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**FIXING *PERLMAN*: HOW THE MISAPPLICATION OF A
100-YEAR-OLD DOCTRINE THREATENS TO UNDERMINE
*MOHAWK INDUSTRIES, INC. V. CARPENTER***

*Matthew O. Wagner**

I. INTRODUCTION

The Collateral Order Doctrine and issues surrounding interlocutory appeal have long created headaches for the U.S. Supreme Court.¹ Interlocutory appeal of a discovery order, in particular, is a highly contested area, but the Court has gradually brought clarity to and settled this area of law, culminating recently in *Mohawk Industries v. Carpenter*.² *Mohawk* held that litigants generally cannot appeal discovery orders, even where those orders are adverse to claims of privilege.³ *Mohawk* did not confront the issue of whether non-parties to the litigation are also generally barred from appealing discovery orders adverse to their asserted privilege, but *Mohawk*'s reasoning, combined with past Supreme Court precedents, strongly suggest that *Mohawk*'s holding applies to non-parties as well.

A nearly one hundred year old precedent known as the *Perlman* doctrine, however, remains an obstacle to *Mohawk* settling this area of law.⁴ *Perlman* provides a narrow exception to the ban on interlocutory appeals of discovery orders, and applies only where privileged information is held by a "disinterested" non-party to the litigation, such that the non-party has no incentive to disobey a discovery order compelling delivery of the privileged materials.⁵ The original formulation of the *Perlman* rule was confusing,⁶ and the Supreme Court has never had occasion to clarify the rule beyond mentioning or restating it in dicta. Federal appellate courts, however, have dealt with *Perlman* appeals with increasing frequency over the past thirty years, and their

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1. See *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 611 (2009) (Thomas, J., concurring).
2. *Id.* at 599.
3. *Id.* at 603.
4. See *Perlman v. United States*, 247 U.S. 7 (1918).
5. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 18 n.11 (1992).
6. *Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 591 F.2d 174, 178 (2d Cir. 1979) ("It is hardly surprising that so Delphic a deliverance should give rise to differing interpretations.")

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approaches are diverse and sometimes internally inconsistent.⁷

This Comment argues that *Mohawk's* ban on interlocutory review of discovery orders adverse to privilege implicitly applies to non-parties as well as parties, but that the current approaches to analyzing *Perlman's* applicability in a given situation are unworkable. *Perlman* should require an objective categorical test of a disinterested party in order for *Mohawk* to be meaningful. This Comment also contends that *Perlman's* vitality remains unaffected by *Mohawk*.

Part II surveys Supreme Court jurisprudence on interlocutory appeal of discovery orders, culminating with *Mohawk*. Part III outlines the *Perlman* doctrine, Supreme Court formulations of the rule over the years, and how federal circuit courts apply it today. Part IV extrapolates the case law introduced in Parts II and III to argue that *Mohawk's* reasoning renders it applicable to non-parties as well as parties, and that *Perlman* remains vital and untouched by *Mohawk*. Part IV then recommends an objective categorical approach to *Perlman*, to make *Perlman* fully compatible with *Mohawk* and restore *Perlman* to being a narrow exception. Part IV applies this objective categorical approach to the most common categories of *Perlman* appeals. Part V summarizes the recommendations for a new approach to *Perlman*.

II. MOHAWK AND NON-PARTY DISCOVERY ORDER APPEALS

A. Discovery Appeals Jurisprudence Generally

Federal appellate courts have jurisdiction over all “final orders” issued by district courts, under 28 U.S.C. § 1291.⁸ In a long line of cases, stretching back to *Alexander v. United States*⁹ in 1906, the Supreme Court has repeatedly held that orders to compel discovery are not final orders, and hence are generally not immediately appealable.¹⁰ The ban on interlocutory discovery order appeals applies equally in civil and criminal settings as well as to parties and non-parties to the litigation.¹¹ The Supreme Court reaffirmed the general ban in *United States v. Ryan*, and clarified in *Mohawk* that the collateral order

7. See *infra* Part III.B.

8. 28 U.S.C. § 1291 (2006).

9. *Alexander v. United States*, 201 U.S. 117 (1906).

10. See *id.* at 121–22; *Cobbledick v. United States*, 309 U.S. 323, 327–28 (1940); *United States v. Ryan*, 402 U.S. 530, 532–33 (1971); *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 509, 606, 609 (2009).

11. See *Alexander*, 201 U.S. 117 (government examiner sought evidence from defendants in a civil antitrust case); *Cobbledick*, 309 U.S. 323 (grand jury sought evidence from witnesses pursuant to a criminal investigation); *Mohawk*, 130 S. Ct. 599 (plaintiff sought discovery from defendant in civil suit).

doctrine¹² does not apply to discovery orders.¹³

The ban on interlocutory discovery order appeals, as part of the general final order doctrine, is motivated by concerns about judicial efficiency and such appeals providing too easy an opportunity for litigants to create endless delays or stall grand jury proceedings.¹⁴ Contempt serves as an escape hatch to the ban, mitigating the harshness that sometimes results from denying a discovery order appeal, and an aggrieved party or non-party can elect to travel this route.¹⁵ A court may levy criminal contempt when someone disobeys a court order, and it is designed to punish the non-complying person with fines or imprisonment.¹⁶ Criminal contempt constitutes a final order because the adjudication is distinct from the merits of the main proceeding, and hence, provides an opportunity for immediate review where a party or non-party is dissatisfied with an order compelling discovery.¹⁷

Civil contempt operates differently; it is intended to coerce the person or entity into complying with the court order.¹⁸ Civil contempt is not a final order if levied against a party to the litigation because the order is intertwined with the litigation.¹⁹ When brought against a non-party, however, civil contempt does constitute a final order that can be immediately appealed because non-parties generally cannot appeal at the end of litigation; therefore, a rule holding otherwise would leave non-parties without recourse to challenge the contempt order.²⁰

Thus, the contempt requirement not only provides a potential way out for those strongly opposed to discovery, but also allays the concerns about judicial efficiency and excessive delays; when parties and non-parties are forced to take a more personal stake in the outcome of their claim, the stronger claims are sorted from the weak.²¹

12. The collateral order doctrine originated in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). The doctrine allows certain orders to be considered “final” for the purposes of 28 U.S.C. § 1291. See *Mohawk*, 130 S. Ct. at 605, for a discussion about the collateral order doctrine.

13. *Mohawk*, 130 S. Ct. at 603.

14. *Id.* at 605, 608.

15. *Id.* at 608; *Burden-Meeks v. Welch*, 319 F.3d 897, 899 (7th Cir. 2003) (describing appeal from a contempt citation as “the normal way to obtain [interlocutory] appellate review of” orders to compel discovery).

16. *Int’l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 828–29 (1994).

17. *Mohawk*, 130 S. Ct. at 608.

18. *Int’l Union*, 512 U.S. at 827.

19. *Fox v. Capital Co.*, 299 U.S. 105, 107 (1936); *Bingman v. Ward*, 100 F.3d 653, 655 (9th Cir. 1996); see also *Mohawk*, 130 S.Ct. at 608.

20. *Burden-Meeks*, 319 F.3d at 900; *Pennwalt Corp. v. Durand-Wayland, Inc.*, 708 F.2d 492, 494 n.3 (9th Cir. 1983).

21. *United States v. Ryan*, 402 U.S. 530, 532–33 (1971) (“[W]e have consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist [discovery] to a choice between compliance with the trial court’s order . . . and resistance to that order

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Mohawk is the most recent Supreme Court case addressing discovery order appeals jurisprudence. In *Mohawk*, the defendant was sued by a former employee who complained he had been fired in retaliation for discovering illegal practices at the company, in violation of state and federal laws.²² Just prior to his firing, the plaintiff met with the defendant's retained counsel, and at trial the plaintiff sought discovery regarding that meeting.²³ The defendant refused, citing attorney-client privilege, but the court granted the plaintiff's motion to compel.²⁴ The defendant immediately appealed the motion to compel, citing the collateral order doctrine to justify an exception to the ban on interlocutory discovery order appeals.²⁵

The Court declined to create any such exception, holding that privilege claims, though very important, are insufficient to overcome the ban on interlocutory discovery orders, and the ban's inherent concerns about judicial efficiency and litigation delays.²⁶ The Court was also satisfied that existing methods of review, including contempt, serve as adequate safeguards against the disclosure of sensitive privileged information.²⁷

B. *Mohawk's Application to Non-Parties to the Litigation: A Dwindling Circuit Split*

Before turning to *Perlman*, one more question requires consideration: does *Mohawk* apply to non-parties as well as parties? *United States v. Ryan* settled that discovery orders are not generally appealable,²⁸ but circuit courts thereafter were left to determine whether privilege claims create an exception to *Ryan*. A growing circuit split on the issue prompted the Supreme Court to grant certiorari in *Mohawk*; the Court concluded that litigants cannot immediately appeal discovery orders simply because privilege was asserted.²⁹ A separate circuit split exists,

with the concomitant possibility of an adjudication of contempt"); *Alexander v. United States*, 201 U.S. 117, 121 (1906) ("Let the court go further and punish the witness for contempt of its order, then arrives a right of review, and this is adequate for his protection without unduly impeding the progress of the case."); *Burden-Meeks*, 319 F.3d at 900.

22. *Mohawk*, 130 S. Ct. at 603.

23. *Id.* at 604.

24. *Id.*

25. *Id.*

26. *Id.* at 608.

27. *Id.* at 608–09.

28. See *supra* text accompanying notes 12–13.

29. The Third, Ninth, and D.C. Circuits allowed parties to appeal discovery orders adverse to privilege under the collateral order doctrine; the Federal Circuit and the Second, Fifth, Seventh, and Tenth did not. *Mohawk*, 130 S. Ct. at 604 n.1.

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however, in situations where a non-party to the litigation asserts its own privilege and seeks appellate review of a motion to compel discovery.

Most circuits have had the opportunity to address this question after *United States v. Ryan*. The Second, Fifth, Ninth, and Tenth Circuits all found that, absent a contempt citation, non-parties cannot immediately appeal discovery orders adverse to privilege.³⁰ Alternatively, the Seventh Circuit does allow non-parties asserting privilege to take an immediate appeal without requiring the non-party to resist and receive an adjudication of contempt.³¹ The Seventh Circuit repeatedly expressed doubts about the wisdom of its position,³² however, and recently questioned whether its approach survives *Mohawk*.³³ Based on dicta from very recent cases, the Seventh Circuit is strongly considering abandoning its approach and joining the majority of circuits at the next available opportunity.³⁴

Such a move would bring even greater clarity to the body of law that has been largely settled by *Ryan* and *Mohawk* by providing litigants and non-parties a clear understanding that discovery orders—even if adverse to an asserted privilege—cannot be appealed until the litigation concludes or those resisting the order are held in contempt. One final obstacle, nevertheless, remains to disturb the clear guidance of *Mohawk*: the *Perlman* doctrine.

III. PERLMAN AND ITS MODERN APPLICATION BY THE APPELLATE CIRCUITS

A. *The Perlman Doctrine*

The ban on interlocutory discovery order appeals tolerates only two exceptions.³⁵ The first allows a litigant to immediately appeal a discovery order adverse to an asserted privilege so long as he or she happens to be the President of the United States.³⁶ The other exception is the *Perlman* doctrine.

30. *Del Carmen Montan v. Am. Airlines, Inc. (In re Aircrash at Belle Harbor)*, 490 F.3d 99 (2d Cir. 2007); *Carr v. Monroe Mfg. Co.*, 431 F.2d 384 (5th Cir. 1970); *Newton v. Nat'l Broad. Co., Inc.*, 726 F.2d 591 (9th Cir. 1984); *F.T.C. v. Alaska Land Leasing, Inc.*, 778 F.2d 577 (10th Cir. 1985).

31. *Burden-Meeks v. Welch*, 319 F.3d 897 (7th Cir., 2003).

32. *See id.* at 900–01; *Sandra T.E. v. S. Berwyn Sch. Dist. 100*, 600 F.3d 612, 617–18 (7th Cir. 2010); *Wilson v. O'Brien*, 621 F.3d 641, 642–43 (7th Cir. 2010).

33. *Sandra T.E.*, 600 F.3d at 618.

34. *See id.* at 617–18; *Wilson*, 621 F.3d at 642–43.

35. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 77 n.3 (1987) (Stevens, J., dissenting).

36. *United States v. Nixon*, 418 U.S. 683, 691–92 (1974).

1. *Perlman v. United States*

Henry Perlman invented a metal tire rim that was a direct predecessor to modern automobile tires.³⁷ He and his corporation brought a patent infringement suit against the Firestone Tire Company and submitted their evidence to the court.³⁸ Perlman then moved to have the suit dismissed without prejudice; the court complied on the condition that the court would retain the evidence in a sealed record, to be opened should the suit recommence.³⁹ Following the dismissal, a grand jury opened an investigation into charges that Perlman had committed perjury, and a U.S. attorney sought exhibits belonging to Perlman that were directly related to the charges.⁴⁰ These exhibits lay among the sealed evidence in the hands of the clerk of courts for the district court where Perlman had brought suit against Firestone, and the district court ordered the clerk to deliver Perlman's evidence to the U.S. attorney.⁴¹ Perlman immediately appealed the order, maintaining that the exhibits were privileged.⁴²

The government moved to dismiss the appeal because it was not a final order, which precluded appellate court jurisdiction, despite no other avenue for review existing.⁴³ The Supreme Court, with little explanation, said that it was "unable to concur" and proceeded to the merits of the appeal.⁴⁴ The outcome hinged on the Court's description of Perlman as "powerless to avert the mischief of the order," and the Court's subsequent desire to grant him a remedy.⁴⁵ That singular phrase, combined with the facts of the case, gave rise to the *Perlman* rule as the Supreme Court understands it today: immediate appeal is available to a litigant who asserts privilege to resist a discovery order directed at a disinterested non-party.⁴⁶ The *Perlman* rule relies on the idea that a disinterested non-party has no incentive to resist the order and accept a contempt citation, and therefore, absent the rule, a litigant has no recourse to prevent the release of privileged information, no matter

37. Tony Borroz, *May 21, 1906: Research on Motion Creates Tire Rim*, WIRED, May 21, 2009, http://www.wired.com/thisdayintech/2009/05/dayintech_0521/.

38. *Perlman v. United States*, 247 U.S. 7, 8–9 (1918).

39. *Id.*

40. *Id.* at 9.

41. *Id.* at 10.

42. Perlman's privilege claim was somewhat vague and seems to have been based on his ownership of the exhibits and his desire to keep them out of the government's hands for use in his criminal proceeding. *Id.*

43. *Id.* at 13.

44. *Perlman*, 247 U.S. at 13.

45. *Id.*

46. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 18 n.11 (1992).

how damaging such a release might be.⁴⁷

2. *Perlman*'s Evolution and the Formulation of the Modern Rule

The Supreme Court has repeatedly honed its understanding of the *Perlman* rule since its inception. The Court considered the rule in *Ryan*, where the non-party appellant unsuccessfully sought to invoke *Perlman* to justify the Court's jurisdiction over his interlocutory discovery order appeal.⁴⁸ The Court rejected the contention that appellate jurisdiction was appropriate under *Perlman* because in *Ryan* the discovery order was made against the non-party and that same non-party was resisting the order and asserting privilege.⁴⁹ The Court believed *Perlman*, by contrast, applied only where the litigant asserting privilege was separate from the non-party who had custody of the contested information.⁵⁰ *Ryan* appeared to endorse a broad reading of *Perlman*, by presuming that non-parties to litigation would never be willing to risk contempt.⁵¹

The status of the non-party as having no *incentive* to risk contempt became part of the analysis in later cases. Shortly after *Ryan* the Court spoke of a "neutral third party" as triggering *Perlman*.⁵² A decade later, the Court understood *Perlman* as applying when privileged information is sought from a "third party who has no independent interest in preserving . . . confidentiality."⁵³ In 1992, the Court issued the most recent pronouncement on *Perlman*, noting that "a discovery order directed at a disinterested third party is treated as an immediately appealable final order because the third party presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance."⁵⁴

The Court understands the rule as applying in very narrow circumstances—where a third party truly has no interests in protecting a litigant's claim of privilege, as was the case originally in *Perlman*.⁵⁵

47. *Id.*

48. *United States v. Ryan*, 402 U.S. 530, 532 (1971).

49. *Id.* at 532–33.

50. *Id.* at 533.

51. *Id.*

52. *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 514 (1975) (Marshall, J., concurring in the judgment).

53. *Pennsylvania v. Ritchie*, 480 U.S. 39, 77 n.3 (1987) (Stevens, J., dissenting).

54. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 18 n.11 (1992).

55. The *Perlman* doctrine, however, has never been the subject of a decision by the Supreme Court since *Perlman*; later discussions of the rule have been dicta, with the possible exception of *United States v. Ryan*. See *Eastland*, 421 U.S. at 514 (Marshall, J., concurring in the judgment); *Ritchie*, 480 U.S. at 77 (Stevens, J., dissenting); *Church of Scientology*, 506 U.S. at 18 n.11.

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The Court's discovery appeals jurisprudence, which allows virtually no other exceptions to the ban on interlocutory discovery appeals, also lends support for a very narrow reading of *Perlman*. The concept of a neutral or disinterested non-party, however, has been mentioned but never explored by the Supreme Court, so the task of defining *Perlman*'s scope has fallen to the appellate circuits.

B. Modern Appellate Circuit Approaches to the Perlman Doctrine

1. Overview of the Circuit Approaches

Federal circuit courts take a variety of approaches to *Perlman*, but most circuits fall into one of two camps. The first camp mechanically applies *Perlman* when a litigant objects to a discovery order made against a non-party, without considering whether the non-party is sufficiently "disinterested" or "neutral" so that *Perlman* is appropriate.⁵⁶ The second camp takes a subjective approach and applies *Perlman* any time a litigant resists a discovery order based on privilege and the non-party towards whom the order is directed indicates their intent to comply.⁵⁷ The several remaining circuits have forged their own unique approaches and remain outside of either camp.⁵⁸

Very few circuits adopted and maintained a consistent approach between *Ryan*—the Supreme Court's last pre-*Mohawk* case involving discovery order appeals, in 1971—and *Mohawk*, in 2009. Some circuits fell into a predictable approach over the years, while others continue to reach for the proper solution. Though discord among circuits on an issue is never desirable, the confusion over *Perlman*'s application is even less desirable post-*Mohawk*, because misapplications of the *Perlman* doctrine can circumvent *Mohawk* entirely, and provide parties with inappropriate appellate review of discovery orders adverse to an asserted privilege.

The three camps of *Perlman* approaches—(1) the mechanical approach, (2) the subjective approach, and (3) the remaining individual circuits, which take various approaches—will be examined in turn in an effort to lay the groundwork for this Comment's recommendation for a better and more uniform *Perlman* standard in light of *Mohawk*.

56. See *infra* Part III.B.2; see also *In re Grand Jury Proceedings in Matter of Fine*, 641 F.2d 199, 203 (5th Cir. 1981) (This case is representative of the mechanical approach taken by several circuits.).

57. See *infra* Part III.B.3; see also *Velsicol Chem. Corp. v. Parsons*, 561 F.2d 671, 674 (7th Cir. 1977) (This case is representative of the subjective approach taken by several circuits.).

58. See *infra* Part III.B.4.

2. The First Camp: Mechanical Application of *Perlman*

The largest group of circuits takes a mechanical approach to *Perlman*. If a litigant claims privilege to resist a discovery order aimed at a non-party, appellate jurisdiction is automatically granted by *Perlman*. Generally, the opinions contain no discussion of whether the non-party in question is neutral or disinterested; *Perlman* simply applies based on the posture of the litigants and non-parties. This approach is taken by the First, Fourth, Fifth, Sixth, and Eleventh Circuits.⁵⁹ This subpart examines case law from the First and Fifth Circuits as representative examples of this approach.⁶⁰

a. The First Circuit

The First Circuit did not originally take a mechanical approach to *Perlman*. For many years the leading case was *In re Oberkoetter*, which held that a litigant could not immediately appeal a discovery order directed at the litigant's non-party attorney, notwithstanding an attorney-client privilege claim.⁶¹ The *Oberkoetter* court endorsed a very narrow reading of *Perlman*.⁶² Specifically, the court analyzed whether the attorney-client relationship was truly analogous to that between court clerk and litigant in *Perlman*.⁶³ The First Circuit reasoned that a "stout-hearted" attorney might risk contempt to protect his or her client's interests, but it was inconceivable that a court clerk would do the same for a total stranger.⁶⁴ The court further followed the

59. *In re Grand Jury Subpoena (Custodian of Records, Newparent, Inc.)*, 274 F.3d 563 (1st Cir. 2001) (holding that *Perlman* applies where non-party asserts privilege to resist discovery orders directed at a separate non-party); *United States v. (Under Seal) (In re Grand Jury Subpoena)*, 836 F.2d 1468 (4th Cir. 1988) (holding that *Perlman* applied where four deposed witnesses in a civil case asserted privilege to resist a discovery order issued by a grand jury against the attorney in possession of the depositions); *Conkling v. Turner*, 883 F.2d 431 (5th Cir. 1989) (holding that *Perlman* applied where litigant resisted discovery aimed at litigant's non-party attorney); *Ross v. City of Memphis*, 423 F.3d 596 (6th Cir. 2005) (holding that discovery order aimed at non-party former police chief of city could be immediately appealed under *Perlman* by the defendant city, where the city asserted privilege); *John Roe, Inc. v. United States (In re Grand Jury Proceedings)*, 142 F.3d 1416, 1418, 1420 n.9 (11th Cir. 1998) (holding that *Perlman* applied where targets of grand jury investigation resisted subpoena aimed at their former attorney, a non-party).

60. The Eleventh Circuit inherited the Fifth Circuit's developing approach to *Perlman* when the Eleventh Circuit was split off from the Fifth. Fifth Circuit cases predating the 1981 split were accepted as binding precedent by the newly created Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

61. *In re Oberkoetter*, 612 F.2d 15, 18 (1st Cir. 1980).

62. The *Oberkoetter* court's opinion was at least partly informed by the belief that *Perlman* was no longer good law and would soon be overruled by the Supreme Court. *Id.*

63. *Id.*

64. *Id.*

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Supreme Court's lead, finding that the policy concerns about judicial efficiency and delays to litigation, as expressed in *Cobbledick v. United States*, mandated a narrow application of the *Perlman* rule.⁶⁵

The First Circuit later extended *Oberkoetter*'s rationale to different contexts. For example, in *Corporacion Insular de Seguros v. Garcia*, the court believed it was possible that non-party aides to the litigant, in this case the President of the Senate of Puerto Rico, would potentially risk contempt for their employer and refuse to testify about privileged information.⁶⁶ *Perlman* was therefore unavailable to grant an interlocutory appeal from the discovery order.⁶⁷

The First Circuit explicitly overruled *Oberkoetter* in *In re Grand Jury Subpoenas*, wherein the court threw out its cautious approach and joined several other circuits that apply *Perlman* in a broader, more mechanical fashion.⁶⁸ The case involved a litigant appealing from a discovery order made against the litigant's non-party attorney.⁶⁹ *Oberkoetter* precluded the client's appeal, but the court reversed course and allowed the client's petition to move forward.⁷⁰

A combination of factors convinced the First Circuit to change direction. First, the court noted that several other circuits allow *Perlman* appeals to a broader class of cases than *Oberkoetter* permitted.⁷¹ Second, the court was influenced by the Fifth Circuit's reasoning that non-parties would, in many instances, refuse to accept a contempt citation in furtherance of protecting the litigant's privilege claim.⁷² Because the willingness of a non-party to risk a contempt citation is uncertain, the First Circuit reasoned, the contempt requirement should be dispensed with entirely in cases where the participants are situated similarly to *Perlman*.⁷³ Third, the First Circuit noted that, despite the *Oberkoetter* court's predictions, *Perlman* had not been overruled and was still a vital doctrine.⁷⁴ The First Circuit in *In re Grand Jury Subpoenas* did not cite to the Supreme Court's most recent discussion of *Perlman* and thus did not dispense with the Supreme Court's

65. *Id.*

66. *Corporacion Insular de Seguros v. Garcia*, 876 F.2d 254, 260 (1st Cir. 1989).

67. *Id.*

68. *In re Grand Jury Subpoenas*, 123 F.3d 695, 699 (1st Cir. 1997).

69. *Id.* at 696.

70. *Id.* at 699.

71. *Id.* at 698.

72. *Id.* (citing *In re Grand Jury Proceedings in Matter of Fine*, 641 F.2d 199, 203 (5th Cir. 1981)) (“[S]ome significant number of client-intervenors might find themselves denied all meaningful appeal by attorneys unwilling to make such a sacrifice.”).

73. *Id.*

74. *Id.* at 697–98.

pronouncements that *Perlman* required a “neutral” and “disinterested” non-party.

b. The Fifth Circuit

The Fifth Circuit has long followed the mechanical approach to *Perlman*,⁷⁵ but recently demonstrated a willingness to engage in more searching inquiry into the relationship between the litigant asserting privilege and the non-party at whom the discovery order is aimed.

In one case, a grand jury was investigating the activities of a corporation and a number of its officers, including its corporate counsel.⁷⁶ Subpoenas were issued to the corporate counsel and other officers to produce documents, and the Fifth Circuit held *Perlman* did not permit either the corporation or the corporate counsel interlocutory appeal of the subpoenas.⁷⁷ Because the corporate counsel was also a target of the grand jury, he was not a disinterested non-party who could not be expected to risk contempt; rather, the corporate counsel had as much incentive to risk contempt as the corporation, and therefore *Perlman* granted no relief.⁷⁸ The court believed that *Perlman* was not “intended as a backdoor around the *Cobbledick* doctrine,” and that contempt is a prerequisite for an interlocutory discovery order appeal.⁷⁹

A second case runs in a similar vein, where the Fifth Circuit considered the relationship between a non-party consultant and their corporate client before declaring that the consultant was sufficiently disinterested in risking contempt that a *Perlman* appeal was appropriate.⁸⁰ The decision was made with little analysis about the relationship, so whether the opinion was fact-specific or intended to apply generally to the relationship between independent consultants and corporate clients is unclear.⁸¹

The Fifth Circuit has not considered another case in which a *Perlman* appeal was at issue,⁸² thus leaving open the question of whether these

75. See *In re Grand Jury Proceedings in Matter of Fine*, 641 F.2d at 203; *Conkling v. Turner*, 883 F.2d 431, 433–34 (5th Cir. 1989).

76. *In re Grand Jury Subpoena*, 190 F.3d 375, 377, 377 n.2 (5th Cir. 1999).

77. *Id.* at 384–85.

78. *Id.*

79. *Id.* at 385.

80. *In re Grand Jury Subpoena*, 220 F.3d 406, 410 (5th Cir. 2000).

81. The sum of analysis is the declaration that “[c]ertainly, the employees of an outside consulting firm do not have the same interest in the confidentiality of the subject communications that the Corporation has.” *Id.*

82. A recent case should have presented another *Perlman* question, but apparently neither side argued the question of jurisdiction, so the issue was ignored by the court. *In re Grand Jury Subpoenas*, 561 F.3d 408, 412 (5th Cir. 2009).

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latter cases represent a trend away from the mechanical application of *Perlman*.

3. The Second Camp: The Subjective Approach to *Perlman*

The second approach is a subjective test, wherein the inquiry is whether the specific non-party at whom the discovery order is directed intends to comply with the order. If they intend to comply, immediate appeal by the litigant claiming privilege is permissible under *Perlman*. This approach is followed by the Seventh, Eighth,⁸³ Tenth, and D.C. Circuits.⁸⁴ This subpart will examine case law from the D.C. and Seventh Circuits as representative of approach.

a. The D.C. Circuit

Interestingly, the D.C. Circuit's case law, like the First Circuit, originally followed a more objective approach. The leading case was *In re Sealed Case I*, in which the D.C. Circuit found that, generally, the nature of the attorney–client relationship took it outside of the “limited class of cases” to which the Supreme Court intended *Perlman* to apply.⁸⁵ The D.C. Circuit explained that clients who turn privileged evidence over to their attorney expect the attorney to vigorously protect that privilege, and hence, this dynamic rules out a *Perlman* appeal.⁸⁶

Unlike the First Circuit, however,⁸⁷ *In re Sealed Case I* was never overruled; rather, its holding was rapidly eroded until a contrary,

83. The Eighth Circuit's case law is actually mixed. The circuit historically applied a mechanical approach, permitting litigant clients to appeal discovery orders directed at their non-party attorneys. See *In re Grand Jury Proceedings (Malone)*, 655 F.2d 882 (8th Cir. 1981). But see *In re Burlington Northern Inc.*, 679 F.2d 762, 768 (8th Cir. 1982) (court followed a subjective approach, holding that a litigant employer could not assert privilege and appeal a discovery order directed at its non-party employee because the employer had not asserted that the employee would refuse to comply with the order). There is only one *Perlman* case in the Eighth Circuit after *In re Burlington Northern Inc.*, and that case relies on *In re Grand Jury Proceedings (Malone)* and applies the mechanical approach. *In re Grand Jury Proceedings Subpoena to Testify to: Wine*, 841 F.2d 230, 232 (8th Cir. 1988). Given the lack of any subsequent case law, it is difficult to determine which approach—mechanical or subjective—represents the current law of the Eighth Circuit.

84. *Velsicol Chem. Corp. v. Parsons*, 561 F.2d 671, 674 (7th Cir. 1977); *Intervenor v. United States (In re Grand Jury Proceedings)*, 156 F.3d 1038, 1040 (10th Cir. 1998) (“[T]he *Perlman* exception is available only when the party subject to the subpoena indicates that he or she will comply with the court order . . . and an interlocutory appeal is sought by an intervenor who claims [privilege].”); *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir., 1985) [hereinafter *In re Sealed Case III*].

85. *In re Sealed Case*, 655 F.2d 1298, 1301 (D.C. Cir. 1981) [hereinafter *In re Sealed Case I*] (quoting *United States v. Ryan*, 402 U.S. 530, 533 (1971)).

86. *Id.*

87. See *supra* Part III.B.2.a.

subjective, approach became the law of the D.C. Circuit. First, *In re Sealed Case I* was distinguished by *In re Sealed Case II*, in which a litigant was permitted an immediate appeal under *Perlman* where a discovery order was directed at the litigant's non-party former attorney.⁸⁸ The court reasoned that a former attorney, as opposed to a currently retained attorney, lacks any requisite incentive to risk contempt, bringing the facts of *In re Sealed Case II* within *Perlman*.⁸⁹

In re Sealed Case II was subsequently relied on in *In re Sealed Case III*, where a litigant sought immediate appeal from an order compelling discovery from the organization's non-party attorneys.⁹⁰ The court in *In re Sealed Case III* read the opinion of *In re Sealed Case II* as standing for the proposition that *Perlman* granted immediate appeal when "circumstances make it unlikely that [a non-party] attorney would risk a contempt citation."⁹¹ The inquiry was case-specific and subjective: because the non-party attorneys in *In re Sealed Case III* had signed sworn affidavits indicating their intent to comply with the discovery orders, the court found that *Perlman* supplied jurisdiction over the litigant's interlocutory appeal.⁹² The opinion in *In re Sealed Case III* made no mention of *In re Sealed Case I*, and neither acknowledged it as controlling law nor explained why it was proper to reach an opposite result on very similar facts.⁹³

The subjective approach has been law in the D.C. Circuit since *In re Sealed Case III*.⁹⁴ The D.C. Circuit is not alone in its subtle evolution of *Perlman*-related case law—other circuits have outlier *Perlman* cases hidden in their history that are no longer followed but were never explicitly overruled.⁹⁵

b. The Seventh Circuit

The Seventh Circuit follows the subjective approach.⁹⁶ At times, however, the Seventh Circuit has manifested ambivalence, such as

88. *In re Sealed Case*, 737 F.2d 94, 98 (D.C. Cir. 1984) [hereinafter *In re Sealed Case II*].

89. *Id.*

90. *In re Sealed Case III*, 754 F.2d 395, 398–99 (D.C. Cir. 1985).

91. *Id.* at 399.

92. *Id.*

93. *See id.*

94. *See In re Sealed Case*, 107 F.3d 46, 48 n.1 (D.C. Cir. 1997) (citing to *In re Sealed Case III* and stating that *Perlman* allows a litigant an interlocutory appeal from a discovery order "so long as the witness swears he will give the testimony" or otherwise comply); *United States v. Thompson*, 562 F.3d 387 (D.C. Cir. 2009).

95. *See, e.g., supra* note 83 (discussing the Eighth Circuit's mixed case law).

96. *See Velsicol Chem. Corp. v. Parsons*, 561 F.2d 671, 674 (7th Cir. 1977).

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when, in *In re Klein*, Judge Easterbrook expressed grave doubts about the wisdom of the Seventh Circuit's course.⁹⁷

In re Klein involved litigants who asserted privilege and sought to appeal a discovery order aimed at their non-party attorneys.⁹⁸ The opinion articulated concerns about the potential delays and abuses of the judicial process that an overly broad reading of *Perlman* would permit, and advocated a more objective approach.⁹⁹ The court reasoned that, as a general category, attorneys have too many incentives to protect their clients' interests and thus cannot be sufficiently neutral and disinterested to trigger *Perlman*.¹⁰⁰

The *In re Klein* court realized, however, that overruling its approach could not resolve the wide split among circuits with regards to *Perlman* application; therefore, the subjective approach remains Seventh Circuit law.¹⁰¹ Judge Easterbrook, however, expressed the hope—so far unfulfilled—that the Supreme Court would clarify *Perlman*'s application.¹⁰²

4. The Remaining Circuits' Unique Approaches to *Perlman*

The remaining circuits do not fall squarely into the mechanical application camp or the subjective intent camp. This group, comprising of the Second, Third, and Ninth Circuits, has unique approaches to *Perlman*, each of which is examined in turn.

a. The Second Circuit

The foundation case in the Second Circuit is *National Super Spuds, Inc. v. New York Mercantile Exchange*, a much-cited case wherein a non-party government agency sought to invoke privilege to prevent its employees from answering certain questions during a deposition.¹⁰³ The *National Super Spuds* court characterized *Perlman* as applicable not when it was “unlikely”¹⁰⁴ that a non-party would risk contempt to

97. *In re Klein*, 776 F.2d 628 (7th Cir. 1985).

98. *Id.* at 629–30.

99. *Id.* at 631.

100. *Id.* at 630–31.

101. *Id.* at 631.

102. *Id.*

103. *Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 591 F.2d 174, 175–76 (2d Cir. 1979). *National Super Spuds* contains an excellent discussion of *Perlman*, its history, its relationship to the *Alexander-Cobbledick-Ryan* line of cases, and the Supreme Court's evolving interpretations of *Perlman*. *Id.* at 178–79.

104. *Id.* at 179 (quoting *United States v. Nixon*, 418 U.S. 683, 691 (1974)).

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protect a litigant's privilege claim, but when it was "unimaginable" that a non-party would do so.¹⁰⁵ When the court turned to a standard for applying *Perlman*, however, it first flirted with an objective approach¹⁰⁶ before deciding the issue on subjective grounds, noting that the employee whose testimony was in controversy had refused to answer certain questions and had "not foreclosed the possibility that he will submit to contempt."¹⁰⁷

Then, the Second Circuit immediately moved towards a mechanical application, in *In re Katz*.¹⁰⁸ In *Katz*, the appellate court permitted a litigant an interlocutory appeal from a discovery order directed at their non-party attorney, holding that parties asserting privilege can always appeal discovery orders directed at third parties.¹⁰⁹ *Katz* contains no discussion of the non-party attorney's willingness to comply with the discovery order, nor any citation to *National Super Spuds*.

Subsequent Second Circuit case law sustains the mechanical approach,¹¹⁰ but a subjective approach resurfaces from time to time.¹¹¹ The Second Circuit recently reaffirmed the subjective approach in dicta,¹¹² but simultaneously hinted at an objective approach.¹¹³ The court opined that attorneys, generally, have strong obligations to preserve their clients' interests, and therefore *Perlman* appeals in attorney-client scenarios might be inappropriate.¹¹⁴ Overall the Second Circuit has vacillated between the subjective and mechanical approaches, and is still, by all appearances, searching for the best way to deal with *Perlman* and define its scope.

105. *Id.* at 179.

106. *Id.* at 181 n.7 ("[I]t becomes more difficult to sustain [a *Perlman* appeal] where the target of the disclosure order is both subject to the control of the person or entity asserting privilege and is a participant in the relationship out of which the privilege emerges.").

107. *Id.* at 180–81.

108. *In re Katz*, 623 F.2d 122 (2d Cir. 1980).

109. *Id.* at 124.

110. See *In re Grand Jury Subpoena Duces Tecum Dated Sep. 15, 1983*, 731 F.2d 1032, 1035–36, 1036 n.3 (2d Cir. 1984) (holding that litigant could appeal discovery order aimed at its non-party attorney, despite the attorney also resisting the order and asserting privilege, indicating a mechanical approach to *Perlman*).

111. See *In re Grand Jury Subpoena Dated Jan. 30, 1986 to Bronx Democratic Party*, 784 F.2d 116, 118 (2d Cir. 1986) (denying Democratic Committee a *Perlman* appeal when its chairman was subpoenaed). The court cited *National Super Spuds* as the controlling authority and noted that the non-party chairman resisted the order, indicating a subjective approach to *Perlman*. *Id.*

112. *Del Carmen Montan v. Am. Airlines, Inc. (In re Aircrash at Belle Harbor)*, 490 F.3d 99, 106 (2d Cir. 2007) ("*Perlman* has since come to stand for the principle that the holder of an asserted privilege may immediately appeal [a discovery order] directed at another person *who does not object* to providing the testimony or documents at issue.") (emphasis added).

113. *Id.* at 106–07.

114. *Id.*

b. The Third Circuit

The ambivalence of the Second Circuit contrasts with the diverse situations in which the Third Circuit has applied *Perlman*. Overall, the Third Circuit appears to follow a mechanical approach to *Perlman*, but there are numerous outliers in the case law.¹¹⁵

For example, the Third Circuit allowed a *Perlman* appeal where a non-party resisted discovery and asserted its own privilege in doing so—despite the clear guidance in these situations from the Supreme Court in *United States v. Ryan*.¹¹⁶ The Third Circuit allowed a *Perlman* appeal where a litigant objected to witnesses testifying but asserted no privilege.¹¹⁷

The Third Circuit even allows *Perlman* appeals where a court *denies* a litigant's motion to compel discovery, and the litigant appeals.¹¹⁸ Despite the logical problem of applying *Perlman* where there is no discovery order from which to appeal, the Third Circuit reasoned that *Perlman* is appropriate because a party cannot be held in contempt in order to immediately appeal a court's *refusal* to grant a motion to compel.¹¹⁹

The Third Circuit employed similar reasoning where a non-party witness agreed to give testimony, with no objections from litigants, and applied for a protective order.¹²⁰ When the district court denied the protective order, the witness appealed, and the appellate court found jurisdiction over the appeal based partly on *Perlman*.¹²¹

c. The Ninth Circuit

The Ninth Circuit practices the most unique approach of all circuits. The Ninth Circuit embrace a narrow reading of *Perlman*, finding the

115. It is difficult to glean an overall approach from the Third Circuit's case law, but generally it appears to be following a mechanical approach, with numerous outlier cases. For case law following the mechanical approach, see *Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 671 F.2d 100, 103 (3d Cir. 1982); *In re Grand Jury Proceedings (Impounded)*, 103 F.3d 1140, 1142–44 (3d Cir. 1997).

116. See *United States v. RMI Co.*, 599 F.2d 1183, 1186–87 (3d Cir. 1979).

117. See *In re Grand Jury Applicants*, 619 F.2d 1022, 1024–25 (3d Cir. 1980).

118. See *In re Grand Jury Empanelled*, 597 F.2d 851, 858 (3d Cir. 1979); *In re Grand Jury Investigation*, 630 F.2d 996, 1000 (3d Cir. 1980).

119. *In re Grand Jury Empanelled*, 597 F.2d at 858; *In re Grand Jury Investigation*, 630 F.2d at 1000.

120. *In re Grand Jury Investigation*, No. 08-3727, 2010 U.S. App. LEXIS 2181, at *1 (3d Cir. Jan. 29, 2010).

121. *Id.* at *1–2 (finding jurisdiction through a combination of the collateral order doctrine and *Perlman*).

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doctrine inapplicable in both civil litigation¹²² and criminal litigation, generally.¹²³ The Ninth Circuit now only entertains *Perlman* appeals in proceedings independent from any litigation, such as grand jury proceedings—a distinction only the Ninth Circuit makes.¹²⁴

Most Ninth Circuit *Perlman* cases in the grand jury context involve a litigant appealing from a discovery order directed towards the litigant's non-party attorney, and the jurisprudence in this area has followed a winding path. Originally the circuit followed other appellate courts and routinely permitted such appeals under *Perlman*.¹²⁵ The Ninth Circuit, however, later changed tack, making a distinction between current attorneys and former attorneys: current attorneys will be expected to risk contempt to protect their clients' privilege claims, but former attorneys are not expected to risk contempt.¹²⁶ This narrow formulation—that *Perlman* applies only where a litigant asserts privilege to resist a discovery order directed by a grand jury¹²⁷ at the litigant's non-party former attorney—continues to govern the Ninth Circuit.¹²⁸

IV. RECONCILING *MOHAWK* AND ITS IMPLICATIONS WITH A BETTER APPROACH TO *PERLMAN*

This Part argues first that *Mohawk* crystallized interlocutory discovery appeals jurisprudence by reaffirming the longstanding principles of *Cobbledick v. United States* and *United States v. Ryan*, and declining to create a new exception where a privilege is at stake. Second, this Part explains why the *Perlman* doctrine is likely still vital and necessary after *Mohawk*. Third, this Part criticizes the existing approaches to analyzing *Perlman*'s applicability in a given situation. It also proposes a categorical approach to *Perlman* that would require courts to look objectively at the relationships between litigants and non-parties and either allow or disallow *Perlman* to all cases in a given

122. *Bank of Am. v. Nat'l Mortgage Equity Corp. (In re Nat'l Mortgage Equity Corp. Mortgage Pool Certificates Litig.)*, 857 F.2d 1238, 1239–40 (9th Cir. 1988).

123. *Id.* at 1240.

124. *See id.*

125. *In re Grand Jury Subpoenas Duces Tecum*, 695 F.2d 363, 364 (9th Cir. 1982).

126. *In re Grand Jury Subpoena Dated June 5, 1985*, 825 F.2d 231 (9th Cir. 1987).

127. As noted by the court in *Pool Certificates Litigation*, any proceeding completely independent of litigation should suffice, but it seems that a grand jury proceeding is likely to be one of the most common type of such proceedings. *Bank of Am.*, 857 F.2d at 1239–40.

128. *See United States v. Amlani*, 169 F.3d 1189, 1192 (9th Cir. 1999). *Amlani* concerned hearings to adjudicate a convicted criminal defendant's claims that attorney disparagement unjustly affected his sentencing hearings. This is a rare case outside of the grand jury context where the hearings were found to be sufficiently independent from any litigation to permit application of *Perlman* under Ninth Circuit case law.

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category. Finally, this Part applies the proposed objective categorical approach to several common categories of relationships in which *Perlman* appeals arise, including client/attorney, employer/employee, and business/consultant relationships.

A. *Mohawk Implicitly Applies to Non-Parties as well as Parties*

For as long as the Supreme Court has been deciding questions surrounding the general ban on discovery order appeals, the Court has never found non-parties to have greater rights than litigants.¹²⁹ *Ryan* provides a prime example of this parity. In *Ryan*, a non-party sought to resist a discovery order because compliance would result in hardship, and the Court enforced the same choice given to litigants in such a scenario: compliance or contempt.¹³⁰ The hardship was irrelevant; the appellant's status as a non-party, likely unable to appeal the ruling after the fact, was irrelevant.¹³¹

Other than *Perlman*, one of the only real questions left in this jurisprudential area post-*Ryan* was whether a claim of privilege justifies interlocutory review of a discovery order. The *Mohawk* Court emphatically answered no.¹³² Although *Mohawk* explicitly applies only to litigants, it is difficult to frame an argument that non-parties are implicitly exempt from the scope of *Mohawk*'s near-unanimous¹³³ and strongly-worded ruling.¹³⁴

Although the Supreme Court did not confront whether *Mohawk* applied to non-parties, the holding speaks for itself. Privilege claims cannot justify interlocutory review outside of the three recognized

129. Non-parties possess functionally greater recourse to appeal a discovery order by virtue of civil contempt constituting a "final order," for purposes of 28 U.S.C. § 1291, whereas civil contempt is not considered final when levied against litigants. Despite this distinction, contempt remains a prerequisite to appeal from a discovery order for both litigants and non-parties. See *supra* text accompanying notes 14–21.

130. The non-party appellant was being required to make an application to the Kenyan government for release of business records subpoenaed by a grand jury. If permission was not granted to remove the records, he had to make the records available for inspection in Kenya. *United States v. Ryan*, 402 U.S. 530, 530–31 (1971).

131. See *id.* at 530.

132. *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 610 (2009).

133. Justice Thomas concurred in part and concurred in the judgment. All other justices joined the majority opinion. *Mohawk*, 130 S. Ct. 599.

134. *Id.* at 609 (quoting *Will v. Hallock*, 546 U.S. 345, 350 (2006); *Swint v. Chambers County Comm'n*, 514 U.S. 35, 48 (1995)) ("[W]e reiterate that the class of collaterally appealable orders must remain 'narrow and selective in its membership.' . . . This admonition has acquired special force in recent years with the enactment of legislation designating rulemaking, 'not expansion by court decision,' as the preferred means for determining whether and when prejudgment orders should be immediately appealable.").

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avenues for such review: contempt appeals, 1292(b) appeals, and mandamus review.¹³⁵ Although post-judgment appeals are normally unavailable to non-parties, these three mechanisms for interlocutory review of discovery orders should suffice to protect privilege claims.¹³⁶ There is little reason to believe that *Mohawk*'s holding does not implicitly apply to non-parties as well as parties.

Ultimately, the Supreme Court is unlikely to confront the question of *Mohawk*'s applicability to non-parties because the Seventh Circuit has expressed its belief, in dicta, that *Mohawk* overruled its approach to non-party discovery order appeals.¹³⁷ If the Seventh Circuit overrules its approach, it will join the majority of circuits and end the circuit split, rendering *Mohawk* universally applicable to both parties and non-parties. The assertion that *Mohawk* settled this entire area of law thus appears relatively noncontroversial. The proper scope of *Perlman*, which through its broad and varied interpretations in the circuit courts threatens to undermine *Mohawk*, presents a much more important and difficult question.

B. Mohawk leaves Perlman's Validity Untouched

The Seventh Circuit recently questioned whether *Mohawk* implicitly overruled *Perlman*.¹³⁸ *Perlman* likely remains vital for several reasons. First, *Perlman* has endured for nearly a century, and the Supreme Court has regularly reaffirmed it for decades.¹³⁹

Second, *Perlman* is entirely compatible with the reasoning of *Mohawk*. *Mohawk* recognized that privilege claims, although not crucial enough to justify an unlimited right of interlocutory appeal when abrogated by a discovery order, occupy an important place in our legal system.¹⁴⁰ The Court acknowledged the potential damage done to a privilege holder by releasing the privileged information, and stressed that "litigants confronted with a particularly injurious or novel privilege ruling have several potential avenues of [interlocutory] review."¹⁴¹ These avenues include contempt appeals, 1292(b) appeals, and

135. *Id.* at 609.

136. Non-parties' lack of post-judgment appeals is to some extent counterbalanced by the ability to appeal from both civil and criminal contempt as "final orders." See *supra* text accompanying notes 14–21.

137. See *supra* text accompanying notes 30–34.

138. *Wilson v. O'Brien*, 621 F.3d 641, 643 (7th Cir. 2010).

139. See *supra* Part III.A.2.

140. *Mohawk*, 130 S. Ct. at 606.

141. *Id.* at 607.

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mandamus review.¹⁴²

Perlman occupies a critical and unique place in this scheme because *Perlman* is relevant when the most crucial avenue for immediate review, a contempt appeal, has been taken off the table by virtue of the circumstances. In a true *Perlman* situation, where a disinterested non-party, who has no incentive to risk contempt, holds privileged information, the litigant now has only *two* potential avenues for protecting his or her privilege: 1292(b) and mandamus review.

Now the litigant's options become problematic. By its statutory terms, a 1292(b) appeal is only available in civil litigation, and then still only allowed where both the district court and appellate court judges consent.¹⁴³ Mandamus review should be reserved for "extraordinary circumstances,"¹⁴⁴ where allowing discovery over the litigant's privilege claim "amount[s] to a judicial usurpation of power or a clear abuse of discretion."¹⁴⁵ Where contempt is not available it is easy to contemplate many factual scenarios where a litigant is truly "powerless to avert the mischief of the [discovery] order," which has been precisely the enduring rationale of *Perlman* for almost a century.¹⁴⁶

Contempt appeals are the broadest and most effective form of appeal from discovery orders because litigants or non-parties have a clear choice and can prove their objection is neither frivolous nor a mere delaying tactic by raising the stakes. "Both sides benefit from having a second look" afforded by the contempt requirement,¹⁴⁷ and upon taking that second look many parties and non-parties may choose not to resist discovery via a contempt appeal. Although contempt is a "difficult path to appellate review . . . [i]n discovery disputes . . . this difficulty is deliberate."¹⁴⁸

While defining this jurisprudential area, the Supreme Court has consistently resorted to contempt appeals as the preferred remedy.¹⁴⁹ Only where the Court was presented with a "unique setting" wherein requiring a contempt appeal "would be unseemly, and would present an

142. *Id.* at 609.

143. 28 U.S.C. § 1292(b) (2006).

144. *Mohawk*, 130 S. Ct. at 607.

145. *Id.* (quoting *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 390 (2004)).

146. *Perlman v. United States*, 247 U.S. 7, 13 (1918).

147. *Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 591 F.2d 174, 180 (2d Cir. 1979).

148. *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 444 F.3d 462, 474 (6th Cir. 2006) (quoting *MDK, Inc. v. Mike's Train House, Inc.*, 27 F.3d 116, 121–22 (4th Cir. 1994)) (ruling that the non-party could not appeal until being cited for contempt where the non-party resisted discovery order and asserted privilege).

149. See *Alexander v. United States*, 201 U.S. 117 (1906); *Cobbledick v. United States*, 309 U.S. 323 (1940); *United States v. Ryan*, 402 U.S. 530 (1971); *Mohawk*, 130 S. Ct. 599.

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unnecessary occasion for constitutional confrontation between two branches of the Government” did the Court decline to require the litigant, the President of the United States, to submit to contempt before appealing a discovery order adverse to privilege.¹⁵⁰

The importance of contempt appeals in this area of law and the hardships likely to arise where contempt appeals are truly not available speak to the continuing vitality and importance of *Perlman*. *Perlman* is completely compatible with the spirit and letter of *Mohawk*, if properly and narrowly applied.

C. An Objective Categorical Approach to Perlman

This subpart examines the existing approaches to *Perlman*, as employed by courts or suggested by commentators, and argues that each is problematic. It then proposes a new approach to determining *Perlman*'s applicability in a given situation—an approach that tries to avoid the flaws of existing methods as well as attempts to find a better balance between a sense of fairness to litigants, as embodied by *Perlman*, and longstanding concerns about the abusive delays to litigation.

1. Problems with Currently Employed Approaches

Perlman has not been narrowly applied, and this belies the doctrine's inception as an exception, based on a unique factual setting, to the general ban on discovery order appeals. The Supreme Court defended the general ban on discovery order appeals throughout the twentieth century, in *Alexander v. United States*, *Cobbledick v. United States*, *United States v. Ryan*, and *Mohawk Industries v. Carpenter*.¹⁵¹ *Perlman* represents the sole meaningful exception,¹⁵² and not even privilege claims have proven weighty enough to create another.¹⁵³ The Supreme Court has explicitly recognized that *Perlman* was intended to apply only to a “limited class of cases where denial of immediate review would render impossible any review whatsoever.”¹⁵⁴ Thus, by implication, *Perlman* should apply only where contempt is truly unavailable; where it

150. *United States v. Nixon*, 418 U.S. 683, 691–92 (1974).

151. *See supra* Part II.A.

152. The only other exception was carved out for the President of the United States. *See supra* text accompanying notes 149–150.

153. *See supra* text accompanying notes 22–27.

154. *United States v. Ryan*, 402 U.S. 530, 533 (1971).

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is “not only ‘unlikely’ but unimaginable”¹⁵⁵ that a non-party in a certain situation will submit to contempt.

Other interpretations of *Perlman* are ill advised for a variety of reasons. For example, circuit courts following the mechanical approach apply *Perlman* based simply on the relationship of the participants—automatically allowing *Perlman* appeals where a litigant claims privilege to resist discovery aimed at a non-party.¹⁵⁶ This approach ignores the Supreme Court’s explicit understanding that *Perlman* requires a “neutral”¹⁵⁷ or “disinterested”¹⁵⁸ non-party, and ignores any analysis of whether contempt is likely or unimaginable.

The subjective approach, followed by other circuits, is equally troublesome. Under the subjective approach, the courts look only at whether an individual non-party has already expressed a willingness or unwillingness to continue to resist discovery via contempt.¹⁵⁹ This approach allows savvy litigants to evade *Mohawk* entirely. In a circuit where *Perlman* requires merely an expressed desire to comply with a court order, many non-parties will express that desire. The idea that a licensed attorney or a large law firm, for example, might casually turn over its clients’ privileged information appears irresponsible and unethical in most other contexts, but in jurisdictions where an expressed willingness to disclose privileged information suffices to trigger a *Perlman* appeal, the irresponsible quickly becomes routine.¹⁶⁰

One commentator suggests a multi-factored approach that examines the specific parties and the level of control exerted by the litigant over the non-party across a spectrum.¹⁶¹ The greater the amount of effective control exercised over the non-party, the greater the interests of litigant and non-party overlap and the less a court should permit a *Perlman*

155. *Nat’l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 591 F.2d 174, 179 (2d Cir. 1979) (quoting *United States v. Nixon*, 418 U.S. 683, 691 (1974)).

156. *See supra* Part III.B.2.

157. *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 514 (1975) (Marshall, J., concurring in the judgment).

158. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 18 n.11 (1992).

159. *See supra* Part III.B.3.

160. *See generally* *Velsicol Chem. Corp. v. Parsons*, 561 F.2d 671 (7th Cir. 1977) (attorney announced intent to comply with discovery order and hand over privileged information); *United States v. Davis*, 1 F.3d 606 (7th Cir. 1993) (attorney intended to comply with discovery order and turn over privileged information); *Company X v. United States (In re Grand Jury Proceedings)*, 857 F.2d 710 (10th Cir. 1988) (attorney intended to comply with discovery order and turn over privileged information); *In re Sealed Case*, 146 F.3d 881 (D.C. Cir. 1998) (attorney intended to comply with discovery order and turn over privileged information); *Walter E. Lynch & Co. v. Fuisz*, 862 A.2d 929 (D.C. Ct. App. 2004) (large international law firm Winston & Strawn indicated intent to comply with discovery and turn over client’s privileged information).

161. Michael R. Lazerwitz, Comment, *The Perlman Exception: Limitations Required by the Final Decision Rule*, 49 U. CHI. L. REV. 798, 807 (1982).

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appeal.¹⁶² This approach is enticing because it gets to the heart of the problem: when is a non-party truly disinterested?

The difficulties with this commentator's approach, however, are practical in nature. *Perlman* decides the threshold issue of whether an immediate appeal is granted, and such appeals from discovery orders normally occur during the pre-trial phase of litigation or during grand jury proceedings.¹⁶³ The entire thrust of the Supreme Court's jurisprudence in this area dictates that delaying tactics and piecemeal appeals should be avoided.¹⁶⁴ The "effective control" approach could, in many instances, require a virtual mini-trial at the appellate level simply to resolve the threshold issue of jurisdiction. As Judge Easterbrook wrote in *In re Klein*, "[j]urisdictional inquiries turning on the nuances of particular situations may be worse than rules allowing all appeals in a category" because of the potential excessive delays caused by such inquiries.¹⁶⁵ Thus, the "effective control" approach, while alluring, exacerbates the very problems that the discovery order appeals ban seeks to prevent.

2. Reining in *Perlman* Under an Objective Categorical Approach

Generally, evidence in regards to which a litigant has a valid privilege claim is unlikely to be held by a non-party, meaning that *Perlman* tends to be relevant only to certain categories of relationships. The most common of these categories is where litigants resist discovery directed at their non-party attorney.¹⁶⁶ Another common category finds litigant/employers resisting discovery made against their non-party employees.¹⁶⁷ Other categories include litigant/corporations resisting discovery aimed at non-party consultants,¹⁶⁸ and, of course, the actual *Perlman* scenario wherein a litigant resists discovery directed at a clerk of court who holds privileged evidence submitted in an unrelated case.¹⁶⁹

162. *Id.*

163. It is possible that some courts over the years have been hasty in examining *Perlman*'s applicability simply because it is a somewhat obscure rule that deals with a threshold issue, and courts are more focused on the substantive issues inherent in any given case. This might partly explain the inconsistent jurisprudence of some of the federal circuits.

164. *See Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 605 (2009).

165. *In re Klein*, 776 F.2d 628, 631 (7th Cir. 1985).

166. *See supra* note 160 for several examples.

167. *See In re Burlington Northern Inc.*, 679 F.2d 762 (8th Cir. 1982).

168. *See In re Grand Jury Subpoena*, 220 F.3d 406 (5th Cir. 2000).

169. *See In re Grand Jury Proceedings*, 43 F.3d 966 (5th Cir. 1994) (case has similar facts to *Perlman* in that a court is in possession of evidence and is ordered to turn it over to a separate court).

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The best approach to applying *Perlman* is to look objectively at these categories and determine whether contempt is truly unavailable and whether it is “unimaginable” that the non-party would ever choose to submit to contempt in order to preserve the litigant’s privilege. This approach dodges the pitfalls of the subjective and mechanical approaches; it also seeks the same end as the “effective control” approach while avoiding detailed factual inquiries in every case. This approach fits with the Supreme Court’s understanding that *Perlman* requires disinterested non-parties and is compatible with the reasoning of *Mohawk*: that contempt appeals are the preferred option, but where contempt is truly unavailable an exception is called for to prevent the improvident disclosure of privileged materials. Lastly, there is analogous precedent for taking a categorical approach to jurisdictional issues, as the Supreme Court analyzes collateral order appeals claims by examining whether the entire class of claims falls within the doctrine, and avoids an inquiry based on the facts of the individual case in question.¹⁷⁰

An objective categorical approach will rule out *Perlman* appeals in most of the categories in which such appeals are typically sought and will return *Perlman* to being a narrow exception. Rendering *Perlman* inapplicable in many cases, however, is not nearly as harsh a result as it might at first seem for three reasons.

First, in situations where a litigant claims a privilege and resists a discovery order aimed at a non-party, judges should, whenever possible, be willing to hold the non-party in civil contempt for non-compliance rather than criminal contempt.¹⁷¹ In *National Super Spuds, Inc. v. New York Mercantile Exchange*, the Fifth Circuit referenced a prior appellate case in which a witness was held in civil contempt and imprisoned until he agreed to comply with a discovery order.¹⁷² The *National Super Spuds* court remarked that “district judges do not ordinarily act in so Draconian a fashion as the judge in that case improperly did” and that normally the contempt appeals process should not be so dramatic in a discovery order situation.¹⁷³ Therefore, because civil contempt with fines attached will suffice to trigger an appeal, this should ordinarily be

170. See *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 605 (2009); see also *United States v. MacDonald*, 435 U.S. 850, 857 n.6 (1978) (quoting *Carroll v. United States*, 354 U.S. 394, 405 (1957)) (“Appeal rights cannot depend on the facts of a particular case,” and Congress has defined “final decisions” for 28 U.S.C. § 1291 purposes “in terms of categories.”).

171. Criminal contempt is generally considered to be a harsher sanction than civil contempt, see 17 C.J.S. *Contempt* § 8 (2011), and civil contempt is a “final order” when levied against non-parties and so suffices to grant immediate appeal. See *supra* text accompanying notes 14–21.

172. *Nat’l Super Spuds, Inc. v. N.Y. Mercantile Exchange*, 591 F.2d 174, 180 (2d Cir. 1979).

173. *Id.*

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the sanction, and the appellate courts should so instruct the lower courts.

A second factor mitigating the perceived harshness of narrowing *Perlman* is that litigants still have many means by which to induce recalcitrant witnesses to stand in contempt in order to secure an appeal. The most obvious of these methods is for the litigant to pay any adjudged contempt fines and attorney fees of the non-party should the appeal fail. Other forms of compensation based on the relationship between the litigant and non-party would not be inappropriate in exchange for the non-party doing everything possible to safeguard the litigant's privilege claim.

Lastly, should the non-party be utterly unwilling to risk contempt, there remains the possibility of 1292(b) appeals,¹⁷⁴ a writ of mandamus, and protective orders in order to safeguard a litigant's privileged materials. Though these options are not ideal, they remain available to potentially prevent injury caused by errors at the district court level.

D. Applying the Objective Categorical Approach

Because litigants are unlikely to hand over privileged evidence to an untrustworthy party or a stranger, *Perlman* appeals tend to be raised in certain common categories of relationships. These include client/attorney, employer/employee, and business/consultant relationships, where the former is a litigant and the latter is a non-party at whom a discovery request is directed. This subpart examines each of these categories as well as the factual situation from *Perlman* itself and applies the proposed objective categorical approach.

1. Applying the Objective Categorical Approach to Attorney–Client Scenarios

Attorney–client scenarios represent the most common invocation of *Perlman* and have given appellate courts more trouble than any category of *Perlman* appeals. Courts have gone back and forth about the force of attorneys' ethical obligations to protect their clients' privilege claims as weighed against attorneys' obligations to respect and comply with orders of a court.¹⁷⁵

Under an objective categorical analysis, however, *Perlman* appeals should be unavailable in all attorney–client scenarios. Attorneys have

174. The language of *Ryan*, that *Perlman* exists to provide relief where immediate review of a discovery order is otherwise "impossible" might require that a 1292(b) appeal, if available, be resorted to prior to attempting a valid *Perlman* appeal. *United States v. Ryan*, 402 U.S. 530, 533 (1971).

175. *See In re Klein*, 776 F.2d 628, 630–31, 631 n.1 (7th Cir. 1985).

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ethical obligations to preserve attorney–client privilege, a specific privilege that the Supreme Court recently reaffirmed is one of the oldest and most important privileges recognized in our legal system.¹⁷⁶ The Second Circuit has expressed its belief that “[i]f it is necessary that . . . attorneys suffer contempt in order to ensure that [their] clients have an opportunity for a decision on appeal, then the lawyers must follow this path.”¹⁷⁷

Further, there is analogous Supreme Court precedent supporting a reading that attorneys as a category are not sufficiently disinterested in their clients’ privilege claims allow *Perlman*. In *Cunningham v. Hamilton County, Ohio*, a magistrate judge ordered Federal Rule of Civil Procedure Rule 37 sanctions against an attorney for willfully refusing compliance with an order to compel discovery in a civil lawsuit.¹⁷⁸ A district court affirmed the sanctions; the Sixth Circuit dismissed an appeal for lack of jurisdiction, which the Supreme Court affirmed.¹⁷⁹ To refute the attorney’s contention that, as a non-party to the litigation, the sanctions were “effectively unreviewable” absent interlocutory appeal under the collateral order doctrine, the Supreme Court noted that there is a close “identity of interests between the attorney and client” and that “attorneys assume an ethical obligation to serve their clients’ interests.”¹⁸⁰ The Court went further, saying that “[t]he effective congruence of interests between clients and attorneys counsels against treating attorneys like other nonparties for purposes of appeal.”¹⁸¹

When faced with a choice between accepting the sanctions and taking their own appeal which delays the client’s litigation, the Court explained that the attorney was obligated to accept the sanctions, rendering the “effectively unreviewable” question moot.¹⁸² Similar reasoning argues that attorneys should choose contempt when faced with a choice between submitting to contempt in order protect their client’s privilege claims or turning over privileged material.¹⁸³

176. *Mohawk*, 130 S. Ct. at 606.

177. *In re Klein*, 776 F.2d at 631. The opinion in *Klein* went on to note that New York disciplinary rule 4-101(C)(2) permits an attorney to reveal privileged information when ordered to do so by a court, but that the Second Circuit had also held that attorneys still had an obligation to ensure that the court order was valid, and contempt might sometimes be necessary to make this determination. *Id.*

178. *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198 (1999).

179. *Id.*

180. *Id.* at 206.

181. *Id.* at 207.

182. *Id.* at 206–07.

183. The harshness of this position is mitigated because the ordinary rule should be civil contempt fines, and, should the appeal be rejected, the client should be willing to pay the attorney’s contempt

Lastly, in the absence of a narrower *Perlman* exception, the attorney–client scenario is ripe for collusion. This is potentially rampant in the circuit courts currently following a subjective approach to *Perlman* application.¹⁸⁴ A litigant’s case for a *Perlman* appeal is much more sympathetic when their attorney announces that they have no intention of protecting privileged material—regardless of the sincerity of the attorney’s stated intention.

The Supreme Court in *Cunningham v. Hamilton County, Ohio* was wary of attorney–client collusion as well. The attorney at the center of that case argued that her Federal Rule of Civil Procedure Rule 37 sanctions appeal should be granted because she was no longer representing the client in whose case the sanctions had been ordered. The Supreme Court rejected this contention because such an exception “could be subject to abuse if attorneys and clients strategically terminated their representation in order to trigger a right to appeal with a view to delaying the proceedings.”¹⁸⁵

Given the strong interests shared by attorneys and their clients as well as the analogous recent Supreme Court pronouncements that attorneys and clients have strongly shared interests, it is difficult to marshal an argument that attorneys are sufficiently disinterested in their client’s privilege claims to justify invoking *Perlman*. Hence, *Perlman* appeals should not normally be allowed in the attorney–client context, for either current or former attorneys.

2. Applying the Objective Categorical Standard to Other Potential Categories of *Perlman* Scenarios

Applying the objective categorical approach to other common categories of *Perlman* appeals yields a dramatic reduction in such appeals. In employer/employee scenarios, *Perlman* should not be available. Employers have a variety of positive and negative means by which to induce employees to vigorously protect their employer’s privilege, and it is certainly not objectively “unimaginable” that an employee would submit to contempt in order to do so, particularly if the employer agrees to indemnify the employee for legal fees and any fines incurred.

Cases involving *former* employees present a closer question, however, because the litigant’s options for inducement and the employee’s motives to care about the privilege are both reduced. A

fines. See *supra* text accompanying notes 171–173.

184. See *supra* notes 159–160 and accompanying text.

185. *Cunningham*, 527 U.S. at 209.

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Perlman appeal might, therefore, be tolerated in this rare scenario, wherein privileged information remains in the custody of a former employee who has no other ethical obligations to the former employer.

Where a corporation claims privilege and resists discovery directed at a non-party consultant, *Perlman* should not be available. Unlike former employees, a corporation is a once and potential future customer for a consultant. Furthermore, professional and reputation-based reasons exist to protect that customer's privilege claims. As with employer–employee scenarios, although it is far from certain that any individual consultant will submit to contempt for a customer, it is not “unimaginable,” and so consultants generally are not sufficiently disinterested.

Finally, there is the factual scenario that gave rise to *Perlman*, where a litigant resists discovery aimed at a clerk of court who holds privileged materials submitted into evidence for other litigation. This scenario is very rare, but it still occurs,¹⁸⁶ and under an objective categorical analysis *Perlman* will continue to apply because it is “unimaginable” that a clerk of court will make a contempt appeal to protect a stranger.

V. CONCLUSION

Mohawk came close to fully settling the case law surrounding discovery order appeals; all that remains is to define the scope of *Perlman* in a way compatible with *Mohawk*. This Comment recommends taking an objective categorical approach, in which the inquiry is whether it is “unimaginable” that a similarly situated non-party would ever risk contempt to protect the litigant's privilege claims. Furthermore, in order to mitigate the potential harshness of a narrower *Perlman* rule, appellate courts should recommend that civil contempt fines be the only sanctions ordinarily levied in situations where *Perlman* is not applicable. This approach will reconcile *Perlman* with the reasoning of *Mohawk* and the line of cases preceding it, and fully settle this area of law.

186. See *In re Berkley & Co., Inc.*, 629 F.2d 548 (8th Cir. 1980); *In re Grand Jury Proceedings*, 43 F.3d 966 (5th Cir. 1994).