

**As Reported by the House Civil and Commercial Law Committee**

**124th General Assembly**

**Regular Session**

**2001-2002**

**Am. H. B. No. 533**

**REPRESENTATIVES Buehrer, Willamowski, Seitz, Manning,  
Womer Benjamin**

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**A B I L L**

To amend section 2317.02 of the Revised Code to permit 1  
the testimonial privilege between a physician and a 2  
deceased patient to be waived by any party to a 3  
will contest action. 4

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

**Section 1.** That section 2317.02 of the Revised Code be 5  
amended to read as follows: 6

**Sec. 2317.02.** The following persons shall not testify in 7  
certain respects: 8

(A) An attorney, concerning a communication made to the 9  
attorney by a client in that relation or the attorney's advice to 10  
a client, except that the attorney may testify by express consent 11  
of the client or, if the client is deceased, by the express 12  
consent of the surviving spouse or the executor or administrator 13  
of the estate of the deceased client and except that, if the 14  
client voluntarily testifies or is deemed by section 2151.421 of 15  
the Revised Code to have waived any testimonial privilege under 16  
this division, the attorney may be compelled to testify on the 17  
same subject; 18

(B)(1) A physician or a dentist concerning a communication 19

made to the physician or dentist by a patient in that relation or  
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,

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neglect, or abuse or temporary or permanent custody proceedings 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 requests the 76  
testimony, demonstrates to the court that that party would be an 78  
heir of the patient if the patient died without a will, is a 79  
beneficiary under the will that is the subject of the will contest 80  
action, or is a beneficiary under another testamentary document 81  
allegedly executed by the patient, and demonstrates to the court 82

that the testimony is necessary to establish the party's rights as  
described in this division.

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

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

administered the test to which the records pertain, the person  
under whose supervision the test was administered, the custodian  
of the records, the person who made the records, or the person  
under whose supervision the records were made.

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

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

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

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

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

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

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

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

surgical facility, cardiac catheterization facility, diagnostic  
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

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Revised Code upon physicians who report an employee's use of a  
drug of abuse, or a condition of an employee other than one  
involving the use of a drug of abuse, to the employer of the  
employee in accordance with division (B) of that section. As used  
in division (B)(7) of this section, "employee," "employer," and  
"physician" have the same meanings as in section 2305.33 of the  
Revised Code.

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

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

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

(F) A person who, if a party, would be restricted under  
section 2317.03 of the Revised Code, when the property or thing is  
sold or transferred by an executor, administrator, guardian,

trustee, heir, devisee, or legatee, shall be restricted in the 241  
same manner in any action or proceeding concerning the property or 242  
thing. 243

(G)(1) A school guidance counselor who holds a valid educator 244  
license from the state board of education as provided for in 245  
section 3319.22 of the Revised Code, a person licensed under 246  
Chapter 4757. of the Revised Code as a professional clinical 247  
counselor, professional counselor, social worker, or independent 248  
social worker, or registered under Chapter 4757. of the Revised 249  
Code as a social work assistant concerning a confidential 250  
communication received from a client in that relation or the 251  
person's advice to a client unless any of the following applies: 252

(a) The communication or advice indicates clear and present 253  
danger to the client or other persons. For the purposes of this 254  
division, cases in which there are indications of present or past 255  
child abuse or neglect of the client constitute a clear and 256  
present danger. 257

(b) The client gives express consent to the testimony. 258

(c) If the client is deceased, the surviving spouse or the 259  
executor or administrator of the estate of the deceased client 260  
gives express consent. 261

(d) The client voluntarily testifies, in which case the 262  
school guidance counselor or person licensed or registered under 263  
Chapter 4757. of the Revised Code may be compelled to testify on 264  
the same subject. 265

(e) The court in camera determines that the information 266  
communicated by the client is not germane to the counselor-client 267  
or social worker-client relationship. 268

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

counselor is relevant to that action. 272

(g) The testimony is sought in a civil action and concerns 273  
court-ordered treatment or services received by a patient as part 274  
of a case plan journalized under section 2151.412 of the Revised 275  
Code or the court-ordered treatment or services are necessary or 276  
relevant to dependency, neglect, or abuse or temporary or 277  
permanent custody proceedings under Chapter 2151. of the Revised 278  
Code. 279

(2) Nothing in division (G)(1) of this section shall relieve 280  
a school guidance counselor or a person licensed or registered 281  
under Chapter 4757. of the Revised Code from the requirement to 282  
report information concerning child abuse or neglect under section 283  
2151.421 of the Revised Code. 284

(H) A mediator acting under a mediation order issued under 285  
division (A) of section 3109.052 of the Revised Code or otherwise 286  
issued in any proceeding for divorce, dissolution, legal 287  
separation, annulment, or the allocation of parental rights and 288  
responsibilities for the care of children, in any action or 289  
proceeding, other than a criminal, delinquency, child abuse, child 290  
neglect, or dependent child action or proceeding, that is brought 291  
by or against either parent who takes part in mediation in 292  
accordance with the order and that pertains to the mediation 293  
process, to any information discussed or presented in the 294  
mediation process, to the allocation of parental rights and 295  
responsibilities for the care of the parents' children, or to the 296  
awarding of parenting time rights in relation to their children; 297

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

section shall limit the obligation of a communications assistant 304  
to divulge information or testify when mandated by federal law or 305  
regulation or pursuant to subpoena in a criminal proceeding. 306

Nothing in this section shall limit any immunity or privilege 307  
granted under federal law or regulation. 308

(J)(1) A chiropractor in a civil proceeding concerning a 309  
communication made to the chiropractor by a patient in that 310  
relation or the chiropractor's advice to a patient, except as 311  
otherwise provided in this division. The testimonial privilege 312  
established under this division does not apply, and a chiropractor 313  
may testify or may be compelled to testify, in any civil action, 314  
in accordance with the discovery provisions of the Rules of Civil 315  
Procedure in connection with a civil action, or in connection with 316  
a claim under Chapter 4123. of the Revised Code, under any of the 317  
following circumstances: 318

(a) If the patient or the guardian or other legal 319  
representative of the patient gives express consent. 320

(b) If the patient is deceased, the spouse of the patient or 321  
the executor or administrator of the patient's estate gives 322  
express consent. 323

(c) If a medical claim, dental claim, chiropractic claim, or 324  
optometric claim, as defined in section 2305.11 of the Revised 325  
Code, an action for wrongful death, any other type of civil 326  
action, or a claim under Chapter 4123. of the Revised Code is 327  
filed by the patient, the personal representative of the estate of 328  
the patient if deceased, or the patient's guardian or other legal 329  
representative. 330

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

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a communication made to the chiropractor by the patient in 335  
question in that relation, or the chiropractor's advice to the 336  
patient in question, that related causally or historically to 337  
physical or mental injuries that are relevant to issues in the 338  
medical claim, dental claim, chiropractic claim, or optometric 339  
claim, action for wrongful death, other civil action, or claim 340  
under Chapter 4123. of the Revised Code. 341

(3) The testimonial privilege established under this division 342  
does not apply, and a chiropractor may testify or be compelled to 343  
testify, in any criminal action or administrative proceeding. 344  
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(4) As used in this division, "communication" means 346  
acquiring, recording, or transmitting any information, in any 347  
manner, concerning any facts, opinions, or statements necessary to 348  
enable a chiropractor to ~~diagnosis~~ diagnose, treat, or act for a 349  
patient. A communication may include, but is not limited to, any 350  
chiropractic, office, or hospital communication such as a record, 351  
chart, letter, memorandum, laboratory test and results, x-ray, 352  
photograph, financial statement, diagnosis, or prognosis. 353

**Section 2.** That existing section 2317.02 of the Revised Code 354  
is hereby repealed. 355