

ORIGINAL

IN THE SUPREME COURT OF OHIO

Squire, Sanders & Dempsey L.L.P.,

Plaintiff-Appellant,

v.

Givaudan Flavors Corporation,

Defendant-Appellee.

Case No. 2009-1321

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

Court of Appeals Case No. 92366

**APPELLEE GIVAUDAN FLAVORS CORPORATION'S MOTION FOR
RECONSIDERATION; AND MEMORANDUM IN SUPPORT THEREOF**

ORAL ARGUMENT REQUESTED

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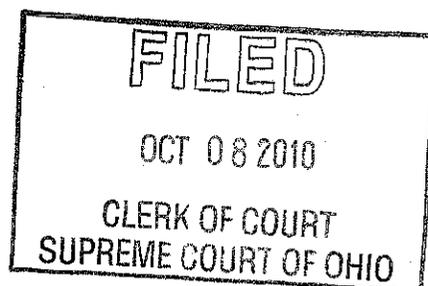
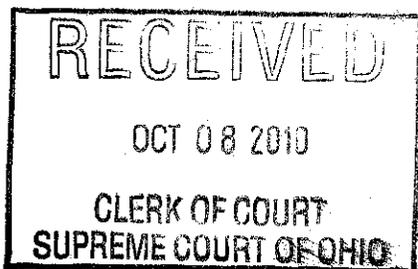


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MOTION FOR RECONSIDERATION

Givaudan Flavors Corporation respectfully moves this Court for reconsideration of Slip Opinion No. 2010-Ohio-4469 issued in the above-entitled case on September 28, 2010. This motion is timely made pursuant to Section 2 of the Supreme Court Practice Rules, Rule XI. Because this issue will significantly impact the remainder of this litigation and future Ohio jurisprudence in general, Givaudan respectfully requests oral argument.

The reasons and authorities for reconsideration are set forth in the attached memorandum and incorporated as part of this motion.

Dated: October 7, 2010

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MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

Givaudan Flavors Corporation (“Givaudan”) seeks reconsideration of Slip Opinion No. 2010-Ohio-4469 (“Opinion”) to address a single, but critical, sentence in the Conclusion.

In the Syllabus and throughout the body of the Opinion, this Court consistently states that the common law *self-protection* exception permits an attorney who is charged with malpractice or other wrongdoing or who is trying to collect unpaid fees (collectively, “charged attorney”) to testify regarding communications with the client where it is necessary for the charged attorney to *protect himself or herself*. Here, the law firm of Squire Sanders & Dempsey LLP (“SSD”) is charged with malpractice and other wrongdoing, and Givaudan is the client. Accordingly, this Court’s holding in the Syllabus and in the body of the Opinion would permit an SSD attorney to testify at trial about attorney-client communications with Givaudan to the extent such testimony is necessary for self-protection.¹

However, the Conclusion (at ¶ 64) appears to inadvertently misstate this holding. Rather than re-state that the self-protection exception *permits a charged attorney to testify* when necessary, the Conclusion states an entirely different proposition: that “the self-protection exception *permits discovery of the evidence* necessary to establish a claim or defense on behalf of the attorney.” Opinion, ¶ 64 (emphasis added). This appears entirely inadvertent as neither the Syllabus nor the body of the Opinion even mentions, much less analyzes, whether the self-protection exception compels the client to provide discovery regarding attorney-client

¹ For the record, many of Givaudan’s claims do not necessitate SSD’s testimony regarding attorney-client communications. As explained to the Trial Court below, Givaudan discovered, among other things, that SSD intentionally and knowingly transmitted (and collected payments for) invoices for legal services containing massively-inflated billing entries, as well as personal expenses for vacations, luxury hotels, airfare, and meals that were entirely unrelated to Givaudan matters. To the extent SSD develops an explanation for these and other improper billing practices, it can provide such testimony without revealing any attorney-client communications.

communications. Moreover, such a rule would hardly constitute “*self*-protection.” Assuming this language is inadvertent, Givaudan respectfully requests that this Court, upon reconsideration, modify the Conclusion to clarify that the self-protection exception permits the charged attorney (SSD) to testify when necessary, but does not require the client (Givaudan) or its in-house attorneys (who are not charged with malpractice or other wrongdoing and who are not trying to collect unpaid fees) to testify about or produce attorney-client communications.

Alternatively, in the unlikely event this Court intended its Conclusion language to radically alter the 150-year-old self-protection exception to affirmatively require client disclosure of attorney-client communications, this would constitute patent error. First, the very essence of the exception is to permit the charged attorney to self-protect through his or her own testimony. Second, the lone Ohio case (*In re Butler's Estate*) cited by this Court in support of the self-protection exception addresses only when a charged attorney is permitted to testify, not whether the client is required to testify about or produce attorney-client communications. Third, no one (this Court, SSD, or Givaudan) located any Ohio case in which a court used the self-protection exception to force the client to testify about attorney-client communications. Fourth, the Opinion states that the self-protection exception comports with Rule of Professional Conduct 1.6(b)(5) (“Rule 1.6”), but that rule addresses only when a charged attorney is permitted to testify, not when the client is required to testify about or produce attorney-client communications. Fifth, all of the non-Ohio cases cited in the Opinion (and in SSD’s merit brief) similarly relate to when a charged attorney is permitted to testify, not to when the client is required to testify or produce attorney-client communications.

Accordingly, whether the Conclusion’s expansion of the self-protection exception to include “discovery” from the client regarding attorney-client communications (Opinion, ¶ 64)

constitutes an inadvertent mistake or a patent error, the remedy is the same. This Court, upon reconsideration, should modify the language to confirm, consistent with the Syllabus and the body of the Opinion, that the self-protection exception permits a charged attorney to testify on relevant matters when necessary to protect himself or herself, but it does not require a client to testify about or produce attorney-client communications.

A. The Syllabus Clearly States The Holding Regarding The Scope Of The Self-Protection Exception: Ohio Recognizes A Self-Protection Exception That Permits A Charged Attorney To Testify When Necessary

The Syllabus states:

Ohio recognizes the common-law self-protection exception to the attorney-client privilege, which *permits an attorney* to testify concerning attorney-client communications where necessary to establish a claim for legal fees on behalf of the attorney or *to defend against a charge of malpractice or other wrongdoing* in litigation between the attorney and the client.

Opinion, Syllabus at 1 (emphasis added).

Neither this sentence nor any other portion of the Syllabus states that the self-protection exception to the attorney-client privilege would require a client (or its in-house counsel) to testify about or produce attorney-client communications.

B. The Opinion Clearly Frames The Issue Considered As: Whether A Self-Protection Exception Permits A Charged Attorney To Testify When Necessary

The Opinion clearly defines the “issue” considered by this Court as:

whether the common-law self-protection exception to the attorney-client privilege, *permitting an attorney* to reveal attorney-client communications when necessary *to establish a claim or defense on the behalf of the attorney*, applies as an exception to R.C. 2317.02(A) ...

Opinion, ¶ 2 (emphasis added).

Later in the Opinion, this Court reiterates that the “central issue” is:

whether Ohio recognizes the self-protection exception to the attorney-client privilege *permitting an attorney to testify* concerning attorney-client communications *to establish a claim or defense on behalf of the attorney* in connection with litigation against a client or a former client.

Id., ¶ 15 (emphasis added).

Neither of these two sentences nor any other language in the body of the Opinion frames the issue as to whether the self-protection exception would require a client (or its in-house counsel) to testify about or produce attorney-client communications.

C. The Opinion Repeats And Explains The Holding In The Syllabus: Ohio Recognizes A Self-Protection Exception That Permits A Charged Attorney To Testify When Necessary

Consistent with the Syllabus (and the issue framed by this Court), the Opinion states *six separate times* that the holding relates to whether the self-protection exception permits a charged attorney to testify to attorney-client communications where necessary:

[A]n *attorney should be permitted to testify* concerning attorney-client communications *where necessary to collect a legal fee or to defend against a charge of malpractice or other wrongdoing* in litigation against a client or former client.

Opinion, ¶ 4 (emphasis added).

At common-law, ‘[a]n exception to the attorney-client privilege *permits an attorney to reveal* otherwise protected confidences when necessary *to protect his own interest.*’

Id., ¶ 34 (citation omitted, alteration in original).

The rule is very broad which *permits testimony of an attorney in support of his claim* for fees.

Id., ¶ 37 (citation and quotation marks omitted; emphasis added).

Further, the self-protection exception to the attorney-client privilege *permitting the attorney to testify* also applies when the client puts the representation at issue by *charging the attorney with a breach of duty or other wrongdoing*.

Id., ¶ 41 (emphasis added).

Ohio recognizes the common-law self-protection exception to the attorney-client privilege, which *permits an attorney to testify* concerning attorney-client communications where necessary *to establish a claim* for legal fees *on behalf of the attorney* or *to defend against a charge of malpractice or other wrongdoing* in litigation between the attorney and the client.

Id., ¶ 48 (emphasis added).

Neither these references nor any other portion of the body of the Opinion state that the common-law self-protection exception to the attorney-client privilege would require a client (or its in-house counsel) to testify about or produce attorney-client communications.

D. The Conclusion Appears To Inadvertently Misstate The Holding

This Court's conclusion regarding the existence and scope of the self-protection exception is set forth in Paragraph 64 of the Opinion, which states:

Ohio recognizes a common law self-protection exception to the attorney-client privilege codified in R.C. 2317.02(A). Thus, when the attorney client relationship has been placed at issue in litigation between an attorney and a client or a former client, the self-protection exception *permits discovery of the evidence* necessary to establish a claim or defense on behalf of the attorney.

(Emphasis added).

The above string of excerpts demonstrates that the formulation of the self-protection exception in the Conclusion materially differs from this Court's statements in the Syllabus and throughout the Opinion. Because no explanation or analysis is provided, Givaudan assumes that this significantly expanded definition of the self-protection exception – “permits discovery of the evidence” instead of the “an attorney is permitted to testify” – is merely an inadvertent mistake.

Of course, this would not constitute a meaningless mistake. A significant issue in this appeal is whether the self-protection exception requires Givaudan's current and former in-house lawyers (Jane Garfinkel and Fred King) to testify about attorney-client communications. Under the holding set forth in the Syllabus and throughout the body of the Opinion, the clear answer is no. Although Ms. Garfinkel and Mr. King are attorneys, they are not accused of malpractice or other wrongdoing, they are not trying to collect unpaid fees, they are not parties to this litigation, and they do not need to testify to protect themselves against claims of malpractice or other wrongdoing. Accordingly, the self-protection exception described in the Syllabus and throughout the body of the Opinion does not apply to them.

However, the apparently mistaken definition of the self-protection exception in the Conclusion, if accepted, is not limited to charged attorneys who need to protect themselves. Rather, the Conclusion radically alters the self-protection exception to justify a motion to compel the client to produce attorney-client communications and to compel the client's in-house attorneys to testify about attorney-client communications. Obviously, this is not the law in Ohio.

If left uncorrected, the apparent mistake would also cause confusion in future cases. As the first Ohio Supreme Court decision to analyze the self-protection exception to the attorney-client privilege, this Opinion could guide Ohio jurisprudence for decades to come. If this Court did not intend to significantly expand the 150-year-old self-protection exception in its Conclusion (to also require a client to testify about and produce attorney-client communications), now is the time to clarify this point as unequivocally as possible.

E. In The Unlikely Event This Court Intended To Expand The Self-Protection Exception To Require Clients To Testify About And Produce Attorney-Client Communications, This Would Constitute Patent Error

In *State ex rel. Huebner v. W. Jefferson Village Council* (1995), this Court granted a motion to reconsider “[t]he majority *Huebner* opinion [which] reasoned that denial of the

requested writ was justified, in part, by the Home Rule Amendment to the Ohio Constitution.” 75 Ohio St. 3d 381, 383, 662 N.E.2d 339. This Court noted “that the discussion of the Home Rule Amendment in [its] original opinion appears to be contrary to established precedent, and the sole case cited therein appears to be inapposite.” *Id.* “Upon further reflection, [this Court] ... conclude[d] that the Home Rule Amendment cannot support denial of the writ requested in this case.” *Id.* at 384.

If this Court actually intended to radically expand the self-protection exception in its Conclusion, without any analysis or explanation whatsoever anywhere in the Syllabus or Opinion, reconsideration is warranted for the same reasons as in *Huebner*.² As described in more detail below, the sole Ohio self-protection case cited in the Opinion does not support the purported expansion of the self-protection exception. Nor does Rule 1.6 or any of the non-Ohio decisions cited in the Opinion (or in SSD’s merit brief).

1. *In Re Butler’s Estate* Does Not Support An Expansion Of The Self-Protection Exception To Require The Client To Testify About Or Produce Attorney-Client Communications

The Opinion cites only one Ohio case (*In re Butler’s Estate*) in support of the self-protection exception. Opinion, ¶¶ 37-40. However, this case addressed whether the attorney was permitted to testify, not whether the client (who was deceased) was required to testify. *In re Butler’s Estate* (1940), 127 Ohio St. 96, 114, 17 O.O. 432, 28 N.E.2d 186 (“Nor should the testimony of Brown [the attorney] have been wholly excluded on the ground that he had been counsel and attorney for Butler.”). Because the client (Butler) was deceased, there certainly was

² See also *Buckeye Community Hope Found. v. Cuyahoga Falls* (1998), 82 Ohio St. 3d 539, 541, 697 N.E.2d 181 (“This court has invoked the reconsideration procedures set forth in S. Ct. Prac. R. XI to ‘correct decisions which, upon reflection, are deemed to have been made in error.’”) (citation omitted); *State ex rel. Shemo v. Mayfield Hts.*, 2002-Ohio-4905, ¶ 5, 96 Ohio St. 3d 379, 775 N.E.2d 493 (*per curiam*) (same).

no analysis as to whether the self-protection exception would require the client to testify about attorney-client communications.

Accordingly, if this Court intended to expand the self-protection exception in the Conclusion, such expansion is entirely unsupported by any Ohio precedent located by this Court, SSD, or Givaudan.³

2. Rule 1.6 Similarly Addresses When An Attorney Is Permitted To Testify, Not When A Client is Required To Testify About Or Produce Attorney-Client Communications

The Opinion states that it “comports with Prof.Cond.R. 1.6(b)(5), which provides:”

*‘A lawyer may reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer reasonably believes necessary * * *’*

*‘(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client * * *.’*

Opinion, ¶¶ 49-51 (emphasis added).

It is one thing to suggest that the language in Rule 1.6 – “*a lawyer may reveal*” – comports with the “*a charged lawyer is permitted to testify*” self-protection exception stated in the Syllabus and throughout the body of the Opinion. But the language in Rule 1.6 certainly does not comport with the “*requires discovery from the client*” expanded exception stated in the Conclusion. Simply stated, even if Rule 1.6 trumped the statutory privilege (which Givaudan

³ In its merit brief, SSD argued that an Ohio appellate court recognized a self-protection exception in *Keck v. Bode* (1902), 13 Ohio C.D. 413, 1902 WL 868. The present Opinion points out (as did Givaudan) that this Court reversed that appellate decision without opinion in *Bode v. Keck* (1903), 69 Ohio St. 549, 10 N.E. 1115. In any event, the appellate court in *Keck* expressly considered whether to permit an attorney to testify, not whether to require a client to testify about or produce attorney-client communications. Accordingly, even if SSD’s appellate authority was still good law (and it clearly is not), it (like *In re Butler’s Estate*) does not provide any authority whatsoever for the expanded self-protection exception set forth in the Conclusion. There simply is no Ohio precedent whatsoever for the expanded self-protection exception.

disputes), it does not support the “*permits discovery from the client*” exception stated in the Conclusion.

3. The Non-Ohio Decisions Cited In The Opinion (And By SSD) Similarly Relate To When An Attorney Is Permitted To Testify, Not When A Client Is Required To Testify

The Opinion cites numerous foreign decisions in support of its holding in the Syllabus and throughout the body of the Opinion that the self-protection exception permits an attorney to testify when necessary to defend himself or herself. *See* Opinion at pp. 13-19.

However, none of these cases supports the expanded self-protection exception stated in the Conclusion (§ 64). Specifically, the foreign “self-protection exception” cases address permissive disclosure by an attorney, not mandatory testimony by a client regarding attorney-client communications. *See Rochester City Bank v. Suydam, Sage & Co.*, (N.Y.Sup.Ct. 1851), 5 How. Pr. 254 (addressing disclosure made by the charged attorney: “when their [i.e., attorney-client communications] disclosure becomes necessary to protect his [i.e., attorney’s] own personal rights, he must of necessity and in reason be exempted from the obligation of secrecy [sic]”); *Hunt v. Blackburn* (1888), 128 U.S. 464, 470-71, 9 S. Ct. 125, 32 L. Ed. 488 (“if the client has voluntarily waived the privilege, it cannot be insisted on to close the mouth of the [charged] attorney”); *Nave v. Baird* (1859), 12 Ind. 318, 1859 WL 4663, at *1 (charged attorney permitted to testify regarding privileged communications “to rebut testimony introduced by Mr. Nave [the client]”); *Mitchell v. Bromberger* (1866), 2 Nev. 345, 1866 WL 1643, at *1-2 (charged attorney permitted to testify in action for attorney’s fees); *Koeber v. Somers* (Wis. 1901), 84 N.W. 991, 994-95 (charged attorney permitted to testify because testimony “fell clearly outside of a proper limit of communications to the attorney in the course of his professional employment” and because the client “waived his privilege to have them [i.e., communications] preserved in secrecy”); *In re Lott* (6th Cir. 2005), 424 F.3d 446, 447, 453-57 (addressed

propriety of attorney testimony); *Doe v. A Corp.* (5th Cir. 1983), 709 F.2d 1043, 1048-49 (addressed permissible disclosure by charged attorney in action against the client); *Daughtry v. Cobb* (Ga. 1939), 5 S.E.2d 352, 354-55 (charged attorney permitted to testify after the client testified extensively about her communications with the attorney); *Stern v. Daniel* (1907), 47 Wash. 96, 97-98 91 P. 552 (charged attorney permitted to introduce attorney-client communications in an action for attorneys' fees).

The foreign authority cited by SSD similarly addresses permissive disclosure by an attorney, not a motion to compel a client to testify about and produce attorney-client communications. *E.g., see* SSD's Merit Brief at 14; *Hunt v. Blackburn* (*see infra*); *Daughtry v. Cobb* (*see infra*); *Pierce v. Norton* (Conn. 1909), 74 A. 686, 687-88 (charged attorney permitted to testify in an attorneys' fee collection action "in response to the claims and statements of Mr. Norton [the client] on the witness stand").

Like in *Huebner, supra*, the Opinion simply does not cite any Ohio precedent to support the radical expansion of the self-protection exception set forth in the Conclusion. Accordingly, if this Court intended to dramatically expand this exception in the Conclusion – without any authority, analysis, or explanation – that would constitute patent error.

CONCLUSION

For the foregoing reasons, this Court should (a) grant Givaudan's motion to reconsider the Opinion, (b) confirm that the self-protection exception permits a charged attorney to testify when necessary, but does not require the client (or its in-house counsel) to testify about or produce attorney-client communications, (c) and modify the Conclusion (§ 64) as follows:

Original Language:

Thus, when the attorney-client relationship has been placed at issue in litigation between an attorney and a client or a former client, the self-protection exception permits *discovery of the evidence* necessary to establish a claim or defense on behalf of the attorney.

Modified Language:

Thus, when the attorney-client relationship has been placed at issue in litigation between an attorney and a client or a former client, the self-protection exception *permits an attorney to testify if* necessary to establish a claim or defense on behalf of the attorney.⁴

Dated: October 7, 2010

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⁴ Depending on the nature of the correction to Paragraph 64, this Court may also need to make a corresponding clarification to Paragraph 66 to confirm that, although the charged attorney (SSD) is permitted to testify as to relevant privileged matters if necessary to protect itself, the client (Givaudan and its current and former in-house counsel) is not required to testify about or produce attorney-client communications.

CERTIFICATE OF SERVICE

On this 7th day of October, 2010 the original plus ten copies of the foregoing Motion for Reconsideration were duly filed with the Clerk of Court. On the same day a true copy was mailed by regular U.S. Mail, postage prepaid, to:

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