[J-65-2010][M.O. McCaffery, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 8 EAP 2009
	:	
Appellee	:	
	:	Appeal from the Order entered on 1/28/09
	:	in the Court of Common Pleas, Criminal
v.	:	Division of Lancaster County at No. CP-
	:	36-CR-0000672-1997
	:	
FRANCIS BAUER HARRIS,	:	
	:	
Appellant	:	ARGUED: September 15, 2010

CONCURRING OPINION

MR. JUSTICE SAYLOR

I join the majority opinion, subject to the following comments.

On the jurisdictional question, I previously expressed my own preference that discovery orders requiring production of assertedly privileged material generally should follow the permissive appeals route. See Commonwealth v. Kennedy, 583 Pa. 208, 231-32, 876 A.2d 939, 953-54 (2005) (Saylor, J., concurring).[1] Nevertheless, I

[1] The majority makes a valid observation that the requirements of Rule of Appellate Procedure 1311 may be too stringent as applied to privilege matters. See Majority Opinion, slip op. at 11. I note only that, as the rulemaker, this Court does have the ability to tailor the applicable rules in light of the stated concerns, as an alternative to maintaining the present categorical approach. See generally John C. Nagel, Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence with Discretionary Review, 44 DUKE L.J. 200, 216 (1994) ("A broad discretionary exception [to the final judgment rule] avoids the difficult, perhaps intractable, problem of defining in advance all the categories of orders that should be appealable before final decision."); Robert J. Martineau, Defining Finality and Appealability by Court Rule: Right Problem, Wrong
(continued...)

supported the application of the collateral order doctrine based on Pennsylvania precedent. See id. (citing Commonwealth v. Dennis, 580 Pa. 95, 107-09, 859 A.2d 1270, 1278 (2004)). Nothing said in Mohawk Industries, Inc. v. Carpenter, ___ U.S. ___, 130 S. Ct. 599 (2009), alters my calculus in this latter regard, albeit that our collateral order jurisprudence otherwise is fashioned after the federal model.

As to the merits, I support the majority's primary logic, but have some difficulty with a few of the collateral comments. For example, the majority's effort to address the ethical concerns expressed by Dr. Berger, see Majority Opinion, slip op. at 17, while perhaps salutary, do not solve his dilemma, in the absence of a determination of exactly what matters and materials fall within the scope of an extant privilege.[2] The majority's comment that Dr. Berger must appear "without further remuneration," id at 16, seems to me to go to the psychologist's motion to the PCRA court, see id. at 5-6, which I see as beyond the scope of the present appeal proceedings.

(...continued)
Solution, 54 U. PITT. L. REV. 717, 777 (1993) ("The discretionary appeal thus provides the relief valve in those cases in which the strict adherence to the final judgment rule would not serve the best interests of the parties or the public, but with an individualized balancing of interests made on a case by case basis.").

[2] For my own part, I believe the waiver to be very broad, since Dr. Berger was not a treating psychologist, but rather, was retained as a defense expert for trial purposes. See PCRA Petition at ¶343. Thus, it seems to me that the wider range of his observations and opinions should be subject to the waiver, given that Appellant has placed his performance as a defense expert in issue.