IN THE SUPREME COURT OF OHIO

ORIGINAL

Squire, Sanders & Dempsey L.L.P., **Appellant,** **v.** **Givaudan Flavors Corp.,** **Appellee.**	**Case No. 09-1321** **Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District** **Court of Appeals Case No. 92366**

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INTRODUCTION

For over 150 years, courts and commentators have universally recognized that traditional evidentiary privileges arising out of an attorney-client relationship do not apply in a lawsuit between the attorney and the client over the attorney's legal services. This traditional "self-protection exception" has been adopted "[i]n states where the privilege protecting communications with attorneys is still regulated by the common law, as well as in those where it is prescribed by statute"—including in Ohio. *Keck v. Bode* (Ohio Cir. Ct. 1902), 13 Ohio C.D. 413, 415, 1902 WL 868, at *1 (approving of the self-protection exception, but excluding the communication at issue on prejudice grounds), *rev'd without opinion by Bode v. Keck* (1903), 69 Ohio St. 549 (reinstating the trial court's judgment admitting the communication under the self-protection exception). Breaking from this unanimous law—to say nothing of common sense—the Eighth District Court of Appeals flatly rejected the self-protection exception, and in the process called into question all traditional privilege exceptions, including, for example, the crime-fraud exception. This Court should reverse the court of appeals' unprecedented decision.

From 2003 to 2007, appellant Squire, Sanders & Dempsey L.L.P. ("Squire Sanders") represented appellee Givaudan Flavors Corporation ("Givaudan") in product-liability litigation. In May 2007, just months after hiring a new general counsel, Givaudan terminated Squire Sanders, leaving an unpaid bill of about $1.8 million and forcing Squire Sanders to file this suit. In response, Givaudan alleged that Squire Sanders committed malpractice and fraud, and demanded via counterclaim that Squire Sanders return unspecified amounts already paid. Given Givaudan's far-reaching allegations of incompetence and dishonesty, Squire Sanders sought discovery concerning the bases of those charges. But, despite accusing Squire Sanders of abusing its relationship with Givaudan, Givaudan blocked inquiry into that very relationship, literally hundreds of times over, through assertion of attorney-client and related work-product

privilege. Recognizing the gross unfairness that would result were Givaudan permitted to continue these tactics, the trial court granted Squire Sanders' motion to compel reasonably necessary discovery concerning the Squire Sanders/Givaudan relationship pursuant to the self-protection exception.

The Eighth District Court of Appeals reversed the trial court's ruling. The court of appeals refused to recognize the self-protection exception. It held instead that, unless the requirements of *waiver* were satisfied, attorney-client privilege barred Squire Sanders' use and discovery of materials and information that would be privileged as to third parties. It did so based upon a failure to differentiate, as this Court's holdings require, between the waiver of privilege (which applies *after* a valid privilege claim has been made) and an exception to privilege (which limits the materials that *initially* fall within the privilege). The traditional self-protection exception represents a limitation on the privilege's underlying scope, not a general waiver of the privilege. Under the self-protection exception, the privilege still protects attorney-client communications from disclosure at the behest of third parties, but it does not extend to a lawsuit between the attorney and the client over the attorney's legal services.

The court of appeals relied almost entirely on this Court's opinion in *Jackson v. Greger*. *Jackson* held that Ohio's statutory privilege "provides the exclusive means"—namely, the client's express consent or voluntary testimony—"by which privileged communications directly between an attorney and a client can be *waived*." *Jackson v. Greger*, 110 Ohio St. 3d 488, 2006-Ohio-4968, syllabus ¶ 1 (emphasis added). But *Jackson* did not consider traditional exceptions. A former client had sued her attorney for legal malpractice. *Id.* at ¶ 4. During discovery, the defendant attorney sought the client's communications with *her new attorney*, alleging that the client had waived the privilege with *that new attorney* by bringing the suit. *Id.* Because the

defendant attorney sought to invade the client's privileged relationship with another attorney, *Jackson* represents a prototypical *waiver* case. Indeed, as discussed *infra* at page 28, the client expressly conceded that her communications with the defendant attorney were non-privileged in a suit between the two. The question instead was whether the client had impliedly waived privilege with respect to communications with her new attorney. Here, however, Squire Sanders' motion to compel and the trial court's order (both of which relied on the self-protection exception) did not cover Givaudan's communications with its new counsel. Thus, the court of appeals erred in applying the waiver analysis discussed in *Jackson* to the question of the self-protection exception at issue here.

As a policy matter, moreover, the court of appeals' decision disserves both the bar and the clients they serve. Under the court of appeals' approach, a finding that there has been no waiver would leave the client free to level false charges of professional misconduct against its former law firm while manipulating confidentiality to prevent the law firm from protecting its interests. On the other hand, a finding that there has been a waiver would open up confidential communications broadly to third parties.

The self-protection exception represents a solution to this dilemma that is as sensible as it is venerable. Under that exception, the privilege does not apply in litigation between an attorney and client relating to the attorney's services, but it does prevent disclosure at the behest of third parties who were never a part of that relationship. By defining the scope of the privilege that way, the law enables an attorney to protect his interest within the confines of litigation with the former client, and at the same time enables the former client to retain privilege as to third parties. The court of appeals inexplicably abolished this rule (and the sound policy it represents) in favor of a waiver-only approach that will harm both law firms and clients. This Court should reverse

the court of appeals, and reaffirm Ohio's longstanding approval of the traditional self-protection exception.

STATEMENT OF CASE AND FACTS

This is a dispute between a law firm and its former client. The law firm, Squire Sanders, is the plaintiff and counterclaim-defendant. It is a limited liability partnership of lawyers engaged in the practice of law. Since its founding in 1890, its principal place of business has been in Cleveland, Ohio. (Compl. ¶ 2, Supp. 1-2.) The former client, Givaudan, is the defendant and counterclaim-plaintiff. It manufactures flavorings used in many consumer products from chewing gum to frozen pizza. (Garfinkel Dep. at 9, Ex. E. to Squire Sanders Mot. to Compel, Supp. 114.)

A. Squire Sanders Represented Givaudan In Its Butter-Flavorings Litigation.

Between 2003 and 2007, hundreds of individuals spanning four different States filed personal-injury lawsuits against Givaudan. (Compl. ¶ 6, Supp. 2; Answer ¶ 6, Supp. 9.) These individuals alleged that they suffered health problems from their extended exposure at various manufacturing plants to the butter flavorings that Givaudan makes for use in popcorn. (Compl. ¶ 6, Supp. 2; Answer ¶ 6, Supp. 9.) In 2003, Givaudan hired Squire Sanders to defend it in this "butter-flavorings litigation." Fred King, Givaudan's Vice President for Legal Affairs at the time, was the individual who chose the firm. (King Dep. at 17, 21, Ex. F. to Squire Sanders Mot. to Compel, Supp. 185, 186.) Zurich North America Insurance was Givaudan's primary insurance carrier for the litigation. (Garfinkel Dep. at 99-100, Supp. 137; King Dep. at 33, Supp. 189.) Zurich agreed to pay a percentage of Squire Sanders' legal fees, and Givaudan covered the remainder. (King Dep. at 35-36, Supp. 190.)

For each Squire Sanders invoice, Zurich audited the time entries of the attorneys to make sure that they were not duplicative and proper for payment. (*Id.* at 37, Supp. 190.) After this

auditing process, King reviewed the invoices himself along with Zurich's audit results. (*Id.* at 37-38, Supp. 190-91.) If he had any questions, he would ask Squire Sanders about the bills. (*Id.* at 37-39, Supp. 190-91.) In general, he gave his approval for payment to all Squire Sanders invoices. (*Id.* at 88-89, Supp. 203.) King remained Givaudan's Vice President of Legal Affairs until September 2006, and worked on an independent-contractor basis during the remaining months of 2006. (*Id.* at 67-68, Supp. 198.)

Subsequently, Givaudan hired Jane Garfinkel as its new Senior Vice President and General Counsel in January 2007. (Garfinkel Dep. at 6, 8, Supp. 114.) Within five months, on May 14, 2007, Givaudan terminated Squire Sanders' legal services. (Compl. ¶ 12, Supp. 4; Answer ¶ 12, Supp. 10.) At some point early in 2007, Givaudan also stopped payment of Squire Sanders' invoices, leaving an unpaid balance of $1,801,204.37 for the legal services that Squire Sanders had already performed. (Compl. ¶ 12, Supp. 4.)

B. Squire Sanders Sought To Recover For Its Unpaid Legal Services, But Givaudan Prevented Discovery Regarding These Services.

In November 2007, because Givaudan still refused to pay for the legal work that Squire Sanders had conducted before its termination, Squire Sanders brought this suit. It alleged two counts: breach of contract and money due on an account. (Compl. ¶¶ 7-19, Supp. 3-5.) In response, Givaudan filed an answer and counterclaims alleging breach of contract, legal malpractice, breach of fiduciary duty, fraud, unjust enrichment, and constructive fraud. (Answer ¶¶ 53-80, Supp. 16-21.) An amended pleading later removed the two fraud counts. (*See* Am. Answer ¶¶ 52-67, Supp. 35-37.) As their common core, Givaudan's defenses and counterclaims asserted that Squire Sanders had incurred "unreasonable, excessive, and/or unnecessary amounts for its services" and had failed "to properly and adequately provide legal services." (Answer ¶ 54, Supp. 16.)

Givaudan's responses to Squire Sanders' interrogatories were a kitchen sink of conclusory allegations of misconduct. (*See* Givaudan Supp. Resp. to Int., Ex. H to Squire Sanders Mot. to Compel, Supp. 212-28.) According to Givaudan, Squire Sanders' fees were allegedly unreasonable because, among other things, Squire Sanders had engaged in "excessive or improper billing for particular tasks" (*id.* at 6, Supp. 217); had "bill[ed] for unnecessary work" (*id.* at 7, Supp. 218); had billed for work performed by lawyers "without sufficient experience" (*id.* at 8, Supp. 219); had "bill[ed] for "duplicative work" (*id.*); had billed "for apparently fabricated tasks" (*id.* at 11, Supp. 222); and had billed "for unauthorized work" (*id.* at 12, Supp. 223).

Similarly, Givaudan alleged that Squire Sanders' legal work was improper because its lawyers had "an inadequate and/or insufficient strategy or plan for handling the [butter-flavorings litigation]"; its lawyers had "inadequate and insufficient experience"; and its supervising lawyers had "failed to properly manage, lead, or supervise" lower-level lawyers. (*Id.* at 14, Supp. 225.) Givaudan also claimed, among other things, that Squire Sanders had failed to properly conduct "legal research"; "investigate factual issues"; "conduct discovery"; "identify, review, and coordinate experts"; "prepare the Givaudan cases for trial"; "identify, investigate, and pursue potential defenses"; "staff trial teams"; and "identify and pursue settlement opportunities." (*Id.* at 14-16, Supp. 225-27.)

Despite these far-reaching allegations of incompetence and misbehavior, Givaudan rebuffed every effort by Squire Sanders to seek discovery in defense. For starters, Squire Sanders sent Givaudan requests for the production of documents, including documents related to, for example, Squire Sanders' strategy for the butter-flavorings litigation, its handling of experts, its staffing for the litigation, and its pursuit of settlement opportunities. (*See generally* Squire

Sanders Reqs. for Produc., Ex. A to Squire Sanders Mot. to Compel, Supp. 42-67.) In response, Givaudan asserted the attorney-client and work-product privileges over all requested documents and, to this date, has not produced a single document. (*See generally* Givaudan Response to Reqs. for Produc., Ex. B. to Squire Sanders Mot. to Compel, Supp. 68-105.) Likewise, Squire Sanders served subpoenas on Zurich, the third-party insurance carrier that audited its bills, for similar documents. Givaudan again objected on privilege grounds and instructed Zurich not to produce anything. (*See* Correspondence regarding subpoenas, Ex. C to Squire Sanders Mot. to Compel, Supp. 106-11.)

In addition, Givaudan interfered with Squire Sanders' attempts to obtain deposition testimony about Givaudan's claims. Specifically, Squire Sanders sought to depose Fred King, Givaudan's former general counsel who hired and worked with Squire Sanders for most of the relevant period. (King Dep. at 21, 43-44, Supp. 186, 192.) During King's deposition, Givaudan asserted countless privilege objections, and repeatedly instructed King not to answer questions going to the heart of this case. (*See* King Dep., Supp. 181-209.) For instance, while Givaudan alleges that Squire Sanders "had an inadequate and/or insufficient [litigation] strategy" (Givaudan Supp. Resp. to Int. at 14, Supp. 225), it refused to allow King—who was ready and willing to do so—to explain his understanding of that strategy (King Dep. at 41-43, 66-67, Supp. 191-92, 198). Likewise, while Givaudan asserts that Squire Sanders "failed to identify and pursue settlement opportunities in a timely manner" (Givaudan Supp. Resp. to Int. at 16, Supp. 227), Givaudan prohibited King from testifying about his communications with Squire Sanders concerning settlement opportunities (King Dep. at 68-71, Supp. 198-99). As yet another example, Givaudan refused to allow King to answer questions regarding Squire Sanders' trial staffing (King Dep. at 25, 53, 58-62, 83-85, Supp. 187, 194, 196-97, 202), despite its allegations

that Squire Sanders lawyers "failed to appropriately staff trial teams" (Givaudan Supp. Resp. to Int. at 15, Supp. 226).

The same interference occurred even more frequently at the deposition of Jane Garfinkel, the individual who replaced King in January 2007. (*See* Garfinkel Dep., Supp. 112-80.) Remarkably, while Givaudan claims that Squire Sanders billed for unauthorized work (Givaudan Supp. Resp. to Int. at 12, Supp. 223), Garfinkel was instructed not to discuss her instructions to Squire Sanders about the work that she had authorized (Garfinkel Dep. at 156-58, Supp. 151-52). Similarly, while Givaudan alleges that Squire Sanders "bill[ed] for work that was not timely or ever completed and/or followed up" (Givaudan Supp. Resp. to Int. at 11, Supp. 222), Garfinkel refused to testify about the communications with Squire Sanders or the specific billing entries that contributed to Garfinkel's forming that view (Garfinkel Dep. at 163-66, Supp. 153-54). She, likewise, was not permitted to testify about, or even identify, the alleged "event" that led her to conclude that Squire Sanders should be replaced. (Garfinkel Dep. at 187-88, Supp. 159.)

On top of this interference, Givaudan also repeatedly claimed privilege over documents in Squire Sanders' own possession. For instance, Givaudan has not paid invoiced amounts, but has invoked privilege even with respect to the very invoices at issue in this case. In fact, it has refused to allow the invoices even to be marked as deposition exhibits. (*See generally* Garfinkel Dep. at 62-95, Supp. 128-36 (Givaudan counsel refusing to allow marking of, or testimony regarding, twenty-nine allegedly privileged documents, including invoices).) Furthermore, Givaudan has not permitted Squire Sanders to properly prepare its experts. While it argues that Squire Sanders' charges were unreasonable and excessive, it claims that Squire Sanders' experts cannot have access to the invoices and other documents necessary for them to opine on that and

other aspects of the Squire Sanders/Givaudan relationship. (*See* Correspondence regarding experts, Ex. G to Squire Sanders Mot. to Compel, Supp. 210-11.)

C. Relying On The Self-Protection Exception, The Court Of Common Pleas Properly Granted Squire Sanders' Motion To Compel The Discovery And Use Of Evidence Reasonably Necessary For This Litigation.

Givaudan's repeated inappropriate reliance on the attorney-client and work-product privileges left Squire Sanders no choice but to file a motion to compel in the trial court. (*See* Squire Sanders Mot. to Compel, Supp. 229-31.) Squire Sanders' motion asserted that, under the universally recognized self-protection exception to the attorney-client privilege and work-product doctrine, communications between Squire Sanders and Givaudan and other evidence concerning Squire Sanders' legal work were not privileged for purposes of this litigation. (*See id.* at 1-2, Supp. 229-30.) Squire Sanders asked the court to compel Givaudan to stop relying on these improper privilege objections. Specifically, Squire Sanders asked that Givaudan produce certain documents that Squire Sanders had requested; withdraw its instructions to its third-party insurance carrier not to respond to Squire Sanders' valid subpoenas; allow Givaudan's general counsel and former general counsel, King and Garfinkel, to sit for depositions without these improper privilege objections; and stop challenging Squire Sanders' use of documents in its own possession based upon these improper privilege objections. (*See id.*; Mem. in Supp. of Mot. to Compel at 3-5, 14, Supp. 234-36, 245.)

The trial court granted the motion. It found that the "traditional self-protection exception to" the attorney-client and work-product privileges applied in this suit. (Appx. 34.) It reached this conclusion because the self-protection exception "has well over a century of foundation in American jurisprudence." (Appx. 35.) It also pointed to Ohio Rule of Professional Conduct 1.6(b)(5), which permits a lawyer to reveal confidential client information "'to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client.'" (*Id.*) As

a factual matter, the court concluded that "good cause ha[d] been shown for [Squire Sanders'] need for the discovery items and testimony it seeks." (*Id.*)

In response to Givaudan's arguments, the court noted that this Court's decision in *Jackson v. Greger* (2006), 110 Ohio St. 3d 448, 2006-Ohio-4968, "did not abrogate, alter, or even address the traditional self-protection exception to privilege for communications between lawyers and former clients who are parties to a professional liability suit." (Appx. 34.) Rather, as the court explained, *Jackson* addressed the circumstances when a party that asserts a valid claim of privilege could be found to have *waived* that privilege. (*Id.*) Under the self-protection exception applicable in this litigation, however, Givaudan has no basis for its privilege claims to begin with, so no waiver analysis is needed. (*Id.*) As a result, the court ordered Givaudan to produce the documents requested by Squire Sanders' motion to compel, to permit King and Garfinkel to sit for depositions without improper interference, and to allow use of material already in Squire Sanders' possession. (Appx. 35-36.)

D. The Court Of Appeals Removed The Self-Protection Exception From Ohio Law.

The Court of Appeals for the Eighth Appellate District reversed. It found that the traditional self-protection exception in no way limited the scope of Ohio's statutory or common-law attorney-client privilege or work-product doctrine. (Appx. 15-29.) Rather, it determined that Squire Sanders' communications with Givaudan could fall within these privileges for purposes of this litigation. Thus, according to the court of appeals, the general rules governing the *waiver* of a properly asserted claim of privilege provided the exclusive means by which Squire Sanders could obtain and seek to use those communications as evidence in this case. (Appx. 25, 29.)

The court of appeals then went through the waiver rules that apply under these doctrines. As for Ohio's statutory attorney-client privilege, which governs testimonial evidence, the court of appeals determined that the types of waivers mentioned in R.C. 2317.02(A)—either "the client expressly consents or the client voluntarily testifies on the same subject"—provided the exclusive means by which Givaudan could waive the privilege. (Appx. 18, 26.) As for Ohio's common-law attorney-client privilege, which applies more broadly, the court relied upon the "implied waiver test set forth in" *Hearn v. Rhay* (E.D. Wash. 1975), 68 F.R.D. 574. (Appx. 20, 25-26.) Under that test, a client will be found to have impliedly waived the attorney-client privilege "when '(1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.'" (Appx. 17 (quoting *Hearn*, 68 F.R.D. at 581).) Finally, turning to the work-product doctrine, the court noted that "'[a] showing of good cause under Civ.R. 26(B)(3) requires demonstration of need for the materials—i.e., a showing that the materials, or the information they contain, are relevant and otherwise unavailable.'" (Appx. 28 (quoting *Jackson*, 2006-Ohio-4968, at syllabus ¶ 2).)

After setting forth these rules for all allegedly non-discoverable evidence, the court of appeals held that the trial court abused its discretion by not "hold[ing] an evidentiary hearing or in camera review in this matter in light of the claim of privilege." (Appx. 23.) The court also determined that these rules apply not only to the documents in Givaudan's possession but also to the documents in Squire Sanders' possession. In other words, "all documents claimed to come within the attorney-client privilege, which were intended to be privileged, must be reviewed under the applicable [waiver] law, and all claimed work product must likewise be analyzed under

that controlling law." (Appx. 13.) It rejected Squire Sanders' protest that an *in camera*, document-by-document review of the requested materials was unnecessary because the discovery issue concerned not whether privilege had been waived for particular individual items, but instead application of the self-protection exception to the circumstances in general. This Court granted discretionary leave to appeal.

ARGUMENT

PROPOSITION OF LAW: UNDER THE SELF-PROTECTION EXCEPTION, THE ATTORNEY-CLIENT AND WORK-PRODUCT PRIVILEGES THAT ARISE FROM AN ATTORNEY-CLIENT RELATIONSHIP DO NOT APPLY IN LITIGATION BETWEEN THE ATTORNEY AND THE CLIENT OVER THE ATTORNEY'S LEGAL SERVICES.

For over a century, courts have universally held that traditional evidentiary privileges arising from an attorney-client relationship do not apply in a suit between the attorney and the client over the attorney's legal services. *See infra* Section I. Ohio's statutory and common-law attorney-client privileges incorporate this longstanding "self-protection exception." *See infra* Section II. Ohio's work-product doctrine likewise does so. *See infra* Section III. Applying the exception here, the trial court correctly found, as a factual matter, that the evidence that Squire Sanders identified in its motion to compel was relevant and reasonably necessary for this litigation. *See infra* Section IV. For these reasons, this Court should reverse the court of appeals' decision and reinstate the trial court's judgment.

The standard of review of those decisions depends on the question at issue. For questions of law—such as the scope of the statutory or common-law attorney-client privileges—the Court's review is *de novo*. *See Med. Mut. of Ohio v. Schlotterer* (2009), 122 Ohio St. 3d 181, 2009-Ohio-2496, at ¶ 13 (noting that "whether the information sought is . . . privileged from disclosure is a question of law that is reviewed de novo") (citing *Castlebrook, Ltd. v. Dayton Props. Ltd. P'ship* (2d Dist. 1992), 78 Ohio App. 3d 340, 346). By contrast, factual or otherwise

"discretionary decisions"—such as whether the trial court should have undertaken an *in camera* hearing—are reviewed for an abuse of discretion. *Castlebrook*, 78 Ohio App. 3d at 346.

I. The Self-Protection Exception Establishes A Universally Recognized Limitation On The Scope Of The Attorney-Client Privilege.

While the attorney-client privilege generally protects "communications between an attorney and his client," *Taylor v. Sheldon* (1961), 172 Ohio St. 118, 121, several "well-established exceptions" limit its underlying scope, *Loutzenhiser v. Doddo* (Pa. 1970), 260 A.2d 745, 748; *see Lang v. Ingalls Zinc Co.* (Tenn. Ch. App. 1898), 49 S.W. 288, 295 (noting that "there are exceptions to the general rule as well settled as the rule itself"). These exceptions include the "crime-fraud exception," *see State ex rel. Nix v. City of Cleveland* (1998), 83 Ohio St. 3d 379, 383-84, the "joint-representation exception," *see Netzley v. Nationwide Mut. Ins. Co.* (2d Dist. 1971), 34 Ohio App. 2d 65, 77-79, and the "self-protection exception," *see Keck v. Bode* (Ohio Cir. Ct. 1902), 13 Ohio C.D. 413, 415, 1902 WL 868, at *1. Under that last exception, the one relevant here, evidence concerning the client's communications with its attorney or the attorney's legal work does not qualify as privileged in a suit between the client and the attorney over the attorney's professional services. *See, e.g.*, *Restatement (Third) of Law Governing Lawyers* § 83 (2000).

A. Courts And Commentators Alike Universally Agree With The Self-Protection Exception.

This self-protection exception is both deeply rooted and universally recognized. It dates back over 150 years. *See Rochester City Bank v. Suydam, Sage & Co.* (N.Y. Sup. Ct. 1851), 5 How. Pr. 254, 262. It has been adopted both "[i]n states where the privilege protecting communications with attorneys is still regulated by the common law, as well as in those where it is prescribed by statute." *Keck*, 1902 WL 868, at *1; *see Koeber v. Somers* (Wis. 1901), 84 N.W. 991, 993. In fact, the exception is mentioned with approval by every jurisdiction that has

considered it.[1] The United States Supreme Court, for example, recognized it in 1888. *See Hunt v. Blackburn* (1888), 128 U.S. 464, 470-71. Many state supreme courts have likewise done so. *See, e.g.*, *Pierce v. Norton* (Conn. 1909), 74 A. 686, 688 ("An attorney may maintain an action against his client for professional services, and, when to such action a defense like that in the present case is made, he may show the circumstances under which the services were rendered in proof of their value and in proof of his good faith."); *Daughtry v. Cobb* (Ga. 1939), 5 S.E.2d 352, 355 ("Thus the rule as to privilege has no application where the client, in an action against the attorney, charges negligence or malpractice, or fraud, or other professional misconduct. In such cases it would be a manifest injustice to allow the client to take advantage of the rule of privilege to the prejudice of his attorney.") (internal quotation marks and citations omitted).

Ohio courts, including this Court, approved of the self-protection exception more than a century ago. *See Keck*, 1902 WL 868, at *1. In *Keck*, a lawyer sued a former client seeking legal fees for work performed in settling a dispute between the client and a third party. *Id.* at *1. Despite an Ohio statute prohibiting an attorney from testifying about communications with the client, the trial court permitted the attorney to testify that the client had confessed to him that fraud accusations made by the third party were partially true. *Id.* at *2. On appeal, the circuit

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[1] *See, e.g.*, *Dewberry v. Bank of Standing Rock* (Ala. 1933), 150 So. 463, 471 (Alabama law); *Carlson, Collins, Gordon & Bold v. Banducci* (Cal. Ct. App. 1967), 257 Cal. App. 2d 212, 227-28 (California law); *Pierce v. Norton* (Conn. 1909), 74 A. 686, 688 (Connecticut law); *Browning v. Potter* (Colo. 1954), 271 P.2d 418, 422 (Colorado law); *Olmstead v. Webb* (1894), 5 App. D.C. 38, 1894 WL 11974, at *7 (District of Columbia law); *Daughtry v. Cobb* (Ga. 1939), 5 S.E.2d 352, 355 (Georgia law); *Sokol v. Mortimer* (Ill. App. Ct. 1967), 225 N.E.2d 496, 501 (Illinois law); *Nave v. Baird* (1859), 12 Ind. 318, 318 (Indiana law); *Weinshenk v. Sullivan* (Mo. Ct. App. 1937), 100 S.W.2d 66, 70 (Missouri law); *State v. Madigan* (Minn. 1896), 68 N.W. 179, 180 (Minnesota law); *Mitchell v. Bromberger* (1866), 2 Nev. 345, 1866 WL 1643, at *1-2 (Nevada law); *Rochester*, 5 How. Pr. at 262 (New York law); *State v. Luper* (Or. 1907), 91 P. 444, 445-46 (Oregon law); *Loutzenhiser*, 260 A.2d at 748 (Pennsylvania law); *Lang*, 49 S.W. at 295 (Tennessee law); *Smith v. Guerre* (Tex. Civ. App. 1913), 159 S.W. 417, 419-20 (Texas law); *Hunt v. Blackburn* (1888), 128 U.S. 464, 470-71 (United States law); *Stern v. Daniel* (Wash. 1907), 91 P. 552, 553 (Washington law); *Koeber*, 84 N.W. at 993-94 (Wisconsin law).

court agreed with the trial court that Ohio's statutory privilege included the self-protection exception, noting that the privilege "should receive the same construction as the rule of the common law." *Id.* at *1. It ultimately reversed the trial court, however, because it found that the specific communication at issue (an admission of fraud) was unduly prejudicial and not reasonably necessary to prove the legal services performed. *Id.* at *2. This Court, without opinion, reversed the circuit court and reinstated the trial court's judgment, thereby indicating its approval of the self-protection exception. *See Bode v. Keck* (1903), 69 Ohio St. 549.

In addition to the unanimity in decisional law, many legal commentators and treatises have treated the exception as black-letter law. *See, e.g., Restatement (Third) of Law Governing Lawyers* § 83 ("The attorney-client privilege does not apply to a communication that is relevant and reasonably necessary for a lawyer to employ in a proceeding: (1) to resolve a dispute with a client concerning compensation or reimbursement that the lawyer reasonably claims the client owes the lawyer; or (2) to defend the lawyer or the lawyer's associate or agent against a charge by any person that the lawyer, associate, or agent acted wrongfully during the course of representing a client."); Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* Pt. 1, § V.F at 460 (ABA Sect. of Litig. 3d ed. 2001) ("The other major exception allows an attorney to breach the privilege in the attorney's own interest, generally when the performance of the attorney's responsibilities has been called into question."); *McCormick on Evidence* § 91.1 at 414 (6th ed. Practitioner Treatise Series 2006) ("The weight of authority seems to support the view that when client and attorney become embroiled in a controversy between themselves, as in an action by the attorney for compensation or by the client for damages for the attorney's negligence, the seal is removed from the attorney's lips."); Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence Under The Rules* 909 (4th ed. 2000)

(noting that, "[b]y common consensus, the attorney-client privilege gives way in several circumstances," and citing "[s]uits between client and lawyer [as] an obvious example"); 2 F. Mechem, *A Treatise On The Law Of Agency* § 2313 (2d ed. 1914) (noting that "the attorney may disclose information received from the client when it becomes necessary for his own protection").

B. The Self-Protection Exception Establishes Clear Rules Regarding The Scope Of Privilege, And Is Fundamentally Different From A Waiver Of Privilege.

These authorities set forth clear rules governing the exception. To begin with, it applies both where the attorney sues the client seeking legal fees, *see, e.g.*, *Sokol v. Mortimer* (Ill. App. Ct. 1967), 225 N.E.2d 496, 501, and where the client sues the attorney alleging fraud or malpractice, *see, e.g.*, *Nave v. Baird* (1859), 12 Ind. 318, 318. Where it applies, it permits the discovery and use of evidence that is "relevant and reasonably necessary" in a suit between the lawyer and client, even if that evidence would be privileged in a suit between the client and a third party. *See Restatement (Third) Of The Law Governing Lawyers* § 83; *see also Mitchell v. Bromberger* (1866), 2 Nev. 345, 1866 WL 1643, at *2; Prof. Cond. Rule 1.6(b)(5).

The authorities likewise make clear that the self-protection exception represents a limitation on the privilege's *underlying scope*. *See, e.g.*, *Stern v. Daniel* (Wash. 1907), 91 P. 552, 553 ("It is also claimed that these letters were privileged, and that the court erroneously admitted them. They would have been privileged, no doubt, as between either of the parties to this suit and third parties; but as between the attorney and client the rule of privilege will not be enforced where the client charges mismanagement of his cause by the attorney, as was the case here."). The exception is thus similar to other required elements of a valid privilege claim, such as that the attorney-client communication be confidential, *see State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St. 3d 261, 2005-Ohio-1508, at ¶ 26, or that the attorney-client

communication be related to the matter for which the client retained the attorney, *see Lemley v. Kaiser* (1983), 6 Ohio St. 3d 258, 264.

In this respect, as this Court has expressly recognized, there is a fundamental difference between "*waiver* of the privilege" and an "*exception* to the privilege." *Boone v. Vanliner Ins. Co.* (2001), 91 Ohio St. 3d 209, 213. *Boone* held that, while Ohio's statutory attorney-client privilege "provides the exclusive means by which privileged attorney-client communications can be waived by the client," traditional limitations on the scope of the privilege are "unaffected by" the rules regarding waiver. *Id.* The *Restatement (Third) Of The Law Governing Lawyers* likewise expressly distinguishes between "waivers" of privilege (set forth in Restatement §§ 78-80) and "exceptions" that limit its scope (set forth in Restatement §§ 81-85). *See id.* Chapter 5, Topic 2, Title C, Introductory Note.

Because the traditional self-protection exception limits the privilege's scope, it does not constitute a general waiver of privilege. Waiver destroys an otherwise validly asserted privilege based on the client's conduct. Under the self-protection exception, by contrast, the privilege is not destroyed, because it still protects attorney-client communications from disclosure at the behest of third parties. Rather, the scope of that valid privilege simply does not cover a lawsuit between the attorney and the client over the attorney's legal services. *See, e.g., United States v. Ballard* (5th Cir. 1986), 779 F.2d 287, 292 ("A lawyer may reveal otherwise privileged communications from his clients in order to recover a fee due him, or to defend himself against charges of improper conduct, without violating the ethical rules of confidentiality or the attorney-client privilege. The mere institution of suit against a lawyer, however, is not a waiver of the privilege for all subsequent proceedings, however unrelated.").

The self-protection exception is thus on all fours with the traditional joint-representation exception that applies where an attorney jointly represents two clients. The joint-representation exception also represents a limitation on the scope of privilege, rather than a privilege waiver. It provides that communications between the attorney and one of the clients are not privileged "in a controversy between the [two clients]," even though there has been no waiver. *Netzley*, 34 Ohio App. 2d at 78 ("Here the communications are clearly privileged from disclosure at the instance of a third person. Yet they are not privileged in a controversy between the original parties . . . .") (internal quotation marks omitted); *see Loutzenhiser*, 260 A.2d at 748 (noting that the privilege does not apply where "the attorney represents both parties to the transaction—in disputes between the parties inter se").

C. Sound Policy Supports The Self-Protection Exception.

As a final matter, sound policy supports this exception. It establishes the appropriate balance between competing interests. On the one hand, it protects the client's legitimate interests. It does not represent a general waiver of the privilege and applies only in the attorney-client dispute. *See, e.g.*, *Ballard*, 779 F.2d at 292; *Qualcomm Inc. v. Broadcom Corp.* (S.D. Cal. Nov. 7, 2008), No. 05-CV-1958-B, 2008 WL 4858685, at *6-7 (entering protective order that any disclosures in the case were "made pursuant to . . . the self-defense exception to the attorney-client privilege and shall not be viewed as a consent or waiver of any privilege or work product immunity on the part of [the client]"); *Restatement (Third) Of The Law Governing Lawyers* § 83 cmt. c (noting that "[p]rotective orders are a common feature of litigation involving otherwise privileged materials" and can be used to limit access to evidence disclosed under the self-protection exception); *Med. Mut.*, 2009-Ohio-2496, at ¶ 23 ("Trial courts may use protective orders to prevent confidential information, such as that contained in the medical records at issue, from being unnecessarily revealed."). Here, for example, the exemption merely recognizes that

Squire Sanders can obtain and use evidence regarding its relationship with Givaudan in this litigation.

On the other hand, the self-protection exception protects the attorney's legitimate interests. Without it, a client who refuses to pay its law firm's fees could both assert professional misconduct as a defense and rely upon the attorney-client privilege to prevent the law firm from disproving the allegation. *See, e.g.*, *Sokol*, 225 N.E.2d at 501 ("To reach a contrary conclusion [to the self-protection exception] would be to permit an attorney to be charged with conduct fatal to his cause of action, yet render him incompetent to answer in response to the attack upon his professional integrity."); *Mitchell*, 1866 WL 1643, at *2 ("It would be a manifest injustice to allow the client to take advantage of [the privilege] to the prejudice of his attorney; or that it should be carried to the extent of depriving the attorney of the means of obtaining or defending his own rights."). The tactics employed by Givaudan throughout these proceedings illustrate this concern. Givaudan freely accuses Squire Sanders of malpractice, incompetence, and dishonesty. (*See, e.g.*, Givaudan Supp. Resp. to Int. at 6-16, Supp. 217-27.) Yet Givaudan invokes privilege to prevent Squire Sanders from defending these charges. The self-protection exception is specifically designed to prevent this unfairness.

II. Ohio Law On The Attorney-Client Privilege Incorporates The Well-Established Self-Protection Exception.

Givaudan cannot use the attorney-client privilege to conceal Squire Sanders' legal work here because this longstanding self-protection exception has been incorporated into Ohio's law of evidence. An overlay of statutory enactments and common-law rules govern Ohio's attorney-client privilege. Ohio Evidence Rule 501 makes that plain. It indicates that "[t]he privilege of a witness, person, state or political subdivision thereof shall be governed by statute enacted by the General Assembly or by principles of common law as interpreted by the courts of this state in the

light of reason and experience." Evid. R. 501; *see Leslie*, 2005-Ohio-1508, at ¶ 26 (identifying statutory and common-law attorney-client privileges); *State v. McDermott* (1995), 72 Ohio St. 3d 570, 574 (same). The self-protection exception applies equally whether the statutory or common-law privilege is at issue.

A. The Statutory Attorney-Client Privilege Incorporates The Self-Protection Exception.

Ohio's statutory attorney-client privilege, codified at R.C. 2317.02(A), prohibits an attorney from testifying about privileged communications. It provides in relevant part:

> The following persons shall not testify in certain respects:
> (A)(1) An attorney, concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client. However, if the client voluntarily testifies or is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject.

R.C. 2317.02(A)(1). This statute establishes a "testimonial privilege," *Leslie*, 2005-Ohio-1508, at ¶ 26, that governs "communications directly between an attorney and a client," *Jackson v. Greger*, 110 Ohio St. 3d 488, 2006-Ohio-4968, at ¶ 7. Traditional common-law concepts—including, among others, the crime-fraud, joint-representation, and self-protection limitations on the scope of privilege—have been incorporated into the statutory attorney-client privilege.

1. The General Assembly Intended To Incorporate Common-Law Concepts Not Expressly Displaced By The Statute.

Common-law rules, like the self-protection exception, necessarily define the scope of R.C. 2317.02(A)'s privilege. Under a traditional canon of construction, courts interpret statutory language that has a "widely accepted common-law meaning" in accord with that meaning. *Klemas v. Flynn* (1993), 66 Ohio St. 3d 249, 250 (internal quotation marks and citation omitted); *see Richardson v. Doe* (1964), 176 Ohio St. 370, 372-73 ("It is well established that where a

statute uses a word which has a definite meaning at common law, it will be presumed to be used in that sense and not in the loose popular sense."); *Neder v. United States* (1999), 527 U.S. 1, 21 ("It is a well-established rule of construction that [w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.") (internal quotation marks and citation omitted); R.C. 1.42 (instructing courts to construe a phrase with "a technical or particular meaning" in conformity with that meaning). This rule follows from the principle that statutes "in derogation of the common law" should be "strictly construed" to enact only those changes from the common law that are unambiguous. *Weis v. Weis* (1947), 147 Ohio St. 416, 428-29.

This traditional canon applies with full force to R.C. 2317.02(A) because the statute represents a codification of the common-law privilege. *See Lemley*, 6 Ohio St. 3d at 263 ("The Ohio Legislature has codified the common law attorney-client privilege in R.C. 2317.02."). It is true that the statutory language "clearly enumerates the means by which a client may *waive* the statutory attorney-client privilege" for evidence that falls within it, thereby displacing any contrary common-law rules related to *waiver*. *Jackson*, 2006-Ohio-4968, at ¶ 12 (emphasis added). But the statute "provides only minimal guidance" for determining the antecedent question of "[w]hat is a privileged communication between an attorney and a client" in the first instance. *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St. 3d 638, 660 & 662 n.8 (noting that "the statute does not define what is meant by the term 'communication'"). That is because, "[i]n the determination [of] whether a communication by a client to an attorney should be afforded the cloak of privilege, much . . . depend[s] on the circumstances of each case." *Lemley*, 6 Ohio St. 3d at 264 (internal quotation marks and citations omitted). The statute uses many

"legal term[s] of art" with established common-law meanings, *Klemas*, 66 Ohio St. 3d at 250 (internal quotation marks omitted), such as attorney-client "communication," "in that relation," and "testimonial privilege," R.C. 2317.02(A). Accordingly, common-law privilege rules, such as the self-protection exception, offer *specific* guidance in interpreting this *general* language.

For this reason, many courts elsewhere have interpreted nearly identical testimonial privilege statutes as including the traditional self-protection exception. *See, e.g.*, *Pappas v. Holloway* (Wash. 1990), 787 P.2d 30, 33-34 (holding that the self-protection exception was incorporated into a Washington statute providing that "[a]n attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment"); *Mitchell*, 1866 WL 1643, at *1-2 (holding that the self-protection exception was incorporated into a Nevada statute prohibiting an attorney from being a witness "to any communication made by the client to him, or his advice given therein, in the course of professional employment"); *Koeber*, 84 N.W. at 993 (holding that the self-protection exception was incorporated into a Wisconsin statute prohibiting an attorney from "disclos[ing] a communication made by his client to him or his advice given thereon in the course of his professional employment").

This Court should follow this case law interpreting these nearly identical statutes. Because the common law has long included the self-protection exception, *see supra* Section I, the general statutory language at issue here should likewise be interpreted to include it. *See Klemas*, 66 Ohio St. 3d at 250.

2. The General Assembly Repeatedly Amended Ohio's Statutory Attorney-Client Privilege Without Ever Indicating Disapproval Of The Universally Accepted Self-Protection Exception.

The Court has even more reason to follow the self-protection rule, because, as mentioned above, Ohio courts have incorporated it into the statutory privilege dating back a century. *See*

Keck, 1902 WL 868, at *1 (approving of the self-protection exception, but excluding communication at issue on prejudice grounds), *rev'd without opinion by Bode*, 69 Ohio St. 549 (reinstating the trial court's judgment admitting communication under self-protection exception). *Keck* has great relevance here because "[i]t is presumed that the General Assembly is fully aware of any prior judicial interpretation of an existing statute when enacting an amendment." *Clark v. Scarpelli* (2001), 91 Ohio St. 3d 271, 278. Since *Keck*, the Ohio General Assembly has repeatedly amended and recodified Ohio's statutory attorney-client privilege without ever indicating disapproval of the self-protection exception. *See, e.g.*, Am. Sub. S.B. No. 117 (2006); Sub. H.B. No. 144 (2006); H.B. No. 606 (1998); S.B. No. 223 (1996); S.B. No. 230 (1996); H.B. No. 529 (1986); Am. H.B. No. 284 (1980); H.B. No. 682 (1975); Am. H.B. No. 576 (1953); G.C. 11494 (1938). Not once has the General Assembly added language to eliminate or otherwise alter the self-protection rule recognized in this State by *Keck* and accepted by every other jurisdiction to have addressed the issue. *Cf. State v. Ferguson*, 120 Ohio St. 3d 7, 2008-Ohio-4824, at ¶ 23 (recognizing that "the General Assembly has shown no hesitation in acting promptly when it disagrees with appellate rulings involving statutory construction and interpretation").

That rule has essentially been codified, because this "legislative inaction in the face of longstanding judicial interpretations . . . evidences legislative intent to retain existing law." *State v. Cichon* (1980), 61 Ohio St. 2d 181, 183-84. To reverse course after a hundred years, and to make Ohio the only State in the country to refuse to recognize the self-protection exception, would only unsettle the General Assembly's settled expectations. *See Spitzer v. Stillings* (1924), 109 Ohio St. 297, 305 ("[T]he law having existed since that date without amendment of that particular feature, it will be presumed that the Legislature has been satisfied with the

interpretation given [by the court], and it being entirely a question of policy, it would amount to judicial legislation upon the part of this court to make a change of interpretation or application at this late date.").

3. Abrogating The Self-Protection Exception Would Call Into Question The Statute's Incorporation Of Other Common-Law Concepts, Including The Crime-Fraud Exception.

This Court has repeatedly relied upon common-law principles and common-law sources in interpreting the scope of R.C. 2317.02(A) and its predecessors. For starters, the Court has suggested, based on tradition, that the "communications" covered by the statute include only "*confidential* communications" between attorney and client, even though the statute by its terms applies to all "communications" between attorney and client in that relation. *Leslie*, 2005-Ohio-1508, at ¶ 26 (emphasis added); *see Moskovitz*, 69 Ohio St. 3d at 660-61 (noting that "the mere relation of attorney and client does not raise a presumption of confidentiality of all communications made between them"); *Ex parte Martin* (1943), 141 Ohio St. 87, 104-05 (distinguishing between "facts within [attorney's] own knowledge" and "confidential communications") (internal quotation marks omitted); *Foley v. Poschke* (1941), 137 Ohio St. 593, 595 (referencing "general rule that communications between an attorney and his client in the presence of a third person are not privileged," but finding that the rule did not apply "when such third person is the agent of either the client or the attorney"). That follows from the common law, which requires that the communications be "made in confidence" as an element of the privilege. *Leslie*, 2005-Ohio-1508, at ¶ 21 (internal quotation marks omitted). Were the statute interpreted otherwise, the privilege would protect all client communications to the attorney, even those openly and intentionally made in front of adversaries that were never meant to be privileged.

Furthermore, the Court has interpreted the statutory requirement of a "communication" from a client to an attorney "in that relation," R.C. 2317.02(A)(1), consistent with common-law concepts. Relying on common-law sources, for example, it has held that the statute covers communications between an attorney and a *prospective* client, not simply an actual client. *See Taylor*, 172 Ohio St. at 120-21. Showing its approval of this Court's reliance on the common law, the General Assembly subsequently codified that holding. *See* R.C. 2317.021(A) (defining "client" as "a person . . . that . . . consults an attorney for the purpose of retaining the attorney"). The Court has likewise indicated that—while the term "'communications,'" "in the lay sense," is "confined to oral or written matters"—the term, as used in the common-law sense of the word, also protects even "*knowledge* gained by an attorney, during the attorney-client relationship." *Taylor*, 172 Ohio St. at 122-24 (emphasis added).

In addition, the Court has indicated that the statute incorporates other traditional limitations on the scope of attorney-client privilege, such as the crime-fraud exception—the exception for attorney-client communications in furtherance of a crime or fraud. *See Boone*, 91 Ohio St. 3d at 211-12; *Moskovitz*, 69 Ohio St. 3d at 661; *see also Nix*, 83 Ohio St. 3d at 383-84. As an offshoot of that traditional crime-fraud exception, *Boone* and *Moskovitz* established related exceptions for an insurer's bad-faith denial of insurance coverage or refusal to settle. *See Boone*, 91 Ohio St. 3d at 213; *Moskovitz*, 69 Ohio St. 3d at 661. If this Court rejects the traditional self-protection exception, it necessarily must reject all other well-supported exceptions, such as the crime-fraud exception and the joint-representation exception. And it must do so despite case law suggesting approval of these other exceptions.[2]

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[2] Notably, moreover, the Court in *Boone* departed from the crime-fraud exception's traditional common-law procedure for insurance companies—it held that the exception applied immediately after an *allegation* of bad-faith, 91 Ohio St. 3d at 213, rather than requiring a *prima facie*

In sum, the Court has repeatedly looked to common-law principles and common-law sources in determining the scope of the statutory privilege. It should continue to do so here by applying the traditional self-protection exception.

4. This Court Recently Reaffirmed Its Approval Of The Self-Protection Exception Through Adoption Of Ohio Rule Of Professional Conduct 1.6(b)(5).

This Court just recently reaffirmed its approval of the self-protection exception when it adopted new Ohio Rules of Professional Conduct to govern Ohio lawyers, effective February 2007. Rule 1.6(b)(5) permits an attorney to reveal "information protected by the attorney-client privilege under applicable law" when reasonably necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client." But if the statutory privilege lacked a similar exception, it would make this Rule effectively meaningless. The privilege would *prohibit* a lawyer from using the very information that the Rule *permits* the lawyer to use "to establish a claim or defense." Prof. Cond. Rule 1.6(b)(5). The Court should strive to set forth an interpretation that reconciles the attorney-client privilege and the Ohio Rules of Professional Conduct rather than one that places them in conflict. *See, e.g.*, *Lannen v. Worland* (1928), 119 Ohio St. 49, syllabus ¶ 1 (interpreting separate provisions "enacted in two separate and distinct acts" "with a view to harmonizing their several provisions" because they

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showing of bad faith, *see id.* at 217 (Cook, J., dissenting). The General Assembly recently reversed that aspect of *Boone,* and returned to the prior common-law approach, requiring a *prima facie* showing. *See* R.C. 2317.02(A)(2) (requiring, where the client is an insurance company, for "the party seeking disclosure of the [attorney-client] communications [to make] a prima facie showing of bad faith, fraud, or criminal misconduct by the client"). That this Court departed from the common-law procedure, only to have the General Assembly reverse the Court and return to the common law, illustrates the legislative intent that this Court look to traditional common-law rules on matters—such as the crime-fraud and self-protection exceptions—as to which the statute is silent.

were "related and interdependent"); *cf.* 2B Sutherland Statutes & Statutory Construction § 51:2 (7th ed. 2009) (noting that laws on the same subject "all should be construed together").

For all these reasons, the Court should hold that R.C. 2317.02(A) incorporates the longstanding self-protection exception.

B. Ohio's Common-Law Attorney-Client Privilege Likewise Incorporates The Self-Protection Exception.

Ohio's law of evidence also includes a common-law attorney-client privilege on top of the statutory privilege set forth in R.C. 2317.02. *See Leslie*, 2005-Ohio-1508, at ¶ 26. It governs "information obtained in the confidential relationship," *id.* (internal quotation marks omitted), that does not fall within the statutory privilege's domain of communications "directly between an attorney and a client," *Jackson*, 2006-Ohio-4968, at ¶ 7. The Court has applied it, for example, to communications between the client and an agent of the attorney rather than directly with the attorney. *See McDermott*, 72 Ohio St. 3d at 574; *State v. Post* (1987), 32 Ohio St. 3d 380, 385. The self-protection exception, which originated with the common law, equally limits the scope of this common-law privilege. As the court noted in *Keck*, "[i]n states where the privilege protecting communications with attorneys is still regulated by the common law," attorney-client communications are not privileged in a suit between attorney and client. 1902 WL 868, at *1.

C. The Court Of Appeals Erred By Rejecting The Self-Protection *Exception* To Attorney-Client Privilege, And Focusing Instead On *Waiver* Of Privilege.

The court of appeals flatly rejected the self-protection exception under both the statutory and common-law attorney-client privileges. (Appx. 16-18, 25.) That decision represents (to our knowledge based on exhaustive research) the first time any court in the United States has rejected the existence of the self-protection exception. The court of appeals erred in numerous ways.

1. In Construing The Statutory Privilege, The Court Of Appeals Mistakenly Relied On The *Waiver* Rules In *Jackson v. Greger.*

With respect to the statutory attorney-client privilege, the court of appeals erroneously relied on waiver rules without any analysis as to the underlying scope of the privilege. In that respect, the court of appeals erred by eliminating the self-protection exception based solely on this Court's decision in *Jackson v. Greger*. (*See* Appx. 16-18.)

In *Jackson*, the plaintiff, Maudy Jackson, had pleaded guilty to a crime at the advice of her attorney, the defendant, Lawrence Greger. 2006-Ohio-4968, at ¶ 2. With the aid of a new attorney, Jackson brought suit under 42 U.S.C. § 1983 against the police officers that had charged her. Her § 1983 suit was dismissed on the basis of her prior guilty plea. *Id.* at ¶ 3. As a result, Jackson sued Greger, alleging that he had committed malpractice by advising her to plead guilty. In that malpractice action, Jackson *expressly conceded* that she had no privilege with respect to any communications or work performed by Greger. *See* Br. of Appellee, Maudy Jackson, *Jackson v. Greger*, Ohio S. Ct. Case No. 05-0905, at 7. The question instead was whether Jackson had impliedly waived privilege with respect to communications with her *new attorney* in the § 1983 suit, merely by filing the malpractice action against Greger. The Court held that she had not. Relying upon *State v. McDermott*, 72 Ohio St. 3d 570, it held that "R.C. 2317.02(A) provides the exclusive means by which privileged communications directly between an attorney and a client can be waived." *Jackson*, 2006-Ohio-4968, at syllabus ¶ 1. Because R.C. 2317.02(A) unambiguously authorizes waiver of the attorney-client privilege only by the client's express consent or voluntary testimony, *id.* at ¶ 12, Greger could not rely upon Jackson's mere filing suit for his waiver claim.

This holding from *Jackson* is irrelevant here. As is evident, *Jackson* addressed solely the manner in which a client could *waive* the statutory privilege for evidence that clearly fell within

it. *Id.* at ¶ 12. The Court did not opine upon the antecedent question concerning the statutory privilege's scope, including whether the privilege incorporated well-established exceptions such as the crime-fraud exception, the joint-representation exception, or the self-protection exception. This case, however, concerns that antecedent question. Because the self-protection rule holds that attorney-client communications are not privileged in a suit between the attorney and the client, no waiver analysis need be undertaken. A client obviously cannot waive privilege for non-privileged materials.

Jackson would be relevant if Squire Sanders had moved to compel production of material concerning Givaudan's relationship *with its new counsel* (a waiver situation), rather than Givaudan's relationship *with Squire Sanders* (a self-protection situation). But that is not what Squire Sanders sought in its motion to compel or what the trial court ordered produced. While some of Squire Sanders' original document requests asked for communications between Givaudan and its new counsel (*see* Squire Sanders Reqs. for Produc. at 5-8, Supp. 46-49), those requests were not part of its motion to compel or the trial court's order, both of which relied solely on the self-protection exception (*see* Squire Sanders Mot. to Compel at 1-3, Supp. 229-31; Appx. 33-36). As a result, no waiver analysis was necessary for deciding Squire Sanders' motion to compel.

To be sure, the *Jackson* opinion mentioned "exceptions" and "limitations" in the course of its discussion of waiver. It indicated that this Court had previously "rejected the adoption of judicially created waivers, exceptions, and limitations for testimonial privilege statutes." 2006-Ohio-4968, at ¶ 13; *see also Roe v. Planned Parenthood Sw. Ohio Region*, 122 Ohio St. 3d 399, 2009-Ohio-2973, at ¶ 48 (noting that any "exception to the physician-patient privilege is a matter for the General Assembly to address"). But *Jackson* cannot reasonably be interpreted as more

than a case addressing when an otherwise valid attorney-client privilege claim can be *waived*. *See Jackson*, 2006-Ohio-4968, at syllabus ¶ 1 (the *Jackson* syllabus, referring to "*waive[r]*" of privilege and making no mention of any traditional *exceptions* that go to the scope of privilege) (emphasis added); *Grace v. Mastruserio* (1st Dist.), 182 Ohio App. 3d 243, 2007-Ohio-3942, at ¶ 22 (noting that "the *Jackson* court expressly limited its holding to the case that was under consideration").

To begin with, the specific authority on the statutory attorney-client privilege that *Jackson* cited for its dictum concerning "exceptions" addressed *waiver* of a valid privilege claim after it had been established, not exceptions and limitations on the underlying scope of the attorney-client privilege. 2006-Ohio-4968, at ¶ 13; *see McDermott*, 72 Ohio St. 3d at 572 (refusing to recognize *waiver* of the attorney-client privilege from the client's later disclosure of privileged communications to a third party); *see Waldmann v. Waldmann* (1976), 48 Ohio St. 2d 176, 178 (per curiam) (refusing to recognize *waiver* of the attorney-client privilege from the mere "filing of a domestic relations complaint"); *Swetland v. Miles* (1920), 101 Ohio St. 501, 504 (refusing to recognize *waiver* of the attorney-client privilege after the client's death based upon a request by the client's heirs). What is more, with respect to one of those waiver opinions, *Waldmann*, the Court later explicitly clarified that the traditional crime-fraud exception limits the scope of the privilege even where there has been no statutory waiver. *Lemley*, 6 Ohio St. 3d at 264-66 & n.8 (treating *Waldmann* as "narrow[]" and holding that the privilege did not apply "when the attorney's assertion of [it] is a cover for cooperation in wrongdoing"—*i.e.*, the crime-fraud exception limits the scope of the privilege, notwithstanding that the statute does not include "crime-fraud" as a circumstance constituting waiver).

Indeed, the Court would have to overrule more than *Lemley* were it to hold that the statute did not include traditional exceptions. *See Boone*, 91 Ohio St. 3d at 212-13; *Moskovitz*, 69 Ohio St. 3d at 661-63. In *Moskovitz*, for example, this Court held that the privilege included an *exception* for "materials showing the lack of a good faith effort to settle" by a party. *Boone*, 91 Ohio St. 3d at 212 (internal quotation marks omitted). *Boone* applied that holding to an insurer's bad-faith denial of coverage. *Id.* at 213. The Court rejected the defendant's argument that the statutory privilege "provides the exclusive means by which privileged attorney-client communications can be waived by the client," an argument based upon the *McDermott* opinion on which *Jackson* relied. *Id.* To do so, *Boone* expressly adopted the very distinction between waiver and exception with which the court of appeals disagreed here. (Appx. 24.) Specifically, *Boone* indicated: "*McDermott* addresses client *waiver* of the privilege, whereas *Moskovitz* sets forth an *exception* to the privilege and is therefore unaffected by our holding in *McDermott*." *Boone*, 91 Ohio St. 3d at 213. *Boone*'s holding controls the question whether *Jackson*, a case about waiver, affected the continuing viability of the self-protection exception. It did not.

In any event, even if the particular phrase in *Jackson* referring to "exceptions" were to be taken more broadly as having relevance for determining the underlying scope of the privilege, the court of appeals' decision is still erroneous. That is because that phrase stands, at most, for the proposition that the courts do not have the power to manufacture—"*judicially create[]*"—exceptions separate and apart from the legislative intent behind R.C. 2317.02(A), which was to incorporate exceptions historically recognized at common law. *Jackson*, 2006-Ohio-4968, at ¶ 13 (emphasis added). Confirming, as here, that a statute codifying the common-law privilege includes an historically well-recognized exception is no act of creation, judicial or otherwise. Even the dissent in *Boone*, which argued that the exception involved there was being judicially

created, agreed with the majority that the statute *does* incorporate "well-supported" common-law exceptions. 91 Ohio St. 3d at 218-19 (Cook, J., dissenting) (citing the crime-fraud and joint-representation exceptions as being well-supported). The disagreement between the majority and dissent in *Boone* instead concerned whether an exception for an insurer's bad-faith denial of coverage had ever been a traditional exception to privilege. *Id.*

Here, we do not ask the Court to manufacture some novel exception to attorney-client privilege completely divorced from the statute and based solely on notions of public policy. To the contrary, the self-protection exception is as well-rooted in common law as the crime-fraud and joint-representation exceptions. It is Givaudan that urges the Court to ignore 150 years of history and to become the first court in the United States to reject the existence of the self-protection exception.

2. In Construing The Common-Law Privilege, The Court Of Appeals Mistakenly Relied On The *Waiver* Rules In *Hearn v. Rhay*.

The court of appeals equally erred by relying on waiver rules to reject the self-protection exception for the common-law privilege. (*See* Appx. 19-20.) It did so again without engaging in any analysis of the underlying scope of that privilege or its necessary elements. (*Id.*) Instead, it automatically (and once again) turned to waiver rules, adopting the implied-waiver doctrine set forth in *Hearn v. Rhay* (E.D. Wash. 1975), 68 F.R.D. 574. Under that test, a party will be found to have impliedly waived privilege "when '(1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.'" (Appx. 17 (quoting *Hearn*, 68 F.R.D. at 581).)

Hearn's implied-waiver test is irrelevant here. Givaudan has identified no Ohio court that has applied the *Hearn* test for communications between an attorney and a client in litigation between the two, which is the circumstance at issue here. Rather, the Ohio case law that has adopted *Hearn* has done so in waiver cases, where an attorney *outside* the privileged relationship seeks communications between a former client and a *different* attorney. *See, e.g.*, *Grace*, 2007-Ohio-3942, at ¶¶ 12, 21 (applying implied-waiver test when attorney sought communications between client and *other counsel*).[3] Here, as described above, Squire Sanders' current motion to compel seeks documents and testimony concerning only the Squire Sanders/Givaudan relationship, not Givaudan's relationship or communications with successor counsel. No implied-waiver analysis is necessary for the evidence sought by that motion to compel.

In addition, while *Hearn* referred to the situation here—"where the attorney and client are themselves adverse parties in a lawsuit arising out of the relationship"—as involving "[a]n implied *waiver*" of privilege, 68 F.R.D. at 580, as opposed to an *exception*, that was simply an imprecise dictum offered in support of *Hearn*'s actual holding. *Hearn* was a prototypical waiver case. A prisoner had filed a § 1983 suit against prison employees, alleging that they violated his constitutional rights by confining him in a solitary cell with unsanitary conditions. *Id.* at 577. In defense, the employees relied upon qualified immunity by arguing that their decisions were made in good faith. *Id.* To negate this defense, the prisoner sought discovery on the legal advice that the employees had received. *Id.* Waiver principles thus applied because an individual *outside*

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[3] *See also McMahon v. Shumaker, Loop & Kendrick, LLP* (6th Dist.), 162 Ohio App. 3d 739, 2005-Ohio-4436, at ¶¶ 4-5, 15-17 (same); *Smalley v. Friedman, Domiano & Smith Co. L.P.A.* (Ohio App. 8th Dist. May 6, 2004), No. 83636, 2004 WL 1048207, 2004-Ohio-2351, at ¶¶ 30-32 (same); *G. Rand Smith Co., L.P.A. v. Footbridge Capital, LLC* (Ohio App. 3d Dist. May 3, 2002), Nos. 14-01-39, 14-01-40, 2002 WL 987846, 2002-Ohio-2189, at ¶¶ 4, 8-15 (same); *Ward v. Graydon, Head & Ritchey* (12th Dist.), 147 Ohio App. 3d 325, 2001-Ohio-8654, at ¶¶ 12, 26-29 (same); *H & D Steel Serv., Inc. v. Weston, Hurd, Fallon, Paisley & Howley* (Ohio App. 8th Dist. July 23, 1998), No. 72758, 1998 WL 413772, at *1, *3-4 (same).

the attorney-client relationship sought to invade it. *Id.* at 581-82. The question was whether the client had waived privilege with respect to all parties and all litigations. *Hearn* did not involve the situation presented here, where parties within the protected relationship sue each other.

Nor would *Hearn*'s implied-waiver test make sense in these circumstances. It would encompass too little and too much. For one thing, *Hearn*'s implied-waiver test would effectively eviscerate the longstanding scope of the self-protection exception. As explained above, *supra* Section I, it is black-letter law that the self-defense exception applies even when the *attorney initiates the lawsuit* against the client for legal fees. *See, e.g.*, *Sokol*, 225 N.E.2d at 501; *Keck*, 1902 WL 868, at *1. In those circumstances, even if the client has not engaged in any affirmative acts that make the lawyer-client communications relevant, the self-protection exception still applies. Yet, without any waiver, the *Hearn* test would not.

For another, when *Hearn*'s implied-waiver test is satisfied, it results not only in waiver in litigation between the attorney and the client but also in litigation between the client and all other parties. *See, e.g.*, *Restatement (Third) of Law Governing Lawyers* § 79 cmt. i. (noting that "[w]aiver ordinarily extends to the litigation in or in anticipation of which a disclosure was made *and future proceedings as well*, whether or not related to the original proceeding) (emphasis added). Thus, the court of appeals' decision automatically to apply waiver principles here undermines one of the key reasons for the existence of a self-protection exception—to protect the client from having to choose between litigating a case against a lawyer by waiving the privilege or foregoing that litigation to preserve the privilege. *See Ballard*, 779 F.2d at 292; *Qualcomm*, 2008 WL 4858685, at *6-7.

3. The Court Of Appeals Erroneously Treated The Ohio Rules Of Professional Conduct As Irrelevant.

The court of appeals also erred in treating the Ohio Rules of Professional Conduct as irrelevant to this question. (Appx. 20-22.) It noted that it could not read Rule 1.6(b)(5) "as the preeminent and controlling authority in this matter." (Appx. 22.) But Squire Sanders has never suggested to the contrary; privilege rules are governed by a mixture of statute and common law. *See* Evid. R. 501. That does not mean, however, that courts should simply disregard the Ohio Rules of Professional Conduct in resolving privilege questions, as the court of appeals did here. To the contrary, the Court should strive to maintain consistency in "related bodies of law," including the attorney-client privilege, the work-product doctrine, and the rule of confidentiality in professional ethics. Prof. Cond. Rule 1.6 cmt. 3. That is because "it is [the Court's] role to make sense rather than nonsense out of the *corpus juris*" by interpreting a provision in a manner that "fits most logically and comfortably into the body of both previously and subsequently enacted law." *W. Va. Univ. Hosps., Inc. v. Casey* (1991), 499 U.S. 83, 100-01, *superseded by statute on other grounds as recognized in Richlin Sec. Serv. Co. v. Chertoff* (2008), 128 S. Ct. 2007, 2015, n.6; *see Lannen*, 119 Ohio St. at syllabus ¶ 1.

The court of appeals abandoned this principle by disregarding Rule 1.6(b)(5). It could not—indeed, did not even attempt to—reconcile its reading of the privilege with Rule 1.6(b)(5), which permits an attorney to use privileged information to establish a claim or defense against a client. Rule 1.6(b)(5), while not dispositive alone, certainly supports Squire Sanders' position here. It shows that the Court should interpret the statutory and common-law attorney-client privileges to have incorporated the self-protection exception.

III. Traditional Exceptions, Including The Self-Protection Exception, Equally Limit Ohio's Work-Product Doctrine.

The self-protection exception equally prevents Givaudan from relying on Ohio's work-product doctrine to block discovery of evidence related to Squire Sanders' professional services in this litigation. The work-product doctrine, set forth at Ohio Civil Rule 26(B)(3), generally protects material prepared in anticipation of litigation unless good cause has been shown for its production:

> [A] party may obtain discovery of documents, electronically stored information and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing of good cause therefor.

Civ. R. 26(B)(3). In general, "good cause" "requires demonstration of need for the materials—i.e., a showing that the materials, or the information they contain, are relevant and otherwise unavailable." *Jackson*, 2006-Ohio-4968, at ¶ 16. This Court has held that traditional privilege exceptions satisfy this good-cause requirement. *See Moskovitz*, 69 Ohio St. 3d at 662. Thus, while a *waiver* of attorney-client privilege may not necessarily apply to work-product doctrine, *see In re Election of Nov. 6, 1990 for Office of Att'y Gen.* (1991), 57 Ohio St. 3d 614, 615, the self-protection *exception* applies equally to both.

To begin with, in *Moskovitz*, the Court held that the exception at issue there applied to both the "attorney-client privilege" *and* the "work product" doctrine. *Moskovitz*, 69 Ohio St. 3d at 662. Thus, "materials protected by the attorney-client privilege and those protected by the work product doctrine are . . . treated similarly" for purposes of this exception, "there being no basis for distinguishing the materials." *Nat'l Union Fire Ins. Co. of Pittsburgh v. Ohio State Univ. Bd. of Trs.* (Ohio App. 10th Dist. Aug. 4, 2005), No. 04AP-1340, 2005 WL 1840220, 2005-Ohio-3992, at ¶ 9; *see Garg v. State Auto. Mut. Ins. Co.* (2d Dist.), 155 Ohio App. 3d 258,

2003-Ohio-5960, at ¶ 16 (noting that "both attorney-client communications and work-product materials are subject to disclosure" under bad-faith refusal-to-insure exception).

That conclusion follows from *Moskovitz*'s roots in the traditional crime-fraud exception. *See* 69 Ohio St. 3d at 660-61. "Courts generally hold that the [crime-fraud] exception applies to the work-product doctrine as much as it does to the attorney-client privilege." Epstein, *Attorney-Client Privilege* Pt. 2, § VI.D at 591; *see, e.g.*, *In re Sealed Case* (D.C. Cir. 1982), 676 F.2d 793, 811 n.67 (noting that "[e]very circuit which has considered the question has held or assumed that the crime-fraud exception applies to the work product privilege"); *In re Grand Jury Proceedings* (3d Cir. 1979), 604 F.2d 798, 803 (holding "that the crime-fraud exception comes within 'good cause' to deny applicability of the work product doctrine"). Ohio courts agree. *See, e.g.*, *Kracht v. Kracht* (Ohio App. 8th Dist. June 5, 1997), Nos. 70005, 70009, 1997 WL 298265, at *9 ("Communications otherwise protected by the attorney-client privilege or *work product doctrine* are not protected if the communications are made in furtherance of crime, fraud, or other misconduct.") (emphasis added).

This Court's decision to treat the attorney-client privilege and work-product doctrine the same for purposes of traditional exceptions necessarily applies to the self-protection exception as well. Indeed, numerous authorities recognize that "[i]f the attorney's conduct is a central issue in the case," as when the self-protection exception is implicated, "the work-product protection does not apply." Epstein, *Attorney-Client Privilege* Pt. 2, § VI.C at 589; *see id.* at 584 (referring to this principle as an "exception[] to the work-product protection"); *cf. Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co.* (Ill. 1991), 579 N.E.2d 322, 331 (holding that the joint-representation exception applies to work-product doctrine). In other words, "[a] party who asserts that a lawyer's assistance was defective may not invoke work-product immunity to prevent an

opposing party's access to information concerning the claim." *Restatement (Third) of Law Governing Lawyers* § 92 cmt. c. As a result, the Court should hold that the self-protection exception, when its requirements are met, overcomes any alleged work-product protections.

The court of appeals, by contrast, simply ignored this law in reaching its result. Without citing *Moskovitz*, it instructed the trial court to follow general work-product rules that govern when no traditional exception is at issue. (Appx. 26-29.) Those work-product rules are unnecessary here, however, because of the self-protection exception. Thus, the court of appeals erred by requiring the trial court to follow rules that simply do not apply under these facts.

IV. The Trial Court Correctly Applied The Self-Protection Exception In Resolving Squire Sanders' Motion To Compel.

The trial court correctly applied the self-protection exception in granting Squire Sanders' motion to compel. That motion sought only to prevent Givaudan from blocking discovery and use of evidence that fell within the self-protection exception. (Squire Sanders Mot. to Compel at 1, Supp. 229 (seeking evidence "concerning the Givaudan/Squire Sanders relationship" based on "universally recognized self-protection exception").) Under the exception, this evidence is not privileged in this litigation. To grant the motion, therefore, the court needed only to find that Ohio law incorporated the self-protection exception and that the evidence sought over the Givaudan/Squire Sanders relationship was relevant and reasonably necessary. That is exactly what the trial court did. It adopted the self-protection exception and found "good cause" for Squire Sanders' discovery requests that were based upon that exception. (Appx. 35.)

There can be no real dispute that the requested documents and testimony were relevant and reasonably necessary. Indeed, Givaudan's opposition to the motion to compel made no contrary argument. It claimed only that the evidence was not "vital" to Squire Sanders' defense, which is what Squire Sanders would need to show to establish that Givaudan *waived* common-

law privilege. (Opp'n to Mot. to Compel at 13, Supp. 260.) Givaudan's argument was irrelevant to the question here. Nor could Givaudan have possibly claimed that the documents and testimony sought were irrelevant and outside the realm of reasonable request. While Givaudan has objected literally hundreds of times to document requests and deposition questions, a detailed analysis of every one of these objections is not required to conclude that a law firm accused of abusing its relationship with a former client reasonably needs discovery concerning the client's allegations.

Just a few examples reveal the untenable nature of Givaudan's position. For instance, Givaudan claims that Squire Sanders billed for "unauthorized work." (Givaudan Supp. Resp. to Int. at 12, Supp. 223.) Yet, it "instruct[ed] [its general counsel] not to answer" a question concerning "what [she] specifically authorize[d] Squire Sanders to do." (Garfinkel Dep. at 158, Supp. 152.) Similarly, Givaudan claims that Squire Sanders' invoices "include[d] billing for unnecessary work." (Givaudan Supp. Resp. to Int. at 7, Supp. 218.) Yet again, when its general counsel was asked if she had any "communications with anyone at Squire Sanders about work that [she] believed was unnecessary," she responded that she "can't answer the question without waiving the attorney/client privilege." (Garfinkel Dep. at 163, Supp. 153.) Finally, this is a billing dispute. "The legal fees and how they were compiled is, indeed, the center of this controversy." (Appx. 35.) Givaudan, however, refused to allow testimony concerning specific billing entries, claiming that "there are a number of particular narratives on the bills in general that either are protected by work product or would reveal attorney/client or other privileged information." (Garfinkel Dep. at 81, Supp. 132.) And while Givaudan argues that Squire Sanders' charges were unreasonable and excessive, it claims that Squire Sanders' experts cannot have access, even pursuant to a confidentiality agreement, to the invoices and other documents

necessary for them to opine on that and other aspects of the Squire Sanders/Givaudan relationship. (*See* Correspondence regarding experts, Supp. 210-11.) Under the self-protection exception, Givaudan cannot continue to claim malpractice and privilege in the same breath. The trial court correctly found that privilege did not prevent Squire Sanders from using and taking discovery on this relevant and reasonably necessary material.

Nor did Givaudan's belated request for "in camera review . . . in light of the claim of privilege" justify the court of appeals' decision. (Appx. 23.) The trial court did not abuse its discretion in granting Squire Sanders' motion without undertaking this *in camera* review. For one thing, Givaudan proposed review only of *privileged* documents. (Opp'n to Mot. to Compel at 11 n.9, Supp. 258.) The trial court, however, only ordered, and Squire Sanders only requested, that Givaudan produce documents falling outside the scope of the privilege—*i.e., non-privileged* documents—under the self-protection exception.

Moreover, an individualized, document-by-document review of the requested materials would be a pointless waste of resources, entirely unnecessary to resolve the motion, because the documents and testimony that Squire Sanders sought here were *all* governed by the identical principle: They all fell within the self-protection exception (and thus outside the scope of privilege applicable here), and all for the same reason. Only because the court of appeals flatly rejected the self-protection *exception*, in favor of a *waiver* approach, did its proposed document-by-document privilege determination appear necessary. Requiring a document-by-document review of documents that will not be exposed to the outside world would be analogous to requiring the trial court to conduct an *in camera* review to determine relevancy. That is neither a necessary nor appropriate use of the trial court's time and resources under any circumstances, let

alone here where it would involve a gargantuan effort covering multiple daily dealings over a period of some four years.

A comparison of this case with the opinion cited by the court of appeals proves that a hearing is unnecessary here. (Appx. 22-23 (quoting *Grace*, 2007-Ohio-3942, at ¶¶ 40, 42).) In *Grace*, an attorney sought discovery over the case file of its former client's *new counsel*. *Id.* at ¶ 12. Because the self-protection exception did not apply to this file, and because a finding of waiver would expose privileged documents to the outside world, an individualized review was required to determine whether the client had waived any valid privilege claims on a document-by document basis. *Id.* at ¶ 36. Here, by contrast, Squire Sanders' motion seeks discovery on *its* communications and *its* relationship with Givaudan. The material would be exposed to Squire Sanders, a party to that relationship, and available for its use in the litigation but not exposed generally to the outside world. Because the self-protection exception squarely applies to this evidence, no privilege exists for any of it in this litigation. No individual inquiry is necessary here, and such an inquiry "would be superfluous."[4] *Nat'l Union Fire Ins.*, 2005-Ohio-3992, at ¶ 19. The trial court appropriately ordered Givaudan to cease blocking discovery and use in this litigation of non-privileged evidence that falls within the self-protection exception.

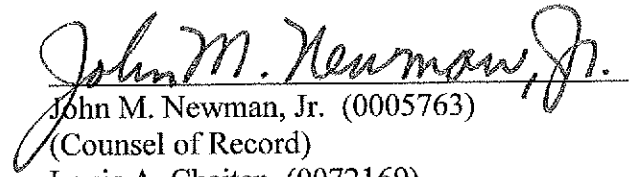
[4] Even Givaudan's trial-court brief recognized the unimportance of *in camera* review for determining whether the self-protection exception applies, as opposed to whether Givaudan waived privilege. Givaudan relegated its request for *in camera* review to a short, unelaborated, and unsupported footnote buried on page eleven of a twenty-five page brief. (Opp'n to Mot. to Compel at 11 n.9, Supp. 258.)

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals and reinstate the trial court's order granting Squire Sanders' motion to compel.

Date: January 25, 2010

Respectfully submitted,



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I hereby certify that on this 25th day of January, 2010, I served the foregoing Merit Brief and Appendix of Appellant Squire, Sanders & Dempsey L.L.P. by email and by U.S. mail upon the following counsel:

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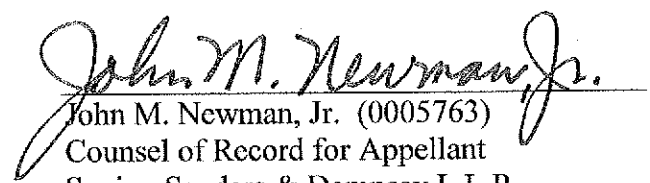

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IN THE SUPREME COURT OF OHIO

Squire, Sanders & Dempsey L.L.P.,	)	
	)	
Appellant,	)	**Case No. 09-1321**
	)	
v.	)	**Appeal from the Cuyahoga County**
	)	**Court of Appeals, Eighth Appellate**
Givaudan Flavors Corp.,	)	**District**
	)	
Appellee.	)	**Court of Appeals Case No. 92366**
	)	

APPENDIX TO THE MERIT BRIEF OF APPELLANT
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SQUIRE SANDERS & DEMPSEY V. GIVAUDAN FLAVORS CORP.
CASE NO. 09-1321
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IN THE SUPREME COURT OF OHIO

Squire, Sanders & Dempsey L.L.P., Appellant, v. Givaudan Flavors Corp., Appellee.	Case No. 09-1321 Appeal from the Cuyahoga County Court of Appeals, Eighth Appelalte District Court of Appeals Case No. 92366

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FILED
JUL 22 2009
CLERK OF COURT
SUPREME COURT OF OHIO

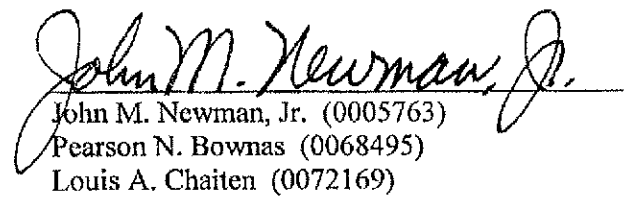
NOTICE OF APPEAL OF APPELLANT SQUIRE, SANDERS & DEMPSEY L.L.P.

Appellant Squire, Sanders & Dempsey L.L.P. hereby gives notice of its appeal to the Supreme Court of Ohio from the judgment of the Ohio Court of Appeals, Eighth Appellate District, entered in Court of Appeals case No. 08-092366 on June 8, 2009.

This is a case of public and great general interest.

Dated: July 22, 2009

Respectfully submitted,



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EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92366

SQUIRE, SANDERS & DEMPSEY L.L.P.

PLAINTIFF-APPELLEE

vs.

GIVAUDAN FLAVORS CORPORATION

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-641027

BEFORE: Dyke, J., Rocco, P.J., and Blackmon, J.

RELEASED: May 28, 2009

JOURNALIZED: JUN - 8 2009

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VOL 683 PG 0530

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FILED AND JOURNALIZED
PER APP. R. 22(E)

JUN 8 - 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

CA08092366

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ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

MAY 28 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

ANN DYKE, J.:

Defendant Givaudan Flavors Corp. ("Givaudan") appeals the trial court's order that it produce various documents in litigation filed by plaintiff Squire, Sanders and Dempsey L.L.P. ("SS&D"). For the reasons set forth below, we conclude that the trial court erred in summarily granting the motion to compel testimony and production. We reverse and remand to the trial court for it to hold an in camera hearing to evaluate all of the discovery at issue in accordance with the rules pertaining to testimonial (statutory) privilege and any waiver thereof, common law privilege and any waiver thereof, and work product privilege and exceptions thereto.

On November 7, 2007, SS&D filed suit against Givaudan for breach of contract and money due on an account. SS&D alleged that it represented Givaudan, a manufacturer of butter flavorings, in personal injury litigation filed by workers alleging that they contracted lung ailments from Givaudan's products. SS&D asserted that it was retained by Givaudan in 2003, and that pursuant to the parties' various Engagement Agreements, Givaudan agreed to compensate SS&D "for time spent in representing Givaudan's interests plus certain itemized costs." By early 2007, Givaudan stopped paying SS&D's invoices. SS&D ceased its representation of Givaudan in May 2007, and at that time, according to SS&D, Givaudan owed the firm $1,801,204.37.

Givaudan denied that it was liable for the alleged fees and costs, and denied SS&D's allegations that its services were "all at the request and with the approval of Givaudan." In addition, Givaudan set forth counterclaims for breach of contract, legal malpractice, breach of fiduciary duty, fraud, unjust enrichment, and constructive fraud, asserting, essentially, that the firm did not competently handle the matter and marked up the actual hours billed to inflate its fees.[1]

SS&D propounded to Givaudan interrogatories and 64 requests for production of documents. The firm also moved for commissions for subpoenas outside the State of Ohio to Zurich North America ("Zurich"), the liability carrier for Givaudan and document subpoenas for depositions to Elizabeth Titus and Jeffrey Mitchell, Zurich employees who "examined and/or audited SS&D's invoices * * * and participated in and/or monitored the planning and preparation of Givaudan's defense * * * [and] activities regarding settlement of certain lawsuits."

SS&D requested the following items in connection with the subpoenas:

"1. All communications between Givaudan and Zurich related to the [lawsuits against Givaudan] including but not limited to, communications

---

[1]Givaudan subsequently dismissed its counterclaims for fraud and constructive fraud. It later sought to amend the counterclaim to reinsert the fraud claim and a claim for unjust enrichment, but the trial court did not permit it to file the proposed amended counterclaim.

related to SS&D's handling of the [lawsuits against Givaudan] and SS&D's invoices * * *

"2. All communications between Zurich and SS&D related to the [lawsuits against Givaudan] * * *

"3. All communications between Zurich and Wilson Young [P.L.C.] related to the [lawsuits against Givaudan] * * *

"4. All internal Zurich communications * * *

"5. All documents or notes created by Zurich * * *

"6. All documents or notes created by Givaudan and provided to Zurich * * *

"7. All invoices for legal services, from any legal service provider, received by Zurich related to the Litigation.

"8. All documents discussing or referring to SS&D's qualifications, capabilities or performance * * *

"9. All documents discussing or reflecting the involvement or participation, or anticipated involvement or participation, of [the law firm of] Morgan Lewis [L.L.P.] in the Litigation on behalf of Givaudan.

"10. All documents related to any examination or audit of SS&D's invoices for legal services related to the Litigation.

"11. All documents related to any examination or audit of Morgan Lewis's invoices for legal services related to the Litigation.

"12. All documents constituting or reflecting communications between Givaudan and Zurich about the payment or non-payment of any SS&D invoice for legal services * * *."

On February 14, 2008, the trial court granted the motion for issuance of subpoenas requiring Zurich to permit inspection and copying of the documents at issue and to produce the record custodians, and Titus and Mitchell for deposition.

SS&D next obtained commissions for subpoenas to Federal Insurance Company ("Federal"), and Chubb Insurance Company ("Chubb"), Givaudan's excess insurance carriers, and propounded a notice of deposition to their records custodians.

Givaudan notified the trial court and SS&D that it intended to assert various objections to the subpoenas substantive objections to discovery upon issuance of any subpoenas, and also objected to SS&D's discovery requests, citing, inter alia, confidentiality, attorney-client privilege, and work product. It also moved for a protective order, arguing that the interrogatories and requests for production sought information that is privileged and confidential.

In July 2008, SS&D deposed Givaudan's current general counsel, Jane Garfinkel, and Givaudan's former Vice President of Legal Affairs, Frederick King. During both depositions, Givaudan repeatedly invoked the attorney client and work product privileges.

The trial court denied Givaudan's motion for a protective order and SS&D filed a motion to compel testimony and production. The trial court granted SS&D's motion to compel. In a written opinion, the court distinguished the instant matter from *Jackson v. Greger*, 110 Ohio St.3d 488, 2006-Ohio-4968, 854 N.E.2d 487, concluding that the "*Jackson* case did not abrogate, alter or even address the traditional self-protection exception to privilege for communications between lawyers and former clients who are parties to a professional liability suit. * * * In addition, * * * Ohio Rule of Professional Conduct 1.6(b)(5) states that a lawyer may reveal protected information if he or she reasonably believes that the revelation is necessary 'to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client to establish a defense to a * * * civil claim against the lawyer based upon conduct in which the client was involved.'" Finally, the court held that "'SS&D's use of documents already in its possession, and otherwise protected, that relate to the billing dispute between SS&D and Givaudan are permitted to be used by Squire Sanders & Dempsey in

order to mount a defense in this case in accordance with Rule[s] of Professional Conduct 1.6(b)(5) and [R.C.]2317.02(A)."

Givaudan now appeals and assigns six errors for our review. For the sake of convenience, we shall address the assignments of error out of their predesignated order.

In the sixth assignment of error, Givaudan asserts that the trial court erred in refusing to stay the matter pending completion of the underlying litigation claiming personal injuries in connection to butter flavoring.

As an initial matter, we note that in *State v. Weist,* Champaign App. No. 2007-CA-16, 2008-Ohio-4006 an order denying a stay of proceedings is not a final appealable order under R.C. 2505.02(B)(4). Accord *Holivay v. Holivay,* Cuyahoga App. No. 89439, 2007-Ohio-6492.

In any event, this ruling would be evaluated for an abuse of discretion. *Dzina v. Dzina,* Cuyahoga App. Nos. 90936, 90937, 90938, 90939 and 90940, 2009-Ohio-136, citing *Nationwide Mut. Fire Ins. Co. v. Modroo,* Geauga App. No. 2004-G-2557, 2004-Ohio-4697. In this matter, we find no abuse of discretion. The record clearly indicates that the underlying personal injury litigation against Givaudan involves numerous plaintiffs in multiple jurisdictions and it is conceivable that this litigation will not terminate for several years. Moreover, Givaudan's interests in the underlying litigation can be secured through proper

application of the rules regarding attorney-client privilege, the work product doctrine, and the exceptions to these provisions.

The sixth assignment of error is without merit.

In its fifth assignment of error, Givaudan asserts that the trial court erred by ruling that "documents already in its possession, and otherwise protected, that relate to the billing dispute between SS&D and Givaudan are permitted to be used by Squire Sanders & Dempsey in order to mount a defense in this case in accordance with the Rule[s] of Professional Conduct 1.6(b)(5) and [R.C.]2317.02(A)."

It is axiomatic that the attorney-client privilege belongs not to the attorney but to the client. *Allen County Bar Ass'n. v. Williams,* 95 Ohio St.3d 160, 2002-Ohio-2006, 766 N.E.2d 973, citing *Frank W. Schaefer, Inc. v. C. Garfield Mitchell Agency, Inc.* (1992), 82 Ohio App.3d 322, 329, 612 N.E.2d 442. Subject to certain exceptions and waivers, to those communications intended to be confidential. *Smith v. Smith,* Hamilton App. No. C-050787, 2006-Ohio-6975.

Accordingly, the trial court erred insofar as it summarily concluded, without applying the law as to waivers, or exclusions that SS&D could use documents already in its possession, if these documents contain communications intended to be confidential. In this connection, it must be noted that even fee agreements, and billing statements may contain privileged information. *Shell*

v. Drew & Ward Co., L.P.A., 178 Ohio App.3d 163, 2008-Ohio-4474, 897 N.E.2d 201; *Tenn. Laborers Health & Welfare Fund v. Columbia/HCA Healthcare Corp. (In Re Columbia/HCA Healthcare Corp. Billing Practices Litig.)* (C.A.6, 2002), 293 F.3d 289.

We further note that information which is claimed to be protected as work product is analyzed pursuant to Civ.R. 26(B), and pursuant to the Supreme Court's decision in *Hickman v. Taylor* (1946), 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451, and its progeny. See *Jerome v. A-Best Prods. Co.*, Cuyahoga App. Nos. 79139-79142, 2002-Ohio-1824.

In accordance with the foregoing, the trial court erred to the extent that it gave SS&D unrestricted permission to use information in its possession in this matter, which is otherwise claimed to be protected by the attorney-client privilege or work product. We hold that all documents claimed to come within the attorney-client privilege, which were intended to be privileged, must be reviewed under the applicable law, and all claimed work product must likewise be analyzed under that controlling law.

This assignment of error is well-taken.

In its first, third[2] and fourth assignments of error, Givaudan asserts that the trial court erred by granting SS&D's motion to compel the production of privileged documents, and privileged testimony from King and Garfinkel. Within these assignments of error, Givaudan further asserts that the requested information seeks protected work product.

In its second assignment of error, Givaudan asserts that the trial court erred in failing to conduct an in camera hearing to ascertain whether the requested information would reveal privileged or work product information and whether such privilege or work product exclusion had been waived.

JURISDICTION / STANDARD OF REVIEW

As an initial matter, we note that in *Riggs v. Richard,* Stark App. No. 2006CA00234, 2007-Ohio-490, the court held that an interlocutory appeal could be taken from an order compelling the production of material alleged to be protected by attorney-client privilege. *Miles-McClellan Construction Co. Inc. v. The Board of Education Westerville City School Board,* Franklin App. No. 05AP-1112, 2006-Ohio-3439, citing *Shaffer v. OhioHealth Corp.,* Franklin App. No. 03 AP-102, 2004-Ohio-63.

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[2]This portion of our opinion pertains solely to the attorney client and work product claims set forth in the third assignment of error; the claims regarding the court's jurisdiction to issue a subpoena to an out-of-state deponent are addressed separately.

The *Miles-McClellan Construction Co.* Court set forth the standard of review as follows:

"Most aspects of trial court rulings in the discovery process will be reviewed under an abuse-of-discretion standard. *State ex rel. Daggett v. Gessaman* (1973), 34 Ohio St.2d 55, 295 N.E.2d 659. However, where the trial court has either misstated the law or applied an incorrect legal standard, giving rise to a purely legal issue on appeal, our appellate review is de novo. *Shaffer [v. OhioHealth Corp.*, Franklin App. No. 03AP-102, 2004-Ohio-63], at ¶6; *Ohio State Bd. of Pharmacy v. Dick's Pharmacy,* 150 Ohio App. 3d 343, 2002-Ohio-6500, 780 N.E.2d 1075."

Accord *Shell v. Drew and Ward Co., L.P.A.*, supra.

The burden to show that testimony or documents are confidential or privileged is on the party seeking to exclude the material. *Grace v. Mastruserio,* Hamilton App. No. C-060732, 2007-Ohio-3942, citing *Lemley v. Kaiser* (1983), 6 Ohio St.3d 258, 452 N.E.2d 1304.

ATTORNEY-CLIENT PRIVILEGE

R.C. 2317.02 states:

"Privileged communications

"The following persons shall not testify in certain respects:

"(A) (1) An attorney, concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client. However, if the client voluntarily testifies or is deemed by section 2151.421 [2151.42.1] of the Revised Code to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject.

"* * *

"(2) An attorney, concerning a communication made to the attorney by a client in that relationship or the attorney's advice to a client * * *."

In *Jackson v. Greger* (2006) 110 Ohio St.3d 488, 854 N.E.2d 487, paragraph one of the syllabus, the Supreme Court held:

"R.C. 2317.02(A) provides the exclusive means by which privileged communications directly between an attorney and a client can be waived. (*State v. McDermott*, 72 Ohio St.3d 570, 1995-Ohio-80, 651 N.E.2d 985, followed.)"

In *Jackson*, the client sued her former attorney for malpractice upon learning that her guilty plea in the matter in which he had represented her would bar her action pursuant to 42 U.S.C. Section 1983 against the arresting officers and the prosecuting city. The former counsel sought all attorney-client

communications and documentation related to the Section 1983 action. The trial court granted the former attorney's motion to compel. The court of appeals applied the three-part test for implied waiver of the attorney-client privilege set forth in *Hearn v. Rhay* (E.D.Wash.1975), 68 F.R.D. 574. According to the *Hearn* test, a client impliedly waives the attorney-client privilege when "(1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense." Id. at 581.

The Ohio Supreme Court reversed and stated:

"'In Ohio, the attorney-client privilege is governed by statute, R.C. 2317.02(A), and in cases that are not addressed in R.C. 2317.02(A), by common law.' *State ex rel. Leslie v. Ohio Hour. Fin. Agency,* 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 990, ¶18. We have stated that the statutory privilege governs communications directly between an attorney and a client." Id.

In a footnote, the court additionally noted:

"R.C. 2317.02(A) provides a testimonial privilege--i.e., it prevents an attorney from testifying concerning communications made to the attorney by a client or the attorney's advice to a client. A testimonial privilege applies not only

to prohibit testimony at trial, but also to protect the sought-after communications during the discovery process. The purpose of discovery is to acquire information for trial. Because a litigant's ultimate goal in the discovery process is to elicit pertinent information that might be used as testimony at trial, the discovery of attorney-client communications necessarily jeopardizes the testimonial privilege. Such privileges would be of little import were they not applicable during the discovery process."

Id., at footnote 12.

The court then declined to apply the *Hearn* test to situations where the statutory privilege is applicable, and stated:

"The General Assembly has chosen to limit the means by which a client's conduct may effect waiver of the attorney-client privilege. It is not the role of this court to supplant the legislature by amending that choice."

Thus, under *Jackson v. Greger,* supra, R.C. 2317.02(A) provides the exclusive means by which privileged testimonial communications directly between an attorney and a client can be waived, i.e., the client expressly consents or the client voluntarily testifies on the same subject. Accord *Air-Ride, Inc. v. DHL Express (USA), Inc.,* Clinton App. No. CA2008-01-001, 2008-Ohio-5669; *State v. McDermott,* supra; *Smith v. Smith,* supra.

Pursuant to the common law, "the attorney-client privilege 'reaches far beyond a proscription against testimonial speech. The privilege protects against any dissemination of information obtained in the confidential relationship.'" *Jackson v. Greger,* supra (Lanzinger, J., concurring in judgment only), quoting *Am. Motors Corp. v. Huffstutler* (1991), 61 Ohio St.3d 343, 348, 575 N.E.2d 116 (other internal citations and quotations omitted).

In *Grace v. Mastruserio* , Hamilton App. No. C-060732, 2007-Ohio-3942, the court delineated the contours of the testimonial privilege and held that in cases which do not involve the testimonial privilege, the common law attorney-client privilege is applicable, and in this instance, the *Hearn* test remains viable. The *Grace* Court stated:

"The common-law attorney-client privilege 'reaches far beyond a proscription against testimonial speech. The privilege protects against any dissemination of information obtained in the confidential relationship.' [quoting the concurring opinion in *Jackson v. Greger,* supra.] The common-law attorney-client privilege protects against the disclosure of oral, written, and recorded information, unless the privilege is waived. At common law, a client may waive the attorney-client privilege either expressly or by conduct implying a waiver. * * * A client may impliedly waive the attorney-client privilege

through affirmative acts. Ohio appellate courts have discussed and applied the tripartite test set forth in *Hearn v. Rhay* [supra]."

Accord *State ex rel. Leslie v. Ohio Hous. Fin. Agency,* 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 990 (distinguishing the testimonial, i.e., statutory privilege from the nontestimonial, i.e., common law privilege).

Thus, where the common law attorney-client privilege is at issue, the implied waiver test set forth in *Hearn* may be applied. *Grace v. Mastruserio,* supra; *Ward v. Graydon, Head & Ritchey,* 147 Ohio App.3d 325, 770 N.E.2d 613, 2001-Ohio-8654 ("At common law, the attorney-client privilege could be waived either expressly or by conduct implying waiver. See 8 Wigmore, Evidence (McNaughton Rev.1961), Section 2327. * * * [T]he statute does not abrogate the common law. Waiver of the attorney-client privilege can still occur by implication.")

Moreover, insofar as the trial court determined that this matter is governed by 1.6(b)(5)[3] of the Ohio Rules of Professional Conduct and that rule

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[3]In relevant part, Rule 1.6 provides:

"(a) A lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by division (b) or required by division (c) of this rule.

"(b) A lawyer may reveal information relating to the representation of a client,

authorizes SS&D to reveal "protected information," we note that the scope of these rules has been set forth, in relevant part, as follows:

"SCOPE

"(14) * * * These define proper conduct for purposes of professional discipline * * *

"* * *

"(20) * * * The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies.

Further, the comment to Section 1.6 states:

"(3) The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine, and the rule of confidentiality established in professional ethics. The attorney-client

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including information protected by the attorney-client privilege under applicable law, to the extent the lawyer reasonably believes necessary for any of the following purposes:

"* * *

"(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding, including any disciplinary matter, concerning the lawyer's representation of the client;

"(6) to comply with other law or a court order. * * *"

privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. * * *"

Accordingly, we cannot read Rule 1.6(b)(5) as the preeminent and controlling authority in this matter; the correct analysis must focus chiefly upon the statutory and common law related to attorney-client privilege for each piece of evidence for which this privilege is claimed.

In this connection, and as is pertinent to the second assignment of error, we note that the court in *Grace v. Mastruserio,* supra, further held that the trial court must conduct an in camera hearing to determine whether compelling discovery will violate the attorney client privilege. The Court stated:

"When a party seeks to compel discovery of the entirety of an attorney case file, the trial court, using its broad discretion, is best suited to initially determine whether the evidence is discoverable or is protected under attorney-client privilege or the work-product doctrine, and for that determination to be a reasonable, informed, and conscionable one, the court must conduct an evidentiary hearing or perform an in camera inspection of the materials sought to be disclosed. * * *

"As we have noted, Mastruserio's request to discover the entire attorney case file necessarily implicated an umbrella of protection under the attorney-client privilege and the work-product doctrine. And under these circumstances, that alone required that the trial court, at a minimum, hold an evidentiary hearing or conduct an in camera review to determine the scope of the protection.

"We conclude that the trial court abused its discretion by compelling discovery of an entire case file without holding an evidentiary hearing or conducting an in camera review."

We find this reasoning sound and wholly applicable herein. The trial court must hold an evidentiary hearing or in camera review in this matter in light of the claim of privilege. Although SS&D insists that the request for an in camera hearing was not properly raised below and is not properly preserved herein, because Givaudan requested this proceeding in a footnote of its brief in opposition to SS&D's motion to compel, we decline to adopt so rigid a rule. We further note that the in camera proceedings are favored over too broad an application of the rule of waiver requiring unlimited disclosure, which might tend to destroy the purpose of the privilege. *In re Grand Jury Proceedings October 12, 1995* (C.A.6, 1996), 78 F.3d 251, citing *United States v. Cote* (C.A.8, 1972), 456 F.2d 142.

SS&D strenuously argues that the rule announced in *Jackson v. Greger,* supra, pertaining to privileged testimonial communications under R.C. 2317.02, and the rule announced in *Hearn v. Rhay,* supra, are completely inapplicable herein since this matter involves communications between a client and his former counsel and *Jackson* and *Hearn* involved situations where the defendant sought to obtain communications between a client and a different attorney or firm. We reject this argument. As an initial matter, we note that R.C. 2317.02 does not set forth these distinctions, but instead plainly states: "The following persons shall not testify in certain respects: * * * An attorney, concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client * * *." Accord *Woyczynski v. Wolf* (1983), 11 Ohio App.3d 226, 464 N.E.2d 612 ("The [R.C. 2317.02] privilege is not presumed waived merely because a third party filed a claim alleging malicious prosecution, nor does this court find the privilege waived from the fact that the defendants denied the allegations of the complaint. The statute contains no provision for an automatic waiver based upon the pleadings") (disapproved on other grounds in *Trussell v. General Motors Corp.*, 53 Ohio St.3d 142 , 559 N.E.2d 732).

In addition, *Hearn* also clearly indicated that its implied waiver analysis is applicable to situations "where the attorney and client are themselves adverse parties in a lawsuit arising out of the relationship, McCormick, §91 at 191 * * *."

We therefore hold that the law regarding testimonial communications, and waiver thereof, under R.C. 2317.02 and the common law regarding nontestimonial communications and waiver thereof are to be applied where the attorney and client, who are the subject of such communications, are now in an adverse relationship. In other words, we will not recognize an "automatic waiver" of the attorney-client privilege simply because the attorney and client who are the subject of such communications are now in an adverse relationship. Accord *Ward v. Graydon, Head & Ritchey,* supra, wherein this court stated:

"We choose to follow and find the *Hearn* approach is best suited to deal with the complexities of the attorney-client privilege. We note that the Second Appellate District and the Eighth Appellate District of this state have adopted this approach. See, *Schaefer* [*Frank W. Schaefer, Inc. v. C. Garfield Mitchell Agency, Inc.* (1992), 82 Ohio App.3d 322, 329, 612 N.E.2d 442], 82 Ohio App.3d at 331; *H&D Steel [Inc. v. Weston, Hurd, Fallon, Paisley, & Howley]* (July 23, 1998), 1998 Ohio App. LEXIS 3422 (July 23, 1998), Cuyahoga App. No. CV-284-135, unreported, at 3. Furthermore, the Ohio Supreme Court, although never having extensively discussed this issue, has nevertheless suggested its disapproval of the "automatic waiver" approach. See, *Waldmann v. Waldmann* (1976), 48 Ohio St.2d 176, 179, 358 N.E.2d 521."

Accord *H & D Steel, Inc. v. Weston, Hurd, Fallon, Paisley, & Howley*, supra (noting that many courts have rejected application of the "automatic waiver rule" as "too rigid"); *Frank W. Schaefer Inc. v. C. Garfield Mitchell Agency, Inc.*, supra (same).

In accordance with all of the foregoing, we hold that in this matter, the trial court committed reversible error in summarily granting SS&D's motion to compel. On remand, the trial court must determine whether: (1) the requested evidence seeks testimonial evidence, and, if so, has Givaudan met its burden of proof in establishing this privilege or has the statutory privilege been waived in the manner set forth in R.C. 2317.02 and *Jackson v. Greger*, supra; and (2) whether the requested evidence seeks nontestimonial evidence, and, if so, has Givaudan met its burden of establishing the claim of privilege, or has there been a waiver of the privilege in accordance with the *Hearn* test. Accordingly, the trial court erred insofar as it failed to analyze the discovery issues under this rubric.

WORK PRODUCT

The work-product privilege is a civil privilege, that is governed by Civ.R. 26(B). *Geggie v. Cooper Tire & Rubber Co.*, Hancock App. No. 5-05-01, 2005-Ohio-4750; *Jackson v. Greger*, supra.

Pursuant to Civ.R. 26(B)

"Subject to the provisions of subdivision (B)(4) of this rule, a party may obtain discovery of documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing of good cause therefor."

The work-product doctrine is designed to allow an attorney to "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference * * * to promote justice and to protect [his] clients' interests." *Hickman v. Taylor* (1947), 329 U.S. 495, 510, 67 S.Ct. 385, 393, 91 L.Ed. 451.

In *State v. Hoop* (1999), 134 Ohio App.3d 627, 731 N.E.2d 1177, the court explained the scope of this doctrine as follows:

"There are two types of work product, and the degree of protection afforded depends on which work product is applicable.

"Ordinary fact or 'unprivileged fact' work product, such as witness statements and underlying facts, receives lesser protection. *Antitrust Grand Jury* (C.A.6, 1986), 805 F.2d 155, 163. Written or oral information transmitted to the attorney and recorded as conveyed may be compelled upon a showing of 'good cause' by the subpoenaing party. Civ.R. 26(B)(3); *Hickman,* 329 U.S. at 511-512, 67 S.Ct. at 394. * * * 'Good cause,' as set forth in Civ.R. 26(B)(3),

requires a showing of substantial need, that the information is important in the preparation of the party's case, and that there is an inability or difficulty in obtaining the information without undue hardship. * * *

"The other type of work product is 'opinion work product,' which reflects the attorney's mental impressions, opinions, conclusions, judgments, or legal theories. *Hickman,* 329 U.S. at 511, 67 S.Ct. 393. Because opinion work product concerns the mental processes of the attorney, not discoverable fact, opinion work product receives near absolute protection. *Antitrust Grand Jury,* 805 F.2d at 164. Notes made by the attorney or his agents which record the witness' statement, but which also convey the impressions of the interviewer, are protected as opinion work product, because such notes reveal the attorney's or agent's thoughts."

Accord *Jackson v. Greger,* supra, at paragraph two of the syllabus, in which the Supreme Court held: " A showing of good cause under Civ.R. 26(B)(3) requires demonstration of need for the materials -- i.e., a showing that the materials, or the information they contain, are relevant and otherwise unavailable."

Finally, if requested discovery is arguably work product, the trial court should conduct an evidentiary hearing or in camera inspection to evaluate this claim. *Stegman v. Nickels,* Erie App. No. E-05-069, 2006-Ohio-4918, citing *Peyko*

v. Frederick (1986), 25 Ohio St.3d 164, 495 N.E.2d 918 and *Miller v. Bassett,* Cuyahoga App. No. 86938, 2006-Ohio-3590; *Grace v. Mastruserio,* supra.

In this matter, Givaudan asserted that the requested information contained work product, and the trial court summarily granted the motion to compel. Because the trial court did not hold an evidentiary hearing or in camera review to analyze the requested evidence in light of the law regarding work product, and good cause, the court committed reversible error. The second assignment of error is therefore well-taken.

Further, and in accordance with all of the foregoing, the first, third (insofar as it pertains to the privilege and work product issues), and fourth assignments of error are well-taken.

We therefore reverse the order compelling discovery and remand the case with directions for the trial court to conduct an evidentiary hearing or to undertake an in camera review of the attorney case file, and to decide which materials are protected, as well as which are unprotected, under the attorney-client privilege or the work-product doctrine.

In the remainder of the third assignment of error, Givaudan asserts that the trial court misapplied Civ.R. 28 and Civ.R. 45 in ordering King, a nonparty and resident of Florida to appear for deposition in Ohio.

The Uniform Foreign Depositions Act, adopted in Ohio pursuant to R.C. 2319.09, states:

"Whenever any mandate, writ, or commission is issued out of any court of record in any other state, territory, district, or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness in this state, witnesses may be compelled to appear and testify in the same manner and by the same process and proceedings as are employed for the purpose of taking testimony in proceedings pending in this state. * * *"

In *Fischer Brewing Co. v. Flax* (2000), 138 Ohio App.3d 92, 740 N.E.2d 351, the court held that this statute does not extend any further than enforcing implementation of the foreign discovery order. In any event, since King no longer works for Givaudan, it is unclear that Givaudan has standing to assert the contention that King, a nonparty and resident of Florida, should not be compelled to continue his deposition in Cleveland.

Accordingly, we reject this claim herein.

In accordance with all of the foregoing, the judgment which granted SS&D's motion to compel testimony and production is reversed and the matter is remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, JUDGE

KENNETH A. ROCCO, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR

CASE NO. 641027 ASSIGNED JUDGE David T. Matia

Squire, Sanders & Dempsey, L.L.P. VS Grivaudan Flavors, Corp.

☐ 02 REASSIGNED	DISPOSITION	☐ 81 JURY TRIAL	☐ 89 DIS. W/PREJ.
☐ 03 REINSTATED (C/A)		☐ 82 ARBITRATION DECREE	☐ 91 COGNOVITS
☐ 04 REINSTATED		☐ 83 COURT TRIAL	☐ 92 DEFAULT
☐ 20 MAGISTRATE		☐ 85 PRETRIAL	☐ 93 TRANS TO COURT
☐ 40 ARBITRATION		☐ 86 FOREIGN JUDGMENT	☐ 95 TRANS TO JUDGE
☐ 65 STAY		☐ 87 DIS. W/O PREJ	☐ 96 OTHER
☐ 69 SUBMITTED		☐ 88 BANKRUPTCY/APPEAL STAY	

CV07641027

NO. JURORS _____	COURT REPORTER _____	☐ PARTIAL
START DATE __/__/__	START DATE __/__/__	☐ FINAL
END DATE __/__/__	END DATE __/__/__	☒ POST CARD

54291931

JOURNAL

DATE 10/28/08 (NUNC PRO TUNC ENTRY AS OF & FOR __/__/__)

CLERK OF COU

Plaintiff's Motion To Compel Testimony and Production, filed 7/28/08, is granted.

Opinion attached. O.S.J.

JUDGE

FORM

CPC 43-2

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Squire, Sanders & Dempsey, L.L.P.,	)	Case No. CV-07-641027
Plaintiff,	)	Judge: David T. Matia
vs.	)	
Givaudan Flavors Corporation,	)	**Order Granting Squire, Sanders & Dempsey, L.L.P.'s Motion To Compel**
Defendant.	)	

Plaintiff Squire, Sanders & Dempsey, L.L.P.'s (hereinafter S.S.D.) Motion To Compel Testimony and Production is granted. The attorney – client relationship between plaintiff and defendant Givaudan Flavors Corporation (hereinafter Givaudan) is the core issue of the discovery dispute.

The Court notes that Givaudan's arguments in opposition to Plaintiff's Motion To Compel rely heavily upon *Jackson v. Greger*, (2006) 110 Ohio St. 3d 448; 854 N.E.2d 487. The *Jackson* case involved a client of two attorneys, Maudy Jackson, who pled guilty to a criminal charge of resisting arrest. Attorney Lawrence J. Greger represented her in the criminal case. After entering a guilty plea in her criminal case, she sued the Kettering, Ohio Police Department alleging civil rights violations under 42 U.S.C. § 1983. The trial court in the civil case granted summary judgment against Jackson due to

her plea of guilty in the criminal case. She was represented by different counsel in the civil case.

Jackson then sued Greger and his law firm based on Greger's allegedly negligent advice in the criminal case. Greger sought all attorney-client communication and documents related to the civil case, in which he was not representing Jackson. Jackson would not produce them. The trial court granted Greger's motion to compel. The Second Appellate District reversed that ruling, holding that Greger had not demonstrated good cause for obtaining discovery of trial-preparation materials under Civ.R. 26(b)(3). The Supreme Court affirmed.

The Supreme Court in *Jackson supra*, wrote, "We hold that a showing of good cause under Civ.R. 26(b)(3) requires demonstration of need for the material – i.e., a showing that the materials, or the information they contain, are relevant and otherwise unavailable." The Court continued: "Because this information is available from other sources, Greger has not demonstrated good cause." The *Jackson* Court found that the order to compel issued by the trial court was in error.

The *Jackson* case did not abrogate, alter, or even address the traditional self-protection exception to privilege for communications between lawyers and former clients who are parties to a professional liability suit. The Syllabus in *Jackson* states that "R.C. 2317.02(A) provides the exclusive means by which privileged communications directly between an attorney and a client can be waived." *Jackson* can be distinguished from this case as it involves a completely separate privilege between former client and someone other than the lawyer against whom the assertion of professional negligence was made.

In this case, S.S.D. claims it is owed legal fees. Givaudan alleges that S.S.D. committed professional negligence. Among other things, Givaudan alleges that the fees and charges billed by plaintiff are unreasonable, unfair, and excessive. The legal fees and how they were compiled is, indeed, the center of this controversy.

In addition to the *Jackson* holding and R.C. 2317.02(A), Ohio Rule of Professional Conduct 1.6(b)(5) states that a lawyer may reveal protected information if he or she reasonably believes that the revelation is necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved...."

This Court notes that Rule of Professional Conduct 1.6(b)(5) was adopted by the Supreme Court after it issued the *Jackson* decision. In adopting this rule, the Supreme Court of Ohio recognized that without the ability to use otherwise protected information, a lawyer or law firm defending a legal malpractice claim is severely disadvantaged and prejudiced, as S.S.D. would be here if this Court does not grant plaintiff's motion to compel. The self-protection exception to attorney-client privilege when a lawyer and a former client are opposing parties in a lawsuit has well over a century of foundation in American jurisprudence. See *Hunt v. Blackburn* (1888) 128 U.S. 464, 470-71. See also, *Restatement (Third) Of The Law Governing Lawyers § 83*.

This Court finds that good cause has been shown for S.S.D.'s need for the discovery items and testimony it seeks. The Court further finds that obtaining the items and testimony sought does not run afoul of the Supreme Court's holding in *Jackson, supra* and comports with R.C. 2317.02(A). The Court finds that S.S.D.'s use of

documents already in its possession, and otherwise protected, that relate to the billing dispute between S.S.D. and Givaudan are permitted to be used by Squire, Sanders & Dempsey in order to mount a defense in this case in accordance with Rule of Professional Conduct 1.6(b)(5) and 2317.02(A).

In light of the foregoing, Givaudan Flavors Corporation is ordered to adequately respond to Squire, Sanders & Dempsey's outstanding discovery requests. Givaudan is ordered to produce the requested documents within 14 days of this order. Deponents Jane Garfinkel and Fred King shall make themselves available for deposition and adequately respond to testimony sought relating to the Givaudan – S.S.D. relationship. Their depositions are ordered to take place on November 13, 2008 at 1:00 p.m. in courtroom 17-D of the Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113.

IT IS SO ORDERED.

10·28·08

JUDGE DAVID T. MATIA Date

Copies to:

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Givaudan Flavors Corporation

THE STATE OF OHIO
Cuyahoga County } SS. I, GERALD E. FUERST, CLERK OF THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY,
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL
NOW ON FILE IN MY OFFICE.
WITNESS MY HAND AND SEAL OF SAID COURT THIS 3 DAY OF Nov A.D. 20 08
GERALD E. FUERST, Clerk
By Deputy

RECEIVED FOR FILING
OCT 29 2008
GERALD E. FUERST, CLERK
By Deputy

1.42 Common, technical or particular terms.

Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

Effective Date: 01-03-1972

Chapter 2317: EVIDENCE

2317.01 Competent witnesses.

All persons are competent witnesses except those of unsound mind and children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.

In a hearing in an abuse, neglect, or dependency case, any examination made by the court to determine whether a child is a competent witness shall be conducted by the court in an office or room other than a courtroom or hearing room, shall be conducted in the presence of only those individuals considered necessary by the court for the conduct of the examination or the well-being of the child, and shall be conducted with a court reporter present. The court may allow the prosecutor, guardian ad litem, or attorney for any party to submit questions for use by the court in determining whether the child is a competent witness.

Effective Date: 01-01-1989

2317.02 Privileged communications.

The following persons shall not testify in certain respects:

(A)(1) An attorney, concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client. However, if the client voluntarily testifies or is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject.

The testimonial privilege established under this division does not apply concerning a communication between a client who has since died and the deceased client's attorney if the communication is relevant to a dispute between parties who claim through that deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction, and the dispute addresses the competency of the deceased client when the deceased client executed a document that is the basis of the dispute or whether the deceased client was a victim of fraud, undue influence, or duress when the deceased client executed a document that is the basis of the dispute.

(2) An attorney, concerning a communication made to the attorney by a client in that relationship or the attorney's advice to a client, except that if the client is an insurance company, the attorney may be compelled to testify, subject to an in camera inspection by a court, about communications made by the client to the attorney or by the attorney to the client that are related to the attorney's aiding or furthering an ongoing or future commission of bad faith by the client, if the party seeking disclosure of the communications has made a prima facie showing of bad faith, fraud, or criminal misconduct by the client.

(B)(1) A physician or a dentist concerning a communication made to the physician or dentist by a patient in that relation or the physician's or dentist's advice to a patient, except as otherwise provided in this division, division (B)(2), and division (B)(3) of this section, and except that, if the patient is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the physician may be compelled to testify on the same subject.

The testimonial privilege established under this division does not apply, and a physician or dentist may testify or may be compelled to testify, in any of the following circumstances:

(a) In any civil action, in accordance with the discovery provisions of the Rules of Civil Procedure in connection with a civil action, or in connection with a claim under Chapter 4123. of the Revised Code, under any of the following circumstances:

(i) If the patient or the guardian or other legal representative of the patient gives express consent;

(ii) If the patient is deceased, the spouse of the patient or the executor or administrator of the patient's estate gives express consent;

(iii) If a medical claim, dental claim, chiropractic claim, or optometric claim, as defined in section 2305.113 of the Revised Code, an action for wrongful death, any other type of civil action, or a claim under Chapter 4123. of the Revised Code is filed by the patient, the personal representative of the estate of the patient if deceased, or the patient's guardian or other legal representative.

(b) In any civil action concerning court-ordered treatment or services received by a patient, if the court-ordered treatment or services were ordered as part of a case plan journalized under section 2151.412 of the Revised Code or the court-ordered treatment or services are necessary or relevant to dependency, neglect, or abuse or temporary or permanent custody proceedings under Chapter 2151. of the Revised Code.

(c) In any criminal action concerning any test or the results of any test that determines the presence or concentration of alcohol, a drug of abuse, a combination of them, a controlled substance, or a metabolite of a controlled substance in the patient's whole blood, blood serum or plasma, breath, urine, or other bodily substance at any time relevant to the criminal offense in question.

(d) In any criminal action against a physician or dentist. In such an action, the testimonial privilege established under this division does not prohibit the admission into evidence, in accordance with the Rules of Evidence, of a patient's medical or dental records or other communications between a patient and the physician or dentist that are related to the action and obtained by subpoena, search warrant, or other lawful means. A court that permits or compels a physician or dentist to testify in such an action or permits the introduction into evidence of patient records or other communications in such an action shall require that appropriate measures be taken to ensure that the confidentiality of any patient named or otherwise identified in the records is maintained. Measures to ensure confidentiality that may be taken by the court include sealing its records or deleting specific information from its records.

(e)(i) If the communication was between a patient who has since died and the deceased patient's physician or dentist, the communication is relevant to a dispute between parties who claim through that deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction, and the dispute addresses the competency of the deceased patient when the deceased patient executed a document that is the basis of the dispute or whether the deceased patient was a victim of fraud, undue influence, or duress when the deceased patient executed a document that is the basis of the dispute.

(ii) If neither the spouse of a patient nor the executor or administrator of that patient's estate gives consent under division (B)(1)(a)(ii) of this section, testimony or the disclosure of the patient's medical records by a physician, dentist, or other health care provider under division (B)(1)(e)(i) of this section is a permitted use or disclosure of protected health information, as defined in 45 C.F.R. 160.103, and an authorization or opportunity to be heard shall not be required.

(iii) Division (B)(1)(e)(i) of this section does not require a mental health professional to disclose psychotherapy notes, as defined in 45 C.F.R. 164.501.

(iv) An interested person who objects to testimony or disclosure under division (B)(1)(e)(i) of this section may seek a protective order pursuant to Civil Rule 26.

(v) A person to whom protected health information is disclosed under division (B)(1)(e)(i) of this section shall not use or disclose the protected health information for any purpose other than the litigation or proceeding for which the information was requested and shall return the protected health information to the covered entity or destroy the protected health information, including all copies made, at the conclusion of the litigation or proceeding.

(2)(a) If any law enforcement officer submits a written statement to a health care provider that states that an official criminal investigation has begun regarding a specified person or that a criminal action or proceeding has been commenced against a specified person, that requests the provider to supply to the officer copies of any records the provider possesses that pertain to any test or the results of any test administered to the specified person to determine the presence or concentration of alcohol, a drug of abuse, a combination of them, a controlled substance, or a metabolite of a controlled substance in the person's whole blood, blood serum or plasma, breath, or urine at any time relevant to the criminal offense in question, and that conforms to section 2317.022 of the Revised Code, the provider, except to the extent specifically prohibited by any law of this state or of the United States, shall supply to the officer a copy of any of the requested records the provider possesses. If the health care provider does not possess any of the requested records, the provider shall give the officer a written statement that indicates that the provider does not possess any of the requested records.

(b) If a health care provider possesses any records of the type described in division (B)(2)(a) of this section regarding the person in question at any time relevant to the criminal offense in question, in lieu of personally testifying as to the results of the test in question, the custodian of the records may submit a certified copy of the records, and, upon its submission, the certified copy is qualified as authentic evidence and may be admitted as evidence in accordance with the Rules of Evidence. Division (A) of section 2317.422 of the Revised Code does not apply to any

certified copy of records submitted in accordance with this division. Nothing in this division shall be construed to limit the right of any party to call as a witness the person who administered the test to which the records pertain, the person under whose supervision the test was administered, the custodian of the records, the person who made the records, or the person under whose supervision the records were made.

(3)(a) If the testimonial privilege described in division (B)(1) of this section does not apply as provided in division (B)(1)(a)(iii) of this section, a physician or dentist may be compelled to testify or to submit to discovery under the Rules of Civil Procedure only as to a communication made to the physician or dentist by the patient in question in that relation, or the physician's or dentist's advice to the patient in question, that related causally or historically to physical or mental injuries that are relevant to issues in the medical claim, dental claim, chiropractic claim, or optometric claim, action for wrongful death, other civil action, or claim under Chapter 4123. of the Revised Code.

(b) If the testimonial privilege described in division (B)(1) of this section does not apply to a physician or dentist as provided in division (B)(1)(c) of this section, the physician or dentist, in lieu of personally testifying as to the results of the test in question, may submit a certified copy of those results, and, upon its submission, the certified copy is qualified as authentic evidence and may be admitted as evidence in accordance with the Rules of Evidence. Division (A) of section 2317.422 of the Revised Code does not apply to any certified copy of results submitted in accordance with this division. Nothing in this division shall be construed to limit the right of any party to call as a witness the person who administered the test in question, the person under whose supervision the test was administered, the custodian of the results of the test, the person who compiled the results, or the person under whose supervision the results were compiled.

(4) The testimonial privilege described in division (B)(1) of this section is not waived when a communication is made by a physician to a pharmacist or when there is communication between a patient and a pharmacist in furtherance of the physician-patient relation.

(5)(a) As used in divisions (B)(1) to (4) of this section, "communication" means acquiring, recording, or transmitting any information, in any manner, concerning any facts, opinions, or statements necessary to enable a physician or dentist to diagnose, treat, prescribe, or act for a patient. A "communication" may include, but is not limited to, any medical or dental, office, or hospital communication such as a record, chart, letter, memorandum, laboratory test and results, x-ray, photograph, financial statement, diagnosis, or prognosis.

(b) As used in division (B)(2) of this section, "health care provider" means a hospital, ambulatory care facility, long-term care facility, pharmacy, emergency facility, or health care practitioner.

(c) As used in division (B)(5)(b) of this section:

(i) "Ambulatory care facility" means a facility that provides medical, diagnostic, or surgical treatment to patients who do not require hospitalization, including a dialysis center, ambulatory surgical facility, cardiac catheterization facility, diagnostic imaging center, extracorporeal shock wave lithotripsy center, home health agency, inpatient hospice, birthing center, radiation therapy

center, emergency facility, and an urgent care center. "Ambulatory health care facility" does not include the private office of a physician or dentist, whether the office is for an individual or group practice.

(ii) "Emergency facility" means a hospital emergency department or any other facility that provides emergency medical services.

(iii) "Health care practitioner" has the same meaning as in section 4769.01 of the Revised Code.

(iv) "Hospital" has the same meaning as in section 3727.01 of the Revised Code.

(v) "Long-term care facility" means a nursing home, residential care facility, or home for the aging, as those terms are defined in section 3721.01 of the Revised Code; an adult care facility, as defined in section 3722.01 of the Revised Code; a nursing facility or intermediate care facility for the mentally retarded, as those terms are defined in section 5111.20 of the Revised Code; a facility or portion of a facility certified as a skilled nursing facility under Title XVIII of the "Social Security Act," 49 Stat. 286 (1965), 42 U.S.C.A. 1395, as amended.

(vi) "Pharmacy" has the same meaning as in section 4729.01 of the Revised Code.

(d) As used in divisions (B)(1) and (2) of this section, "drug of abuse" has the same meaning as in section 4506.01 of the Revised Code.

(6) Divisions (B)(1), (2), (3), (4), and (5) of this section apply to doctors of medicine, doctors of osteopathic medicine, doctors of podiatry, and dentists.

(7) Nothing in divisions (B)(1) to (6) of this section affects, or shall be construed as affecting, the immunity from civil liability conferred by section 307.628 of the Revised Code or the immunity from civil liability conferred by section 2305.33 of the Revised Code upon physicians who report an employee's use of a drug of abuse, or a condition of an employee other than one involving the use of a drug of abuse, to the employer of the employee in accordance with division (B) of that section. As used in division (B)(7) of this section, "employee," "employer," and "physician" have the same meanings as in section 2305.33 of the Revised Code.

(C)(1) A cleric, when the cleric remains accountable to the authority of that cleric's church, denomination, or sect, concerning a confession made, or any information confidentially communicated, to the cleric for a religious counseling purpose in the cleric's professional character. The cleric may testify by express consent of the person making the communication, except when the disclosure of the information is in violation of a sacred trust and except that, if the person voluntarily testifies or is deemed by division (A)(4)(c) of section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the cleric may be compelled to testify on the same subject except when disclosure of the information is in violation of a sacred trust.

(2) As used in division (C) of this section:

(a) "Cleric" means a member of the clergy, rabbi, priest, Christian Science practitioner, or regularly ordained, accredited, or licensed minister of an established and legally cognizable church, denomination, or sect.

(b) "Sacred trust" means a confession or confidential communication made to a cleric in the cleric's ecclesiastical capacity in the course of discipline enjoined by the church to which the cleric belongs, including, but not limited to, the Catholic Church, if both of the following apply:

(i) The confession or confidential communication was made directly to the cleric.

(ii) The confession or confidential communication was made in the manner and context that places the cleric specifically and strictly under a level of confidentiality that is considered inviolate by canon law or church doctrine.

(D) Husband or wife, concerning any communication made by one to the other, or an act done by either in the presence of the other, during coverture, unless the communication was made, or act done, in the known presence or hearing of a third person competent to be a witness; and such rule is the same if the marital relation has ceased to exist;

(E) A person who assigns a claim or interest, concerning any matter in respect to which the person would not, if a party, be permitted to testify;

(F) A person who, if a party, would be restricted under section 2317.03 of the Revised Code, when the property or thing is sold or transferred by an executor, administrator, guardian, trustee, heir, devisee, or legatee, shall be restricted in the same manner in any action or proceeding concerning the property or thing.

(G)(1) A school guidance counselor who holds a valid educator license from the state board of education as provided for in section 3319.22 of the Revised Code, a person licensed under Chapter 4757. of the Revised Code as a professional clinical counselor, professional counselor, social worker, independent social worker, marriage and family therapist or independent marriage and family therapist, or registered under Chapter 4757. of the Revised Code as a social work assistant concerning a confidential communication received from a client in that relation or the person's advice to a client unless any of the following applies:

(a) The communication or advice indicates clear and present danger to the client or other persons. For the purposes of this division, cases in which there are indications of present or past child abuse or neglect of the client constitute a clear and present danger.

(b) The client gives express consent to the testimony.

(c) If the client is deceased, the surviving spouse or the executor or administrator of the estate of the deceased client gives express consent.

(d) The client voluntarily testifies, in which case the school guidance counselor or person licensed or registered under Chapter 4757. of the Revised Code may be compelled to testify on the same

subject.

(e) The court in camera determines that the information communicated by the client is not germane to the counselor-client, marriage and family therapist-client, or social worker-client relationship.

(f) A court, in an action brought against a school, its administration, or any of its personnel by the client, rules after an in-camera inspection that the testimony of the school guidance counselor is relevant to that action.

(g) The testimony is sought in a civil action and concerns court-ordered treatment or services received by a patient as part of a case plan journalized under section 2151.412 of the Revised Code or the court-ordered treatment or services are necessary or relevant to dependency, neglect, or abuse or temporary or permanent custody proceedings under Chapter 2151. of the Revised Code.

(2) Nothing in division (G)(1) of this section shall relieve a school guidance counselor or a person licensed or registered under Chapter 4757. of the Revised Code from the requirement to report information concerning child abuse or neglect under section 2151.421 of the Revised Code.

(H) A mediator acting under a mediation order issued under division (A) of section 3109.052 of the Revised Code or otherwise issued in any proceeding for divorce, dissolution, legal separation, annulment, or the allocation of parental rights and responsibilities for the care of children, in any action or proceeding, other than a criminal, delinquency, child abuse, child neglect, or dependent child action or proceeding, that is brought by or against either parent who takes part in mediation in accordance with the order and that pertains to the mediation process, to any information discussed or presented in the mediation process, to the allocation of parental rights and responsibilities for the care of the parents' children, or to the awarding of parenting time rights in relation to their children;

(I) A communications assistant, acting within the scope of the communication assistant's authority, when providing telecommunications relay service pursuant to section 4931.35 of the Revised Code or Title II of the "Communications Act of 1934," 104 Stat. 366 (1990), 47 U.S.C. 225, concerning a communication made through a telecommunications relay service. Nothing in this section shall limit the obligation of a communications assistant to divulge information or testify when mandated by federal law or regulation or pursuant to subpoena in a criminal proceeding.

Nothing in this section shall limit any immunity or privilege granted under federal law or regulation.

(J)(1) A chiropractor in a civil proceeding concerning a communication made to the chiropractor by a patient in that relation or the chiropractor's advice to a patient, except as otherwise provided in this division. The testimonial privilege established under this division does not apply, and a chiropractor may testify or may be compelled to testify, in any civil action, in accordance with the discovery provisions of the Rules of Civil

Procedure in connection with a civil action, or in connection with a claim under Chapter 4123. of the Revised Code, under any of the following circumstances:

(a) If the patient or the guardian or other legal representative of the patient gives express consent.

(b) If the patient is deceased, the spouse of the patient or the executor or administrator of the patient's estate gives express consent.

(c) If a medical claim, dental claim, chiropractic claim, or optometric claim, as defined in section 2305.113 of the Revised Code, an action for wrongful death, any other type of civil action, or a claim under Chapter 4123. of the Revised Code is filed by the patient, the personal representative of the estate of the patient if deceased, or the patient's guardian or other legal representative.

(2) If the testimonial privilege described in division (J)(1) of this section does not apply as provided in division (J)(1)(c) of this section, a chiropractor may be compelled to testify or to submit to discovery under the Rules of Civil Procedure only as to a communication made to the chiropractor by the patient in question in that relation, or the chiropractor's advice to the patient in question, that related causally or historically to physical or mental injuries that are relevant to issues in the medical claim, dental claim, chiropractic claim, or optometric claim, action for wrongful death, other civil action, or claim under Chapter 4123. of the Revised Code.

(3) The testimonial privilege established under this division does not apply, and a chiropractor may testify or be compelled to testify, in any criminal action or administrative proceeding.

(4) As used in this division, "communication" means acquiring, recording, or transmitting any information, in any manner, concerning any facts, opinions, or statements necessary to enable a chiropractor to diagnose, treat, or act for a patient. A communication may include, but is not limited to, any chiropractic, office, or hospital communication such as a record, chart, letter, memorandum, laboratory test and results, x-ray, photograph, financial statement, diagnosis, or prognosis.

(K)(1) Except as provided under division (K)(2) of this section, a critical incident stress management team member concerning a communication received from an individual who receives crisis response services from the team member, or the team member's advice to the individual, during a debriefing session.

(2) The testimonial privilege established under division (K)(1) of this section does not apply if any of the following are true:

(a) The communication or advice indicates clear and present danger to the individual who receives crisis response services or to other persons. For purposes of this division, cases in which there are indications of present or past child abuse or neglect of the individual constitute a clear and present danger.

(b) The individual who received crisis response services gives express consent to the testimony.

(c) If the individual who received crisis response services is deceased, the surviving spouse or the executor or administrator of the estate of the deceased individual gives express consent.

(d) The individual who received crisis response services voluntarily testifies, in which case the team member may be compelled to testify on the same subject.

(e) The court in camera determines that the information communicated by the individual who received crisis response services is not germane to the relationship between the individual and the team member.

(f) The communication or advice pertains or is related to any criminal act.

(3) As used in division (K) of this section:

(a) "Crisis response services" means consultation, risk assessment, referral, and on-site crisis intervention services provided by a critical incident stress management team to individuals affected by crisis or disaster.

(b) "Critical incident stress management team member" or "team member" means an individual specially trained to provide crisis response services as a member of an organized community or local crisis response team that holds membership in the Ohio critical incident stress management network.

(c) "Debriefing session" means a session at which crisis response services are rendered by a critical incident stress management team member during or after a crisis or disaster.

(L)(1) Subject to division (L)(2) of this section and except as provided in division (L)(3) of this section, an employee assistance professional, concerning a communication made to the employee assistance professional by a client in the employee assistance professional's official capacity as an employee assistance professional.

(2) Division (L)(1) of this section applies to an employee assistance professional who meets either or both of the following requirements:

(a) Is certified by the employee assistance certification commission to engage in the employee assistance profession;

(b) Has education, training, and experience in all of the following:

(i) Providing workplace-based services designed to address employer and employee productivity issues;

(ii) Providing assistance to employees and employees' dependents in identifying and finding the means to resolve personal problems that affect the employees or the employees' performance;

(iii) Identifying and resolving productivity problems associated with an employee's concerns about

any of the following matters: health, marriage, family, finances, substance abuse or other addiction, workplace, law, and emotional issues;

(iv) Selecting and evaluating available community resources;

(v) Making appropriate referrals;

(vi) Local and national employee assistance agreements;

(vii) Client confidentiality.

(3) Division (L)(1) of this section does not apply to any of the following:

(a) A criminal action or proceeding involving an offense under sections 2903.01 to 2903.06 of the Revised Code if the employee assistance professional's disclosure or testimony relates directly to the facts or immediate circumstances of the offense;

(b) A communication made by a client to an employee assistance professional that reveals the contemplation or commission of a crime or serious, harmful act;

(c) A communication that is made by a client who is an unemancipated minor or an adult adjudicated to be incompetent and indicates that the client was the victim of a crime or abuse;

(d) A civil proceeding to determine an individual's mental competency or a criminal action in which a plea of not guilty by reason of insanity is entered;

(e) A civil or criminal malpractice action brought against the employee assistance professional;

(f) When the employee assistance professional has the express consent of the client or, if the client is deceased or disabled, the client's legal representative;

(g) When the testimonial privilege otherwise provided by division (L)(1) of this section is abrogated under law.

Effective Date: 04-11-2003; 01-27-2006; 2006 HB144 06-15-2006; 2006 SB17 08-03-2006; 2006 SB8 08-17-2006; 2006 SB117 10-31-2007

2317.021 Extension of attorney-client privilege in case of dissolved corporation.

(A) As used in division (A) of section 2317.02 of the Revised Code:

"Client" means a person, firm, partnership, corporation, or other association that, directly or through any representative, consults an attorney for the purpose of retaining the attorney or securing legal service or advice from the attorney in the attorney's professional capacity, or

consults an attorney employee for legal service or advice, and who communicates, either directly or through an agent, employee, or other representative, with such attorney; and includes an incompetent person whose guardian so consults the attorney in behalf of the incompetent person.

Where a corporation or association is a client having the privilege and it has been dissolved, the privilege shall extend to the last board of directors, their successors or assigns, or to the trustees, their successors or assigns.

This section shall be construed as in addition to, and not in limitation of, other laws affording protection to communications under the attorney-client privilege.

(B) As used in this section and in sections 2317.02 and 2317.03 of the Revised Code, "incompetent" or "incompetent person" means a person who is so mentally impaired as a result of a mental or physical illness or disability, or mental retardation, or as a result of chronic substance abuse, that the person is incapable of taking proper care of the person's self or property or fails to provide for the person's family or other persons for whom the person is charged by law to provide.

Effective Date: 10-14-1963; 2007 HB53 08-07-2007

2317.022 Written statement requesting release of drug or alcohol test records.

(A) As used in this section:

(1) "Health care provider" has the same meaning as in section 2317.02 of the Revised Code.

(2) "Drug of abuse" has the same meaning as in section 4506.01 of the Revised Code.

(B) If an official criminal investigation has begun regarding a person or if a criminal action or proceeding is commenced against a person, any law enforcement officer who wishes to obtain from any health care provider a copy of any records the provider possesses that pertain to any test or the result of any test administered to the person to determine the presence or concentration of alcohol, a drug of abuse, or alcohol and a drug of abuse in the person's blood, breath, or urine at any time relevant to the criminal offense in question shall submit to the health care facility a written statement in the following form:

"WRITTEN STATEMENT REQUESTING THE RELEASE OF RECORDS

To: ..... (insert name of the health care provider in question).

I hereby state that an official criminal investigation has begun regarding, or a criminal action or proceeding has been commenced against, ... (insert the name of the person in question), and that I believe that one or more tests has been administered to that person by this health care provider to determine the presence or concentration of alcohol, a drug of abuse, a combination of them, a controlled substance, or a metabolite of a controlled substance in that

PAGE'S

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ANNOTATED

CONTAINING

ALL LAWS OF A GENERAL AND PERMANENT NATURE IN FORCE AT THE DATE OF PUBLICATION, WITH NOTES OF DECISIONS CONSTRUING THE STATUTES

WILLIAM H. PAGE

EDITOR-IN-CHIEF

AUTHOR OF PAGE ON CONTRACTS AND PAGE ON WILLS

EDITOR-IN-CHIEF, PAGE'S OHIO DIGEST, LIFETIME EDITION

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the time at which such witness testified; or reasonably near thereto: Radke v. State, 107 O. S. 399, 140 N. E. 586.

Before evidence may be offered impeaching one's general reputation for truth and veracity in the community in which he lives, the impeaching witness must show on preliminary examination that he has the means of knowing such general reputation of the witness sought to be impeached in the community in which the witness lives: Radke v. State, 107 O. S. 399, 140 N. E. 586.

An adverse witness may, on proper foundation being laid, be contradicted or impeached by proof of his statements or acts inconsistent with his testimony on the trial: Traction Co. v. Hatfield, 1 O. App. 354, 17 O. C. C. (N.S.) 350, 24 O. C. D. 378 [hearing after reversal, in Traction Co. v. Hatfield, 86 O. S. 356].

If a witness on cross-examination denies making certain statements which are inconsistent with his evidence, it is not a violation of the hearsay rule to permit the adversary party to offer evidence of such inconsistent statement made by such witness: Traction Co. v. Hatfield, 1 O. App. 354, 17 O. C. C. (N.S.) 350, 24 O. C. D. 378 [hearing after reversal in Traction Co. v. Hatfield, 86 O. S. 356].

It is only such a conviction as under the old law would have rendered a witness incompetent that can be introduced under the law as it is today to discredit him; and where for the purpose of discrediting a witness a record is offered of conviction of an offense which is not made a crime or misdemeanor under any statute of the state, and was in violation of a city ordinance only, it is not error to sustain an objection to its admission in evidence: August v. Finnerty, 10 O. C. C. (N.S.) 433, 20 O. C. D. 338.

When a witness has denied the authenticity of a document, purporting to have been written and signed by him, containing statements material to the issue in the case, he may be required, on cross-examination, to write specimens of his handwriting for the purpose of comparison. But this rule does not apply to the direct examination of the witness. In such a case, where testimony has been given by another that the document is in the handwriting of the party, it may be offered for the purpose of impeachment, and if the witness be a party, for the additional reason that it is a declaration against interest: Sullivan v. Starkey, 14 O. C. C. (N.S.) 281, 22 O. C. D. 486.

It is not necessary that the questions asked of an impeaching witness be in the exact words of the questions asked the witness sought to be impeached, if the substance of the inquiry is in each case the same: Order of Americus v. McDowell, 16 O. C. C. (N.S.) 573, 27 O. C. D. 594.

A party calling a witness is not thereby precluded from proving the truth of a relevant fact by another witness whose testimony may incidentally reflect upon the person previously testifying as to such fact: Industrial Commission v. Ware, 10 O. App. 375, 30 O. C. A. 7.

A party calling a witness may in case of surprise, question the witness as to inconsistent statements previously made by him, for the purpose of refreshing his recollection and inducing him to correct his testimony, but he can not discredit the testimony of his own witness by proving that he made contradictory statements; he can only rebut his testimony by showing the facts to be otherwise than as stated by him: Murray v. Third National Bank, 334 Fed. 481, 148 C. C. A. 247.

For impeachment of an expert witness, see Hoover v. State, 91 O. S. 41, 109 N. E. 626 [affirming judgment of court of appeals, which affirmed, State v. Hoover, 17 O. N. P. (N.S.) 65, 24 O. D. (N.P.) 212].

17. Privilege

When a witness refuses to answer a question propounded to him, basing his refusal upon the alleged reason that his answer would incriminate him, his answer is not conclusive with respect to the incriminating character of the evidence sought to be elicited, and he may be required to answer, if by any inquiry which does not invade his immunity, it is made to appear to the trial judge that his answer would not have the tendency claimed by him: McGorray v. Sutter, 80 O. S. 400, 89 N. E. 10, 131 Am. St. 715, 24 L. R. A. (N.S.) 165 [distinguishing Warner v. Lucas, 10 O. 336; and reversing on rehearing In re Sutter, 18 O. C. C. (N.S.) 69, 31 O. C. D. 20, which was affirmed, without opinion, In re Sutter, 80 O. S. 713].

When a witness refuses to answer a question propounded to him, on the ground that his answer will tend to criminate him, his claim of privilege is properly allowed by the court if from the circumstances of the particular case and the nature of the question asked, it appears there is reasonable ground to apprehend that his answer would have the effect claimed by him: State v. Murray, 82 O. S. 305, 92 N. E. 467.

SEC. 11494. Privileged communications and acts. The following persons shall not testify in certain respects:

1. An attorney, concerning a communication made to him by his client in that relation, or his advice to his client; or a physician, concerning a communication made to him by his patient in that relation, or his advice to his patient. But the attorney or physician may testify by express consent of the client or patient; and if the client or patient voluntarily testifies, the attorney or physician may be compelled to testify on the same subject;

2. A clergyman or priest, concerning a confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs;

3. Husband or wife, concerning any communication made by one to the other, or an act done by either in the presence of the other, during coverture, unless the communication was made, or act done, in the known presence or hearing of a third person competent to be a witness. The rule shall be the same if the marital relation has ceased to exist;

4. A person who assigns his claim or interest, concerning any matter in respect to which he would not, if a party, be permitted to testify;

5. A person who, if a party, would be restricted in his evidence under the next following section, when the property or thing is sold or transferred by an executor, administrator, guardian, trustee, heir, devisee or legatee, shall be restricted in the same manner in any action or proceeding concerning such property or thing. (R. S. Sec. 5241.)

HISTORY.—R. S. § 5241; 51 v. 37, § 315; 67 v. 113, § 314; S. & C. 1038; S. & S. 558.

Witnesses in criminal cases, see G.C. § 13444-2 et seq.

Limitation on number of character witnesses, G.C. § 13444-18.

Comparative legislation

Privileged communications:

Ala. Code 1928, § 7720.
Cal. Deering's Code of Civil Proc. 1937, § 1881.
Ill. Smith-Hurd Rev. Stat. 1933, ch. 51, § 5.
Ind. Burns' Stat. 1933, § 2-1714.