

ORIGINAL

IN THE SUPREME COURT OF OHIO

SQUIRE, SANDERS & DEMPSEY,)
L.L.P.,)
)
Appellant,)
)
)
v.)
)
GIVAUDAN FLAVORS CORP.,)
)
)
Appellee.)

CASE NO. 09-1321

On Appeal from the Cuyahoga
County Court of Appeals,
Eighth Appellate District

Court of Appeals
Case No. 92366

AMICUS CURIAE BRIEF OF THE OHIO STATE BAR ASSOCIATION
URGING REVERSAL

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INTRODUCTION

The attorney-client privilege is not a device to hide secrets; it is justified by public interests. The Eighth District's decision focused on a particular client's tactical interests in secrecy to the exclusion of the public interest at the heart of the privilege. With that erroneous focus, the result is at odds with the proper scope of the privilege. The Eighth District should be reversed because its decision ignores the policy of the privilege, eliminates widely-recognized exceptions to the privilege that promote public interests and serve justice, and undermines constitutional principles that limit the privilege. Further, if Ohio lawyers can be barred from using evidence to defend themselves against malpractice claims, that anomalous law is likely to affect the availability and affordability of malpractice insurance coverage, to the detriment of lawyers and clients in this state.

Ohio law is and should continue to be that, in disputes between lawyers and clients over fees or claims of malpractice, an exception applies to lift the attorney-client privilege as inapplicable and to permit the lawyer to disclose evidence that might otherwise be privileged in another context. The exception and the resulting disclosure and use of evidence apply within the confines of the attorney-client dispute, without disclosure to third parties. The exception is fair, just, and sensible, and should remain the law of Ohio, as it is throughout the country.

The attorney-client privilege fosters public good because the qualified confidentiality it draws over the lawyer-client relationship encourages client consultations with attorneys. Encouraging client consultations with attorneys promotes the public interest in helping clients follow the law. A privilege with no exception for

clients who assert malpractice charges against attorneys or who refuse to pay legal fees is not only manifestly unfair but counterproductive to promoting access to legal services. When a client accuses an attorney of malpractice, the social goals of the privilege are inoperative—the privilege has no function within the context of these disputes.

The malpractice exception or self-defense exception to the privilege is similar to other well-known doctrines where the privilege yields to promote social goals, such as the crime-fraud exception. The Eighth District's decision not only threatens these doctrines but also effectively erases Rule 1.6(b)(5) of the Ohio Rules of Professional Conduct by interpreting the privilege as a monolith subject only to a narrow version of client waiver.

The Eighth District's interpretation of the privilege is also tone deaf to constitutional limits on the attorney-client privilege. Via the Modern Courts Amendment, this Court is sovereign over matters of evidence, lawyer discipline, and the rules of professional conduct. The Eighth District's version of the privilege intrudes on each. An unyielding privilege also tramples an attorney's right to a remedy against certain clients and an attorney's due process right of self defense against malpractice charges.

The Eighth District's decision—if adopted as the law of the state—would make Ohio a national anomaly and would create unfairness in lawyer-client disputes.

STATEMENT OF AMICUS CURIAE INTEREST

The Ohio State Bar Association is an unincorporated association of more than 25,000 members, including lawyers, judges, law students, and paralegals. The OSBA's lawyer members range from sole practitioners to members of the nation's largest law

firms. Its members' practices include every kind of legal services. The OSBA's Constitution declares that one purpose of the OSBA is "to promote improvement of the law, our legal system, and the administration of justice." This amicus brief furthers those purposes.

The attorney-client privilege hovers over the daily decisions of OSBA members. The members therefore have keen interests in protecting application of the privilege to further the public interests served by the privilege, to protect the profession from client abuse, and to promote public confidence in the profession. The Eighth District's decision threatens all of these interests. The OSBA urges reversal.

STATEMENT OF THE CASE AND FACTS

The Ohio State Bar Association adopts the statement of facts and statement of the case in appellant's brief.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

The Eighth District's decision is an outlier, and with good reason. The Eighth District casts aside the social purposes of the privilege, the sensible rationale of the self-defense exception to the privilege, and the constitutional limits on its scope. This Court should reverse.

I. The attorney-client privilege evolved to promote public good, not private secrecy

The motivating rationale of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice

or advocacy depends upon the lawyer's being fully informed by the client.” *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 990, at ¶20 (quoting *Upjohn Co. v. U.S.* (1981), 449 U.S. 383, 389, 101 S.Ct. 677) (emphasis added).

A privilege that extends to hide evidence in disputes between an attorney and a client does not advance the public interest in legal compliance or justice. Privileges have the least social value when asserted merely in litigation dividing money between two parties. See Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information* (1981), *Supreme Court Review* 309, 361 (“society wants to encourage the creation of information in litigation only to the extent it contributes to [rule creation or rule compliance]; otherwise we gain by a policy of maximum use of existing information at the expense of lower incentives to create it”). When a client sues an attorney for malpractice, or the attorney and client dispute the fee, justice is not served by enforcement of a privilege to hide the key evidence necessary to resolve the dispute. The parties to the dispute (client and attorney) already know the confidences, and those confidences can remain shielded from all but the eyes of the tribunal resolving the dispute.

Extending the attorney-client privilege into malpractice cases and fee disputes thwarts the public interest in legal compliance and justice. If attorneys are prohibited from using evidence to defend malpractice charges and are disabled from pursuing fee disputes, an unfair playing field is created to the detriment of the attorney-client relationship. The rule that, “in controversies between attorney and client the privilege is relaxed, may best be based upon the ground of practical necessity that if effective legal service is to be encouraged the privilege must not stand in the way of the lawyer's just

enforcement of his rights to be paid a fee and to protect his reputation.” Kenneth S. Broun, *McCormick on Evidence* (2009), § 91.1. The attorney-client privilege should not be interpreted in a way that discourages effective access to legal services for all clients.

Further, if the privilege is used to deny Ohio lawyers a defense in malpractice lawsuits, attorneys would be encouraged to practice law with one eye on the client’s interests and the other on their own. A lawyer with that incentive does not offer the undivided loyalty that clients expect or deserve. The attorney-client relationship is not well-served by encouraging lawyers to focus on self-defense during the relationship while knowing that, according to the Eighth District, a self-defense exception does not exist should litigation with the client arise in the future. Trust, rather than mistrust, is necessary for the attorney-client relationship to work. Knowing that, should a dispute arise in the future with the client, the lawyer may then defend herself based on the evidence contained in otherwise privileged information, the lawyer is encouraged to trust the client and focus on the client’s needs during the course of the relationship.

The Eighth District’s holding would also have negative consequences on the availability and cost of malpractice insurance. If Ohio lawyers (but not lawyers in any other state) can be barred from using otherwise-privileged materials to defend against malpractice claims, Ohio’s lawyers may find themselves uninsurable, or only insurable at prices that push many out of the practice or that are passed through at higher rates to clients.

Ultimately, the client has control over the confidences divulged during the attorney-client relationship. It is the client’s choice to sue the lawyer or to refuse to pay the lawyer’s fees that removes its own confidences from the reach of the attorney-client privilege. Further, applying a self-defense exception in attorney-client disputes does not

remove the confidentiality of privileged communications as to third parties, which is the client's fundamental protection under the privilege in the first place. The client retains that protection with respect to anyone other than the attorney with whom the client has a dispute over fees or for claimed malpractice. Thus, the self-defense exception operates to protect, and fairly so, the interests of both the client and the attorney in the privileged materials, while permitting the tribunal presiding over the dispute to consider pertinent evidence that is otherwise fully known between the litigants.

II. The Eighth District's version of the attorney-client privilege threatens or eliminates long-established carve-outs from the privilege

As with other well-established exceptions, the self-defense exception to the privilege operates as an exclusion that prevents the privilege from attaching in the first instance. See, e.g., *Ross v. Abercrombie & Fitch Co.* (S.D. Ohio April 22, 2008), Nos. 2:05-cv-0819, etc., 2008 WL 1844357, at *6 ("waiver is irrelevant because the privilege never attaches in the first instance") (analyzing *Garner* exclusion). However, the Eighth District's version of the privilege wipes away exceptions recognized in Ohio and elsewhere. The attorney-client privilege occasionally must yield when it threatens more important social goals. By way of example, the logic of the Eighth District's opinion would eliminate the crime-fraud exception. It also trumps Ohio Rule of Professional Conduct 1.6(b)(5).

This Court recognizes the crime-fraud exception to the attorney-client privilege. *State ex rel. Nix v. Cleveland* (1998), 83 Ohio St.3d 379, 383, 700 N.E.2d 12 ("A communication is excepted from the attorney-client privilege if it is undertaken for the purpose of committing or continuing a crime or fraud."). That exception is threatened, if not erased, if the Eighth District's opinion is the law of Ohio.

This Court's most recent recognition of the malpractice or self-defense exception to the attorney-client privilege took place on February 1, 2007, when the Ohio Rules of Professional Conduct became effective. Rule 1.6(b)(5) expressly lifts the privilege and permits lawyers to disclose information where reasonably necessary "to establish a claim or defense on behalf of a lawyer in a controversy between the lawyer and the client." This is a clear and unequivocal restatement of the well-established exception to the privilege, as recognized by courts throughout the nation. However, the Eighth District's decision would effectively erase those words from the Ohio Rules of Professional Conduct.

This Court also recognizes that the attorney-client privilege is flexible enough to accommodate other exceptions that may not currently be part of Ohio law. "Lastly, the facts of this case are not so compelling that a judicially created waiver must be invoked." *In re Miller* (1992), 63 Ohio St.3d 99, 109, 585 N.E.2d 396 (emphasis added); *Jackson v. Greger*, 110 Ohio St.3d 488, 2006-Ohio-4968, 854 N.E.2d 487 (Evidence Rule 501 preserves the judicial role in shaping the privilege and its exclusions) (Pfeifer, J., concurring and dissenting).

The Eighth District's version of the privilege would foreclose doctrines founded on the idea that the attorney-client privilege yields to broader social goals of truth-seeking and justice. Exceptions recognized by other courts have included: Where lawyers commit fraud on the court (see, e.g., *CSX Transp., Inc. v. Robert V. Gilkison* (N.D.W.Va. May 29, 2009), No. 5:05-CV-202, 2009 WL 1528190, at *7 ("Simply put, a lawyer or law firm may not engage in fraudulent or criminal activity and then hide behind any privilege to protect the firm's or the individual lawyer's interests. The Court believes that this is exactly what Defendant is attempting to do in this case")); where the

privileged document would impeach testimony (see, e.g., *In re Southern and Eastern Dist. Asbestos Litig.* (S.D.N.Y.1990), 730 F.Supp. 582, 585); and where company officers assert the privilege as against shareholder interests (see, e.g., *In re Lindsey* (C.A.D.C. 1998), 148 F.3d 1100, 1112).

Like these other exceptions, the malpractice exception to the privilege is widely recognized. See, e.g., Subin, *The Lawyer As Superego: Disclosure of Client Confidences To Prevent Harm* (1985), 70 Iowa L. Rev. 1091, 1135 (noting the “well-established right to defend against attacks by the client”); Martyn, *In Defense of Client-Lawyer Confidentiality . . . and Its Exceptions . . .* (2003), 81 Neb. L. Rev. 1320, 1344 (labeling this exclusion “relatively uncontroversial”). Ohio law would not only stand alone if it eliminated the malpractice exception, but it would also threaten other well-established exceptions.

III. A privilege expanded into attorney-client disputes treads on significant constitutional principles

Even if the Eighth District’s expanded privilege advanced social interests (which it does not), and did not threaten other exceptions (which it does), the overbroad privilege must be pruned back because it intrudes on constitutional delegations of judicial power, and constitutional guarantees of remedies and due process.

A. A privilege that disables attorneys from defending malpractice charges infringes on this Court’s exclusive power to regulate the bar and the practice of law

The Constitution commits to this Court alone regulatory power over practice and procedure in Ohio’s courts. Section 5(B), Article IV, Ohio Constitution. Rules enacted under this authority “control over conflicting statutes on procedural matters.” *State ex rel. Thompson v. Spon* (1998), 83 Ohio St.3d 551, 555, 700 N.E.2d 128. “[T]he

legislature does not have the authority to regulate the practice of law in the state of Ohio * * *.” *Cleveland Bar Assn. v. Pearlman*, 106 Ohio St.3d 136, 2005-Ohio-4107, 832 N.E.2d 1193, at ¶33 (O’Donnell, J., dissenting). This Court avoids, where possible, statutory interpretations that create potential conflicts with rules derived from the Court’s Section 5(B) power. *Spon*; see also *Pearlman*, at ¶24. The Eighth District’s construction of a privilege without exceptions conflicts with several rules established under the Court’s Section 5(B) constitutional authority.

The Eighth District’s version of the privilege interferes with this Court’s authority over the Rules of Evidence. For example, Rule 612 entitles a party to examine a writing used to refresh a witness’s recollection. The privilege yields to this rule of evidence because retaining a privilege over Rule 612 materials would “ignore the unfair disadvantage which could be placed upon the cross-examiner by the simple expedient of using only privileged writings to refresh recollection.” *Bailey v. Meister Brau, Inc.* (N.D.Ill.1972), 57 F.R.D. 11, 13 (applying the federal counterpart to Ohio’s Rule 612).

The Rules for the Government of the Bar are also threatened by the Eighth District’s ruling. A privilege that silences an attorney facing either litigation or disciplinary proceedings exposes the attorney to unwarranted risks of sanctions and interferes with this Court’s power to regulate the bar. See, e.g., *People v. Robnett* (Colo.1993), 859 P.2d 872 (attorney-client privilege did not justify lawyer’s refusal to answer questions in a disciplinary hearing).

Finally, as noted in the previous section, the Eighth District’s expanded privilege directly conflicts with Rule of Professional Conduct 1.6(b)(5), which authorizes attorneys to use information otherwise protected by the privilege “to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client.” The

Rule is a pronouncement of this Court that cannot be swept away by a lower court or the General Assembly. If the Eighth District decision stands, it will effectively remove Rule 1.6(b)(5) from the standards of professional responsibility.

B. A privilege that disables attorneys from defending malpractice charges violates the Remedies Clause and the Due Process Clause

This Court recognized the right of attorneys to defend themselves from malpractice and similar charges when it enacted Rule of Professional Responsibility 1.6(b)(5). The right of lawyer self-defense is also embodied in the clauses of Section 16, Article I of the Constitution that guarantee a right to remedy and due process.

A lawyer's right to self defense is primarily a right to protect her reputation. This Court ruled long ago that the General Assembly may not invade the settled remedies for attacks on reputation. *Byers v. Meridian Printing Co.* (1911), 84 Ohio St. 408, 95 N.E. 917 (Section 16, Article I preserves substantive law of remedies for libel; invalidating statute). The Fifth Circuit has likewise recognized that the privilege cannot abridge an attorney's right to a remedy. "The assertion of ethical barriers to [the attorney's] attempt to vindicate his personal claims creates a conflict with another fundamental policy: the availability of a legal forum for the adjudication of rights. * * * While [there is no] broad 'right' of access to federal court, the courtroom door should not lightly be barred to a person who has a tenable legal claim." *Doe v. A. Corp.* (C.A.5 1983), 709 F.2d 1043, 1048. The Eighth District's holding violates Section 16, Article I by removing attorneys' right to a remedy for charges of malpractice or in disputes on unpaid fees.

The right of self defense is also protected by the due process clause of Section 16. Thus, documents otherwise privileged are discoverable because "attorneys have a due

process right to defend themselves.” *Qualcomm Inc. v. Broadcom Corp.* (S.D.Cal. March 5, 2008), No. 05CV1958-RMB, 2008 WL 638108, at *3. The right to self-defense means that the attorney can use otherwise-privileged documents even if non-privileged documents are available. *Children First Foundation, Inc. v. Martinez* (N.D.N.Y. Dec. 10, 2007), No. 1:04-CV-0927, 2007 WL 4344915, at *18 (attorney’s right of self-defense means “she is entitled to present her version of the facts with suitable evidence of her choosing”). “[T]he attorney must be afforded the right to defend himself because the alternatives are unacceptable. Although the attorney-client privilege may be important enough to justify suppressing evidence that allows a guilty person to escape civil or criminal liability, it cannot be important enough to justify imposing such liability on an innocent person.” Subin, 70 Iowa L. Rev. 1091, 1140-41. Or, as the Fifth Circuit said, a “lawyer, however, does not forfeit his rights simply because to prove them he must utilize confidential information. Nor does the client gain the right to cheat the lawyer by imparting confidences to him.” *Doe*, 709 F.2d 1043, 1050.

On the attorney’s side, then, is the fundamental right to fairness, due process and self-defense in litigated disputes with the client. On the client’s side, the privileged information remains so with respect to third parties but is fairly disclosed within the context of the attorney-client dispute between the parties who already know and have access to such information. On the tribunal’s side, having access to relevant information to resolve the dispute between attorney and client is the best way to achieve a just result.

CONCLUSION

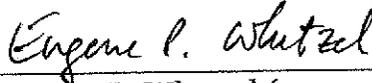
The Eighth District has radically altered the course of the attorney-client privilege in Ohio. The Eighth District’s new path also eliminates well-established exceptions to

the privilege and conflicts with Ohio's Constitution and the Ohio Rules of Professional Responsibility. Ultimately the Eighth District's decision is wrong because it is unfair and will only promote injustice in any case where the attorney-client relationship has broken down into a dispute. The Ohio State Bar Association urges reversal.

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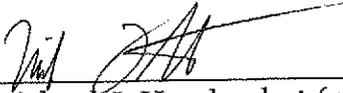
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