

Attorney-Client Privilege - Ohio

State the general circumstances under which the jurisdiction will treat a communication as attorney-client privileged, including identification of all required elements/circumstances.

In Ohio, the attorney-client privilege is governed by statute, R.C. 2317.02(A), and in matters not addressed in R.C. 2317.02(A), by the common law. State ex rel. Leslie v. Ohio Hous. Fin. Agency, 105 Ohio St.3d 261, 205-Ohio-1508, 824 N.E.2d 990, ¶ 15.

R.C. 2317.02(A) states that:

The following persons shall not testify in certain respects:

(1) An attorney, concerning a communication made to the attorney by a client in that relation or concerning 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 reveals the substance of attorney-client communications in a nonprivileged context or is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject.

The testimonial privilege established under this division does not apply concerning either of the following:

(a) A communication between a client in a capital case, as defined in section 2901.02 of the Revised Code, and the client's attorney if the communication is relevant to a subsequent ineffective assistance of counsel claim by the client alleging that the attorney did not effectively represent the client in the case;

(b) A communication between a client who has since died and the deceased client's attorney if the communication is relevant to a dispute between parties who claim through that deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction, and the dispute addresses the competency of the deceased client when the deceased client executed a document that is the basis of the dispute or whether the deceased client was a victim of fraud, undue influence, or duress when the deceased client executed a document that is the basis of the dispute.

(2) An attorney, concerning a communication made to the attorney by a client in that relationship or the attorney's advice to a client, except that if the client is

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an insurance company, the attorney may be compelled to testify, subject to an in camera inspection by a court, about communications made by the client to the attorney or by the attorney to the client that are related to the attorney's aiding or furthering an ongoing or future commission of bad faith by the client, if the party seeking disclosure of the communications has made a prima-facie showing of bad faith, fraud, or criminal misconduct by the client bars an attorney from testifying concerning a communication made to the attorney by a client in that relation or concerning the attorney's advice to a client without the client's express consent.

Although R.C. 2317.02(A) is framed in terms of a testimonial privilege, the Ohio Supreme Court has held that it "applies not only to prohibit testimony at trial, but also to protect the sought after communications during the discovery process." *Jackson v. Greger*, 110 Ohio St.3d 488, 2006-Ohio-4968, 854 N.E.2d 487, ¶ 7.

The common law attorney-client privilege is broader than R.C. 2317.02(A) and applies "(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived." *State ex rel. Leslie*, 2005-Ohio-1508 at ¶ 21, quoting *Reed v. Baxter*, 134 F.3d 351, 355-356 (6th Cir. 1998). "Where a person approaches an attorney with the view of retaining his services to act on the former's behalf, an attorney-client relationship is created, and communications made to such attorney during the preliminary conferences prior to the actual acceptance or rejection by the attorney of the employment are privileged communications." *Taylor v. Sheldon*, 172 Ohio St. 118, 173 N.E.2d 892 (1961).

"The attorney-client privilege is one of the oldest recognized privileges for confidential communications. Its purpose 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 the public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. By protecting client communications designed to obtain legal advice or assistance, the client will be more candid and will disclose all relevant information to his attorney, even potentially damaging and embarrassing facts." *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, 937 N.E.2d 533, ¶ 16 (internal citations and quotations omitted).

The privilege "does not require the communication to contain purely legal analysis or advice to be privileged. Instead, if a communication between a lawyer and a client would facilitate the rendition of legal services or advice, the communication is privileged." *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth.*, 121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221, ¶ 27, quoting *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869, 875 (5th Cir.1991). "[A]n attorney's factual investigation, if incident to or related to any legal advice that the attorney would give on a particular issue, is covered by the privilege." *State ex rel Lanham v. DeWine*, 135 Ohio St.3d 191, 2013-Ohio-199, 985 N.E.2d 467, ¶ 30.

However, previously created documents independent of any communication between attorney and client are not covered by the privilege. In *re Klemann*, 132 Ohio St. 187, 192, 5 N.E.2d 492 (1936); *Nageotte v. Boston Mills Brandywine Ski Resort*, 9th Summit No. 26563, 2012-Ohio-6102, ¶ 11-12. Thus, incident reports generated shortly after an accident, that are not made at the express instruction of counsel, generally are not privileged. *Besack v. Kroger Co.*, 10th Dist. Franklin No. 22Ap-341-, 2023-Ohio-2497, ¶ 25-28 (collecting cases and discussing factors relevant to determining whether such documents are privileged). The identity of persons who participated in an investigation and witnesses also are not protected. *Pales v. Fedor*, 2018-Ohio-2056, 113 N.E.3d 1019, ¶ 26 (8th Dist.) *State v. Hoop*, 134 Ohio App.3d 627, 640, 731 N.E.2d 1177 (12th Dist. 1999) ("The identity of a witness is not protected by the attorney-client privilege because witness identity does not belong to a particular party."). Likewise, the identity of a client is generally not privileged, although special circumstances can alter that result.

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See, e.g., Pales, 2018-Ohio-2056 at ¶ 26-30. Billing and time records are also generally not privileged, unless they disclose the substance of an attorney-client communication. See, e.g., State ex rel. Dawson v. Bloom-Carroll Local Sch. Dist., 131 Ohio St.3d 10, 2011-Ohio-6009, 959 N.E.2d 524, ¶ 28; Shell v. Drew & Ward Co., L.P.A., 178 Ohio App.3d 163, 2008-Ohio-4474, 897 N.E.2d 201 (1st Dist.); Pavlik v. Barium & Chemicals, Inc., 7th Dist. No. 02 JE 33, 2004-Ohio-1726, ¶ 92. Ohio courts generally allow the narrative portion of invoices to be redacted. State ex rel Ames v. Baker, Dublikar, Beck, Wiley, & Mathews, 11th Dist. Portage No, 2021-P0046, 207 N.E.3d 101, 103-104.

“The attorney-client privilege is not an absolute privilege, and it applies only where necessary to achieve its purpose and protects only those communications necessary to obtain legal advice.” Perfection Corp. v. Travelers Cas. & Sur., 153 Ohio App.3d 28, 2003-Ohio-3358, 790 N.E.2d 817, ¶ 26 (8th Dist.). The party asserting the attorney-client privilege as a bar to discovery bears the burden of proving that it applies. Lemley v. Kaiser, 6 Ohio St.3d 258, 263-264, 452 N.E.2d 1304 (1983); Waldmann v. Waldmann, 48 Ohio St.2d 176, 178, 358 N.E.2d 521 (1976); In re Martin, 141 Ohio St. 87, 103, 47 N.E.2d 388 (1943); Holliday v. Gerth, 8th Dist. Cuyahoga No. 86570, 2006-Ohio-934, ¶ 3.

Some authorities have stated that there is no material difference between Ohio’s attorney-client privilege and the federal attorney-client privilege. See, e.g., 12312 Mayfield Rd., LLC v. High & Low Little Italy, LLC, 8th Dist. Cuyahoga No. 113549, 2024-Ohio-2717, ¶ 14, n.3; Guy v. United Healthcare Corp., 154 F.R.D. 172, 177 n.3 (S.D. Ohio 1993); MA Equip. Leasing I, LLC v. Tilton, 10th Dist. Franklin Nos. 12AP-564, 12AP-586, 2012-Ohio-4668, ¶ 20. For example, Ohio courts have followed federal law in rejecting the “control group test” and applying the attorney-client privilege to communications with corporate employees regardless of their position, provided that the communication is related to their employment. See, e.g., Clapp v. Mueller Elec. Co., 162 Ohio App.3d 810, 2005-Ohio-4410, 835 N.E.2d 757, ¶ 53 (8th Dist.); Bennett v. Roadway Express, Inc., 9th Dist. Summit No. 20317, 2001 Ohio App. LEXIS 3394, *41-44 (Aug. 1, 2001). One court has noted that the United States Supreme Court’s decision in Upjohn Co. v. United States, 449 U.S. 383, 396 (1981) “is cited by every Ohio case considering the issue of the attorney-client privilege in the corporate context.” Smith v. The Tech. House, Ltd., 11th Dist. Portage No. 2018-P-0080, 2019-Ohio-2670, ¶ 26 n.1. However, as discussed below, Ohio has some unique issues relating to waiver of the attorney-client privilege, the common-interest doctrine, and immediate appeal of orders relating to disclosure of privileged materials that are worth noting.

Does the jurisdiction recognize/preserve the attorney-client privilege for communications among co-defendants in joint-defense or common-interest situations? If so, what are the requirements for establishing two or more co-defendants’ communications qualify?

Ohio, like many other jurisdictions, does not always clearly distinguish between arguably distinct but related doctrines such as the common-interest doctrine, joint-client privilege or joint-defense doctrine. Cf. Lugosch v. Congel, 219 F.R.D. 220, 236 (N.D.N.Y. 2003) (“[The] joint defense privilege has many monikers such as the common interest doctrine, common interest arrangement doctrine, or pooled information doctrine. Unfortunately, courts, commentators, and attorneys use these terms interchangeably even when they do not serve the same purpose.”); George S. Mahaffey Jr., Taking Aim at the Hydra: Why the “Allied-Party Doctrine” Should Not Apply in Qui Tam Cases When the Government Declines to Intervene, 23 Rev. Litig. 629, 631-33 (2004) (cataloguing the mishmash of terms before choosing “allied-party doctrine”).

Ohio law clearly recognizes that communications between joint clients and counsel are afforded the same protection as communications between a single client and counsel. Assuming that the general elements of the attorney-client privilege are satisfied, such communications cannot be discovered by a third party. All of the joint clients must agree to waive the privilege to disclose communications to a third party. However, the joint clients cannot assert the privilege against each other. When their interests become adverse, the otherwise privileged

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communications become fair game in a dispute between them. See, e.g., *Squire, Sanders and Dempsey, L.L.P.*, 127 Ohio St.3d 161, 937 N.E.2d 533, 2010-Ohio-4469, ¶ 32; *Emley v. Selepchak*, 76 Ohio App. 257, 262, 63 N.E. 919 (9th Dist. 1945).

This privilege was applied in *Hinerman v. The Grill on Twenty First St. LLC*, 5th Dist. Licking No. 17-CA-82, 2018-Ohio-1927. The dispute involved two members of a limited liability company who had a falling out over the business. The plaintiff sought to depose the attorney who formed the LLC. The defendant disputed that the attorney had represented the other member of the LLC. There apparently was no representation letter outlining the parties to the representation. The attorney testified in support of the privilege objection that his client in drafting the operating agreement for the LLC was the defendant. *Id.* at ¶ 16. However, his deposition testimony prior to the privilege objection was far more equivocal. *Id.*

The court noted that the creation of an attorney–client relationship involves the subjective belief of the client. *Id.* at ¶ 12. The plaintiff testified that he had personally employed the attorney in the past and was never told that the attorney was only representing the defendant in forming the LLC. *Id.* at ¶ 15. Based on this testimony, the appellate court concluded that the trial court did not abuse its discretion in finding that there was a joint representation.

The application of the privilege among joint clients was also discussed in *Galati v. Pettorini*, 8th Dist. Cuyahoga No. 101712, 2015-Ohio-1305. The plaintiff was one of 11 joint plaintiffs who filed suit against an insurance company. He later filed a malpractice claim against the attorney and sought discovery of communications with other plaintiffs concerning the handling of the original case. The attorney objected on the basis of the attorney–client privilege. The trial court ordered the documents produced. The court of appeals agreed with the attorney and reversed, holding that the plaintiff “could not and cannot unilaterally waive the privilege of the other . . . clients.” *Id.* at ¶ 40. It should be noted that courts in other jurisdictions have reached different results in similar scenarios. See, e.g., *Newsome v. Lawson*, 286 F. Supp. 3d 657 (D. Conn. 2017); *Anten v. Superior Court of Los Angeles Cty.*, 183 Cal. Rptr.3d 422 (2d Dist. 2015); *Williamson v. Edwards*, 880 So. 2d 310 (Miss. 2004); *Scrivner v. Hobson*, 854 S.W. 2d 148 (Tex. Ct. App. 1993).

The Ohio Supreme Court has referenced the common-interest and joint-defenses doctrines in cases involving public records requests but has not substantively addressed the elements of the doctrines. In *re Grand Jury Proceeding of Doe*, 150 Ohio St.3d 398, 2016-Ohio-8001, 82 N.E.3d 1115, ¶ 22 n.3; *State ex rel. ESPN, Inc. v. Ohio State Univ.*, 132 Ohio St.3d 212, 2012-Ohio-2690, 970 N.E.2d 939, ¶ 38. However, lower Ohio courts and federal courts applying Ohio law have consistently recognized the common-interest doctrine. See, e.g., *Gerace v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga No. 113231, 2024-Ohio-2708, ¶ 22; *Savel v. Metrohealth Sys.* No. 1:22-cv-02154, 2024 U.S. Dist. LEXIS 132025, *5(N.D. Ohio July 26, 2024); *Am. Mun. Power, Inc. v. Voith Hydro, Inc.*, No. 2:17-cv-708, 2021 U.S. Dist. LEXIS 201870,*22-25 (N.D. Ohio Oct. 20, 2021) (collecting cases). For example, in *State ex rel. Bardwell v. Cordray*, 181 Ohio App.3d 661, 2009-Ohio-1265, 910 N.E.2d 504, ¶ 87 (10th Dist.) the court held:

Apparently, the so-called “common interest privilege” of the attorney-client privilege is succinctly set forth in *McCormick on Evidence* (6 Ed.2006) 413-414, Section 91.1:

Another step beyond the joint client situation is the instance where two or more clients, each represented by their own lawyers, meet to discuss matters of common interest- commonly called a joint defense agreement or pooled information situation. Such communications among the clients and their lawyers are within the privilege. Although it originated in the context of criminal cases, the doctrine has been applied in civil cases and to plaintiffs in litigation as well as defendants * * *

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The doctrine has been explained as “an exception to the general rule that disclosure of privileged materials to a third party waives the privilege.” *Condos. at Stonebridge Owners’ Ass’n v. K&D Grp., Inc.*, 8th Dist. Cuyahoga No. 100261, 2014-Ohio-503, ¶ 15. The doctrine does not create an independent privilege, but rather presupposes the existence of an otherwise valid privilege. *Id.*; see also *Gerace*, 2024-Ohio-2708, at ¶ 23 (“The common interest doctrine is an extension of the attorney-client privilege and work-product doctrine. It is not an independent source of privilege or confidentiality. If a communication or document is not otherwise protected by the attorney-client privilege or work-product doctrine, the common-interest doctrine has no application.”).

“[T]he common-interest doctrine protects documents and communications from discovery if two conditions are satisfied: (1) the documents or communications were shared between parties with a common legal interest or who are represented by the same attorney and (2) the documents or communications are protected by the attorney-client privilege and/or work-product doctrine.” *Gerace*, 2024-Ohio-2708 at ¶ 24. Under Ohio law there is no requirement that the parties be in the same lawsuit for the doctrine to apply. *Id.* at ¶ 26. However, the shared interest must be a legal one, a commercial interest is not sufficient. *Am. Mun. Power*, 2021 U.S. Dist. LEXIS 201870 at *24-26. One court has suggested that this is a requirement where federal law and Ohio law may differ, with Ohio law only requiring a “common legal strategy” and federal law requiring an “identical legal interest.” *Savel*, 2024 U.S. Dist. LEXIS 132025, at *4, n.17. However, Ohio courts routinely cite to federal law in discussing the common-interest doctrine. See, e.g., *Gerace*, 2024-Ohio-2708 at ¶ 22-26; *Total Quality Logistics v. BBI Logistics, LLC*, 12th Dist. Clermont No. CA2021-04-012, 2022-Ohio-1440, ¶ 19.

Some of the potential limitations of these doctrines are addressed in *M.A. Equip. Leasing*, 2012-Ohio-4668. The case involved an entity created to hold leases. *Id.* at ¶ 2. In the course of litigation, outside counsel for the entity communicated with non-lawyers at parent entities. Relying heavily on the Third Circuit Court of Appeals decision in *In re Teleglobe Commc’n Corp. v. BCE, Inc.*, 493 F.3d 345, 361 (3d Cir. 2007), the court held that the corporate parent/subsidiary relationship was not sufficient to create an attorney/client relationship between counsel for the holding entity and the parent entities, and therefore the attorney-client privilege did not apply to the communications. The court found there was no evidence the parent entities ever retained or were represented by the outside counsel. *Id.* at ¶ 33-35. In a footnote, the court also rejected application of what it described as the “community-of-interest rationale” because that rationale would only apply to communications between counsel for the entities regarding a matter of common interest, not to communications between an attorney for one entity and employees of the other entities. *Id.* at ¶ 36, n.2.

Identify key pitfalls/situations likely to result in the loss of the ability to claim the protections of the privilege – e.g. failure to assert, waiver, crime-fraud exception, assertion of advice of counsel, transmittal to additional non-qualifying recipients, etc.

As discussed above, the Ohio attorney-client privilege is based both in statute and the common law. This has created some complexities in determining how the privilege can be lost.

In *State v. McDermott*, 72 Ohio St.3d 570, 651 N.E.2d 985 (1995), the Ohio Supreme Court considered whether a client’s disclosure of conversations with his counsel to a third-party waived the privilege. The version of R.C. 2317.02(A) in place at the time only allowed for waiver of the privilege if the client “testifies” about the communications. The Court held that “R.C. 2317.02(A) provides the exclusive means by which privileged communications directly between an attorney and a client can be waived.” Therefore, because the client had neither testified nor consented to disclosure of the communications, the Court held there was no waiver. *Id.* at 574.

The Ohio Supreme Court further addressed the issue of waiver in *Jackson*, 2006-Ohio-4968. The case involved a

claim a party had implicitly waived the privilege as to certain communications by placing them “at-issue” in subsequent litigation. The Court disagreed, rejecting the doctrine of at-issue waiver and refusing to recognize waivers not explicitly recognized in the statute. *Id.* at ¶ 13.

McDermott and Jackson appeared to sharply limit the circumstances in which the attorney-client privilege could be waived to those expressly contained in R.C. 2317.02. However, the Ohio Supreme Court clarified its earlier holdings in *Squire Sanders & Dempsey*, 2010-Ohio-4469. The plaintiff had filed a malpractice complaint, but then objected to the disclosure of privileged communications because there was no provision in R.C. 2317.02 waiving the privilege in such circumstances. The Ohio Supreme Court drew a distinction between judicially created waivers of the privilege and recognized common law “exceptions” to the privilege. The Court recognized a “self-protection” exception to the privilege when the client charges the attorney with a breach of duty or other wrongdoing. *Id.* at ¶ 37-41. Thus, Ohio law draws a distinction between “waiver” of the privilege and “exceptions” to the privilege. See, e.g., *Rehm v. Eckinger*, 5th Dist. Stark No. 2023CA00113, 2024-Ohio-1860, ¶ 22-23 (discussing difference between waivers and exceptions). Decisions following *Jackson* have clarified that the self-defense exception only applies to communications between the former client and the defending attorneys, not communications between the former client and other counsel. See, e.g., *Rehm*, at ¶ 26; *Cochran Ohio LLC v. Washington*, 2d Dist. Montgomery No. CA 29713, 2023-Ohio-2212, ¶ 25.

The Court in *Squire Sanders & Dempsey* also discussed several other examples of common law exceptions to application of the attorney-client privilege. One such exception is the crime-fraud exception, which applies when the advice sought by the client and conveyed by the attorney relates to a future unlawful or fraudulent transaction. 2010-Ohio-4469 at ¶ 25-28. In order for the exception to apply, “[a] party invoking the crime-fraud exception must demonstrate that there is a factual basis for a showing of probable cause to believe that a crime or fraud has been committed and that the communications were in furtherance of the crime or fraud.” *State ex rel. Nix v. Cleveland*, 83 Ohio St.3d 379, 384, 700 N.E.2d 12 (1994). A court may conduct an in camera review of purportedly privileged communications to determine whether the exception applies. *Suhay v. Hall*, 11th Dist. Ashtabula No. 2022-A-0062, 2023-Ohio-4869, ¶ 16. A lesser evidentiary showing is required to trigger in camera review than is required to waive the privilege. *Id.* Ohio courts apply this exception to wrongful acts that are not strictly “crimes” or “frauds.” *Id.* at ¶ 15. “Ohio courts have, and will continue to, analyze wrongful conduct not strictly falling into the category of either crimes or frauds on a case-by-case basis to determine if the conduct involves similar elements of malicious or injurious intent and deliberate falsehood. If it does, there is no reason why the law should prevent disclosure of the role an attorney may have played in assisting his or her client to commit that type of act, which itself has no social value.” *Safety Today, Inc. v. Roy*, No. 2:12-cv-510, 2013 U.S. Dist. LEXIS 147765, *16-17 (S.D. Ohio Oct. 11, 2013).

Another exception is the joint representation exception, touched on above, “which provides that a client of an attorney cannot invoke the privilege in litigation against a co-client.” *Squire Sanders & Dempsey*, 2010-Ohio-4469 at ¶ 32.

A third exception mentioned by the Court in *Squire Sanders & Dempsey* that has generated considerable litigation in Ohio courts is the “lack of good faith” exception. 2010-Ohio-4469 at ¶ 29-31. In *Boone v. Vanliner Ins. Co.*, 91 Ohio St.3d 209, 212, 744 N.E.2d 154 (2001), the Ohio Supreme Court held that attorney-client communications furthering an insurance company’s lack of good faith in denying coverage, were unworthy of protection by the attorney-client privilege. “That is, claims file materials that show an insurer’s lack of good faith in denying coverage are unworthy of protection.” *Id.* at 213. The Court limited its holding somewhat, explaining that “the only attorney-client and work-product documents that would contain information related to the bad faith claim, and, thus, be unworthy of protection, would have been created prior to the denial of coverage.” *Id.*

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The Ohio General Assembly tried to address the Boone decision by amending of R.C. 2317.02(A)(2) to require a prima facie showing of bad faith before allowing disclosure of privileged information. However, despite the holding in Jackson, 2006-Ohio-4968 at ¶ 7 that the statute “applies not only to prohibit testimony at trial, but also to protect the sought after communications during the discovery process,” a majority of courts have held that the amendment only applies to testimony and does not prevent the disclosure of claims file documents. See, e.g., William Powell Co. v. OneBeacon Ins. Co., No. 1:14-cv-807, 2017 U.S. Dist. LEXIS 146802, *7 (S.D. Ohio June 21, 2017). In order to address the potential prejudice that can result from disclosure of privileged materials relevant to the bad faith claim on the underlying privilege claim, some courts have ordered bifurcation of the bad faith claim and a stay of bad faith discovery until after the underlying coverage issue is resolved. See, e.g., Ryan v. State Farm Auto Ins. Co., 2d Dist. No. 29778, 2023-Ohio-3731, ¶ 25-42 (discussing cases and holding that “as a matter of law, in an action based on an insurance contract, a trial court errs in failing to bifurcate a bad faith claim from a breach of contract claim and in failing to stay all discovery in the bad faith claim until the adjudication of the breach of contract claim.”). These issues are heavily fact intensive, involve consideration of the work-product doctrine as well as the attorney-client privilege, and decisions arguably vary between appellate districts, so a full analysis is beyond the scope of this article. Parties with privilege issues in the context of insurance bad faith litigation must carefully review Boone and its progeny.

Although not specifically mentioned in Squire Sanders & Dempsey, Ohio courts have also found an exception to the attorney-client privilege when a party asserts an advice of counsel defense. See, e.g., Maddox v. Bd. of Comm’rs, 2d Dist. Greene No. 2013-CA-71, 2014-Ohio-1541, ¶ 9; Meyers Roman Friedberg & Lewis v. Malm, 183 Ohio App.3d 195, 2009-Ohio-2577, 916 N.E.2d 832 (8th Dist.). And despite the holding in Jackson, the assertion of other claims and defenses that specifically put privileged communications at issue may waive the privilege depending on the facts of the case and general common law waiver principles. See, e.g., Smith, 2019-Ohio-2670 at ¶ 32-33 (holding that assertion of Faragher/Ellerth affirmative defense to sexual harassment claim did not waive privilege concerning internal investigation because defendant did not rely on the investigation as the basis of the defense, but recognizing possibility of waiver depending on facts); Fifth Third Bancorp v. Certain Underwriters at Lloyd’s, No. 1:14-cv-869, 2017 U.S. Dist. LEXIS 70639, *14 (S.D. Ohio May 9, 2017) (limiting Jackson to its facts and recognizing possibility of implied common law waiver when party “simultaneously [relies] on privileged information to prove its claims while brandishing the ‘shield’ of privilege to prevent the [opposing party] from obtaining the same information.”).

Ohio courts have also recognized waiver based upon the inadvertent disclosure of privileged information. Inadvertent disclosure does not automatically waive the attorney-client privilege, but rather courts consider a variety of factors to determine whether waiver is fair under the circumstances. See, e.g., See v. Haugh, 8th Dist. Cuyahoga No. 101380, 2014-Ohio-5290, ¶ 29; Miles-McClellan, 10th Dist. Franklin Nos. 05AP-1112, 05AP-1113, 05AP-1114 and 05AP-1115, 2006-Ohio-3439, ¶ 14-15 (applying five factor test including: “(1) the reasonableness of the precautions taken by the party asserting privilege to prevent the disclosure, (2) the time taken to rectify the inadvertent error, (3) the scope and nature of the discovery proceedings, (4) the extent of the disclosure in relation to a role in discovery proceedings, and (5) the overriding issue of fairness.”).

When an exception or waiver is found, Ohio courts have generally applied a subject matter test to determine the scope of the disclosure. See, e.g., MA Equip. Leasing, 2012-Ohio-4668 at ¶ 20; Hollingsworth v. Time Warner Cable, 157 Ohio App.3d 539, 812 N.E.2d 976 (1st Dist. 2004).

As noted above, the party asserting the protection that the attorney-client privilege affords has the burden of showing it applies. Broad and generalized claims of attorney-client privilege are not sufficient to satisfy this burden. See, e.g., Eddy v. Farmers Prop. Cas. Ins. Co., 1st Dist. No. C-230298, 2024-Ohio-1047, ¶ 32 (collecting cases). Generally, Ohio Civ.R. 26(B)(8) requires the production of a privilege log to support a claim of privilege.

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Drummond, 2023-Ohio-283, at ¶ 25; Total Quality Logistics, 2022-Ohio-1440, at ¶ 22. However, a log is not required in all cases, such as when the basis of the privilege claim is clear and generally applicable. See, e.g., Gerace, 2024-Ohio-2708, at ¶ 32 (holding that documents created after litigation was filed were presumptively privileged and did not need to be logged). The Ohio Civil Rules do not specify when the log must be produced and parties should carefully review any local rules and court orders that might provide details on the timing of production of a privilege log.

Identify any recent trends or limitations imposed by the jurisdiction on the scope of the attorney-client privilege.

Ohio law concerning immediate appeal of orders to produce arguably privileged information continues to develop. Under Ohio procedure, an order for discover of a “privileged matter” is a “provisional remedy.” R.C. 2505.02(A)(3). An order granting or denying a provisional remedy is final and appealable if it has the effect of “determin[ing] the action with respect to the provisional remedy and prevent[ing] a judgment in the action in favor of the appealing party with respect to the provisional remedy” and “[t]he appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.” R.C. 2505.02(B)(4).

In *Smith v. Chen*, 142 Ohio St.3d, 2015-Ohio-1480, 31 N.E.3d 633, the Ohio Supreme Court held that an appellate court did not have jurisdiction to review a trial court’s order to produce a surveillance video that the defendant claimed was protected by the work-product doctrine. The Court did not provide much explanation for its ruling, except to say that the defendant had never even attempted to explain why it could not be afforded a meaningful or effective remedy upon final review. *Id.* at ¶ 6.

The Ohio Supreme Court expanded its analysis of the issue in *Burnham v. Cleveland Clinic*, 151 Ohio St.3d 356, 2016-Ohio-8000, 89 N.E.3d 546. In *Burnham*, the Court held that an order requiring production on an incident report the defendant claimed was privileged was immediately appealable because disclosure of privileged information destroys confidentiality and cannot be remedied on final review. *Id.* at ¶ 21. The Court did not overrule *Chen*, or limit it to the fact the defendant in that case simply had failed to make the necessary showing there could be no effective final review of the order. Instead, the Court distinguished *Chen* on the grounds that although the opinion referred to “privileged material” it had only done so in a “looser, popular sense.” *Id.* at ¶ 27. The Court explained that *Chen* addressed materials allegedly protected by the work-product doctrine, which the majority opinion held was not recognized by common law and was entitled to less protection than materials protected by the attorney-client privilege. *Id.* at ¶ 17-18. As the dissent points out, the proposition that the work-product doctrine was not recognized in the common law is a dubious one. *Id.* at ¶ 46.

The majority opinion left the door open to immediate appeal of orders to produce work product by stating that “[t]his is not to say that compelling the production of an attorney’s work product pursuant to Civ. R. 23(B)(3) would never satisfy R.C. 2505.02(B)(4)(b) and require an interlocutory appeal.” *Burnham* at ¶ 26. However, the Court did not provide any guidance concerning what circumstances would warrant an immediate appeal. Therefore, the ability to immediately appeal orders concerning the production of information covered by the work-product doctrine unfortunately remains uncertain. However, subsequent lower court decisions have generally extended the right to immediately appeal to orders that clearly require disclosure of allegedly work-product documents. See, e.g., *Drummond v. State Farm Auto Ins. Co.*, 2023-Ohio-283, 206 N.E.3d 1274, ¶ 31-34 (10th Dist.)

An order is only immediately appealable if it specifically orders production of allegedly privileged information. For example, an order refusing to stay discovery of a bad faith claim is not immediately appealable, although as discussed above such discovery is likely to implicate privilege information. See, e.g., *Gordon v. GEICO Ins. Co.*, 8th

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Dist. Cuyahoga No. 107440, 2019-Ohio-2437, ¶ 11; Nationwide Mut. Fire Ins. Co. v. Jones, 4th Dist. Scioto No. 15CA3709, 2017-Ohio-4244, ¶ 15-16. An order to produce information for an in camera inspection or to appear for deposition is also not immediately appealable. “); Cobb v. Shipman, 11th Dist. Trumbull No. 2011-T-0049, 2012-Ohio-1676, ¶ 37.