

ORIGINAL

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 Appellate  
District

Court of Appeals Case No. 92366

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REPLY BRIEF OF APPELLANT SQUIRE, SANDERS & DEMPSEY L.L.P.

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Anthony J. Hartman (0021226)  
(Counsel of Record)  
Jay H. Salamon (0029192)  
Hugh D. Berkson (0063997)  
HERMANN, CAHN & SCHNEIDER LLP  
1301 East Ninth St., Suite 500  
Cleveland, OH 44114  
Telephone: (216) 781-5515  
Facsimile: (216) 781-1030  
ahartman@hcsattys.com  
jsalamon@hcsattys.com  
hberkson@hcsattys.com

Jeffrey L. Richardson  
MITCHELL SILBERBERG & KNUPP LLP  
11377 West Olympic Blvd.  
Los Angeles, CA 90064  
Telephone: (310) 312-2000  
Facsimile: (311) 312-3100  
jlr@msk.com

Attorneys for Appellee  
GIVAUDAN FLAVORS CORPORATION

John M. Newman, Jr. (0005763)  
(Counsel of Record)  
Louis A. Chaiten (0072169)  
Pearson N. Bownas (0068495)  
Matthew P. Silversten (0074536)  
Eric E. Murphy (0083284)  
JONES DAY  
North Point  
Cleveland, OH 44114-1190  
Telephone: (216) 586-3939  
Facsimile: (216) 579-0212  
jmnewman@jonesday.com  
lachaiten@jonesday.com  
pnbownas@jonesday.com  
mpsilversten@jonesday.com  
eemurphy@jonesday.com

Attorneys for Appellant  
SQUIRE, SANDERS & DEMPSEY  
L.L.P.

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## INTRODUCTION

Givaudan does not dispute that *exceptions* to the scope of attorney-client privilege are distinct from *waiver* of the privilege. It does not dispute that the issue here is whether Ohio recognizes an exception to the scope of the privilege—the self-protection exception. And it does not dispute that every jurisdiction to have addressed the question has recognized the exception.

Givaudan instead argues that Ohio’s attorney-client privilege statute plainly and unambiguously sets the scope of the privilege, thereby precluding any reliance on traditional common-law limitations to interpret the statute’s scope. But the Court has already rejected that argument. It has repeatedly held that the scope of the communications covered by the statute is ambiguous, and it has repeatedly relied upon common-law exceptions as an interpretive tool to delimit the privilege’s scope. *See, e.g., Lemley v. Kaiser* (1983), 6 Ohio St. 3d 258, 266 (interpreting the statute to incorporate the crime-fraud exception); *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St. 3d 638, 661; *Boone v. Vanliner Ins. Co.* (2001), 91 Ohio St. 3d 209, 213-14. Givaudan does not even attempt to reconcile its argument with these holdings, except to assert that other exceptions, such as the crime-fraud or joint-representation exceptions, “are not before this Court.” (Br. of Appellee at 45.) But they are, because to accept Givaudan’s argument the Court would have to abolish those exceptions also and overrule multiple other cases applying common law to limit the scope of the privilege.

Givaudan attempts to make much of a body of law, mentioned in *Jackson v. Greger*, 110 Ohio St. 3d 488, 2006-Ohio-4968, that has rejected “judicially created” exceptions to the scope of privilege. But that body of law is entirely consistent with the existence of the self-protection exception, which is well-supported at common law. The General Assembly has *instructed* the Court to look to common-law concepts when interpreting statutory language that is not self-defining. R.C. 1.42, 1.49(D). The “judicially created” exceptions to which the Court has

referred and which it has resisted are policy-based exceptions that have been urged upon it, not ones historically well-supported at common law. In *Boone*, for example, despite disagreement on whether an exception to the scope of the privilege for bad-faith denial of insurance coverage was well-supported, the Court was *unanimous* that the statute does incorporate historically well-supported exceptions. See 91 Ohio St. 3d at 218-19 (Cook, J., dissenting) (arguing that the exception at issue there was a judicial creation, but agreeing that the statute incorporates well-supported common-law exceptions like the crime-fraud and joint-representation exceptions).

Here, we do not ask the Court to create a policy-based exception. We ask the Court to retain a traditional and well-supported exception to the scope of privilege—one that is as well-rooted in common law as are the crime-fraud and joint-representation exceptions. Our position thus reconciles all of the Court’s cases interpreting the attorney-client privilege statute.

Givaudan’s position would require the Court to discard multiple cases, and should be rejected.

In the alternative, Givaudan asks the Court to stay this action pending resolution of underlying product-liability litigation. The court of appeals affirmed the trial court’s denial of a stay (App. 11-12), and Givaudan has not taken a cross-appeal from that decision. This Court lacks jurisdiction to modify a lower-court judgment at an appellee’s request where, as here, the appellee fails to take a cross-appeal. Even if the Court had jurisdiction to address the issue of a stay, moreover, the part of the court of appeals’ decision rejecting a stay was correct.

## ARGUMENT

### **I. Contrary To Givaudan’s Arguments, Ohio’s Statutory Attorney-Client Privilege Has Incorporated The Self-Protection Exception.**

#### **A. R.C. 2317.02(A)’s Language Does Not, As Givaudan Claims, Plainly And Unambiguously Define The Privilege’s Scope.**

Givaudan’s primary argument is that R.C. 2317.02(A) precludes reliance on common-law concepts like the self-protection exception because it clearly and unambiguously defines the

privilege's scope. (Br. of Appellee at 8-10.) It is true that courts must enforce a statute's plain language if its boundaries are self-evident. But that rule does not apply here because the language defining R.C. 2317.02(A)'s scope is far from clear. That language—covering “a communication made to the attorney by a client in that relation or the attorney's advice to a client”—is too barebones to plainly delimit the privilege's reach. “[T]he statute,” for example, “does not define what is meant by the term ‘communication.’” *Moskovitz*, 69 Ohio St. 3d at 662 n.8. It could be interpreted in the layperson sense, or in the legal sense to reach only items traditionally protected at common law. See *Taylor v. Sheldon* (1961), 172 Ohio St. 118, 122.

Given this ambiguity, the Court has already rejected Givaudan's “plain language” argument. It has concluded instead that the language “provides only minimal guidance” for determining the privilege's scope. *Moskovitz*, 69 Ohio St. 3d at 662 n.8. And it has made clear that “[i]n the determination [of] whether a communication by a client to an attorney should be afforded the cloak of privilege” under R.C. 2317.02(A), much depends (not on the text) but “on the circumstances of each case.” *Lemley*, 6 Ohio St. 3d at 264 (internal quotation marks and citations omitted). Accordingly, the Court has repeatedly relied upon common-law concepts to determine the privilege's scope. See, e.g., *id.* at 266. Its decision in that regard is fully supported by the canon that common-law rules should be used to interpret statutes that have their roots in the common law. See *Richardson v. Doe* (1964), 176 Ohio St. 370, 372-73.

Givaudan's own arguments show why it cannot rely on the “plain language” rule. It first points out that the statute nowhere expressly *mentions* a self-protection exception. (Br. of Appellee at 8-9.) But the statute does not expressly *reject* the exception either. And simply because the statute does not use the language “self protection” does not eliminate the ambiguity in its general language. In *Richardson*, for example, the “malpractice” statute at issue did not

expressly indicate that a nurse cannot commit malpractice, but the Court reached that result because of the common law. 176 Ohio St. at 372-373. According to the Court, “[i]f the General Assembly had wished to protect groups other than those traditionally associated with malpractice, it should have listed the ones to be covered.” *Id.* at 373. So too here. If the General Assembly had wished to protect communications other than those traditionally associated with the common-law privilege, it should have listed the ones to be covered. The General Assembly’s silence means that the general language defining the privilege should be interpreted consistent with the common law, not contrary to it. *Weis v. Weis* (1947), 147 Ohio St. 416, 428-29.

Indeed, Givaudan concedes that the Court has needed to “interpret” that language, thus finding it unclear. (Br. of Appellee at 10.) Yet it claims the Court was only “interpret[ing] the word ‘communication,’” and that Squire Sanders “cannot suggest that this Court should interpret [that] word . . . to create a self-protection exception.” (*Id.*) To the contrary, even under Givaudan’s reading, the Court has interpreted the word “communication” (1) to exclude communications furthering a bad-faith refusal to settle, *Moskovitz*, 69 Ohio St. 3d at 662-63; (2) to exclude communications furthering a crime or fraud, *id.* at 661; *Lemley*, 6 Ohio St. 3d at 266; and (3) to include “knowledge gained by an attorney,” not just written or spoken words, *Taylor*, 172 Ohio St. at 122-24. These cases establish that the word is flexible enough to exclude attorney-client communications in a lawsuit between the two, as it always has.

**B. Givaudan Erroneously Relies On Case Law Rejecting Judicial Development Of Policy-Based Limitations On Privilege Statutes.**

Givaudan next relies on the body of law, mentioned in *Jackson*, that has rejected “judicially created” limitations on the privilege statute. 2006-Ohio-4968, at ¶ 13 (emphasis added). Givaudan misinterprets this law.

**1. Incorporating Common-Law Exceptions Into The Statutory Attorney-Client Privilege Does Not Amount To “Judicial Legislation.”**

Givaudan falsely equates *judicially created* limitations with *longstanding common-law* exceptions to the attorney-client privilege, including the crime-fraud, joint-representation, and self-protection exceptions. (Br. of Appellee at 10-13, 15-17.) Because the privilege’s scope is unclear, the Court must rely on traditional tools of interpretation to determine it. *See Sheet Metal Workers’ Int’l Ass’n v. Gene’s Refrigeration, Heating & Air Conditioning, Inc.*, 122 Ohio St. 3d 248, 2009-Ohio-2747, at ¶ 29. For a statute that codifies the common law (except where clearly displaced), the most notable tool is the common law itself. *Richardson*, 176 Ohio St. at 372-373. As such, since the self-protection exception has long been engrained at common law (Br. of Appellant at 13-19), the statute necessarily includes it.

This exception does not arise from “judicial creation,” as Givaudan claims, or “supplant the legislature,” *Jackson*, 2006-Ohio-4968, at ¶ 13. To the contrary, the General Assembly itself instructs courts to look to the common law when construing common-law concepts or unclear statutory language. R.C. 1.42, for example, indicates that courts should construe “[w]ords and phrases that have acquired a technical or particular meaning” according to that meaning. And R.C. 1.49(D) permits courts to examine the “common law” when language is unclear. Accordingly, interpreting a statute that was based on the common law to be consistent with the common law (except where clearly displaced) fully comports with legislative intent.

Confirming this point, the Court has repeatedly acknowledged traditional exceptions as being part of the attorney-client privilege. It has, for example, concluded that the statute incorporates the traditional crime-fraud exception. *Lemley*, 6 Ohio St. 3d at 266; *Moskovitz*, 69 Ohio St. 3d at 661. And it has held that the statute incorporates an exception for communications illustrating a bad-faith refusal to settle, *id.*, or a bad-faith denial of insurance

coverage, *Boone*, 91 Ohio St. 3d at 213-14. To adopt Givaudan’s interpretation of the statute, as clearly excluding well-supported common-law exceptions, the Court would have to overrule these and many other cases in which the Court turned to longstanding common law to define the scope of the privilege.

*Boone* is particularly illuminating in this respect. Though *Boone* was a split decision, the Court was *unanimous* on one critical point: Both the majority and dissent agreed that the privilege statute incorporates “well supported” exceptions at common law, as opposed to ones judicially created out of whole cloth. *Id.* at 219 (Cook, J., dissenting). The dissent agreed, for example, that the statute incorporates the joint-representation exception: “When an attorney has represented the common interests of insurer and insured, one joint client (the insurer) cannot assert the privilege in litigation against another joint client (the insured).” *Id.* at 218-19 (Cook, J., dissenting). The majority and dissent simply disagreed whether the particular exception at issue in *Boone* was well-supported. Accepting, as this Court unanimously did in *Boone*, that the statute incorporates well-accepted common-law exceptions, there is no serious room for debate in this case. Givaudan does not, and cannot, dispute that the self-protection exception has as much (if not more) historical support as the crime-fraud and joint-representation exceptions.

**2. Unlike With *Exceptions To Privilege*, The Statutory Attorney-Client Privilege Unambiguously Departs From Common-Law *Waiver* Rules.**

Givaudan next relies on a trio of cases addressing waiver. But R.C. 2317.02(A)’s *clear* rules for determining whether the privilege has been waived are starkly different from its *unclear* rules for determining whether the privilege applies to begin with. Because exceptions fall into the latter category (the scope to begin with), waiver rules are irrelevant. Givaudan simply ignores (and of course does not ask the Court to overrule) law expressly distinguishing between a “*waiver* of the privilege” and an “*exception* to the privilege.” *Boone*, 91 Ohio St. 3d at 213; *see*

also *Restatement (Third) Of The Law Governing Lawyers* §§ 78-85 (expressly distinguishing between “waivers” of privilege, §§ 78-80, and “exceptions” that limit its scope, §§ 81-85).

Givaudan first cites *Jackson* for the proposition that “this Court already determined that the limitations set forth in R.C. 2317.02(A) are clear.” (Br. of Appellee at 9.) But as *Jackson* indicated, those limitations address *waiver*: “R.C. 2317.02(A) clearly enumerates the means by which a client may *waive* the statutory attorney-client privilege.” *Jackson*, 2006-Ohio-4968, at ¶ 12 (emphasis added). *Jackson* shows that R.C. 2317.02(A) displaces contrary common-law *waiver* rules because the “General Assembly has chosen to limit the means by which a client’s conduct may effect waiver.” *Id.* at ¶ 13. *Jackson* did not hold, however, that R.C. 2317.02(A) departs from common-law rules on the privilege’s scope. To the contrary, on its specific facts, *Jackson* noted that the privilege protected *documents* (a result comports with common law), 2006-Ohio-4968, at ¶ 7 n.1, even though the statute could be read to protect only *testimony*. R.C. 2317.02(A)(1) (noting that “an attorney” “shall not testify”). *Jackson* thus proves that the relevant language on the privilege’s scope—unlike the irrelevant language on waiver—triggers the canon that statutes incorporating the common law should be interpreted consistent with it.

Givaudan next relies on *Swetland v. Miles* (1920), 101 Ohio St. 501, 504, which refused to permit a client’s heirs to *waive* the privilege upon the client’s death. (See Br. of Appellee at 12.) Recognizing the problems with relying on waiver cases, however, Givaudan seeks to transform *Swetland* into a case addressing the privilege’s scope, pointing out that it used the term “exception” in a few places. (*Id.*) But that language aside, *Swetland* was a prototypical waiver case, as this Court has noted. *State v. McDermott* (1995), 72 Ohio St. 3d 570, 572 (noting that *Swetland* “held that the Ohio statute on privileged communication . . . evinced the sole criteria for *waiving* the privilege.”) (emphasis added).

For the same reasons, *Swetland* provides no support for Givaudan’s claim that the Court cannot look to common-law authorities elsewhere. (Br. of Appellee at 22.) While *Swetland* was “not especially concerned about the decisions in other courts,” that was only because R.C. 2307.02(A)’s waiver rules were “clear and comprehensive.” 101 Ohio St. at 505. By contrast, because the text leaves the privilege’s scope unclear, the Court has repeatedly relied on out-of-state authorities to determine the common-law rules incorporated into the statute. *See, e.g., Moskovitz*, 69 Ohio St. 3d at 660-61 (citing Wigmore); *Lemley*, 6 Ohio St. 3d at 264-66 (citing New York cases); *Taylor*, 172 Ohio St. at 121-24 (citing California, Kansas, and Nebraska cases and Wigmore).

Lastly, Givaudan cites *Spitzer v. Stillings* (1924), 109 Ohio St. 297, to argue that the Court has rejected the notion that the statutory privilege incorporates common-law rules. (Br. of Appellee at 18.) Yet again, *Spitzer* addressed *waiver*. In *Spitzer*, the Court interpreted one way that a client could waive the privilege—voluntary testimony. 109 Ohio St. at 300. At common law, waiver occurred only if the client specifically testified about communications with counsel. *Id.* at 302 (“If this case were to be decided according to the principles of the common law, a very different situation would be presented.”). Under the statute, however, a client’s testimony waives privilege for all communications “on the same subject,” regardless whether the client specifically testified about those communications. R.C. 2317.02(A)(1). Precisely because they are specific and unarguable, the liberal statutory waiver rules thus displace the narrower common-law waiver rules. *Spitzer*, 109 Ohio St. at 301. *Spitzer*, however, says nothing about whether the statute displaces traditional common-law exceptions to scope.

### **3. Case Law On The Physician-Patient Privilege Is Irrelevant.**

Givaudan lastly relies upon cases interpreting a different statutory privilege, R.C. 2317.02(B)’s physician-patient privilege. (Br. of Appellee at 11, 13, 16-17 (citing *Roe v.*

*Planned Parenthood SW Ohio Region*, 122 Ohio St. 3d 399, 2009-Ohio-2973; *In re Wieland* (2000), 89 Ohio St. 3d 535; *In re Miller* (1992), 63 Ohio St. 3d 99; *State v. Smorgala* (1990), 50 Ohio St. 3d 222.) This case law does not help Givaudan for two reasons. *First*, the litigants in these cases did not seek to apply the canon that statutes codifying common-law concepts incorporate the common law. To the contrary, they argued for limitations based, not on traditional rules of statutory interpretation, but on policy grounds. *Smorgala*, 50 Ohio St. 3d at 223 (“urg[ing] this court to append a judicial public policy limitation”); *Wieland*, 89 Ohio St. 3d at 538 (urging an exception where “the patient is not voluntarily seeking help”); *Miller*, 63 Ohio St. 3d at 108 (requesting an exception based on the “interest in ensuring that those mentally ill patients who present a danger to themselves or others be hospitalized”); *Roe*, 2009-Ohio-2973, at ¶ 48-52 (asking for exception based on the “public policy in protecting children”).

Here, while sound policy fully supports the self-protection exception (Br. of Appellant at 18-19), we have not relied on policy for incorporating it into the statutory privilege (*id.* at 20-27). Rather, the legislature’s non-definitive textual treatment of scope allows, and in fact calls for, incorporation of longstanding exceptions (regardless of policy), including the self-protection, crime-fraud, and joint-representation exceptions. Traditional rules of statutory construction justify, indeed point toward, that reading, unlike the policy-based arguments in *Roe*, *Wieland*, *Miller*, and *Smorgala*.

*Second*, unlike the attorney-client privilege, “[t]he physician-patient privilege was not recognized at common law,” and thus there was no common-law understanding of the scope of that privilege to incorporate into the statute. Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence Under The Rules* 938 (4th ed. 2000). That is why the General Assembly codified numerous and detailed rules and limitations for the physician-patient privilege, *see* R.C.

2317.02(B), including a *specific definition* of the scope of the “communication[s]” that the physician-patient privilege protects, *id.* 2317.02(B)(5)(a). For the attorney-client privilege, by contrast, the legislature has “provide[d] only minimal guidance,” *Moskovitz*, 69 Ohio St. 3d at 662 n.8, and no definition of the scope of the “communication[s]” protected. The legislature instead intended for the common law to be used as a guide. *Richardson*, 176 Ohio St. at 372-73.

**C. Ohio’s Statutory Privilege Has Incorporated The Self-Protection Exception For Over A Century.**

As already explained (Br. of Appellant at 22-24), the General Assembly has never rejected the self-protection exception even though it has been Ohio law for a century. *Keck v. Bode* (Ohio Cir. Ct. 1902), 13 Ohio C.D. 413, 415, 1902 WL 868, at \*1 (approving of self-protection exception, but excluding communication at issue on prejudice grounds), *rev’d without opinion by Bode v. Keck* (1903), 69 Ohio St. 549 (reinstating trial court’s judgment admitting communication under self-protection exception). Because none of the many intervening amendments to the statute has rejected *Keck*, the legislature’s “inaction in the face of [*Keck*] . . . evidences legislative intent to retain [it].” *State v. Cichon* (1980), 61 Ohio St. 2d 181, 183-84.

To rebut this analysis, Givaudan first asks the Court to place no reliance on the circuit court’s *Keck* decision. It suggests that the legislature is presumed to be aware of only *this Court’s* decisions. (Br. of Appellee at 14.) That is not true. “It is presumed that the General Assembly is fully aware of *any* prior judicial interpretation.” *Clark v. Scarpelli* (2001), 91 Ohio St. 3d 271, 278 (emphasis added). In fact, the Court has even applied the rule to the Attorney General’s interpretations, not just interpretations of this and inferior courts. *Maitland v. Ford Motor Co.*, 103 Ohio St. 3d 463, 2004-Ohio-5717, at ¶ 26; *see also In re Marriage License for Nash* (11th Dist.), 2003 WL 23097095, 2003-Ohio-7221, at ¶ 34 (noting that the General

Assembly's amendment, which did not alter *lower courts'* interpretation, illustrated its intent to follow that interpretation).

In any event, to reverse the circuit court in *Keck* and allow the testimony of the attorney under the self-protection exception, this Court *necessarily* agreed that Ohio recognizes the black-letter self-protection exception. Givaudan characterizes this as “pure speculation” (Br. of Appellee at 14), arguing that the Court could have disagreed with the circuit court's decision “that the admission of evidence was unduly prejudicial” without considering the exception. (*Id.* at 15.) That is not true. This Court's reversal of the appellate court opinion excluding the attorney's testimony required it to conclude that the evidence was *properly* admitted. To do so, it needed to find *both* that the exception provided a valid basis for admitting the evidence *and* then that the evidence was not otherwise prejudicial.

**D. The Court Should Not Ignore The Rules Of Professional Conduct.**

Givaudan's argument regarding Rule of Professional Conduct 1.6(b)(5) takes aim at a straw man. Givaudan asserts that the Rule does not *create* the exception. (Br. of Appellee at 19.) We agree. The exception is rooted in R.C. 2317.02(A). Givaudan offers no response to the argument we actually made in our opening brief—that the Rule *provides support* for interpreting the statute with the common law in mind. That is because Givaudan's reading creates serious tension between the statute and Rule 1.6(b)(5). The former would *prohibit* lawyers from using evidence that the latter *permits* them to use. And since “the rule of confidentiality” and “the attorney-client privilege” are “related bodies of law,” Prof. Cond. Rule 1.6 cmt. 3, they should be interpreted in harmony. *See Lannen v. Worland* (1928), 119 Ohio St. 49, syllabus ¶ 1.

Givaudan seeks to distinguish *Lannen* as involving two provisions enacted by the General Assembly. Here, by contrast, it claims that the Court must ignore Rule 1.6 when interpreting R.C. 2317.02(A) because *this Court* enacted the Rule whereas *the General Assembly* passed the

statute. (Br. of Appellee at 19.) But Givaudan fails to explain why that distinction matters. Even if the statute must trump conflicting rules (*id.*), that does not mean the two should be interpreted in isolation. Instead, the Court should choose a “construction that harmonizes both the statute and the pertinent rules” rather than one that “would create a potential conflict” between them. *State ex rel. Thompson v. Spon* (1998), 83 Ohio St. 3d 551, 555.

Givaudan next notes that Rule 1.6 does not compel document production or deposition testimony. (Br. of Appellee at 19.) That is true but irrelevant. It is enough that the Rule supports the proposition that R.C. 2317.02(A) incorporates the self-protection exception. In the face of the exception, Givaudan cannot rely on any privilege to sidestep normal discovery rules.

Finally, Givaudan points out that the Rules of Professional Conduct only “provide guidance to lawyers.” (Br. of Appellee at 19.) But Givaudan’s interpretation would eviscerate that goal by effectively making Rule 1.6(b)(5) a trap for unwary lawyers, who think they may act under the Rule, when (according to Givaudan) they are statutorily forbidden to do so. Rule 1.6 and R.C. 2317.02(A), as “related bodies of law,” Prof. Cond. Rule 1.6 cmt. 3, should be interpreted together.

**E. The Self-Protection Exception Does Not Offend Due Process.**

Lastly, Givaudan claims that refusing to cast aside the traditional self-protection exception—acknowledged in Ohio more than one-hundred years ago, and in every jurisdiction to have addressed the question—would somehow violate due process. Givaudan did not make this argument below, and has waived it. *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St. 3d 486, 2009-Ohio-3626, at ¶ 34. In any event, the argument lacks merit. Givaudan relies on a case about the retroactive application of *legislation*, not *opinions construing legislation*. (Br. of Appellee at 23 (citing *Roe*, 2009-Ohio-2973 at ¶¶ 33, 37).) And its claim depends on the mistaken view that the Court has already somehow rejected the self-protection exception, only now to create it anew.

The Court's cases, however, confirm that R.C. 2317.02(A) has always incorporated traditional exceptions including the one at issue here. There is no retroactivity, and surely no surprise.

**II. With Respect To The Common-Law Attorney-Client Privilege, Givaudan Erroneously Conflates The Self-Protection Exception With Implied Waiver.**

This Court establishes the scope of Ohio's common-law attorney-client privilege. *See, e.g., McDermott*, 72 Ohio St. 3d at 574. It should reaffirm that Ohio's common-law privilege has long incorporated the self-protection exception. As explained in our opening brief (Br. of Appellant at 13-19), that exception is universally accepted.

Givaudan, by contrast, provides no argument why the Court should reject the exception to the common-law privilege. Rather, like the court of appeals (Appx. 19-20), it automatically turns to *waiver* rules. It suggests that it must disclose evidence concerning attorney-client communications only if "vital" to Squire Sanders' defense (Br. of Appellee at 42), the third factor in the implied-*waiver* test established by *Hearn v. Rhay* (E.D. Wash. 1975), 68 F.R.D. 574, 581. But Givaudan simply ignores all of the reasons why *Hearn*—which is used to determine when a third party outside the privileged relationship can gain access to privileged communications—does not apply here. (Br. of Appellant at 32-34.) Applying *Hearn* would transform the exception into a waiver. That would be contrary to the great weight of authority treating the exception as a limit on the privilege's underlying scope. It would also conflict with a principal reason for the exception, which allows a lawyer to litigate claims against a client without risk that the client automatically waives the privilege as to third parties. *United States v. Ballard* (5th Cir. 1986), 779 F.2d 287, 292.

**III. Givaudan Erroneously Suggests That The Self-Protection Exception Does Not Apply To The Work-Product Doctrine.**

As illustrated in our opening brief, the self-protection exception, when it applies, satisfies the work-product doctrine's "good cause" requirement. (Br. of Appellant at 36-37.) In response,

Givaudan first claims that “[t]he attorney-client privilege and the work-product doctrine constitute independent and distinct sources of immunity.” (Br. of Appellee at 43.) Yet, even if they are separate doctrines, Givaudan does not explain why the same exception cannot apply to both. It, for example, ignores the law holding that the crime-fraud exception governs both. *See Edna Selan Epstein, The Attorney-Client Privilege and the Work-Product Doctrine* (3d ed. 2001), Pt. 2, § VI.D at 591; *see, e.g., Kracht v. Kracht* (Ohio App. 8th Dist. June 5, 1997), Nos. 70005, 70009, 1997 WL 298265, at \*9. And it distinguishes the exception for the bad-faith refusal to settle—which applies to both, *Moskovitz*, 69 Ohio St. 3d at 662—by noting only that it involved information found “unworthy of protection.” (Br. of Appellee at 43 n.16.) That statement, however, supports Squire Sanders, because it illustrates that an exception defeats all privilege protections.<sup>1</sup>

#### **IV. Givaudan’s Request For A Stay Is Not Properly Before The Court, And Lacks Merit In Any Event.**

Givaudan requests, in the alternative, that the Court “stay[] the present action pending the resolution of the underlying Butter Flavor Litigation.” (Br. of Appellee at 24.) The Court should reject that request.

##### **A. The Court Lacks Jurisdiction To Convert The Judgment Below Into A Stay.**

The court of appeals affirmed the trial court’s denial of a stay (App. 11-12), and Givaudan has not taken a cross-appeal from that decision. “The Supreme Court is without authority to grant affirmative relief to an appellee by modification of the judgment of the Court of Appeals where no cross-appeal has been taken by Appellee by the filing of a notice of appeal

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<sup>1</sup> Givaudan points out a difference between fact and opinion work product. (*Id.* at 43.) That distinction is irrelevant here. Traditional exceptions defeat any work-product privilege claim in its entirety and do not distinguish between types of work product. *See Moskovitz*, 69 Ohio St. 3d at 662; *Kracht*, 1997 WL 298265, at \*9.

in the Court of Appeals.” *F. Enterprises, Inc. v. Kentucky Fried Chicken Corp.* (1976), 47 Ohio St. 2d 154, 155, syllabus ¶ 5. To grant Givaudan’s alternative request for a stay would constitute a modification of the court of appeals’ judgment, which denied a stay and instead “revers[ed] and remand[ed] to the trial court for it to hold an in camera hearing” regarding waiver. (App. 6.) Because Givaudan failed to cross-appeal, the Court lacks authority to grant Givaudan’s request.

**B. Even If The Issue Were Properly Before The Court, The Lower Courts Were Correct To Reject A Stay.**

The court of appeals held that an order denying a stay of proceedings is not a final appealable order under R.C. 2505.05(B)(4). (App. 11.) That holding was correct, and it independently precludes review of the trial court’s decision to deny a stay. *State ex rel. Scruggs v. Sadler*, 97 Ohio St. 3d 78, 2002-Ohio-5315, ¶ 4 (“R.C. 2503.03 . . . limits the appellate jurisdiction of courts, including the Supreme Court, to the review of final orders, judgments, or decrees.”); *Community First Bank & Trust v. DaFoe*, 108 Ohio St. 3d 472, 2006-Ohio-1503, ¶ 11 (“A court’s order staying an action . . . is not a final order subject to appeal . . . .”); *State v. Weist* (2d Dist.), 2008-Ohio-4006, ¶ 1, 2008 WL 3165928 (holding that an order denying a stay is not a final appealable order); *Holivay v. Holivay* (8th Dist.), 2007-Ohio-6492, ¶ 7, 2007 WL 4260333.

Givaudan fares no better on the merits of a stay. The court of appeals correctly held that, even if it had jurisdiction to review the denial of a stay, the trial court did not abuse its discretion by denying a stay. (App. 11.) The trial court was well within its discretion to deny an open-ended stay of an indefinite period of years pending resolution of hundreds of product-liability claims in multiple jurisdictions. All the cases relied upon by Givaudan (Br. of Appellee at 24-30) involve staying a case pending the result of a single, finite underlying case (as in the malpractice cases) or sequencing claims within the very same case (as in the insurance cases, such as *Boone*). Here, by contrast, Givaudan asked the trial court to subordinate its own docket

and the matured contract rights of Squire Sanders to a sprawling, inchoate product-liability situation, involving several hundred claimants in multiple courts (including, presumably, new cases filed during the stay), without a recognizable, much less a nearby, endpoint.<sup>2</sup>

Givaudan further asserts (Br. of Appellee at 28) that a stay is necessary to prevent “Givaudan’s ‘full and frank’ attorney-client communications with S[quire Sanders] and the work product arising from Givaudan’s and S[quire Sanders]’ ‘industry and efforts’ . . . fall[ing] into the hands of plaintiffs’ attorneys in the underlying litigation.” But this is a case between former client Givaudan and former counsel Squire Sanders, and all of the materials to be produced are rooted in the Givaudan/Squire Sanders relationship. The irreparable-harm cases cited by Givaudan (Br. of Appellee at 28-29) are distinguishable for the same reason. In those cases, the party seeking discovery of allegedly privileged material was someone outside the underlying privileged relationship. *See Garg v. State Auto. Mut. Ins. Co.* (2d Dist.), 2003-Ohio-5960, ¶ 29, 155 Ohio App. 3d 258 (disclosure to insured of privileged communications between insurer and its attorneys); *United States v. Philip Morris, Inc.* (D.C. Cir. 2003), 314 F.3d 612, 614-15 (disclosure to government of tobacco company’s attorney-client privileged communication). Production here, by contrast, means disclosure to a party (Squire Sanders) within the privileged relationship that is the very subject of the lawsuit.

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<sup>2</sup> Nor is this a situation where Givaudan’s claims must await completion of another litigation in order to assess its supposed losses. (Br. of Appellee at 29 n.14.) The alleged injury relates to supposed billing improprieties, something entirely apart from monetary loss attributable to any underlying adverse judgment or settlement. *See* Supp. 215-24 (Mot. to Compel, App. Ex. H, Givaudan Supp. Resp. to Int. No. 4). There is no need to await the outcome of underlying litigation to pursue allegations of that kind. Givaudan failed to direct the lower courts to anything in the record establishing that damages will depend on the outcome of the underlying product-liability litigation. The related assertion (Br. of Appellee at 29-30 & n.14) that a stay is necessary in order to enable Givaudan to “mitigate” damages rests on the same unsupported *ipse dixit*: that Givaudan needs to await the outcome of underlying litigation to know its damages.

Givaudan lastly contends (Br. of Appellee at 30-31) that Squire Sanders would suffer no cognizable harm from a stay. That is incorrect. A “[d]elay can lead to a less accurate outcome as witnesses become unavailable and memories fade.” *New York v. Hill* (2000), 528 U.S. 110, 117. Unavailable witnesses and faded memories would be an especially acute concern were discovery concerning the Givaudan/Squire Sanders relationship forestalled for an indefinite period of years. Furthermore, forcing Squire Sanders to wait until an unspecified “sometime in the future” to enforce its contractual rights is harm enough, and none of Givaudan’s cases say otherwise. And Givaudan’s own description of the stakes involved raises the very legitimate concern that, if this case is stayed until all the underlying tort cases (and probably others yet to emerge) go to verdict and become final, Givaudan might not have money left to pay Squire Sanders. It is not “sheer speculation” (Br. of Appellee at 31) to take Givaudan at its word concerning the financial stakes of the product-liability litigation. The court of appeals correctly determined that the trial court had not abused its discretion in denying a stay.

**V. Givaudan’s Remaining Arguments Are Misplaced.**

**A. Givaudan’s Policy Arguments Are Unconvincing And Beside The Point.**

Givaudan asserts that the self-protection exception does not adequately protect it from disclosure of sensitive materials to third parties outside of the Squire Sanders/Givaudan relationship. “[T]he law in this area,” complains Givaudan, “is far from certain.” (Br. of Appellee at 31.) That assertion is unconvincing and beside the point. No jurisdiction ever to confront the question whether there is a self-protection exception apart from waiver has ever rejected the existence of that exception. There is no uncertainty whatsoever that the self-protection exception applies only in litigation between former client and lawyer, and does not cover third-party requests for documents and information. There will be even more certainty of scope if this Court reaffirms the distinction between the self-protection exception and waiver.

Ohio ought not to become the first jurisdiction in the country to abrogate the self-protection exception simply because a litigant speculates that some other jurisdiction someday might abrogate it or refuse to recognize its boundaries.

Givaudan’s discussion of matters such as confidentiality orders and trial plans (Br. of Appellee 34-37) is entirely premature, because it has refused to let the trial court take up these matters in the first instance. The trial court is in the best position to craft procedures to ensure that confidential information remains within this litigation.

In any event, as Givaudan itself argues, the parties’ policy disputes “are not before this Court.” (Br. of Appellee at 20.) The question is whether common law recognized a self-protection exception to the scope of privilege and whether that exception—like the crime-fraud and joint-representation exceptions—has for that reason been incorporated into Ohio law.

**B. *In Camera* Review Is Not Required.**

Givaudan does not dispute that *in camera* review (a gargantuan judicial undertaking here) is simply unnecessary to determine that documentation of the Squire Sanders/Givaudan relationship is “relevant and reasonably necessary” in litigation regarding the Squire Sanders/Givaudan relationship. *Restatement (Third) of Law Governing Lawyers* § 83; *see also* Prof. Cond. Rule 1.6(b)(5). Givaudan instead argues that the standard is not what is “relevant and reasonably necessary,” but what is “essential,” citing the court of appeals’ opinion in *Keck*. The argument is unconvincing. To begin with, in this context, there is no material difference between “reasonably necessary” and “essential.” Those terms just represent different ways of saying the same thing—that “[w]hen a controversy arises between client and attorney the facts of which are evidence[d] by communications between them, *the very necessities of the case* require an exception . . . .” *Keck*, 1902 WL 868, at \*1 (emphasis added). It is the very nature of the case that makes obtaining and using relevant information “reasonably necessary” or “essential.” The

court of appeals in *Keck* simply found (notably: incorrectly, per this Court) that the particular information at issue (the client's confession to the attorney of wrongdoing) was irrelevant to the particular claims made by the attorney, and unduly prejudicial. *Id.* at \*2. *Keck*, moreover, involved a determination about admissibility at trial, and nowhere suggests that an *in camera* hearing would be required simply to obtain discovery regarding the communications. Besides, Givaudan has not identified a single covered document outside the realm of reasonableness.

**C. Givaudan's Assertion Concerning Production Of Documents From Current Givaudan Counsel Is A Red Herring.**

Givaudan next asserts that "S[quire Sanders'] motion and the Trial Court's order plainly cover all of [its] requests, many of which seek communications between Givaudan and Morgan Lewis, Givaudan's 'new defense counsel.'" (Br. of Appellee at 40.) Were Givaudan correct, the Court could simply narrow the trial court's order to exclude communications between Givaudan and Morgan Lewis. But the assertion is incorrect. Squire Sanders' motion (as opposed to its earlier document requests) did not seek, and the trial court's order did not compel, production of communications between Givaudan and Morgan Lewis. (Supp. 229, 244 (stating that communications with successor counsel "not involved here.")) In the trial court, Givaudan itself obviously saw the motion as *not* seeking production of Morgan Lewis documents, because it did not oppose the motion on that ground. (Supp. 248-73.)

**D. Squire Sander's Motion Sought Permission To Use, Not Just Production Of, Documents Covered By The Self-Protection Exception.**

Givaudan claims it had no opportunity to respond to Squire Sanders' request that the trial court grant it permission to use documents in its own possession covered by the self-protection exception. (Br. of Appellee at 40-41.) Not so. A key issue identified in Squire Sanders' motion was whether it could use items in its own possession by sharing them with its expert. (Supp. 230.) In any event, if the Court continues to recognize the self-protection exception, there can be

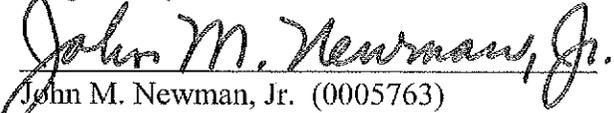
no doubt that it applies to Squire Sanders' use, and not just Givaudan's production, of documents covered by the exception. The latter encompasses the former, because the privilege simply does not apply in a suit between the attorney and client over the attorney's legal services. Besides, there would be no occasion for production if the materials in question were not open to use. After all, that is the whole idea.

### 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.

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Respectfully submitted,

  
John M. Newman, Jr. (0005763)  
(Counsel of Record)

Louis A. Chaiten (0072169)  
Pearson N. Bownas (0068495)  
Matthew P. Silversten (0074536)  
Eric E. Murphy (0083284)  
JONES DAY  
901 Lakeside Avenue  
Cleveland, OH 44114-1190  
Telephone: (216) 586-3939  
Facsimile: (216) 579-0212  
jmnewman@jonesday.com  
lachaiten@jonesday.com  
pnbownas@jonesday.com  
mpsilversten@jonesday.com  
eemurphy@jonesday.com

Attorneys for Appellant  
SQUIRE, SANDERS & DEMPSEY L.L.P.

## CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 2010, I served the foregoing Reply Brief of Appellant Squire, Sanders & Dempsey L.L.P. by email and by U.S. mail upon the following counsel:

Anthony J. Hartman (0021226)  
(Counsel of Record)  
Jay H. Salamon (0029192)  
Hugh D. Berkson (0063997)  
HERMANN, CAHN & SCHNEIDER LLP  
1301 East Ninth St., Suite 500  
Cleveland, OH 44114  
Telephone: (216) 781-5515  
Facsimile: (216) 781-1030  
ahartman@hcsattys.com  
jsalamon@hcsattys.com  
hberkson@hcsattys.com

Jeffrey L. Richardson  
MITCHELL SILBERBERG & KNUPP LLP  
11377 West Olympic Blvd.  
Los Angeles, CA 90064  
Telephone: (310) 312-2000  
Facsimile: (311) 312-3100  
jlr@msk.com

Attorneys for Appellee  
GIVAUDAN FLAVORS CORPORATION

Sandra J. Anderson (0002044)  
(Counsel of Record)  
Michael J. Hendershot (0081842)  
VORYS, SATER, SF. YMOUR AND  
PEASE LLP  
52 East Gay Street  
Columbus, Ohio 43215  
Telephone: (614) 464-6405  
Facsimile: (614) 719-4875  
sjAnderson@vorys.com  
mjHendershot@vorys.com

Eugene P. Whetzel (0013216)  
Ohio State Bar Association  
1700 Lake Shore Drive  
Columbus, Ohio 43204  
Tel: (614) 487-2050  
Fax: (614) 485-3191  
gwhetzel@ohiobar.org

Attorneys for Amicus Curiae,  
OHIO STATE BAR ASSOCIATION

  
John M. Newman, Jr. (0005763)  
Counsel of Record for Appellant  
Squire, Sanders & Dempsey L.L.P.