

ORIGINAL

IN THE SUPREME COURT OF OHIO

MA EQUIPMENT LEASING I LLC and
MA 265 NORTH HAMILTON ROAD LLC

Plaintiffs-Appellees,

v.

LYNN TILTON, PATRIARCH PARTNERS
MANAGEMENT GROUP, LLC,
PATRIARCH PARTNERS XIV, LLC,
LD INVESTMENTS, LLC, JOHN
HARRINGTON, ZOHAR II 2005-1,
LIMITED AND JOHN DOE
DEFENDANTS 1-10

Defendants-Appellants.

Case No. 12-1729

Appeal from the Franklin County
Court of Appeals, Tenth Appellate
District

Court of Appeals Consolidated Case
Nos. 12AP-564 and 12AP-586
(C.P.C. No. 09CVH-08-12912)

MEMORANDUM OF AMICUS CURIAE OHIO STATE BAR ASSOCIATION
IN SUPPORT OF JURISDICTION

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae, the Ohio State Bar Association (OSBA) is an unincorporated association of more than 25,000 members, including lawyers, judges, law students, and paralegals. The OSBA's lawyer members include in-house attorneys, government attorneys, and private practice attorneys ranging from solo practitioners to members of the nation's largest law firms. Its members' practices include every kind of legal services. And, its members' clients run the gamut from individuals to multinational corporations. 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.

At issue in this case is the attorney-client privilege which hovers over the daily decisions of OSBA members. In order to provide competent representation to their clients, lawyers in Ohio need to know when their communications with their clients are privileged against disclosure to adversaries and when they are not. Neither OSBA members nor their clients should be put in the untenable position of believing their communications were privileged against such disclosure, only to find out (when it is too late to do anything about it) that they were not. Accordingly, clear rules are needed to guide lawyers and Ohio's lower courts as to the proper application, scope, and standard of review of attorney-client privilege questions.

OSBA members have important interests in protecting application of the attorney-client privilege to further the public interests served by the privilege and to promote public confidence in the profession.¹ The Tenth District's decision at issue not only threatens these interests, it also

¹ Due to the importance of the attorney-client privilege to its members, the OSBA has participated as amicus curiae on multiple occasions in which the application and/or scope of the privilege have been at issue, including in the following cases: *Squire Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469); *Biddle v. Warren General Hospital*, 86 Ohio St.3d 395, 1999-Ohio-115; *State ex rel. Olander v. French*, 79 Ohio St.3d 176, 1997-Ohio-171; and *State v. McDermott*, 72 Ohio St.3d 570, 1995-Ohio-80.

exacerbates the confusion that already exists regarding application and waiver of the attorney-client privilege as to communications shared among corporate entity parents, subsidiaries and affiliates.

**EXPLANATION OF WHY THIS CASE IS OF
PUBLIC OR GREAT GENERAL INTEREST**

This case is of public or great general interest because it involves an issue that is of vital importance to all corporate entities doing business in Ohio who currently use or may in the future use the services of an attorney as well as to all attorneys who perform services for these corporate entities: What is the proper application and scope of the attorney-client privilege in the context of corporate entities? More specifically, is the attorney-client privilege waived where the communications involved extend across corporate structures to parent, subsidiary, and affiliated corporations?

The attorney-client privilege is one of the oldest recognized evidentiary privileges protecting confidential communications from disclosure. See *Squire Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, 937 N.E.2d 533, at ¶ 16 (citation omitted). As this Court has repeatedly recognized, the underlying 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.” *Id.*; *State ex rel. Leslie v. Ohio Finance Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 990, at ¶ 20; *Boone v. Vanliner Ins. Co.*, 91 Ohio St.3d 209, 2001-Ohio-27, 744 N.E.2d 154, at ¶ 4 (citing *Upjohn v. United States*, 449 U.S. 383, 389 (1981)). Trust is essential for the attorney-client relationship to work. See *Taylor v. Sheldon*, 172 Ohio St.118,

121, 173 N.E.2d 892 (“the purpose of this rule [the attorney-client privilege] is to permit complete freedom of disclosure by a client to his attorney without fear that any facts so disclosed will be used against him”).

Regardless of the scope of the attorney-client privilege, it is intended to assure clients that the information they communicate to their attorneys in confidence will not be disclosed to others and, in particular, will not be made available to adversaries with an interest in using the communications as evidence against the client. Of course, when the application or scope of the privilege is unclear, it complicates the attorney-client relationship and undermines the very purpose of the privilege – the facilitation of full and frank communications between client and attorney.

The application and scope of the attorney-client privilege is fairly well-settled in Ohio and elsewhere regarding individuals as clients, but this is not the case with corporate entity clients. While there is no question that the attorney-client privilege applies to corporate entity clients, the law in Ohio and in other jurisdictions is anything but clear concerning how the attorney-client privilege applies in the context of communications involving corporate parents, subsidiaries and affiliates. See *MA Equipment Leasing 1, LLC v. Tilton*, 10th Dist. Nos. 12AP-564, 12AP-586, 2012-Ohio-4668 (referring to the “conceptual muddle” created by courts’ various rationales in applying the attorney-client privilege in the context of corporate parents, subsidiaries and affiliates) (citing *In re Teleglobe Communications Corp.*, 493 F.3d 345, 369-370 (3d Cir 2007)).

Decisions from other jurisdictions demonstrate that there is a whole host of different standards employed by the courts in determining the scope of the attorney-client privilege in this context. For instance, one federal district court held that where “communications are among

formally different corporate entities which are under *common ownership or control*,” these inter-related corporate communications should be treated in the same manner as intra-corporate communications. *Duplan Corp. v. Deering Milliken, Inc.* 397 F.Supp. 1146, 1184-85 (D.S.C. 1974) (emphasis added).

In another oft cited decision, another federal district court analyzed the issue without looking at common ownership or control and held:

[t]he universal rule of law, expressed in a variety of contexts, is that the parent and subsidiary share a community of interest, such that the parent (as well as the subsidiary) is the ‘client’ for purposes of the attorney-client privilege. Consequently, ***disclosure of legal advice to a parent or affiliate corporation does not work a waiver of the confidentiality * * * because of the complete community of interest*** between parent and subsidiary.

Glidden Co. v. Jandernoa, 173 F.R.D. 459 (W.D. Mich. 1979) (emphasis added).

The Sixth Circuit reached a similar conclusion when addressing whether the attorney-client privilege protected a communication from a parent corporation that was disclosed to a subsidiary, but without analyzing for a “community of interest” or common ownership or control. *Crabb v. KFC Nat’l Mgt. Co.*, 6th Cir. No. 91-5474, 1992 WL 1321 (Jan. 6, 1992) (“The cases clearly hold that a corporate “client” includes not only the corporation by whom the attorney is employed or retained, but also parent, subsidiary, and affiliate corporations.)

In contrast, the Tenth District, relying heavily on *In re Teleglobe Communications Corp.*, 493 F.3d 345 (3d Cir 2007) reached a different conclusion – that the communications between a subsidiary’s attorney and representatives of its parent corporation were not protected from disclosure by the attorney-client privilege. *Teleglobe* employed yet a different standard, the “joint-client” standard, which is applicable where two or more clients have the same counsel for the same matter.

Corporate entity clients need lawyers to assist them in a myriad of business transactions, to determine their rights and obligations vis-à-vis third-parties, and to navigate complex laws and regulations. In today's business environment, corporate entities often are related to other corporate entities as parents, subsidiaries, or in some other way. Attorneys advising such clients must be able to competently represent them and, of course, clients are entitled to competent representation. See Ohio Rules of Professional Conduct, 1.1. At best, it is challenging to competently represent a client when the attorney is unable to definitively give assurance that the communications with the attorney are protected from disclosure by the attorney-client privilege. Ohio attorney-client privilege law concerning corporate entity parents, subsidiaries and affiliates was unclear before the Tenth District's decision, and is even more confusing in light of the Tenth District's decision.

If the purpose of the attorney-client privilege is to be served, "[i]t is essential that parties be able to determine in advance with a high degree of certainty whether communications will be protected by the privilege." *In re Teleglobe*, 493 F.3d 345 (3d Cir. 2007) (citing *Upjohn*, 449 U.S. at 393). Under current Ohio law, including the Tenth District's decision, there is no way for attorneys or their clients to predict with any certainty whether particular confidential inter-corporate discussions with attorneys will be protected from disclosure to adversaries short of an absolute bar against sharing any such communications across corporate structures. This result is much less than optimal, and not reasonable or practical, in light of the realities of today's corporate environment. Both attorneys and corporate entity clients have a need for clarity of the scope of the attorney-client privilege in the context of corporate entity parents, subsidiaries and affiliates, and this case provides the Court with an opportunity to provide this much needed clarification.

Additionally, this case provides the Court with the opportunity to clarify the standard of review that appellate courts are to apply when reviewing privilege questions. In *Medical Mutual of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, this Court held, in the context of the physician-patient privilege, “whether the information sought is confidential and privileged from disclosure is a question of law that is reviewed de novo.” *Id.* at ¶ 13. Despite this decision, some appellate courts, including the Tenth District here, have not applied a de novo standard when reviewing a trial court’s decision that a communication is or is not privileged. *MA Equipment Leasing I, LLC v. Tilton*, 10th Dist. Nos. 12AP-564, 12-AP-586, 2012-Ohio-4668, at ¶ 18 (“Upon review of the relevant case law, we conclude that not all issues surrounding an assertion of privilege are subject to de novo review.”) Instead, these courts have adopted a mixed standard of review under which the trial court’s application of the privilege is reviewed de novo, but the factual findings upon which the privilege decision is made are reviewed under the less stringent abuse of discretion standard. *Id.* (“Accordingly, we review the trial court’s determination of factual issues * * * for an abuse of discretion.”)

On the other hand, other Ohio courts, relying on this Court's decisions in *Schlotterer*, have applied a de novo standard of review to both the trial court’s legal and factual determinations. See, e.g., *Wagner v. Dennis*, 5th Dist. No. 11-COA-050, 2012-Ohio-2485, at ¶¶ 19-22 (applying de novo standard of review in context of attorney-client privilege); *Stewart v. Vivian*, 12th Dist. No. CA2011-06-050, 2012-Ohio-228, at ¶¶ 13. 35-36 (applying de novo standard of review in context of peer review privilege).

The Court should rectify this inconsistency among Ohio appellate courts and adopt a uniform rule to be used in reviewing the important issue of whether communications are protected from disclosure to adversaries by the attorney-client privilege.

The Ohio State Bar Association requests the Court to accept this discretionary appeal in order to provide guidance to Ohio's lower courts and to the thousands of Ohio attorneys advising and representing corporate clients.

STATEMENT OF THE CASE AND FACTS

The OSBA adopts the Statement of the Case and Statement of Facts set out in Appellants' Memorandum in Support of Jurisdiction.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: Communications among counsel and corporate affiliates under common ownership or control are privileged.

The OSBA is not only interested in having a workable rule or standard that its members and their clients can rely on to protect confidential communications from misguided compelled disclosure, it is also important that such rule or standard preserve the purpose underlying the attorney-client privilege. Corporations and their affiliates often have a need to share, and frequently do share, information and communications with counsel under the expectation that those communications will be privileged. See *Glidden*, 173, F.R.D. at 472-73.

In this regard, the better reasoned (and more prevalent) decisions appear to be those in which courts have held that the attorney-client privilege is not waived merely because of disclosure of privileged communications between interrelated corporations, irrespective of whether the courts utilized "common ownership and control," "single client," or "complete community of interest" analysis.²

² See *Duplan Corp. v. Deering Milliken, Inc.* 397 F.Supp. 1146, 1184-85 (D.S.C. 1974) (privilege not waived where the communications were among formally different corporate entities under common ownership and control); *Crabb v. KFC Nat'l Mgt. Co.*, 6th Cir. No. 91-5474, 1992 WL 1321 (Jan. 6, 1992) (privilege not waived under single client rationale); *Glidden Co. v. Jandernoa*, 173 F.R.D. 459 (W.D. Mich. 1979) (privilege not waived under complete community of interest analysis).

The result in these cases is not only legally correct, but is consistent with Ohio case law that holds that the attorney-client privilege extends to communications involving agents, representatives, and consultants of the attorney and/or client. *Foley v. Poschke*, 137 Ohio St. 593, 31 N.E.2d 845 (1941) (holding that communications between a client and his attorney in the presence of a third-party are privileged when the third-party is either the agent of the client or the attorney). In these instances, the attorney-client privilege is not destroyed and the confidential communications remain protected and unavailable to third-party adversaries even though the communications have been shared. See *State ex rel. ESPN, Inc. v. The Ohio State University*, 132 Ohio St.3d 212, 2012-Ohio-2690, 970 N.E.2d 939, at ¶¶ at 36, 37.

Lastly, the Tenth District's reliance on *Teleglobe's* joint client analysis is misplaced. In *Teleglobe*, the issue of waiver arose in the context of a parent and subsidiary corporation, each of which previously had been represented by the same attorneys for the matter that resulted in litigation between them. In *Teleglobe*, the Third Circuit was concerned with one party taking advantage of another by selectively disclosing otherwise privileged communications. Here, unlike in *Teleglobe*, there is no dispute between the parent and subsidiary corporations and there is no issue of selective disclosure. And even if there were, it would not result in disclosure of confidential communications to third-parties. See *Emley v. Selepchak*, 76 Ohio App. 257, 63 N.E.2d 919 (9th Dist. 1945) (holding that when the same attorney acts for two parties having a common interest, and each party communicates with the attorney, "the communications are clearly privileged from disclosure at the instance of a third person," but not privileged from disclosure between the two original parties).

The OSBA urges the Court to accept this discretionary appeal and provide clarity to Ohio's lower courts, attorneys and their clients, regarding the application and scope of the

attorney-client privilege in the context of communications between corporate entity parents, subsidiaries and affiliates.

Proposition of Law No. 2: A trial court's factual findings made in determining whether information is privileged is subject to de novo review on appeal.

Recognizing the importance of ensuring that privilege decisions are correct, especially those that compel disclosure of claimed privileged communications, the General Assembly has expressly provided for an immediate appeal of such decisions. R.C. 2505.02(A)(3) and (B)(4). As a result, Ohio's appellate courts are frequently called on to review trial court decisions determining whether particular communications are privileged prior to trial or any determination of liability.

To further ensure that parties are not improperly required to disclose communications made in confidence and believed to be privileged, Ohio's appellate courts must adhere to a uniform standard in reviewing such decisions.

In *Medical Mutual of Ohio v. Schlotterer*, 122 Ohio St.3d, 2009-Ohio-2496, this Court held, in the context of the physician-patient privilege, "whether the information sought is confidential and privileged from disclosure is a question of law that is reviewed de novo." *Id.* at ¶ 13. The Court reiterated a year later that "if a discovery issue involves an alleged privilege * * * it is a question of law that must be reviewed de novo." *Ward v. Summa Health Sys.*, 128 Ohio St.3d 212, 2010-Ohio-6275, 943 N.E.2d 514, at ¶ 13.

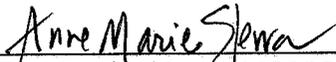
Despite this Court's instruction in *Schlotterer* and *Ward* that a de novo standard of review is to be applied in reviewing a trial court's decision that a communication is not privileged, some appellate courts, including the Tenth District here, have not applied a de novo standard when reviewing a trial court's decision that a communication is not privileged. Instead, these courts have adopted a mixed standard of review under which the trial court's application of the

privilege is reviewed de novo, but the factual findings upon which the privilege decision is made are reviewed under the less stringent abuse of discretion standard. *MA Equipment Leasing I, LLC v. Tilton*, 10th Dist. Nos. 12AP-564, 12-AP-586, 2012-Ohio-4668, at ¶ 18 (“Upon review of the relevant case law, we conclude that not all issues surrounding an assertion of privilege are subject to de novo review.” * * * “Accordingly, we review the trial court’s determination of factual issues * * * for an abuse of discretion.”); *Hartzell v. Breneman*, 7th Dist. No. 10 MA 67, 2011-Ohio-2472, at ¶ 21 (stating that legal questions on the scope of the privilege are reviewed de novo, but a trial court’s discovery decision is reviewed under the less stringent abuse of discretion standard).

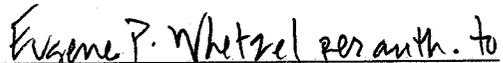
In light of the importance of the attorney-client privilege and the important policy objectives underlying the right to immediate appeal of a decision compelling disclosure of privileged matter, a de novo review of factual and legal determinations is warranted.

CONCLUSION

The OSBA urges the Court to accept this discretionary appeal and provide needed clarity and guidance on these important issues regarding (1) the application and scope of the attorney-client privilege in the context of interrelated corporate communications and (2) the standard of review applicable to decisions compelling the disclosure of privileged communications.



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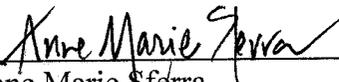
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I hereby certify that a true copy of the foregoing Brief of Appellant was served upon the following via regular U.S. Mail, this 26th day of November, 2012:

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