[Cite as *Squire, Sanders & Dempsey L.L.P. v. Givaudan Flavors Corp.*, 2009-Ohio-2490.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92366

SQUIRE, SANDERS & DEMPSEY L.L.P.

PLAINTIFF-APPELLEE

vs.

GIVAUDAN FLAVORS CORPORATION

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-641027

BEFORE: Dyke, J., Rocco, P.J., and Blackmon, J.

RELEASED: May 28, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).
ANN DYKE, J.:

{¶ 1} Defendant Givaudan Flavors Corp. ("Givaudan") appeals the trial court's order that it produce various documents in litigation filed by plaintiff Squire, Sanders and Dempsey L.L.P. ("SS&D"). For the reasons set forth below, we conclude that the trial court erred in summarily granting the motion to compel testimony and production. We reverse and remand to the trial court for it to hold an in camera hearing to evaluate all of the discovery at issue in accordance with the rules pertaining to testimonial (statutory) privilege and any waiver thereof, common law privilege and any waiver thereof, and work product privilege and exceptions thereto.

{¶ 2} On November 7, 2007, SS&D filed suit against Givaudan for breach of contract and money due on an account. SS&D alleged that it represented Givaudan, a manufacturer of butter flavorings, in personal injury litigation filed by workers alleging that they contracted lung ailments from Givaudan's products. SS&D asserted that it was retained by Givaudan in 2003, and that pursuant to the parties' various Engagement Agreements, Givaudan agreed to compensate SS&D "for time spent in representing Givaudan's interests plus certain itemized costs." By early 2007, Givaudan stopped paying SS&D's invoices. SS&D ceased its representation of Givaudan in May 2007, and at that time, according to SS&D, Givaudan owed the firm $1,801,204.37.

{¶ 3} Givaudan denied that it was liable for the alleged fees and costs, and denied SS&D's allegations that its services were "all at the request and with the approval of Givaudan." In addition, Givaudan set forth counterclaims for breach of contract, legal malpractice, breach of fiduciary duty, fraud, unjust enrichment, and

constructive fraud, asserting, essentially, that the firm did not competently handle the matter and marked up the actual hours billed to inflate its fees.[1]

{¶ 4} SS&D propounded to Givaudan interrogatories and 64 requests for production of documents. The firm also moved for commissions for subpoenas outside the State of Ohio to Zurich North America ("Zurich"), the liability carrier for Givaudan and document subpoenas for depositions to Elizabeth Titus and Jeffrey Mitchell, Zurich employees who "examined and/or audited SS&D's invoices * * * and participated in and/or monitored the planning and preparation of Givaudan's defense * * * [and] activities regarding settlement of certain lawsuits."

{¶ 5} SS&D requested the following items in connection with the subpoenas:

{¶ 6} "1. All communications between Givaudan and Zurich related to the [lawsuits against Givaudan] including but not limited to, communications related to SS&D's handling of the [lawsuits against Givaudan] and SS&D's invoices * * *

{¶ 7} "2. All communications between Zurich and SS&D related to the [lawsuits against Givaudan] * * *

{¶ 8} "3. All communications between Zurich and Wilson Young [P.L.C.] related to the [lawsuits against Givaudan] * * *

{¶ 9} "4. All internal Zurich communications * * *

{¶ 10} "5. All documents or notes created by Zurich * * *

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[1]Givaudan subsequently dismissed its counterclaims for fraud and constructive fraud. It later sought to amend the counterclaim to reinsert the fraud claim and a claim for unjust enrichment, but the trial court did not permit it to file the proposed amended counterclaim.

{¶ 11} "6. All documents or notes created by Givaudan and provided to Zurich * * *

{¶ 12} "7. All invoices for legal services, from any legal service provider, received by Zurich related to the Litigation.

{¶ 13} "8. All documents discussing or referring to SS&D's qualifications, capabilities or performance * * *

{¶ 14} "9. All documents discussing or reflecting the involvement or participation, or anticipated involvement or participation, of [the law firm of] Morgan Lewis [L.L.P.] in the Litigation on behalf of Givaudan.

{¶ 15} "10. All documents related to any examination or audit of SS&D's invoices for legal services related to the Litigation.

{¶ 16} "11. All documents related to any examination or audit of Morgan Lewis's invoices for legal services related to the Litigation.

{¶ 17} "12. All documents constituting or reflecting communications between Givaudan and Zurich about the payment or non-payment of any SS&D invoice for legal services * * *."

{¶ 18} On February 14, 2008, the trial court granted the motion for issuance of subpoenas requiring Zurich to permit inspection and copying of the documents at issue and to produce the record custodians, and Titus and Mitchell for deposition.

{¶ 19} SS&D next obtained commissions for subpoenas to Federal Insurance Company ("Federal"), and Chubb Insurance Company ("Chubb"), Givaudan's excess

insurance carriers, and propounded a notice of deposition to their records custodians.

{¶ 20} Givaudan notified the trial court and SS&D that it intended to assert various objections to the subpoenas substantive objections to discovery upon issuance of any subpoenas, and also objected to SS&D's discovery requests, citing, inter alia, confidentiality, attorney-client privilege, and work product. It also moved for a protective order, arguing that the interrogatories and requests for production sought information that is privileged and confidential.

{¶ 21} In July 2008, SS&D deposed Givaudan's current general counsel, Jane Garfinkel, and Givaudan's former Vice President of Legal Affairs, Frederick King. During both depositions, Givaudan repeatedly invoked the attorney client and work product privileges.

{¶ 22} The trial court denied Givaudan's motion for a protective order and SS&D filed a motion to compel testimony and production. The trial court granted SS&D's motion to compel. In a written opinion, the court distinguished the instant matter from *Jackson v. Greger,* 110 Ohio St.3d 488, 2006-Ohio-4968, 854 N.E.2d 487, concluding that the "*Jackson* case did not abrogate, alter or even address the traditional self-protection exception to privilege for communications between lawyers and former clients who are parties to a professional liability suit. * * * In addition, * * * Ohio Rule of Professional Conduct 1.6(b)(5) states that a lawyer may reveal protected information if he or she reasonably believes that the revelation is necessary 'to establish a claim or defense on behalf of the lawyer in a controversy

between the lawyer and client to establish a defense to a * * * civil claim against the lawyer based upon conduct in which the client was involved.'" Finally, the court held that "'SS&D's use of documents already in its possession, and otherwise protected, that relate to the billing dispute between SS&D and Givaudan are permitted to be used by Squire Sanders & Dempsey in order to mount a defense in this case in accordance with Rule[s] of Professional Conduct 1.6(b)(5) and [R.C.]2317.02(A)."

{¶ 23} Givaudan now appeals and assigns six errors for our review. For the sake of convenience, we shall address the assignments of error out of their predesignated order.

{¶ 24} In the sixth assignment of error, Givaudan asserts that the trial court erred in refusing to stay the matter pending completion of the underlying litigation claiming personal injuries in connection to butter flavoring.

{¶ 25} As an initial matter, we note that in *State v. Weist,* Champaign App. No. 2007-CA-16, 2008-Ohio-4006 an order denying a stay of proceedings is not a final appealable order under R.C. 2505.02(B)(4). Accord *Holivay v. Holivay,* Cuyahoga App. No. 89439, 2007-Ohio-6492.

{¶ 26} In any event, this ruling would be evaluated for an abuse of discretion. *Dzina v. Dzina,* Cuyahoga App. Nos. 90936, 90937, 90938, 90939 and 90940, 2009-Ohio-136, citing *Nationwide Mut. Fire Ins. Co. v. Modroo,* Geauga App. No. 2004-G-2557, 2004-Ohio-4697. In this matter, we find no abuse of discretion. The record clearly indicates that the underlying personal injury litigation against Givaudan involves numerous plaintiffs in multiple jurisdictions and it is conceivable that this

litigation will not terminate for several years. Moreover, Givaudan's interests in the underlying litigation can be secured through proper application of the rules regarding attorney-client privilege, the work product doctrine, and the exceptions to these provisions.

{¶ 27} The sixth assignment of error is without merit.

{¶ 28} In its fifth assignment of error, Givaudan asserts that the trial court erred by ruling that "documents already in its possession, and otherwise protected, that relate to the billing dispute between SS&D and Givaudan are permitted to be used by Squire Sanders & Dempsey in order to mount a defense in this case in accordance with the Rule[s] of Professional Conduct 1.6(b)(5) and [R.C.]2317.02(A)."

{¶ 29} It is axiomatic that the attorney-client privilege belongs not to the attorney but to the client. *Allen County Bar Ass'n. v. Williams,* 95 Ohio St.3d 160, 2002-Ohio-2006, 766 N.E.2d 973, citing *Frank W. Schaefer, Inc. v. C. Garfield Mitchell Agency, Inc*. (1992), 82 Ohio App.3d 322, 329, 612 N.E.2d 442. Subject to certain exceptions and waivers, to those communications intended to be confidential. *Smith v. Smith,* Hamilton App. No. C-050787, 2006-Ohio-6975.

{¶ 30} Accordingly, the trial court erred insofar as it summarily concluded, without applying the law as to waivers, or exclusions that SS&D could use documents already in its possession, if these documents contain communications intended to be confidential. In this connection, it must be noted that even fee agreements, and billing statements may contain privileged information. *Shell v.*

Drew & Ward Co., L.P.A., 178 Ohio App.3d 163, 2008-Ohio-4474, 897 N.E.2d 201; *Tenn. Laborers Health & Welfare Fund v. Columbia/HCA Healthcare Corp. (In Re Columbia/HCA Healthcare Corp. Billing Practices Litig.)* (C.A.6, 2002), 293 F.3d 289.

{¶ 31} We further note that information which is claimed to be protected as work product is analyzed pursuant to Civ.R. 26(B), and pursuant to the Supreme Court's decision in *Hickman v. Taylor* (1946), 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451, and its progeny. See *Jerome v. A-Best Prods. Co.,* Cuyahoga App. Nos. 79139-79142, 2002-Ohio-1824.

{¶ 32} In accordance with the foregoing, the trial court erred to the extent that it gave SS&D unrestricted permission to use information in its possession in this matter, which is otherwise claimed to be protected by the attorney-client privilege or work product. We hold that all documents claimed to come within the attorney-client privilege, which were intended to be privileged, must be reviewed under the applicable law, and all claimed work product must likewise be analyzed under that controlling law.

{¶ 33} This assignment of error is well-taken.

{¶ 34} In its first, third[2] and fourth assignments of error, Givaudan asserts that the trial court erred by granting SS&D's motion to compel the production of privileged documents, and privileged testimony from King and Garfinkel. Within these

[2]This portion of our opinion pertains solely to the attorney client and work product claims set forth in the third assignment of error; the claims regarding the court's jurisdiction to issue a subpoena to an out-of-state deponent are addressed separately.

assignments of error, Givaudan further asserts that the requested information seeks protected work product.

{¶ 35} In its second assignment of error, Givaudan asserts that the trial court erred in failing to conduct an in camera hearing to ascertain whether the requested information would reveal privileged or work product information and whether such privilege or work product exclusion had been waived.

JURISDICTION / STANDARD OF REVIEW

{¶ 36} As an initial matter, we note that in *Riggs v. Richard,* Stark App. No. 2006CA00234, 2007-Ohio-490, the court held that an interlocutory appeal could be taken from an order compelling the production of material alleged to be protected by attorney-client privilege. *Miles-McClellan Construction Co. Inc. v. The Board of Education Westerville City School Board,* Franklin App. No. 05AP-1112, 2006-Ohio-3439, citing *Shaffer v. OhioHealth Corp.,* Franklin App. No. 03 AP-102, 2004-Ohio-63.

{¶ 37} The *Miles-McClellan Construction Co.* Court set forth the standard of review as follows:

{¶ 38} "Most aspects of trial court rulings in the discovery process will be reviewed under an abuse-of-discretion standard. *State ex rel. Daggett v. Gessaman* (1973), 34 Ohio St.2d 55, 295 N.E.2d 659. However, where the trial court has either misstated the law or applied an incorrect legal standard, giving rise to a purely legal issue on appeal, our appellate review is de novo. *Shaffer [v. OhioHealth Corp.,*

Franklin App. No. 03AP-102, 2004-Ohio-63], at _6; *Ohio State Bd. of Pharmacy v. Dick's Pharmacy,* 150 Ohio App. 3d 343, 2002-Ohio-6500, 780 N.E.2d 1075."

{¶ 39} Accord *Shell v. Drew and Ward Co., L.P.A.,* supra.

{¶ 40} The burden to show that testimony or documents are confidential or privileged is on the party seeking to exclude the material. *Grace v. Mastruserio*, Hamilton App. No. C-060732, 2007-Ohio-3942, citing *Lemley v. Kaiser* (1983), 6 Ohio St.3d 258, 452 N.E.2d 1304.

ATTORNEY-CLIENT PRIVILEGE

{¶ 41} R.C. 2317.02 states:

{¶ 42} "Privileged communications

{¶ 43} "The following persons shall not testify in certain respects:

{¶ 44} "(A) (1) An attorney, concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client. However, if the client voluntarily testifies or is deemed by section 2151.421 [2151.42.1] of the Revised Code to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject.

{¶ 45} "* * *

{¶ 46} "(2) An attorney, concerning a communication made to the attorney by a client in that relationship or the attorney's advice to a client * * *."

{¶ 47} In *Jackson v. Greger* (2006) 110 Ohio St.3d 488, 854 N.E.2d 487, paragraph one of the syllabus, the Supreme Court held:

{¶ 48} "R.C. 2317.02(A) provides the exclusive means by which privileged communications directly between an attorney and a client can be waived. (*State v. McDermott*, 72 Ohio St.3d 570, 1995-Ohio-80, 651 N.E.2d 985, followed.)"

{¶ 49} In *Jackson,* the client sued her former attorney for malpractice upon learning that her guilty plea in the matter in which he had represented her would bar her action pursuant to 42 U.S.C. Section 1983 against the arresting officers and the prosecuting city. The former counsel sought all attorney-client communications and documentation related to the Section 1983 action. The trial court granted the former attorney's motion to compel. The court of appeals applied the three-part test for implied waiver of the attorney-client privilege set forth in *Hearn v. Rhay* (E.D.Wash.1975), 68 F.R.D. 574. According to the *Hearn* test, a client impliedly waives the attorney-client privilege when "(1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense." Id. at 581.

{¶ 50} The Ohio Supreme Court reversed and stated:

{¶ 51} "'In Ohio, the attorney-client privilege is governed by statute, R.C. 2317.02(A), and in cases that are not addressed in R.C. 2317.02(A), by common law.' *State ex rel. Leslie v. Ohio Hour. Fin. Agency,* 105 Ohio St.3d 261, 2005-Ohio-

1508, 824 N.E.2d 990, _18. We have stated that the statutory privilege governs communications directly between an attorney and a client." Id.

{¶ 52} In a footnote, the court additionally noted:

{¶ 53} "R.C. 2317.02(A) provides a testimonial privilege--i.e., it prevents an attorney from testifying concerning communications made to the attorney by a client or the attorney's advice to a client. A testimonial privilege applies not only to prohibit testimony at trial, but also to protect the sought-after communications during the discovery process. The purpose of discovery is to acquire information for trial. Because a litigant's ultimate goal in the discovery process is to elicit pertinent information that might be used as testimony at trial, the discovery of attorney-client communications necessarily jeopardizes the testimonial privilege. Such privileges would be of little import were they not applicable during the discovery process." Id., at footnote 12.

{¶ 54} The court then declined to apply the *Hearn* test to situations where the statutory privilege is applicable, and stated:

{¶ 55} "The General Assembly has chosen to limit the means by which a client's conduct may effect waiver of the attorney-client privilege. It is not the role of this court to supplant the legislature by amending that choice."

{¶ 56} Thus, under *Jackson v. Greger,* supra, R.C. 2317.02(A) provides the exclusive means by which privileged testimonial communications directly between an attorney and a client can be waived, i.e., the client expressly consents or the client voluntarily testifies on the same subject. Accord *Air-Ride, Inc. v. DHL Express*

(USA), Inc., Clinton App. No. CA2008-01-001, 2008-Ohio-5669; *State v. McDermott,* supra; *Smith v. Smith,* supra.

{¶ 57} Pursuant to the common law, "the attorney-client privilege 'reaches far beyond a proscription against testimonial speech. The privilege protects against any dissemination of information obtained in the confidential relationship.'" *Jackson v. Greger,* supra (Lanzinger, J., concurring in judgment only), quoting *Am. Motors Corp. v. Huffstutler* (1991), 61 Ohio St.3d 343, 348, 575 N.E.2d 116 (other internal citations and quotations omitted).

{¶ 58} In *Grace v. Mastruserio ,* Hamilton App. No. C-060732, 2007-Ohio-3942, the court delineated the contours of the testimonial privilege and held that in cases which do not involve the testimonial privilege, the common law attorney-client privilege is applicable, and in this instance, the *Hearn* test remains viable. The *Grace* Court stated:

{¶ 59} "The common-law attorney-client privilege 'reaches far beyond a proscription against testimonial speech. The privilege protects against any dissemination of information obtained in the confidential relationship.' [quoting the concurring opinion in *Jackson v. Greger,* supra.] The common-law attorney-client privilege protects against the disclosure of oral, written, and recorded information, unless the privilege is waived. At common law, a client may waive the attorney-client privilege either expressly or by conduct implying a waiver. * * * A client may impliedly waive the attorney-client privilege through affirmative acts. Ohio appellate

courts have discussed and applied the tripartite test set forth in *Hearn v. Rhay* [supra]."

{¶ 60} Accord *State ex rel. Leslie v. Ohio Hous. Fin. Agency,* 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 990 (distinguishing the testimonial, i.e., statutory privilege from the nontestimonial, i.e., common law privilege).

{¶ 61} Thus, where the common law attorney-client privilege is at issue, the implied waiver test set forth in *Hearn* may be applied. *Grace v. Mastruserio,* supra; *Ward v. Graydon, Head & Ritchey,* 147 Ohio App.3d 325, 770 N.E.2d 613, 2001-Ohio-8654 ("At common law, the attorney-client privilege could be waived either expressly or by conduct implying waiver. See 8 Wigmore, Evidence (McNaughton Rev.1961), Section 2327. * * * [T]he statute does not abrogate the common law. Waiver of the attorney-client privilege can still occur by implication.")

{¶ 62} Moreover, insofar as the trial court determined that this matter is governed by 1.6(b)(5)[3] of the Ohio Rules of Professional Conduct and that rule

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[3]In relevant part, Rule 1.6 provides:

"(a) A lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by division (b) or required by division (c) of this rule.

"(b) 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 for any of the following purposes:

"* * *

authorizes SS&D to reveal "protected information," we note that the scope of these rules has been set forth, in relevant part, as follows:

{¶ 63} "SCOPE

{¶ 64} "(14) * * * These define proper conduct for purposes of professional discipline * * *

{¶ 65} "* * *

{¶ 66} "(20) * * * The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies.

{¶ 67} Further, the comment to Section 1.6 states:

{¶ 68} "(3) The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine, and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. * * *"

"(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding, including any disciplinary matter, concerning the lawyer's representation of the client;

"(6) to comply with other law or a court order. * * *"

{¶ 69} Accordingly, we cannot read Rule 1.6(b)(5) as the preeminent and controlling authority in this matter; the correct analysis must focus chiefly upon the statutory and common law related to attorney-client privilege for each piece of evidence for which this privilege is claimed.

{¶ 70} In this connection, and as is pertinent to the second assignment of error, we note that the court in *Grace v. Mastruserio,* supra, further held that the trial court must conduct an in camera hearing to determine whether compelling discovery will violate the attorney client privilege. The Court stated:

{¶ 71} "When a party seeks to compel discovery of the entirety of an attorney case file, the trial court, using its broad discretion, is best suited to initially determine whether the evidence is discoverable or is protected under attorney-client privilege or the work-product doctrine, and for that determination to be a reasonable, informed, and conscionable one, the court must conduct an evidentiary hearing or perform an in camera inspection of the materials sought to be disclosed. * * *

{¶ 72} "As we have noted, Mastruserio's request to discover the entire attorney case file necessarily implicated an umbrella of protection under the attorney-client privilege and the work-product doctrine. And under these circumstances, that alone required that the trial court, at a minimum, hold an evidentiary hearing or conduct an in camera review to determine the scope of the protection.

{¶ 73} "We conclude that the trial court abused its discretion by compelling discovery of an entire case file without holding an evidentiary hearing or conducting an in camera review."

{¶ 74} We find this reasoning sound and wholly applicable herein. The trial court must hold an evidentiary hearing or in camera review in this matter in light of the claim of privilege. Although SS&D insists that the request for an in camera hearing was not properly raised below and is not properly preserved herein, because Givaudan requested this proceeding in a footnote of its brief in opposition to SS&D's motion to compel, we decline to adopt so rigid a rule. We further note that the in camera proceedings are favored over too broad an application of the rule of waiver requiring unlimited disclosure, which might tend to destroy the purpose of the privilege. *In re Grand Jury Proceedings October 12, 1995* (C.A.6, 1996), 78 F.3d 251, citing *United States v. Cote* (C.A.8, 1972), 456 F.2d 142.

{¶ 75} SS&D strenuously argues that the rule announced in *Jackson v. Greger,* supra, pertaining to privileged testimonial communications under R.C. 2317.02, and the rule announced in *Hearn v. Rhay,* supra, are completely inapplicable herein since this matter involves communications between a client and his former counsel and *Jackson* and *Hearn* involved situations where the defendant sought to obtain communications between a client and a different attorney or firm. We reject this argument. As an initial matter, we note that R.C. 2317.02 does not set forth these distinctions, but instead plainly states: "The following persons shall not testify in certain respects: * * * An attorney, concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client * * *. " Accord *Woyczynski v. Wolf* (1983), 11 Ohio App.3d 226, 464 N.E.2d 612 ("The [R.C. 2317.02] privilege is not presumed waived merely because a third party filed a claim

alleging malicious prosecution, nor does this court find the privilege waived from the fact that the defendants denied the allegations of the complaint. The statute contains no provision for an automatic waiver based upon the pleadings") (disapproved on other grounds in *Trussell v. General Motors Corp.,* 53 Ohio St.3d 142 , 559 N.E.2d 732).

{¶ 76} In addition, *Hearn* also clearly indicated that its implied waiver analysis is applicable to situations "where the attorney and client are themselves adverse parties in a lawsuit arising out of the relationship, McCormick, §91 at 191 * * *."

{¶ 77} We therefore hold that the law regarding testimonial communications, and waiver thereof, under R.C. 2317.02 and the common law regarding nontestimonial communications and waiver thereof are to be applied where the attorney and client, who are the subject of such communications, are now in an adverse relationship. In other words, we will not recognize an "automatic waiver" of the attorney-client privilege simply because the attorney and client who are the subject of such communications are now in an adverse relationship. Accord *Ward v. Graydon, Head & Ritchey,* supra, wherein this court stated:

{¶ 78} "We choose to follow and find the *Hearn* approach is best suited to deal with the complexities of the attorney-client privilege. We note that the Second Appellate District and the Eighth Appellate District of this state have adopted this approach. See, *Schaefer* [*Frank W. Schaefer, Inc. v. C. Garfield Mitchell Agency, Inc*. (1992), 82 Ohio App.3d 322, 329, 612 N.E.2d 442], 82 Ohio App.3d at 331; *H&D Steel [Inc. v. Weston, Hurd, Fallon, Paisley, & Howley]* (July 23, 1998), 1998 Ohio

App. LEXIS 3422 (July 23, 1998), Cuyahoga App. No. CV-284-135, unreported, at 3. Furthermore, the Ohio Supreme Court, although never having extensively discussed this issue, has nevertheless suggested its disapproval of the "automatic waiver" approach. See, *Waldmann v. Waldmann* (1976), 48 Ohio St.2d 176, 179, 358 N.E.2d 521."

{¶ 79} Accord *H & D Steel, Inc. v. Weston, Hurd, Fallon, Paisley, & Howley,* supra (noting that many courts have rejected application of the "automatic waiver rule" as "too rigid"); *Frank W. Schaefer Inc. v. C. Garfield Mitchell Agency, Inc.,* supra (same).

{¶ 80} In accordance with all of the foregoing, we hold that in this matter, the trial court committed reversible error in summarily granting SS&D's motion to compel. On remand, the trial court must determine whether: (1) the requested evidence seeks testimonial evidence, and, if so, has Givaudan met its burden of proof in establishing this privilege or has the statutory privilege been waived in the manner set forth in R.C. 2317.02 and *Jackson v. Greger,* supra; and (2) whether the requested evidence seeks nontestimonial evidence, and, if so, has Givaudan met its burden of establishing the claim of privilege, or has there been a waiver of the privilege in accordance with the *Hearn* test. Accordingly, the trial court erred insofar as it failed to analyze the discovery issues under this rubric.

WORK PRODUCT

{¶ 81} The work-product privilege is a civil privilege, that is governed by Civ.R. 26(B). *Geggie v. Cooper Tire & Rubber Co.,* Hancock App. No. 5-05-01, 2005-Ohio-4750; *Jackson v. Greger,* supra.

{¶ 82} Pursuant to Civ.R. 26(B)

{¶ 83} "Subject to the provisions of subdivision (B)(4) of this rule, a party may obtain discovery of documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing of good cause therefor."

{¶ 84} The work-product doctrine is designed to allow an attorney to "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference * * * to promote justice and to protect [his] clients' interests." *Hickman v. Taylor* (1947), 329 U.S. 495, 510, 67 S.Ct. 385, 393, 91 L.Ed. 451.

{¶ 85} In *State v. Hoop* (1999), 134 Ohio App.3d 627, 731 N.E.2d 1177, the court explained the scope of this doctrine as follows:

{¶ 86} "There are two types of work product, and the degree of protection afforded depends on which work product is applicable.

{¶ 87} "Ordinary fact or 'unprivileged fact' work product, such as witness statements and underlying facts, receives lesser protection. *Antitrust Grand Jury* (C.A.6, 1986), 805 F.2d 155, 163. Written or oral information transmitted to the attorney and recorded as conveyed may be compelled upon a showing of 'good

cause' by the subpoenaing party. Civ.R. 26(B)(3); *Hickman,* 329 U.S. at 511-512, 67 S.Ct. at 394. * * * 'Good cause,' as set forth in Civ.R. 26(B)(3), requires a showing of substantial need, that the information is important in the preparation of the party's case, and that there is an inability or difficulty in obtaining the information without undue hardship. * * *

{¶ 88} "The other type of work product is 'opinion work product,' which reflects the attorney's mental impressions, opinions, conclusions, judgments, or legal theories. *Hickman,* 329 U.S. at 511, 67 S.Ct. 393. Because opinion work product concerns the mental processes of the attorney, not discoverable fact, opinion work product receives near absolute protection. *Antitrust Grand Jury,* 805 F.2d at 164. Notes made by the attorney or his agents which record the witness' statement, but which also convey the impressions of the interviewer, are protected as opinion work product, because such notes reveal the attorney's or agent's thoughts."

{¶ 89} Accord *Jackson v. Greger,* supra, at paragraph two of the syllabus, in which the Supreme Court held: " A showing of good cause under Civ.R. 26(B)(3) requires demonstration of need for the materials -- i.e., a showing that the materials, or the information they contain, are relevant and otherwise unavailable."

{¶ 90} Finally, if requested discovery is arguably work product, the trial court should conduct an evidentiary hearing or in camera inspection to evaluate this claim. *Stegman v. Nickels,* Erie App. No. E-05-069, 2006-Ohio-4918, citing *Peyko v. Frederick* (1986), 25 Ohio St.3d 164, 495 N.E.2d 918 and *Miller v. Bassett,* Cuyahoga App. No. 86938, 2006-Ohio-3590; *Grace v. Mastruserio,* supra.

{¶ 91} In this matter, Givaudan asserted that the requested information contained work product, and the trial court summarily granted the motion to compel. Because the trial court did not hold an evidentiary hearing or in camera review to analyze the requested evidence in light of the law regarding work product, and good cause, the court committed reversible error. The second assignment of error is therefore well-taken.

{¶ 92} Further, and in accordance with all of the foregoing, the first, third (insofar as it pertains to the privilege and work product issues), and fourth assignments of error are well-taken.

{¶ 93} We therefore reverse the order compelling discovery and remand the case with directions for the trial court to conduct an evidentiary hearing or to undertake an in camera review of the attorney case file, and to decide which materials are protected, as well as which are unprotected, under the attorney-client privilege or the work-product doctrine.

{¶ 94} In the remainder of the third assignment of error, Givaudan asserts that the trial court misapplied Civ.R. 28 and Civ.R. 45 in ordering King, a nonparty and resident of Florida to appear for deposition in Ohio.

{¶ 95} The Uniform Foreign Depositions Act, adopted in Ohio pursuant to R.C. 2319.09, states:

{¶ 96} "Whenever any mandate, writ, or commission is issued out of any court of record in any other state, territory, district, or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness in this

state, witnesses may be compelled to appear and testify in the same manner and by the same process and proceedings as are employed for the purpose of taking testimony in proceedings pending in this state. * * *"

{¶ 97} In *Fischer Brewing Co. v. Flax* (2000), 138 Ohio App.3d 92, 740 N.E.2d 351, the court held that this statute does not extend any further than enforcing implementation of the foreign discovery order. In any event, since King no longer works for Givaudan, it is unclear that Givaudan has standing to assert the contention that King, a nonparty and resident of Florida, should not be compelled to continue his deposition in Cleveland.

{¶ 98} Accordingly, we reject this claim herein.

{¶ 99} In accordance with all of the foregoing, the judgment which granted SS&D's motion to compel testimony and production is reversed and the matter is remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, JUDGE

KENNETH A. ROCCO, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR