with his attorney on the same subject, *id.* § 2327, at 638; but this rule protects testimony given by the client *in court*, in order that the right to testify should not [*37] come at the price of one's ability to consult privately with counsel. *Id.* § 2327, at 637. Admitting that "authority is scanty," McCormick cites a number of cases in which disclosures by the client, other than those involving in-court testimony, have been held to be a waiver. *I McCormick on Evidence* § 93, at 377-48 (J. Strong ed., 4th ed. 1992).

Appellants respond that the privilege protects "communications, not facts," *Upjohn*, 449 U.S. at 395, so that American Honda cannot have waived the privilege [**16] as to the notes or memoranda merely by revealing to the government the allegations or evidence recorded in the notes or memoranda. The distinction is useful in some circumstances--say, where a party tries to refuse to testify about an automobile accident on the ground that he gave his counsel a private description of the same accident. But, once again, the distinction appears to have little to do with the present problem.

Here, the gist of the matter is that counsel informed the client of detailed evidence and allegations concerning possible bribes of its employees, and the client chose to make this same information available to the government. What is sought by the defense in the criminal trial is merely the recordings by or for the client of this same information. The information now having been disclosed by the client to the government, it is unclear what damage to the attorney-client privilege can occur from making the corresponding portions of the file available. The district court carefully limited the disclosures to the factual allegations, excluding any commentary on their legal implications.

Indeed, American Honda's disclosure to the government of the factual information [**17] received from its law firm not only reveals that information, and American Honda's knowledge of it, but makes an inquiry into the source and basis for the information hard to avoid. A risk of unfairness is evident where information is provided to one side in a case (here, the United States) and then an inquiry into its origin is shielded by a claim of privilege. In a variety of contexts, the affirmative use of privileged information has been held to be a waiver of privilege. See P. Rice, *Attorney-Client Privilege in the United States* § 9.34, at 711, § 9.38, 9.40 § 9.50, at 752-53 (1993) (collecting cases).

Given the disclosure to the government, the waiver label is presumptively apt. Waiver doctrine has only a few hard-edged rules; as to many permutations, it is a fluid body of precedent reflecting a variety of concerns, including an insistence on real confidentiality and limitations based on fairness. See "Developments in the Law--Privileged Communications," 98 *Harv. L. Rev.* 1450, 1629-32 (1985). In this instance, confidentiality has largely been dissolved by American Honda's own actions.

One argument *not* made by appellants is that, as a matter of policy, private [**18] revelations to the government of possible criminal conduct ought not waive the privilege as to third parties. The concern, of course, is to encourage such revelations. The general tendency of the law is to treat waivers as an all-or-nothing proposition, e.g., *ALI Model Code of Evidence*, Rule 231, comment (a) (1942); but there is a trace of support for limited waivers in some cases involving confidential disclosures

to the government. *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 606 (8th Cir. 1977). See generally *Rice, supra*, 9.86-9.87 (collecting and analyzing the cases).

On the other hand, it is a serious matter to withhold from a defendant in a criminal case details that have already been made available to the government by a person claiming the privilege. If there were ever an argument for limited waiver, it might well depend importantly on just what had been disclosed to the government and on what understandings. Without intending to preclude such an argument in a future case, we think that it is enough in this one to say that no such claim of limited waiver has been argued to us.

This discussion also disposes of the alternative request for mandamus. [**19] Mandamus is a discretionary writ available in extraordinary circumstances to redress grievous error. *Garcia*, 876 F.2d at 260. While it is not restricted to errors of law, it does require that the error be manifest and the burden of showing manifest error is upon the applicant for the writ. No such legal [**38] error has been shown and, as to the district court's fact-findings and applications of settled rules to particular facts, it is enough to say that we have found no manifest error.

Judgment has been previously entered. We direct that this opinion be filed and transmitted to the district court and the parties to the appeal. Each side shall bear its own costs.

It is so ordered.