WOODBURY KNOLL, LLC, ET AL. *v.* SHIPMAN AND GOODWIN, LLP, ET AL.
(SC 18584)

Norcott, Zarella, McLachlan, Eveleigh, Harper, Vertefeuille and Espinosa, Js.*

Argued January 11—officially released July 31, 2012

Harold B. Finn III, with whom were *Donna Nelson Heller* and *Tony Miodonka*, for the plaintiff in error (Finn, Dixon & Herling, LLP).

Patrick M. Noonan, with whom, on the brief, was *Matthew H. Geelan*, for the defendants in error (Shipman & Goodwin, LLP, et al.).

Barbara L. Cox, for the plaintiffs in the underlying action (Woodbury Knoll, LLC, et al.).

Opinion

ZARELLA, J. The primary issue is whether a nonparty attorney may bring a writ of error from a trial court's order requiring the attorney to comply with a clear and definite discovery request. The plaintiff in error, Finn, Dixon & Herling, LLP (Finn Dixon), brought this writ of error from an order of the trial court requiring it to comply with a subpoena duces tecum issued by the defendants in error, Shipman & Goodwin, LLP, and Carolyn Cavolo (defendants), who are also the defendants in the underlying case. Finn Dixon contends that the trial court improperly denied its motion to quash, in which it claimed that the defendants sought materials protected by the attorney-client privilege and the attorney work product doctrine. We conclude that (1) the trial court's order is an appealable final judgment, and (2) the trial court improperly denied Finn Dixon's motion to quash the subpoena.

The record reveals the following undisputed facts that are relevant to our resolution of this matter. The plaintiffs in the underlying legal malpractice action, Woodbury Knoll, LLC, Woodbury Knoll II, LLC, Paredim Partners, LLC, and David Parisier (plaintiffs), brought the action against the defendants, alleging that the defendants negligently had represented the plaintiffs in connection with certain real estate transactions. In essence, the plaintiffs alleged that, as a result of the defendants' negligent failure to discover the fraudulent conduct of Andrew Kissel, a party to those real estate transactions, the plaintiffs were subject to a variety of foreclosure actions and related legal proceedings. To represent them in connection with those proceedings, the plaintiffs engaged Finn Dixon. The plaintiffs allege that, as the result of the defendants' failure to discover Kissel's fraud, they incurred damages of $4,288,674.60, which consisted of settlement payments in the amount of $2,917,000 and attorney's fees paid to Finn Dixon in the amount of $1,371,647.60, for which they seek reimbursement from the defendants.

After the plaintiffs brought the underlying legal malpractice action, the defendants served a notice of deposition and subpoena duces tecum on Finn Dixon's custodian of records, directing the custodian to produce, inter alia, "[a]ll documents, including without limitation, notes, memoranda, e-mails, pleadings, document production, billing statements, time records, and every other form of written, typewritten, printed or computer-generated material" relating to Finn Dixon's representation of the plaintiffs for the period from October 13, 2004, through December 4, 2009, the date of the subpoena. In response, and pursuant to Practice Book §§ 13-5[1] and 13-28 (e),[2] Finn Dixon and the plaintiffs filed separate objections, motions to quash the subpoena and motions for protective orders, claiming, inter alia, that much of the material requested was covered by the

attorney-client privilege and the work product doctrine. The defendants then filed an objection to Finn Dixon's motions to quash and for a protective order, a reply to Finn Dixon's objection, and a motion to compel production of unredacted copies of all attorney's billing statements and time entries that formed the basis of the plaintiffs' claim for damages. The trial court overruled Finn Dixon's objection to the subpoena, denied Finn Dixon's motion to quash and granted the defendants' motion to compel (discovery order).[3]

Thereafter, Finn Dixon brought this writ of error, claiming that the trial court improperly had overruled its objection to the defendants' subpoena and denied its motion to quash. To perfect the record for review by this court, Finn Dixon filed a notice pursuant to Practice Book § 64-1,[4] stating that the trial court had not issued a memorandum of decision in connection with its ruling. In response to this notice, the trial court issued a "supplemental" memorandum of decision explaining its ruling. Finn Dixon then filed a motion for further articulation of the trial court's ruling. In response, the trial court ordered the parties to submit briefs on the issues raised in the motion for articulation and ordered them to appear for oral argument. After hearing the parties' arguments, the trial court issued an articulation in which it stated that it had overruled Finn Dixon's objection to the subpoena duces tecum and denied its motion to quash because "[1] the subpoena was not unduly burdensome, [2] a blanket assertion of the [work product doctrine] is inadequate, [3] the work product [doctrine] is not absolute and [is] subject to the court's discretion, [4] even if privileged, under the implied waiver or 'at issue' exception, the materials [sought] were disclosable, [5] [Finn Dixon] has no standing as both the attorney-client privilege and the work product [doctrine] belong to the client, [6] the information sought is essential and cannot be otherwise obtained and [7] its disclosure can lead to the discovery of information [that is] material to the claims and defenses of the parties."

Meanwhile, the defendants filed with this court a motion to dismiss Finn Dixon's writ of error, claiming, inter alia, that it had not been brought from a final judgment of the trial court, as required by Practice Book § 72-1 (a).[5] We denied the motion but, thereafter, ordered the parties to be prepared to address the issue at oral argument before this court.

I

We first address whether the discovery order is an appealable final judgment because it implicates this court's subject matter jurisdiction over Finn Dixon's writ of error. See, e.g., *State* v. *Curcio*, 191 Conn. 27, 30, 463 A.2d 566 (1983) ("[b]ecause our jurisdiction over appeals . . . is prescribed by statute, we must always determine the threshold question of whether the appeal

is taken from a final judgment before considering the merits of the claim"). We conclude that the discovery order constitutes an appealable final judgment under *Curcio*.

Finn Dixon argues that the order was an appealable final judgment because Finn Dixon was not a party to the underlying action and had no interest in the merits of the case or its outcome; rather, its interest is of a professional nature, namely, in protecting the confidentiality of privileged materials and work product, and, once the privileged materials and work product are disclosed, their confidentiality will be permanently lost. In support of this argument, Finn Dixon relies on *State* v. *Curcio*, supra, 191 Conn. 31, and *Abreu* v. *Leone*, 291 Conn. 332, 347, 968 A.2d 385 (2009). In response, the defendants contend that the ordinary rule that discovery orders are not appealable final judgments applies to the trial court's order in the present case.

Specifically, Finn Dixon claims that the discovery order is appealable because it is a final judgment under the second prong of *Curcio*. See *State* v. *Curcio*, supra, 191 Conn. 31 ("[a]n otherwise interlocutory order is appealable in two circumstances: [1] [when] the order or action terminates a separate or distinct proceeding, or [2] [when] the order or action so concludes the rights of the parties that further proceedings cannot affect them"). Finn Dixon further relies on *Abreu* for the proposition that policy considerations may sometimes inform whether a discovery order can be appealed. In this case, Finn Dixon claims that preserving the attorney-client privilege and work product confidentiality and the mandates of the Rules of Professional Conduct constitute important policy considerations that militate in favor of concluding that the discovery order in the present case is an appealable final judgment. Thus, reasons Finn Dixon, a nonparty attorney need not be held in contempt for failing to obey a discovery order before appealing from it.

We agree with Finn Dixon that the present case is governed by our decision in *Abreu* v. *Leone*, supra, 291 Conn. 332, in that the discovery order satisfied the first prong of *Curcio*.[6] Like the discovery order in *Abreu*, the discovery order in the present case satisfies the first prong of *Curcio* because it terminated a separate and distinct proceeding against a nonparty. We further conclude that a counterbalancing factor exists to justify not subjecting Finn Dixon to the ordinary rule that one must be held in contempt in order to challenge a trial court's discovery order, namely, the concern of requiring an attorney, as an officer of the court, to violate a court order and otherwise to behave inconsistently with the Rules of Professional Conduct in order to bring an appeal.

Curcio is the foundational case governing whether an otherwise interlocutory order is appealable. A trial

court's ruling may be appealed if it (1) "terminates a separate or distinct proceeding," or (2) "so concludes the rights of the parties that further proceedings cannot affect them." *State* v. *Curcio*, supra, 191 Conn. 31. Writs of error may be brought only from a final judgment of the trial court; Practice Book § 72-1 (a); and, therefore, *Curcio* must be satisfied. With regard to discovery orders, this court has noted that these orders generally do not satisfy either prong of *Curcio* and that, "in order for appellate jurisdiction to be appropriate, a party challenging the validity of a subpoena or discovery order *ordinarily* must have been found in contempt of the subpoena." (Emphasis added.) *Office of the Governor* v. *Select Committee of Inquiry*, 271 Conn. 540, 570, 858 A.2d 709 (2004). We have noted, however, that appeals from discovery disputes "are more fact specific than would appear at first blush"; *Abreu* v. *Leone*, supra, 291 Conn. 346; and, accordingly, we have held on several occasions that one may bring an appeal challenging a discovery order without first being held in contempt for failing to comply with such an order. See id., 348–50; *Seymour* v. *Seymour*, 262 Conn. 107, 108–109, 809 A.2d 1114 (2002); *Lougee* v. *Grinnell*, 216 Conn. 483, 486–87, 582 A.2d 456 (1990), overruled in part on other grounds by *State* v. *Salmon*, 250 Conn. 147, 735 A.2d 333 (1999).

Abreu is directly on point. In that case, the intervening plaintiff, the department of children and families (department), appealed from an order compelling the plaintiff, Joseph Abreu, to respond to deposition questions that arose in a separate proceeding. *Abreu* v. *Leone*, supra, 291 Conn. 334. In that proceeding, the defendant minor child, Karissa Leone, through her parent and next friend, brought a claim against the department, alleging that she had been injured by Geovanny M., a minor child and ward of the state, while playing at school. Id., 334–35 and n.1. Leone sought to discover whether the department was negligent in that it knew or should have known of Geovanny M.'s violent propensities. Id., 334–35 n.1. "Pursuant to that action, a notice of deposition and subpoena duces tecum [were] issued to [Abreu, the alleged foster parent of Geovanny M.]. [Abreu] thereafter filed [an] independent action in the Superior Court . . . asking the court to quash the subpoena and for a protective order from the deposition on the ground that he [was] prohibited, under General Statutes (Sup. 2006) § 17a-28,[7] from disclosing the matters sought to be discovered in the underlying proceeding, namely, information about a foster child. The department . . . filed a brief in support of [Abreu's] position." Id., 334–35. The trial court noted the potential applicability of § 17a-28 but allowed the deposition to go forward on the basis that Leone might seek information not covered by the statute. Id., 335.

During the deposition, Abreu declined, on counsel's advice, to answer various questions on the ground that doing so would violate § 17a-28. Id., 336. "Thereafter,

the parties filed cross motions, seeking either to compel or to avoid the disclosures and for monetary sanctions. The trial court . . . declined to impose monetary sanctions but ordered [Abreu] to answer the disputed questions. The department filed a motion to reargue, which the court denied. The department thereafter appealed from the trial court's order to the Appellate Court. [Abreu] did not file a separate appeal, relying instead on the department to protect his confidentiality interests underlying § 17a-28 (b). The Appellate Court sua sponte issued an order directing the parties to appear and give reasons, if any, why the appeal should not be dismissed for lack of a final judgment . . . . After a hearing, the Appellate Court dismissed the appeal. This court thereafter granted the department's petition for certification to appeal, limited to the following question: 'Did the Appellate Court properly dismiss [the] appeal for lack of a final judgment?' " (Citations omitted.) Id., 337–38.

To determine whether there was subject matter jurisdiction, this court reviewed its final judgment jurisprudence regarding appeals from discovery orders and identified three points salient to determining whether a discovery order could be considered an appealable final judgment. First, "the court's focus in determining whether there is a final judgment is on the *order* immediately appealed, not [on] the underlying action that prompted the discovery dispute."[8] (Emphasis added.) Id., 345. Second, determining whether an otherwise nonappealable discovery order may be appealed is a "fact specific" inquiry, and the court should treat each appeal accordingly. Id., 346. Third, "although the appellate final judgment rule is based partly on the policy against piecemeal appeals and the conservation of judicial resources . . . there [may be] a counterbalancing factor" that militates against requiring a party to be held in contempt in order to bring an appeal from a discovery order. Id., 347–48.

With these points in mind, the court concluded that Abreu's challenge to the discovery order was an appealable final judgment. See id., 349–50. Specifically, the court reasoned that (1) Abreu's challenge was a separate and distinct proceeding from the action that Leone had initiated against the department; id., 348–49; and (2) policy considerations militated against requiring a foster parent to choose between violating § 17a-28 and facing criminal sanctions, or being held in contempt in order to challenge the discovery order. See id., 347–48. Simply put, requiring a contempt finding as a predicate to appellate review, in this circumstance, would undermine the child welfare system. See id., 348.

The present case is identical in all material respects to *Abreu*. In both cases, the appellant or plaintiff in error[9] challenged a clear and definite discovery order, which was based on the trial court's final and comprehensive ruling, and the appellant or plaintiff in error

perfected the record for appeal. See id., 337–38, 345–46. Under these circumstances, "there are no further proceedings before the Superior Court involving the [person or persons subject to the discovery order] because the questions have been propounded and the trial court has unequivocally ruled what must occur," that is, the discovery order must be complied with, which, in turn, terminates a separate and distinct proceeding. Id., 345–46. Furthermore, in both cases, the appellant or plaintiff in error is a nonparty to the underlying action. In *Abreu*, the nonparty foster parent challenged, as a plaintiff in a separate proceeding, a discovery order that arose in a case between two other parties. See id., 334–35. Similarly in the present case, Finn Dixon is not involved in any way with the lawsuit between the plaintiffs and the defendants. Finn Dixon is involved only insofar as its records custodian has been ordered to comply with the discovery order. For these reasons alone, then, the discovery order in the present case is a final judgment because it satisfies the first prong of *Curcio*, just as the discovery order in *Abreu* constituted a final judgment because it arose out of a separate proceeding brought by a nonparty. See id., 349; see also *Lougee* v. *Grinnell*, supra, 216 Conn. 487 ("a proceeding that will not result in a later judgment from which [the subpoenaed nonparty] can then appeal . . . falls within the first prong of the test of finality of judgment[s] stated in . . . *Curcio*" [internal quotation marks omitted]).

Additionally, as in *Abreu*, there are compelling policy reasons not to require Finn Dixon to be subjected to a contempt ruling in order to obtain appellate review of the discovery order.[10] In *Abreu*, the court focused on the effect that holding a foster parent in contempt would have on the child welfare system—both with regard to the child and to the department—not on whether Abreu, the foster parent, could prevail on his challenge to the discovery order. See *Abreu* v. *Leone*, supra, 291 Conn. 347–48. The relevant policy consideration turned on using a finding of contempt as the only means for Abreu to protect himself from potential liability under § 17a-28. In the present case, Finn Dixon faces similarly conflicting options. Finn Dixon is a law firm, and it and its lawyer members are bound by the Rules of Professional Conduct. Under the Rules of Professional Conduct, Finn Dixon has an obligation—as we discuss further in this opinion—to prevent the disclosure of all privileged and confidential materials relating to the representation of its clients. See generally Rules of Professional Conduct 1.6. Nevertheless, the only means for Finn Dixon, which is not a party to the underlying action, to fulfill this obligation is to disobey a court order and to be held in contempt. In that sense, to force Finn Dixon to be held in contempt for its good faith objection to the discovery order on the basis of the attorney-client privilege and the work product doctrine would, at best, elevate form over substance; see *Abreu* v. *Leone*, supra, 291 Conn.

348; and, at worst, place Finn Dixon and other similar individuals or groups in an incongruous position with regard to their obligations under the Rules of Professional Conduct.

To be sure, the problem lies not with the fact that the discovery order in this case requires the disclosure of potentially privileged materials. The Rules of Professional Conduct provide that an attorney may divulge such materials in certain circumstances. See Rules of Professional Conduct 1.6 (a) and (c) (4) ("[a] lawyer shall not reveal information relating to representation of a client" but "[a] lawyer may reveal such information *to the extent the lawyer reasonably believes necessary* to . . . [c]omply with . . . a court order" [emphasis added]). In doing so, however, an attorney is nevertheless obliged to disclose only what is necessary and to challenge the court order when he or she believes that such disclosure is not necessary. See Rules of Professional Conduct 1.6, commentary. As the commentary to rule 1.6 provides, "[a] fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation." Rules of Professional Conduct 1.6, commentary. Furthermore, "[a] lawyer may be ordered to reveal information relating to the representation of a client by a court . . . . Absent informed consent of the client to do otherwise, *the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law*." (Emphasis added.) Rules of Professional Conduct 1.6, commentary. Moreover, "[s]ubsection (c) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in subsections (c) (1) through (c) (4)." Rules of Professional Conduct 1.6, commentary. See generally General Statutes § 1-25.[11]

Thus, a tension arises from requiring an attorney to take every step necessary to safeguard his or her client's interest by preventing disclosure of privileged and confidential material but limiting a nonparty attorney's means to challenge a discovery order solely by disobeying that order and appealing the subsequent contempt finding. In other words, by not allowing a direct appeal from the discovery order itself, a nonparty attorney, as an officer of the court, has no choice but to defy a court order if he or she believes that the order is contrary to law. Rule 3.4 of the Rules of Professional Conduct, however, provides in relevant part that "[a] lawyer shall not . . . (3) [k]nowingly disobey an obligation under the rules of a tribunal . . . ." Additionally, rule 8.4 of the Rules of Professional Conduct provides in relevant part that "[i]t is professional misconduct for a lawyer to . . . (1) [v]iolate or attempt to violate the Rules of Professional Conduct, knowingly assist or

induce another to do so, or do so through the acts of another . . . .'' Thus, a nonparty attorney or law firm, such as Finn Dixon, faces a real dilemma. Because the attorney is obliged to protect the client's interest, the attorney should challenge any discovery order that requires disclosure of privileged or confidential material. If the trial court overrules the attorney's objection to the discovery order, the attorney should consider whether to bring an appeal. In these circumstances, if we did not allow an appeal, then the only means for a nonparty attorney to seek review of the ruling would be to disobey the court's order and to be held in contempt.[12] In other words, the only way for a nonparty attorney to obtain review of a trial court order he or she believes is erroneous is to violate, or at least to disregard, the Rules of Professional Conduct.

We decline to apply our final judgment jurisprudence in a manner that requires a nonparty attorney, in his or her role as an officer of the court, to disobey a court order as the sole means of raising a good faith challenge to a discovery order in order to satisfy his or her professional obligation to the client. No persuasive reason exists to prevent a nonparty attorney from raising such a challenge by direct appeal. Allowing these appeals will not open the floodgates to numerous discovery order appeals, as they are far less common than typical discovery requests between parties for privileged communications. Moreover, an attorney already can decline to comply with a discovery order and be held in contempt. A nonparty attorney likely would raise the objection regardless of whether the proper means was through contempt or a direct appeal because an attorney has a significant interest in objecting to the discovery order to maintain the privilege and confidentiality.[13] See *PSE Consulting, Inc.* v. *Frank Mercede & Sons, Inc.*, 267 Conn. 279, 329–30, 838 A.2d 135 (2004) (''On numerous occasions we have reaffirmed the importance of the attorney-client privilege and have recognized the long-standing, strong public policy of protecting attorney-client communications. . . . In Connecticut, the attorney-client privilege protects both the confidential giving of professional advice by an attorney acting in the capacity of a legal advisor to those who can act on it, as well as the giving of information to the lawyer to enable counsel to give sound and informed advice. . . . The privilege fosters full and frank communications between attorneys and their clients and thereby promote[s] the broader public interests in the observation of law and [the] administration of justice.'' [Internal quotation marks omitted.]); see also *Mohawk Industries, Inc.* v. *Carpenter*, U.S. , 130 S. Ct. 599, 606, 175 L. Ed. 2d 458 (2009) (''acknowledg[ing] the importance of the attorney-client privilege, which is one of the oldest recognized privileges for confidential communications'' [internal quotation marks omitted]); cf. *Hickman* v. *Taylor*, 329 U.S. 495, 510–12, 67 S. Ct.

385, 91 L. Ed. 451 (1947) (noting importance of attorney's interest in preserving confidentiality of work product). Simply put, any concern over a flood of discovery order appeals is both misinformed and speculative. Indeed, we need look no further than the fact that, in the three years since *Abreu* was decided, no flood of appeals from discovery orders has occurred.

More fundamentally, we repeatedly have stated that the attorney-client privilege is foundational to our legal system. "Connecticut has a long-standing, strong public policy of protecting attorney-client communications. . . . This privilege was designed, in large part, to encourage full disclosure by a client to his or her attorney so as to facilitate effective legal representation. . . . Rule 1.6 (a) of the Rules of Professional Conduct effectuates that goal by providing in relevant part that [a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . . The attorney-client privilege seeks to protect a relationship that is a mainstay of our system of justice. . . . Indeed, this court has stated: It is obvious that professional assistance would be of little or no avail to the client, unless his legal adviser were put in possession of all the facts relating to the subject matter of inquiry or litigation, which, in the indulgence of the fullest confidence, the client could communicate. And it is equally obvious that there would be an end to all confidence between the client and attorney, if the latter was at liberty or compellable to disclose the facts of which he had thus obtained possession; and hence it has become a settled rule of evidence, that the confidential attorney, solicitor or counselor can never be called as a witness to disclose papers committed or communications made to him in that capacity, unless the client himself consents to such disclosure." (Citations omitted; internal quotation marks omitted.) *Gould, Larson, Bennet, Wells & McDonnell, P.C.* v. *Panico*, 273 Conn. 315, 321–22, 869 A.2d 653 (2005); see also *Metropolitan Life Ins. Co.* v. *Aetna Casualty & Surety Co.*, 249 Conn. 36, 47–51, 730 A.2d 51 (1999) (granting interlocutory appeal from discovery order under General Statutes § 52-265a principally on issues implicating need to preserve attorney-client privilege); J. Sexton, "A Post-*Upjohn* Consideration of the Corporate Attorney-Client Privilege," 57 N.Y.U. L. Rev. 443, 445 (1982) ("[T]he attorney-client privilege is 'the oldest of the privileges for confidential communications' know to the common law. Indeed, '[t]he history of this privilege goes back to the reign of Elizabeth I, where the privilege already appears as unquestioned.' The privilege, based initially [on] 'the oath and honor of the attorney,' embodied the notion that a gentleman never revealed confidences . . . ."). Thus, there are strong policy considerations for excepting a nonparty attorney asserting a claim of privilege from the ordinary rule requiring a party to be held in contempt prior to being

able to challenge a discovery order.

In sum, there is no compelling reason to prevent a nonparty attorney from directly appealing from a discovery order on the basis of an asserted privilege, and there are significant considerations that militate against requiring a nonparty attorney to be held in contempt first. We conclude, therefore, in accordance with the first prong of *Curcio* and the principles espoused in *Abreu*, that the discovery order in the present case is an appealable final judgment.

II

Before proceeding to the merits of Finn Dixon's writ of error, we pause to address the dissent's analysis of our final judgment precedent in order to identify precisely the issue presented by this case. The dissent disagrees that a claim of attorney-client privilege justifies allowing a nonparty attorney to appeal from an interlocutory discovery order and instead concludes that the discovery order in this case does not satisfy either prong of *Curcio*. The dissent also restricts *Abreu*'s reasoning to only the narrowest of circumstances. We find the dissent's analysis in this context unconvincing.

The dissent first rejects Finn Dixon's argument that its interest in preserving the attorney-client privilege satisfies the second prong of *Curcio*, relying principally on *Melia* v. *Hartford Fire Ins. Co*., 202 Conn. 252, 258, 520 A.2d 605 (1987) ("[o]ur concern for the efficient operation of the judicial system, which is the practical consideration behind the policy against piecemeal litigation inherent in the final judgment rule, has induced us to dismiss appeals [when] statutorily created rights of privacy, no less significant than the right of confidentiality for attorney-client communications, have been at stake"). This reliance is misplaced. The court in *Melia* held that an assertion of a privilege, standing alone, is insufficient to transform an ordinary discovery dispute between parties into an appealable final judgment under the second prong of *Curcio*.[14] *Melia*, thus, is inapposite with respect to the issue of whether a nonparty's objection to a discovery order satisfies the first prong of *Curcio*. In order to determine whether such an objection satisfies the first prong, the relevant analysis is found in *Abreu*, not *Melia*. Because the procedural posture of the discovery order in the present case is virtually identical to the one in *Abreu*, and because the discovery order further implicates policy considerations that militate against an overly formulaic application of our final judgment jurisprudence, we conclude that Finn Dixon properly may bring its writ of error. Accordingly, we disagree with the dissent's contrary reasoning that (1) the present discovery order is not the result of a separate proceeding but, rather, part of an ongoing civil action, and (2) "there is no principled reason to treat parties and nonparties differently in this

context because both classes are exposed to the same threat of irremediable harm from a nonappealable discovery order . . . .”

The dissent's concern over creating separate rules is misplaced. A different rule for nonparties would not undermine the rules governing the discovery process between parties in any manner. Indeed, as *Abreu* demonstrates, this court has allowed a nonparty to appeal from a discovery order when the order satisfies *Curcio* without causing harm to the trial process. Moreover, a principled distinction exists, namely, that a discovery order affecting a nonparty likely will satisfy the first prong of *Curcio*; see *Abreu* v. *Leone*, supra, 291 Conn. 348; whereas one affecting a party in a case will not. See, e.g., *Ruggiero* v. *Fuessenich*, 237 Conn. 339, 345–46, 676 A.2d 1367 (1996) (“[a] *party* to a pending case does not institute a separate and distinct proceeding merely by filing a petition for discovery or other relief that will be helpful in the preparation and prosecution of that case” [emphasis added]).

We also are unpersuaded by the dissent's varying explanations of why the discovery order in the present case, which was directed against a nonparty, does not constitute a separate proceeding but the discovery order that was challenged in *Abreu* did.[15] The dissent disavows any reading of *Abreu* that a discovery order directed at a nonparty is appealable when it satisfies the first prong of *Curcio*. Instead, the dissent would draft a rule permitting appeals only if the discovery order “threatens an important public policy” and subsequently could not be appealed by the party challenging it. In other words, the dissent announces a new final judgment test for discovery orders that is different from the test for other interlocutory rulings. We decline to adopt a new final judgment rule in this case.

More importantly, the dissent's interpretation of *Abreu* ignores (1) the plain language and holding of that decision, a fact that the dissent concedes,[16] and (2) our related jurisprudence concerning the applicability of the first prong of *Curio* to discovery orders affecting nonparties. In that connection, we note that the dissent's insistence on reviewing, under the second prong of *Curcio*, all discovery orders affecting nonparties is not supported by the text of that case. The second prong of *Curcio* focuses on the “rights of the parties . . . .” *State* v. *Curcio*, supra, 191 Conn. 31. By contrast, the first prong of *Curcio* concerns the nature of the “proceeding[s] . . . .” Id. We see no reason either to deviate from the language of *Curcio* or to upend our final judgment jurisprudence.

In the end, we are not convinced by the dissent's conclusion that *Abreu*'s analysis of the first prong of *Curcio* is inapplicable to the present case or, alternatively, that *Abreu* should be overruled. As we previously stated, both cases present virtually identical procedural

postures and both properly can be analyzed under the first prong of *Curcio*. The discovery order in the present case constitutes a final judgment because it terminated a separate and distinct proceeding and thus satisfied the first prong of *Curcio*. Additionally, it implicates important policy considerations that militate against requiring an officer of the court who also is not a party to the underlying action to be held in contempt of court in order to be able to seek appellate review.

Lastly, we disagree with the dissent's conclusion that an attorney's interest in preserving the attorney-client privilege and the confidentiality of work product is no more significant than the client's interest. This reflects a misunderstanding of the relevant policy considerations. The threshold question in determining the policy considerations implicated in the present case is not whether the attorney's interest is greater than the client's or whether the *parties* could adequately repair the harm caused by a disclosure of privileged material. Cf. *Melia* v. *Hartford Fire Ins. Co.*, supra, 202 Conn. 257. Rather, the policy consideration in this case is whether the attorney's interest in preserving the privilege, and the potential for sanctions, provides a sufficient justification for allowing Finn Dixon to seek appellate review of a discovery order. An attorney has an affirmative obligation to invoke the attorney-client privilege when the substance of privileged communications is sought, and, unlike the client, cannot unilaterally waive such privilege. Furthermore, an attorney is subject to significant sanctions if he or she fails to assert and defend the privilege. Thus, these professional and ethical constraints, as a matter of policy, elevate the duty to protect the privilege that all attorneys assume to a level of greater significance than the privilege itself, thereby highlighting the policy implications for allowing interlocutory appeals from adverse rulings. This increased significance militates against an overly rigid, formulaic application of our final judgment jurisprudence and instead compels the conclusion, in accordance with *Abreu* and *Curcio*, that the discovery order in the present case is an appealable final judgment.

III

We now address whether the trial court properly ordered Finn Dixon to comply with the defendants' subpoena, which directed Finn Dixon to disclose all materials relating to its representation of the plaintiffs. We begin with the applicable standard of review.

"Practice Book § 13-14 (a) provides in relevant part that a trial court 'may, on [a] motion [relating to discovery], make such order as the ends of justice require.' Consequently, although we review the trial court's factual findings to determine whether they are clearly erroneous, 'the granting or denial of a discovery request rests in the sound discretion of the court.' . . . Provided the trial court properly interpreted the pertinent

statutes, a question over which this court has plenary review . . . that decision will be reversed only if such an order constitutes an abuse of that discretion." (Citations omitted.) *Babcock* v. *Bridgeport Hospital*, 251 Conn. 790, 819–20, 742 A.2d 322 (1999). Under the abuse of discretion standard, "[w]e must make every reasonable presumption in favor of the trial court's action. . . . The trial court's exercise of its discretion will be reversed only [when] the abuse of discretion is manifest or [when] injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Erickson*, 297 Conn. 164, 176, 997 A.2d 480 (2010).

Finn Dixon raises five claims in support of its contention that the trial court's discovery order was clearly erroneous. The first claim concerns whether the trial court incorrectly concluded that Finn Dixon lacked standing to object to the order. The remaining four claims concern whether the trial court correctly concluded that the subpoenaed materials were discoverable and not privileged. We first address the trial court's decision with respect to Finn Dixon's standing.

In its articulation, the trial court stated, as a ground for denying Finn Dixon's objection to the subpoena, that Finn Dixon had no standing to assert the attorney-client privilege. This is incorrect. Although we have stated that the attorney-client privilege is *held* by the client, this refers to which party has the ability to unilaterally *waive* the privilege. See *Gebbie* v. *Cadle Co.*, 49 Conn. App. 265, 274, 714 A.2d 678 (1998) ("[t]he power to waive the attorney-client privilege rests with the client *or with his attorney acting with his authority*" [emphasis added]). The fact that the client can elect to waive the privilege does not prevent his or her attorney from claiming it, especially when the client is not present. Indeed, as the commentary to rule 1.6 of the Rules of Professional Conduct makes clear, the attorney has an obligation to make that claim. See id., 274 n.7 ("[w]hile it is true that the allowable scope of inquiry at a discovery deposition clearly exceeds the boundaries of admissible evidence . . . this does not relieve the attorney of the duty to uphold the attorney-client privilege" [citation omitted; internal quotation marks omitted]). We therefore conclude that Finn Dixon properly may challenge the discovery order on the basis of the attorney-client privilege.

Finn Dixon's remaining claims all concern whether the trial court incorrectly concluded that the requested materials were not, or no longer, protected by the attorney-client privilege or the work product doctrine.[17] In essence, Finn Dixon argues that the trial court abused its discretion when it ordered Finn Dixon to comply with a subpoena that, on its face, clearly requested privileged and protected materials. Finn Dixon notes that the subpoena sought *all* materials relating to Finn Dixon's representation of the plaintiffs, without regard

to their relevance to the underlying action, and that some of these materials necessarily would contain privileged communications and protected work product. We agree with Finn Dixon that the subpoena inappropriately sought materials containing privileged communications.[18]

First, the request for any and all documents relating to Finn Dixon's representation of the plaintiffs clearly embodied a request for privileged materials. "[W]ith respect to privilege claims generally, we have held that [when] the confidential status of otherwise discoverable information is apparent, a claim of privilege may be disposed of without further inquiry." *Babcock* v. *Bridgeport Hospital*, supra, 251 Conn. 847. Thus, the subpoena inappropriately sought privileged materials in violation of Practice Book §§ 13-2,[19] 13-26[20] and 13-28.[21] For this reason alone, it would have been proper for the trial court to grant Finn Dixon's motion to quash the subpoena.[22]

The defendants argue that Finn Dixon failed to properly invoke the attorney-client privilege, and thus waived it, because *Babcock* further held that, "to establish an exemption from disclosure [the claim] must not be couched in conclusory language or generalized allegations . . . but should be sufficiently detailed, without compromising the asserted right to confidentiality . . . ." (Internal quotation marks omitted.) Id., 828. The defendants misconstrue this statement in *Babcock*, which refers to whether a specific statutory exemption to disclosure applies. That statute, General Statutes § 19a-17b,[23] bars the discovery of records of a medical review committee engaged in peer review. In *Babcock*, we determined that the burden rests on the party asserting the statutory privilege to demonstrate that the materials sought to be discovered relate to a committee's peer review, as the statute precluded the discovery of only those materials generated by a medical review committee. See id., 821–22, 836. Thus, *Babcock* and the other cases on which the defendants rely for this proposition are distinguishable, as they all involve instances in which the privileged nature of the materials was not facially apparent. In the present case, by contrast, the subpoena sought any and all materials relating to Finn Dixon's *representation* of the plaintiffs, which necessarily would include privileged, attorney-client communications.

In that connection, we reject the defendants' suggestion that Finn Dixon had an affirmative obligation to submit a privilege log, detailing the specific materials sought and the reason why they are privileged, in order to maintain the confidentiality of those materials. No provision of the rules of practice, and no decision by this court or the Appellate Court, requires that any person claiming the attorney-client privilege has the burden to provide a privilege log at the time the claim

of privilege is made. Instead, the customary practice is that the trial court *may* order the party claiming the privilege to compile and produce a privilege log, which the opposing party and the trial court will then examine. See, e.g., *Kenny* v. *Woods Restoration Services, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-06-4021690-S (February 20, 2007) (attorney-client privilege); *Fiddner* v. *Dhumale*, Superior Court, judicial district of Danbury, Docket No. CV-03-0350306-S (January 11, 2005) (peer review privilege); see also *Collins* v. *Anthem Health Plans, Inc.*, Superior Court, judicial district of Waterbury, Complex Litigation Docket, Docket No. CV-99-0156198-S (July 9, 2002) (32 Conn. L. Rptr. 464) ("[w]hile courts sometimes require parties who are withholding documents on the basis of claims of privilege to supply . . . a log of the withheld items, neither the [rules of practice] nor case law suggests any reason to impose on a party the burden of preparing a log of documents not within the scope of discovery simply because an adversary seeks broader discovery"). Indeed, we have implicitly approved of this procedure. See *Babcock* v. *Bridgeport Hospital*, supra, 251 Conn. 832 (noting that trial court "afforded the defendants numerous opportunities and ample means by which to establish the privilege," including ordering submission of privilege log); cf. *Hutchinson* v. *Farm Family Casualty Ins. Co.*, 273 Conn. 33, 37, 50, 867 A.2d 1 (2005) (when attorney-client privilege was not waived and no exceptions applied, trial court improperly ordered in camera review of privileged documents). Moreover, unlike typical claims of attorney-client privilege in discovery disputes between parties, Finn Dixon is not a party to the underlying litigation and could not reasonably be expected to maintain a readily available privilege log in connection with the litigation. It therefore would unfairly penalize Finn Dixon in this case to conclude that the attorney-client privilege does not apply simply because Finn Dixon did not compile and produce a privilege log of all of its materials relating to its representation of the plaintiffs, in all matters, for a case in which it also was not a party.

Notwithstanding the foregoing, the defendants, relying on the trial court's articulation, also claim that the plaintiffs waived any privilege when they brought the underlying action against the defendants because they placed their privileged communications "at issue." "[T]he 'at issue,' or implied waiver, exception is invoked only when the contents of the legal advice [are] integral to the outcome of the legal claims of the action. . . . Such is the case when a party specifically pleads reliance on an attorney's advice as an element of a claim or defense, voluntarily testifies regarding portions of the attorney-client communication, or specifically places at issue, in some other manner, the attorney-client relationship. In those instances the party has waived the right to confidentiality by placing the con-

tent of the attorney's advice directly at issue because the issue cannot be determined without an examination of that advice. 'If the information is *actually* required for a truthful resolution of the issue on which the party has raised . . . the party must either waive the attorney-client privilege as to that information or it should be prevented from using the privileged information to establish the elements of the case.' . . .

"*Merely because the communications are relevant does not place them at issue.* . . . If admitting that one relied on legal advice in making a legal decision put the communications relating to the advice at issue, such advice would be at issue whenever the legal decision was litigated. If that were true, the at issue doctrine would severely erode the attorney-client privilege and undermine the public policy considerations [on] which it is based." (Citations omitted; emphasis added.) *Metropolitan Life Ins. Co.* v. *Aetna Casualty & Surety Co.*, supra, 249 Conn. 52–54.

In the present case, the plaintiffs have not pleaded reliance on any information or advice from Finn Dixon that might be found in the requested privileged materials, and, thus, it is not apparent that the plaintiffs have waived the privilege. See, e.g., id., 54–55. Nevertheless, the defendants reason as follows: The plaintiffs' complaint and request for damages placed Finn Dixon's representation of the plaintiffs at issue because a determination of damages turns on the reasonableness of settlements entered into by the plaintiffs. The reasonableness of these settlements, according to the defendants, further turns on the reasonableness of Finn Dixon's advice, and, therefore, the plaintiffs have placed these communications at issue and cannot invoke the attorney-client privilege to prevent their disclosure. We reject this line of reasoning.

Neither this court nor the Appellate Court has held that the reasonableness of a settlement is necessarily determined by the advice that the settling party receives from counsel. To the contrary, we have held that "[t]he reasonableness of [a] settlement . . . should be examined under an *objective* standard." (Emphasis added.) Id., 55. "It would be quite different if the [plaintiffs] sought to prove reasonableness based [on] the advice of counsel. In that instance, counsel's advice would be at issue . . . but that is not the situation in the present case. Accordingly, although the reasonableness of the settlements is directly at issue, the exact communications between the [plaintiffs] and [Finn Dixon] regarding the decision to settle, which would aid only in a subjective determination, are not at issue." Id., 56; see also *Black* v. *Goodwin, Loomis & Britton, Inc.*, 239 Conn. 144, 161 and n.17, 681 A.2d 293 (1996) (citing, with approval, trial court's instruction to jury that "[t]he test as to whether the settlement is reasonable is what a reasonably prudent person in the position of the

[d]efendant would have settled for considering the liability and damage aspects of the [p]laintiff's claim, as well as the risk of going to trial" [internal quotation marks omitted]).

The defendants provide only one potentially persuasive authority for their argument to the contrary. In *Rutgard* v. *Haynes*, 185 F.R.D. 596 (S.D. Cal. 1999), the defendant, Richard Haynes, represented the plaintiff, Jeffrey Jay Rutgard, in a civil antitrust suit. See id., 597. That case was unsuccessful, and both Rutgard and Haynes were sued for malicious prosecution. See id. Rutgard was represented by new counsel in the malicious prosecution action; id., 598; and settled the case on that counsel's advice. See id., 599. Rutgard then brought a legal malpractice action against Haynes and sought attorney's fees and costs incurred in the malicious prosecution action as well as the settlement amount. See id., 597–98.

The question before the court was whether Rutgard, by virtue of the malpractice action, waived the attorney-client privilege for communications between him and his new attorney while the new attorney represented Rutgard during the malicious prosecution case. Id., 598. The court noted that, generally, a malpractice action against former counsel does not serve to waive the attorney-client privilege as to successive representation. Id., 598–99. The court further noted that simply seeking attorney's fees would not place a plaintiff's communications with subsequent counsel at issue. Id., 599. Nevertheless, the court reasoned that Rutgard "also [was] attempting to recover the amount he paid to settle the malicious prosecution suit" and "this claim for damages puts 'in issue' the reasonableness of that settlement." Id.

We are not persuaded by the reasoning in *Rutgard* for two reasons. First, the decision appears to be an outlier, as the vast majority of jurisdictions that have addressed the issue have concluded that the privilege is not waived simply because a plaintiff is seeking to recover the amount of a settlement that arose out of a claim resulting from the alleged malpractice of the plaintiff's former counsel. See, e.g., *Miller* v. *Superior Court*, 111 Cal. App. 3d 390, 394–95, 168 Cal. Rptr. 589 (1980); *Fischel & Kahn, Ltd.* v. *Van Straaten Gallery, Inc.*, 189 Ill. 2d 579, 590, 727 N.E.2d 240 (2000); *Jakobleff* v. *Cerrato, Sweeney & Cohn*, 97 App. Div. 2d 834, 835–36, 468 N.Y.S.2d 895 (1983). Second, a closer examination of *Rutgard* reveals that its reasoning stands on questionable grounds. The court in *Rutgard* based much of its holding on *Fischel & Kahn, Ltd.* v. *Van Straaten Gallery, Inc.*, 301 Ill. App. 3d 336, 703 N.E.2d 634 (1998). See *Rutgard* v. *Haynes*, supra, 185 F.R.D. 598–99. The Illinois Appellate Court's decision in *Fischel & Kahn, Ltd.*, however, was subsequently reversed by the Illinois Supreme Court in *Fischel &*

Kahn, Ltd. v. *Van Straaten Gallery, Inc.*, supra, 189 Ill. 2d 581.

The facts and issues contained in *Fischel & Kahn, Ltd.* align with those in the present case. Fischel & Kahn, Ltd. (Fischel) had represented van Straaten Gallery, Inc. (van Straaten) in previous business deals that gave rise to litigation. See *Fischel & Kahn, Ltd.* v. *Van Straaten Gallery, Inc.*, supra, 189 Ill. 2d 581–82, 585. Van Straaten retained new counsel in this litigation. Id., 581. After Fischel sued van Straaten for unpaid legal fees, van Straaten filed a counterclaim, alleging, inter alia, that Fischel was negligent in advising van Straaten. Id., 582. Fischel filed a request for production with new counsel for documents relating to new counsel's representation of van Straaten in the subsequent litigation. Id., 582–83. In response to van Straaten's objection, Fischel argued that van Straaten had "waived its attorney-client privilege with [new counsel] when van Straaten sued Fischel . . . for malpractice. Fischel . . . argue[d] that because van Straaten [sought] damages for the defense and settlement of the [underlying] litigation, any facts surrounding that litigation [were] central to the question of whether [Fischel could] be held liable for malpractice. Fischel . . . claim[ed] that without receiving all the documents surrounding the [underlying] litigation and its settlement, including documents that reveal[ed] otherwise privileged attorney-client communications, it would be impossible to determine whether and to what extent van Straaten's alleged loss resulted from [Fischel's] alleged malpractice." Id., 585. The Illinois Supreme Court disagreed. Id.

The court noted "that van Straaten, by [filing a counterclaim] against Fischel . . . for legal malpractice, ha[d] placed [Fischel's] advice at issue and ha[d] waived the attorney-client privilege with respect to communications between it and Fischel . . . . However, [the court did] not believe that it follow[ed] that van Straaten, by that same action, ha[d] waived the attorney-client privilege with respect to communications between it and its [new] counsel . . . ." Id. "That van Straaten's damages [were] subject to dispute by the parties [did] not mean that van Straaten ha[d] waived its attorney-client privilege regarding communications between it and [new counsel] that might touch on that question. If raising the issue of damages in a legal malpractice action automatically resulted in the waiver of the attorney-client privilege with respect to subsequently retained counsel, then the privilege would be unjustifiably curtailed." Id., 587.

Ultimately, the court "disagree[d] with [Fischel's] assertion that, without reviewing all the documents surrounding the [underlying] litigation and its settlement, it is impossible to determine whether and to what extent van Straaten's alleged loss resulted from [Fischel's] alleged malpractice, if any, or some other source. . . .

[T]he privileged documents present[ed] one alternative means, though perhaps the most convenient, in which this information [could] be obtained. Mere convenience, however, should not justify waiver of the attorney-client privilege. To allow Fischel . . . access to the privileged documents . . . would . . . unnecessarily undermine the purpose of the attorney-client privilege to encourage full and frank communication between attorneys and their clients. . . . Therefore . . . van Straaten has not waived the attorney-client privilege . . . with respect to [new counsel] by filing a malpractice action seeking [attorney's] fees and settlement costs of the [underlying] litigation." (Citations omitted.) Id., 590.

We agree with the Illinois Supreme Court's reasoning and find it applicable to the present case. The plaintiffs' malpractice claim concerns only the allegedly negligent representation by the defendants, which is separate from the plaintiffs' subsequent representation by Finn Dixon. Although the issue of damages will likely involve the reasonableness of the settlements entered into on Finn Dixon's advice, the fact finder should be able to assess damages adequately through other means without resorting to privileged communications between the plaintiffs and Finn Dixon. We decline to adopt the contrary rule urged by the defendants because it lacks precedential support and runs counter to our narrow construction of exceptions to the attorney-client privilege. See, e.g., *Metropolitan Life Ins. Co.* v. *Aetna Casualty & Surety Co.*, supra, 249 Conn. 52–54. Therefore, we conclude that the plaintiffs did not waive the attorney-client privilege with respect to their communications with Finn Dixon, that the defendants' subpoena sought, inter alia, privileged communications in violation of the rules of practice, and that it was an abuse of the trial court's discretion to order compliance with such an overbroad subpoena.

The writ of error is granted and the case is remanded to the trial court with direction to vacate the order compelling production.

In this opinion NORCOTT, McLACHLAN and ESPINOSA, Js., concurred.

* This case originally was argued before a panel of this court consisting of Justices Norcott, Zarella, McLachlan, Eveleigh, Harper and Vertefeuille. Thereafter, Judge Espinosa was added to the panel, and she has read the record and briefs and listened to the recording of oral argument.

[1] Practice Book § 13-5 provides in relevant part: "Upon motion by a party from whom discovery is sought, and for good cause shown, the judicial authority may make any order which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense . . . ."

[2] Practice Book § 13-28 (e) provides in relevant part: "The court in which the cause is pending . . . may, upon motion made promptly and, in any event, at or before the time for compliance specified in a subpoena authorized by subsection (b) of this section, (1) quash or modify the subpoena if it is unreasonable and oppressive or if it seeks the production of materials not subject to production under the provisions of subsection (c) of this section . . . ."

[3] The trial court stated in its order on the motion to compel: "The court has accepted the plaintiffs' invitation . . . to treat this motion as a ruling

on [the] plaintiffs' objections to discovery. Objection overruled."

[4] Practice Book § 64-1 provides in relevant part: "(a) The court shall state its decision either orally or in writing, in all of the following . . . (6) in making any other rulings that constitute a final judgment for purposes of appeal under Section 61-1, including those that do not terminate the proceedings. . . .

"(b) If the trial judge fails to file a memorandum of decision or sign a transcript of the oral decision in any case covered by subsection (a), the appellant may file with the appellate clerk an original and three copies of a notice that the decision has not been filed in compliance with subsection (a). The notice shall specify the trial judge involved and the date of the ruling for which no memorandum of decision was filed. The appellate clerk shall promptly notify the trial judge of the filing of the appeal and the notice. The trial court shall thereafter comply with subsection (a)."

[5] Practice Book § 72-1 (a) provides in relevant part: "Writs of error for errors in matters of law only may be brought from a final judgment of the superior court to the supreme court . . . ."

[6] Although Finn Dixon primarily argued that the discovery order satisfied the second prong of *Curcio*, its reliance on *Abreu* necessarily implicates the first prong of *Curcio*. We also note that "concerns regarding subject matter jurisdiction implicate [this] court's fundamental authority and may properly be raised and decided by the court sua sponte"; *Soracco* v. *Williams Scotsman, Inc.*, 292 Conn. 86, 91, 971 A.2d 1 (2009); and that "[t]his court is not limited in its disposition of a case to claims raised by the parties and has frequently acted sua sponte [on] grounds of which the parties were not previously apprised." (Internal quotation marks omitted.) *State* v. *Badgett*, 200 Conn. 412, 432 n.10, 512 A.2d 160, cert. denied, 479 U.S. 940, 107 S. Ct. 423, 93 L. Ed. 2d 373 (1986).

[7] General Statutes (Sup. 2006) § 17a-28 (b) prohibits the unauthorized disclosure of confidential records maintained by the department, and General Statutes (Sup. 2006) § 17a-28 (n) (1) provides a mechanism for an aggrieved party or his or her representative to bring an action to prevent such disclosure.

Hereinafter, all references to § 17a-28 are to the version appearing in the 2006 supplement to the 2005 revision of the General Statutes.

[8] In this sense, the relevant consideration is whether the order is sufficiently clear and defined. In cases in which the trial court's order was open-ended or when it was unclear whether the objecting party would ultimately have complied with the order, this court has declined to treat the challenged discovery order as a final judgment. See *Presidential Capital Corp.* v. *Reale*, 240 Conn. 623, 626, 633, 692 A.2d 794 (1997); *Barbato* v. *J. & M. Corp.*, 194 Conn. 245, 248–50, 478 A.2d 1020 (1984).

"[T]he present case [like *Abreu*] is distinguishable from *Barbato* and *Presidential Capital Corp.* for several reasons. First, in those cases, the party [had] not yet appeared before the trial court to answer any questions'; *Barbato* v. *J. & M. Corp.*, supra, 194 Conn. 248–49; and the trial court [had] yet to consider what requests for information, if any, it [would] direct the appellants to answer. *Presidential Capital Corp.* v. *Reale*, supra, 240 Conn. 633. Unlike [in] *Presidential Capital Corp.*, in the present case there are no further proceedings before the Superior Court involving [Finn Dixon] because the questions have been propounded and the trial court unequivocally has ruled what must occur—[a] certain identified [discovery request] must be [complied with]. . . . Unlike [in] *Barbato*, in the present case, it is known whether [Finn Dixon] will refuse to [comply with] the [discovery request made] by the defendant[s], and it is known whether the trial court will uphold the privilege as to the [discovery request]. Unlike [in] *Presidential Capital Corp.*, the trial court in the present case has considered what requests for information it will direct [Finn Dixon] to [comply with], and [Finn Dixon] has decided what information [it] is unwilling or unable to provide." (Internal quotation marks omitted.) *Abreu* v. *Leone*, supra, 291 Conn. 345–46.

[9] In *Abreu*, the department appealed, apparently on behalf of Abreu, the plaintiff in the proceeding challenging the discovery order. See *Abreu* v. *Leone*, supra, 291 Conn. 334–35. In the present case, the nonparty plaintiff in error, Finn Dixon, brought a writ of error challenging the discovery order.

[10] To be clear, policy concerns are not a factor under either prong of *Curcio*, and, accordingly, it would be inappropriate to rely on policy alone to justify allowing an appeal under *Curcio*. Cf. General Statutes § 52-265a (a) ("any party to an action who is aggrieved by an order or decision of the Superior Court in an action which involves a matter of substantial public

interest and in which delay may work a substantial injustice, may appeal under this section from the order or decision to the Supreme Court").

Nevertheless, this court never has held that policy considerations are wholly irrelevant to a *Curcio* analysis. Rather, policy can provide support for determining whether it is appropriate to "deem interlocutory orders or rulings to have the attributes of a final judgment . . . ." *BNY West Trust* v. *Roman*, 295 Conn. 194, 202, 990 A.2d 853 (2010). Indeed, this court previously has looked to policy to help inform its decision of whether it would be wise jurisprudence to deem an otherwise interlocutory order a final judgment. See, e.g., *Abreu* v. *Leone*, supra, 291 Conn. 347–48; see also *CFM of Connecticut, Inc.* v. *Chowdhury*, 239 Conn. 375, 402–403, 685 A.2d 1108 (1996) ("[A]lthough the appellate final judgment rule is based partly on the policy against piecemeal appeals and the conservation of judicial resources . . . there is a counterbalancing factor in this situation. Requiring the postponement of an appeal of a sanctions order until the final judgment in the underlying action could well result in an appeal from a judgment that has nothing to do with the issues on appeal. . . . Similarly, if the client lost in the trial court but there were no good faith grounds of appeal going to the merits of the trial [court's] judgment, the appeal of the sanctions order would be only artificially linked to the judgment on appeal. *Neither scenario commends itself as wise jurisprudence.*" [Citation omitted; emphasis added.]), overruled on other grounds by *State* v. *Salmon*, supra, 250 Conn. 147. Thus, to the extent that our *Curcio* analysis is guided by policy concerns over piecemeal litigation, there may be instances in which these concerns are outweighed by countervailing considerations.

[11] General Statutes § 1-25 governs oaths for various offices and, with regard to the oath for attorneys, provides: "You solemnly swear or solemnly and sincerely affirm, as the case may be, that you will do nothing dishonest, and will not knowingly allow anything dishonest to be done in court, and that you will inform the court of any dishonesty of which you have knowledge; that you will not knowingly maintain or assist in maintaining any cause of action that is false or unlawful; that you will not obstruct any cause of action for personal gain or malice; but that you will exercise the office of attorney, in any court in which you may practice, according to the best of your learning and judgment, faithfully, to both your *client* and the court; so help you God or upon penalty of perjury." (Emphasis added.)

[12] There is yet another problem with relying on a finding of contempt as the sole means, and thus the only safeguard, available to a nonparty attorney seeking to assert a claim of privilege. Simply put, it transforms contempt, which should be considered an important and drastic power of the court, into nothing more than a procedural mechanism to bring an appeal. As Justice Vertefeuille noted during oral argument in this case, it is highly unlikely that a judge would imprison an attorney simply because the attorney refused to comply with a discovery order. The more probable scenario is that the judge would find the attorney in contempt, perhaps merely as a matter of formality, in order to allow the attorney to appeal the contested discovery order. This, however, undermines the court's power of contempt. The contempt penalty is one of the court's most important and deeply rooted enforcement powers. See, e.g., *Papa* v. *New Haven Federation of Teachers*, 186 Conn. 725, 737–38, 444 A.2d 196 (1982) ("The court's authority to impose civil contempt penalties arises not from statutory provisions but from the common law. *Potter* v. *Board of Selectmen*, [174 Conn. 195, 197, 384 A.2d 369 (1978)]; *Welch* v. *Barber*, 52 Conn. 147, 156 [1884]; *Huntington* v. *McMahon*, 48 Conn. 174, 196 [1880]. The penalties which may be imposed, therefore, arise from the inherent power of the court to coerce compliance with its orders. In Connecticut, the court has the authority in civil contempt to impose on the contemnor either incarceration or a fine or both."). Relying on it as a mere procedural vehicle to obtain a final judgment runs the risk of trivializing this power.

[13] In that connection, allowing an appeal from a discovery order by a nonparty claiming a privilege will not have a detrimental effect on judicial resources or on the timely resolution of the underlying action. The present case provides a clear example. According to the dissent, Finn Dixon should have elected to challenge the discovery order by refusing to comply with it, being held in contempt, and then appealing from the contempt ruling. Yet, this process, from the standpoint of judicial resources, would be no different from allowing Finn Dixon to appeal directly from the discovery order. In both cases, the party seeking to discover Finn Dixon's documents must wait for the appeal process to conclude before it receives, or knows that it will not receive, the requested documents. Also, in both cases, the

underlying action could continue with other discovery and pretrial actions notwithstanding the ongoing challenge to the discovery order, a fact that also supports our conclusion that the issuance of a discovery order against a nonparty represents a separate and distinct proceeding for the purposes of the first prong of *Curcio*.

[14] Accordingly, we do not dispute that Finn Dixon's claim under the second prong is likely meritless under *Melia*. In *Melia*, the court dismissed the defendant's claim that the appeal satisfied the *second* prong of *Curcio*, concluding that the disclosure of privileged documents did not significantly terminate the party's rights. See *Melia* v. *Hartford Fire Ins. Co.*, supra, 202 Conn. 257 ("In arguing that this appeal from a disclosure order falls within the second *Curcio* alternative, that the rights of a party be so concluded that further proceedings cannot affect them, the defendant concedes that adequate relief from most erroneous discovery rulings that are also prejudicial can be obtained on appeal after trial. It maintains, however, that the privacy interests protected by the attorney-client privilege cannot be completely restored once they have been invaded by a disclosure order. It is true that a remand for a new trial resulting from an erroneous order to disclose information protected by the privilege cannot wholly undo the consequences of its violation, though the rights of the client in respect to use of privileged material during further proceedings in the litigation can be adequately safeguarded. Vindication at the appellate level can seldom regain all that has been lost by an erroneous determination of a cause in the trial court. . . . The same imperfection in the appellate remedy would be present if the attorney-client privilege were violated, not by a pretrial disclosure order . . . but by a ruling on evidence during trial, which would have to await final judgment for appellate review unless trials were to be interrupted whenever such a ruling occurred." [Citation omitted; internal quotation marks omitted.]). Thus, it is clear that the court's discussion in *Melia* of the relative importance of the attorney-client privilege focused on whether the *parties* could ever repair the harm caused by disclosure and whether this harm was significant enough to satisfy the second prong of *Curcio*. For those reasons, *Melia* does not inform our analysis of whether a discovery order against a nonparty satisfies the first prong of *Curcio*.

For the same reason, we distinguish the facts of *Metropolitan Life Ins. Co.* v. *Aetna Casualty & Surety Co.*, supra, 249 Conn. 36, from the facts of the present case. *Metropolitan Life Ins. Co.*, like *Melia*, concerned whether an interlocutory appeal from a discovery order satisfied the second prong of *Curcio*. Relying on *Melia*, the court concluded that it did not. See id., 42, 46. The court, however, allowed the appeal under § 52-265a. Id., 50–51. The court found that a matter of substantial public interest was implicated, principally on the ground that the appeal concerned the attorney-client privilege, "the importance of which [this court] . . . recently [had] reaffirmed." Id., 48.

[15] The dissent's principal argument in this regard concerns *Ruggiero* v. *Fuessenich*, supra, 237 Conn. 345–46. In *Ruggiero*, however, the court held that discovery issues *between parties* do not constitute separate and distinct proceedings under the first prong of *Curcio*. It did not address the issue of a discovery order directed against a nonparty, which is more appropriately analyzed under *Abreu* and *Lougee*.

[16] The dissent partially justifies this by reasoning that some language in *Abreu* demonstrates that the court, in its analysis, conflated the first and second prongs of *Curcio*. We agree that the language in *Abreu* that the dissent quotes is unclear with regard to whether the court relied on the first or second prong of *Curcio*. This portion of *Abreu*, however, is mere dictum because the court concluded, relying in part on *Lougee* v. *Grinnell*, supra, 216 Conn. 487, that the discovery order satisfied the first prong of *Curcio*. *Abreu* v. *Leone*, supra, 291 Conn. 341 ("we conclude that the first *Curcio* prong is satisfied" and "need not address the parties' arguments regarding the second prong of *Curcio*"); see also id., 349 ("as in *Lougee*, the first prong of *Curcio* has been satisfied").

[17] Specifically, Finn Dixon challenges the trial court's discovery order because (1) Practice Book § 13-3 (a) prohibits a judicial authority from ordering disclosure of protected work product, (2) the plaintiffs did not unilaterally waive any work product protection of the requested materials when they commenced the underlying action, (3) the plaintiffs did not unilaterally waive the attorney-client privilege with respect to the requested materials when they commenced the underlying action, and (4) the defendants failed to demonstrate any need for the privileged communications between Finn Dixon and the plaintiffs.

[18] Because we conclude that the court abused its discretion solely on the basis of its decision to grant the defendants' request for privileged, attorney-client communications, we do not reach Finn Dixon's claims regarding the work product doctrine. See, e.g., *Metropolitan Life Ins. Co.* v. *Aetna Casualty & Surety Co.*, supra, 249 Conn. 51 n.17.

[19] Practice Book § 13-2 addresses the scope of discovery and provides in relevant part: "In any civil action . . . a party may obtain . . . discovery of information or disclosure, production and inspection of papers, books, documents and electronically stored information *material to the subject matter involved in the pending action, which are not privileged* . . . ." (Emphasis added.)

[20] Practice Book § 13-26 addresses the scope of depositions and provides in relevant part: "[S]ubject to the provisions of Sections 13-2 through 13-5, any party . . . may . . . take the testimony of any person . . . by deposition upon oral examination. The attendance of witnesses may be compelled by subpoena as provided in Section 13-28. . . ."

[21] Practice Book § 13-28 provides in relevant part: "(c) A subpoena issued for the taking of a deposition may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents or tangible things which constitute or contain matters *within the scope of the examination permitted by Sections 13-2 through 13-5*. . . ." (Emphasis added.)

[22] We note that the trial court stated in its articulation that Practice Book § 1-8 provides for a liberal interpretation of the rules of practice "in any case [in which] it shall be manifest that a strict adherence to them will work surprise or injustice," and should be applied to the underlying discovery dispute because the requested materials will be relevant to deciding the issues in the case. Although we agree that this is the correct interpretation of Practice Book § 1-8, we disagree that the failure to apply the rules liberally in this case will work an injustice. As this court has made clear, "[m]erely because the communications are relevant does not place them at issue." *Metropolitan Life Ins. Co.* v. *Aetna Casualty & Surety Co.*, supra, 249 Conn. 54. The trial court appeared to have conflated the relevance of the privileged communications with their discoverability, without explaining why it was necessary to allow the defendants to subpoena privileged materials. We conclude that neither the defendants nor the trial court justified the liberal interpretation of the relevant rules of practice in this case.

The subpoena in this case also violated the time restraints imposed by Practice Book § 13-28 (c), which requires that "any subpoena issued to a person commanding the production of documents or other tangible things at a deposition shall not direct compliance within less than fifteen days from the date of service thereof." The defendants' subpoena is dated December 4, 2009, and directed Finn Dixon's custodian of records to appear, with the subpoenaed materials, on December 16, 2009, less than fifteen days later.

[23] General Statutes § 19a-17b (d) provides in relevant part: "The proceedings of a medical review committee conducting a peer review shall not be subject to discovery or introduction into evidence in any civil action for or against a health care provider arising out of the matters which are subject to evaluation and review by such committee, and no person who was in attendance at a meeting of such committee shall be permitted or required to testify in any such civil action as to the content of such proceedings . . . ."