

Ohio Supreme Court Recognizes Self-Protection Exception to Attorney-Client Privilege

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Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp., ___ N.E.2d ___, 2010 WL 3812910 (2010)

Brief Summary

The Ohio Supreme Court held that exceptions exist to both the attorney-client privilege and work product protection when the attorney-client relationship has been put at issue by a claim for legal fees or a claim that the attorney breached a duty owed to a client.

Complete Summary

Plaintiff law firm sued its former client for unpaid legal fees, and the client brought multiple counterclaims, including for legal malpractice. The client had decided to stop using the law firm based on the client's in-house counsel's concerns.

During discovery, the client asserted the attorney-client privilege and work product protection to block the law firm from information related to: the law firm's staffing of the case, the resources committed to the litigation, the law firm's strategy and trial preparation, and the client's reasons for terminating its relationship with the law firm. The law firm moved to compel the production of documents as well as the testimony of the client's in-house counsel. The trial court granted the law firm's motion, but the appellate court reversed.

On appeal, the Ohio Supreme Court held that the common law "self protection" exception to the attorney-client privilege applied, and that the discovery was permissible. The Court began by noting that it had recognized a number of common law exceptions to the privilege, including the crime fraud exception and the joint representation exception.

The Court then cited its own precedent from 1939, where it recognized that the attorney-client privilege “does not prevent an attorney from testifying to the correctness, amount, and value of the legal services rendered to the client in an action calling those fees into question.” The legislature did not supersede this holding, the Court noted, when it later recoded the attorney-client privilege statute. The Court further held that the self protection exception “also applies when the client puts the representation at issue by charging the attorney with a breach of duty or other wrongdoing.”

The client argued that Ohio’s attorney-client privilege statute provides the exclusive means of waiving the privilege. The Court acknowledged its prior decisions to this effect, but noted that such decisions applied only to waiver and not to exceptions.

Finally, regarding the client’s assertion of work product protection, the Court held: “[w]hen the attorney-client relationship has been put at issue by a claim for legal fees or by a claim that the attorney breached a duty owed to the client, good cause exists for the production of attorney work product to the extent necessary to collect those fees or to defend against the client’s claim.”

Ohio Supreme Court Justice Lanzinger, concurring, took issue with the Court’s characterization of exceptions to the privilege as “fall[ing] into the category of situations in which the privilege does not attach to the communications in the first instance. . . .” She opined that exceptions are no different than waivers because both arise as a result of some action taken by the client.

Significance of Opinion

This opinion aligns Ohio with the majority of other jurisdictions to the extent that it denies the protections of the attorney-client privilege and the work product doctrine on claims in which the client has placed the relationship with its lawyer at issue.

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