

As Introduced

**124th General Assembly
Regular Session
2001-2002**

H. B. No. 533

REPRESENTATIVE Buehrer

A B I L L

To amend section 2317.02 of the Revised Code to permit
the testimonial privilege between a physician and a
deceased patient to be waived by any party to a
will contest action.

1
2
3
4

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That section 2317.02 of the Revised Code be
amended to read as follows:

5
6

Sec. 2317.02. The following persons shall not testify in
certain respects:

7
8

(A) 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 and except that, if the
client voluntarily testifies 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;

9
10
11
12
13
14
15
16
17
18

(B)(1) A physician or a dentist concerning a communication
made to the physician or dentist by a patient in that relation or

19
20

the physician's or dentist's advice to a patient, except as
otherwise provided in this division, division (B)(2), and division
(B)(3) of this section, and except that, if the patient is deemed
by section 2151.421 of the Revised Code to have waived any
testimonial privilege under this division, the physician may be
compelled to testify on the same subject.

The testimonial privilege established under this division
does not apply, and a physician or dentist may testify or may be
compelled to testify, in any of the following circumstances:

(a) In any civil action, in accordance with the discovery
provisions of the Rules of Civil Procedure in connection with a
civil action, or in connection with a claim under Chapter 4123. of
the Revised Code, under any of the following circumstances:

(i) If the patient or the guardian or other legal
representative of the patient gives express consent;

(ii) If the patient is deceased, the spouse of the patient or
the executor or administrator of the patient's estate gives
express consent;

(iii) If a medical claim, dental claim, chiropractic claim,
or optometric claim, as defined in section 2305.11 of the Revised
Code, an action for wrongful death, any other type of civil
action, or a claim under Chapter 4123. of the Revised Code is
filed by the patient, the personal representative of the estate of
the patient if deceased, or the patient's guardian or other legal
representative.

(b) In any civil action concerning court-ordered treatment or
services received by a patient, if the court-ordered treatment or
services were ordered as part of a case plan journalized under
section 2151.412 of the Revised Code or the court-ordered
treatment or services are necessary or relevant to dependency,
neglect, or abuse or temporary or permanent custody proceedings

21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51

under Chapter 2151. of the Revised Code. 52

(c) In any criminal action concerning any test or the results 53
of any test that determines the presence or concentration of 54
alcohol, a drug of abuse, or alcohol and a drug of abuse in the 55
patient's blood, breath, urine, or other bodily substance at any 56
time relevant to the criminal offense in question. 57

(d) In any criminal action against a physician or dentist. In 58
such an action, the testimonial privilege established under this 59
division does not prohibit the admission into evidence, in 60
accordance with the Rules of Evidence, of a patient's medical or 61
dental records or other communications between a patient and the 62
physician or dentist that are related to the action and obtained 63
by subpoena, search warrant, or other lawful means. A court that 64
permits or compels a physician or dentist to testify in such an 65
action or permits the introduction into evidence of patient 66
records or other communications in such an action shall require 67
that appropriate measures be taken to ensure that the 68
confidentiality of any patient named or otherwise identified in 69
the records is maintained. Measures to ensure confidentiality that 70
may be taken by the court include sealing its records or deleting 71
specific information from its records. 72

(e) In any will contest action under sections 2107.71 to 73
2107.77 of the Revised Code if all of the following apply: 74

(i) The patient is deceased. 75

(ii) A party to the will contest action gives express 76
consent. 77

(iii) The party who gives consent pursuant to division 78
(B)(1)(e)(ii) of this section demonstrates to the court that that 79
party would be an heir of the patient if the patient died without 80
a will, is a beneficiary under the will that is the subject of the 81
will contest action, or is a beneficiary under another 82

testamentary document allegedly executed by the patient. 83

(2)(a) If any law enforcement officer submits a written 84
statement to a health care provider that states that an official 85
criminal investigation has begun regarding a specified person or 86
that a criminal action or proceeding has been commenced against a 87
specified person, that requests the provider to supply to the 88
officer copies of any records the provider possesses that pertain 89
to any test or the results of any test administered to the 90
specified person to determine the presence or concentration of 91
alcohol, a drug of abuse, or alcohol and a drug of abuse in the 92
person's blood, breath, or urine at any time relevant to the 93
criminal offense in question, and that conforms to section 94
2317.022 of the Revised Code, the provider, except to the extent 95
specifically prohibited by any law of this state or of the United 96
States, shall supply to the officer a copy of any of the requested 97
records the provider possesses. If the health care provider does 98
not possess any of the requested records, the provider shall give 99
the officer a written statement that indicates that the provider 100
does not possess any of the requested records. 101

(b) If a health care provider possesses any records of the 102
type described in division (B)(2)(a) of this section regarding the 103
person in question at any time relevant to the criminal offense in 104
question, in lieu of personally testifying as to the results of 105
the test in question, the custodian of the records may submit a 106
certified copy of the records, and, upon its submission, the 107
certified copy is qualified as authentic evidence and may be 108
admitted as evidence in accordance with the Rules of Evidence. 109
Division (A) of section 2317.422 of the Revised Code does not 110
apply to any certified copy of records submitted in accordance 111
with this division. Nothing in this division shall be construed to 112
limit the right of any party to call as a witness the person who 113
administered the test to which the records pertain, the person 114

under whose supervision the test was administered, the custodian 115
of the records, the person who made the records, or the person 116
under whose supervision the records were made. 117

(3)(a) If the testimonial privilege described in division 118
(B)(1) of this section does not apply as provided in division 119
(B)(1)(a)(iii) of this section, a physician or dentist may be 120
compelled to testify or to submit to discovery under the Rules of 121
Civil Procedure only as to a communication made to the physician 122
or dentist by the patient in question in that relation, or the 123
physician's or dentist's advice to the patient in question, that 124
related causally or historically to physical or mental injuries 125
that are relevant to issues in the medical claim, dental claim, 126
chiropractic claim, or optometric claim, action for wrongful 127
death, other civil action, or claim under Chapter 4123. of the 128
Revised Code. 129

(b) If the testimonial privilege described in division (B)(1) 130
of this section does not apply to a physician or dentist as 131
provided in division (B)(1)(c) of this section, the physician or 132
dentist, in lieu of personally testifying as to the results of the 133
test in question, may submit a certified copy of those results, 134
and, upon its submission, the certified copy is qualified as 135
authentic evidence and may be admitted as evidence in accordance 136
with the Rules of Evidence. Division (A) of section 2317.422 of 137
the Revised Code does not apply to any certified copy of results 138
submitted in accordance with this division. Nothing in this 139
division shall be construed to limit the right of any party to 140
call as a witness the person who administered the test in 141
question, the person under whose supervision the test was 142
administered, the custodian of the results of the test, the person 143
who compiled the results, or the person under whose supervision 144
the results were compiled. 145

(c) If the testimonial privilege described in division (B)(1) 146

of this section does not apply as provided in division (B)(1)(e) 147
of this section, a physician or dentist may be compelled to 148
testify or to submit to discovery in the will contest action under 149
sections 2107.71 to 2107.77 of the Revised Code only as to the 150
patient in question on issues relevant to the competency of the 151
patient at the time of the execution of the will. Testimony or 152
discovery conducted pursuant to this division shall be conducted 153
in accordance with the Rules of Civil Procedure. 154

(4) The testimonial privilege described in division (B)(1) of 155
this section is not waived when a communication is made by a 156
physician to a pharmacist or when there is communication between a 157
patient and a pharmacist in furtherance of the physician-patient 158
relation. 159

(5)(a) As used in divisions (B)(1) to (4) of this section, 160
"communication" means acquiring, recording, or transmitting any 161
information, in any manner, concerning any facts, opinions, or 162
statements necessary to enable a physician or dentist to diagnose, 163
treat, prescribe, or act for a patient. A "communication" may 164
include, but is not limited to, any medical or dental, office, or 165
hospital communication such as a record, chart, letter, 166
memorandum, laboratory test and results, x-ray, photograph, 167
financial statement, diagnosis, or prognosis. 168

(b) As used in division (B)(2) of this section, "health care 169
provider" means a hospital, ambulatory care facility, long-term 170
care facility, pharmacy, emergency facility, or health care 171
practitioner. 172

(c) As used in division (B)(5)(b) of this section: 173

(i) "Ambulatory care facility" means a facility that provides 174
medical, diagnostic, or surgical treatment to patients who do not 175
require hospitalization, including a dialysis center, ambulatory 176
surgical facility, cardiac catheterization facility, diagnostic 177

imaging center, extracorporeal shock wave lithotripsy center, home
health agency, inpatient hospice, birthing center, radiation
therapy center, emergency facility, and an urgent care center.
"Ambulatory health care facility" does not include the private
office of a physician or dentist, whether the office is for an
individual or group practice.

(ii) "Emergency facility" means a hospital emergency
department or any other facility that provides emergency medical
services.

(iii) "Health care practitioner" has the same meaning as in
section 4769.01 of the Revised Code.

(iv) "Hospital" has the same meaning as in section 3727.01 of
the Revised Code.

(v) "Long-term care facility" means a nursing home,
residential care facility, or home for the aging, as those terms
are defined in section 3721.01 of the Revised Code; an adult care
facility, as defined in section 3722.01 of the Revised Code; a
nursing facility or intermediate care facility for the mentally
retarded, as those terms are defined in section 5111.20 of the
Revised Code; a facility or portion of a facility certified as a
skilled nursing facility under Title XVIII of the "Social Security
Act," 49 Stat. 286 (1965), 42 U.S.C.A. 1395, as amended.

(vi) "Pharmacy" has the same meaning as in section 4729.01 of
the Revised Code.

(6) Divisions (B)(1), (2), (3), (4), and (5) of this section
apply to doctors of medicine, doctors of osteopathic medicine,
doctors of podiatry, and dentists.

(7) Nothing in divisions (B)(1) to (6) of this section
affects, or shall be construed as affecting, the immunity from
civil liability conferred by section 307.628 or 2305.33 of the
Revised Code upon physicians who report an employee's use of a

drug of abuse, or a condition of an employee other than one 209
involving the use of a drug of abuse, to the employer of the 210
employee in accordance with division (B) of that section. As used 211
in division (B)(7) of this section, "employee," "employer," and 212
"physician" have the same meanings as in section 2305.33 of the 213
Revised Code. 214

(C) A member of the clergy, rabbi, priest, or regularly 215
ordained, accredited, or licensed minister of an established and 216
legally cognizable church, denomination, or sect, when the member 217
of the clergy, rabbi, priest, or minister remains accountable to 218
the authority of that church, denomination, or sect, concerning a 219
confession made, or any information confidentially communicated, 220
to the member of the clergy, rabbi, priest, or minister for a 221
religious counseling purpose in the member of the clergy's, 222
rabbi's, priest's, or minister's professional character; however, 223
the member of the clergy, rabbi, priest, or minister may testify 224
by express consent of the person making the communication, except 225
when the disclosure of the information is in violation of a sacred 226
trust; 227

(D) Husband or wife, concerning any communication made by one 228
to the other, or an act done by either in the presence of the 229
other, during coverture, unless the communication was made, or act 230
done, in the known presence or hearing of a third person competent 231
to be a witness; and such rule is the same if the marital relation 232
has ceased to exist; 233

(E) A person who assigns a claim or interest, concerning any 234
matter in respect to which the person would not, if a party, be 235
permitted to testify; 236

(F) A person who, if a party, would be restricted under 237
section 2317.03 of the Revised Code, when the property or thing is 238
sold or transferred by an executor, administrator, guardian, 239
trustee, heir, devisee, or legatee, shall be restricted in the 240

same manner in any action or proceeding concerning the property or thing. 241
242

(G)(1) A school guidance counselor who holds a valid educator license from the state board of education as provided for in section 3319.22 of the Revised Code, a person licensed under Chapter 4757. of the Revised Code as a professional clinical counselor, professional counselor, social worker, or independent social worker, or registered under Chapter 4757. of the Revised Code as a social work assistant concerning a confidential communication received from a client in that relation or the person's advice to a client unless any of the following applies: 243
244
245
246
247
248
249
250
251

(a) The communication or advice indicates clear and present danger to the client or other persons. For the purposes of this division, cases in which there are indications of present or past child abuse or neglect of the client constitute a clear and present danger. 252
253
254
255
256

(b) The client gives express consent to the testimony. 257

(c) If the client is deceased, the surviving spouse or the executor or administrator of the estate of the deceased client gives express consent. 258
259
260

(d) The client voluntarily testifies, in which case the school guidance counselor or person licensed or registered under Chapter 4757. of the Revised Code may be compelled to testify on the same subject. 261
262
263
264

(e) The court in camera determines that the information communicated by the client is not germane to the counselor-client or social worker-client relationship. 265
266
267

(f) A court, in an action brought against a school, its administration, or any of its personnel by the client, rules after an in-camera inspection that the testimony of the school guidance counselor is relevant to that action. 268
269
270
271

(g) The testimony is sought in a civil action and concerns 272
court-ordered treatment or services received by a patient as part 273
of a case plan journalized under section 2151.412 of the Revised 274
Code or the court-ordered treatment or services are necessary or 275
relevant to dependency, neglect, or abuse or temporary or 276
permanent custody proceedings under Chapter 2151. of the Revised 277
Code. 278

(2) Nothing in division (G)(1) of this section shall relieve 279
a school guidance counselor or a person licensed or registered 280
under Chapter 4757. of the Revised Code from the requirement to 281
report information concerning child abuse or neglect under section 282
2151.421 of the Revised Code. 283

(H) A mediator acting under a mediation order issued under 284
division (A) of section 3109.052 of the Revised Code or otherwise 285
issued in any proceeding for divorce, dissolution, legal 286
separation, annulment, or the allocation of parental rights and 287
responsibilities for the care of children, in any action or 288
proceeding, other than a criminal, delinquency, child abuse, child 289
neglect, or dependent child action or proceeding, that is brought 290
by or against either parent who takes part in mediation in 291
accordance with the order and that pertains to the mediation 292
process, to any information discussed or presented in the 293
mediation process, to the allocation of parental rights and 294
responsibilities for the care of the parents' children, or to the 295
awarding of parenting time rights in relation to their children; 296

(I) A communications assistant, acting within the scope of 297
the communication assistant's authority, when providing 298
telecommunications relay service pursuant to section 4931.35 of 299
the Revised Code or Title II of the "Communications Act of 1934," 300
104 Stat. 366 (1990), 47 U.S.C. 225, concerning a communication 301
made through a telecommunications relay service. Nothing in this 302
section shall limit the obligation of a communications assistant 303

to divulge information or testify when mandated by federal law or 304
regulation or pursuant to subpoena in a criminal proceeding. 305

Nothing in this section shall limit any immunity or privilege 306
granted under federal law or regulation. 307

(J)(1) A chiropractor in a civil proceeding concerning a 308
communication made to the chiropractor by a patient in that 309
relation or the chiropractor's advice to a patient, except as 310
otherwise provided in this division. The testimonial privilege 311
established under this division does not apply, and a chiropractor 312
may testify or may be compelled to testify, in any civil action, 313
in accordance with the discovery provisions of the Rules of Civil 314
Procedure in connection with a civil action, or in connection with 315
a claim under Chapter 4123. of the Revised Code, under any of the 316
following circumstances: 317

(a) If the patient or the guardian or other legal 318
representative of the patient gives express consent. 319

(b) If the patient is deceased, the spouse of the patient or 320
the executor or administrator of the patient's estate gives 321
express consent. 322

(c) If a medical claim, dental claim, chiropractic claim, or 323
optometric claim, as defined in section 2305.11 of the Revised 324
Code, an action for wrongful death, any other type of civil 325
action, or a claim under Chapter 4123. of the Revised Code is 326
filed by the patient, the personal representative of the estate of 327
the patient if deceased, or the patient's guardian or other legal 328
representative. 329

(2) If the testimonial privilege described in division (J)(1) 330
of this section does not apply as provided in division (J)(1)(c) 331
of this section, a chiropractor may be compelled to testify or to 332
submit to discovery under the Rules of Civil Procedure only as to 333
a communication made to the chiropractor by the patient in 334

question in that relation, or the chiropractor's advice to the 335
patient in question, that related causally or historically to 336
physical or mental injuries that are relevant to issues in the 337
medical claim, dental claim, chiropractic claim, or optometric 338
claim, action for wrongful death, other civil action, or claim 339
under Chapter 4123. of the Revised Code. 340

(3) The testimonial privilege established under this division 341
does not apply, and a chiropractor may testify or be compelled to 342
testify, in any criminal action or administrative proceeding. 343

(4) As used in this division, "communication" means 344
acquiring, recording, or transmitting any information, in any 345
manner, concerning any facts, opinions, or statements necessary to 346
enable a chiropractor to ~~diagnosis~~ diagnose, treat, or act for a 347
patient. A communication may include, but is not limited to, any 348
chiropractic, office, or hospital communication such as a record, 349
chart, letter, memorandum, laboratory test and results, x-ray, 350
photograph, financial statement, diagnosis, or prognosis. 351
352

Section 2. That existing section 2317.02 of the Revised Code 353
is hereby repealed. 354