

As Introduced

**126th General Assembly
Regular Session
2005-2006**

H. B. No. 144

Representative Buehrer

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A BILL

To amend section 2317.02 of the Revised Code to waive 1
the physician-patient and attorney-client 2
privileges in probate cases under certain 3
circumstances. 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.~~ However, if 14
the client voluntarily testifies or is deemed by section 2151.421 15
of 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

The testimonial privilege established under this division 19
does not apply concerning a communication between a client who has 20

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.

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

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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:

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(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:

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

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

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(iii) If a medical claim, dental claim, chiropractic claim, or optometric claim, as defined in section 2305.113 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.

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(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 under Chapter 2151. of the Revised Code.

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

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

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

~~(i) The patient is deceased.~~

~~(ii) A party to the will contest action requests the~~

~~testimony, demonstrates to the court that that party would be an heir of the patient if the patient died without a will, is a beneficiary under the will that is the subject of the will contest action, or is a beneficiary under another testamentary document allegedly executed by the patient, and demonstrates to the court that the testimony is necessary to establish the party's rights as described in this division (i) If the communication was between a patient who has since died and the deceased patient's physician or dentist and the communication is relevant to a dispute between parties who claim through that deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.~~

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(ii) If neither the spouse of a patient nor the executor or administrator of that patient's estate gives consent under division (B)(1)(a)(ii) of this section, testimony or the disclosure of the patient's medical records by a physician, dentist, or other health care provider under division (B)(1)(e)(i) of this section is a permitted use or disclosure of protected health information, as defined in 45 C.F.R. 160.103, and an authorization or opportunity to be heard shall not be required.

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(iii) Division (B)(1)(e)(i) of this section does not require a mental health professional to disclose psychotherapy notes, as defined in 45 C.F.R. 164.501.

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(iv) An interested person who objects to testimony or disclosure under division (B)(1)(e)(i) of this section may seek a protective order pursuant to Civil Rule 26.

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(v) A person to whom protected health information is disclosed under division (B)(1)(e)(i) of this section shall not use or disclose the protected health information for any purpose other than the litigation or proceeding for which the information was requested and shall return the protected health information to

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the covered entity or destroy the protected health information, 114
including all copies made, at the conclusion of the litigation or 115
proceeding. 116

(2)(a) If any law enforcement officer submits a written 117
statement to a health care provider that states that an official 118
criminal investigation has begun regarding a specified person or 119
that a criminal action or proceeding has been commenced against a 120
specified person, that requests the provider to supply to the 121
officer copies of any records the provider possesses that pertain 122
to any test or the results of any test administered to the 123
specified person to determine the presence or concentration of 124
alcohol, a drug of abuse, or alcohol and a drug of abuse in the 125
person's blood, breath, or urine at any time relevant to the 126
criminal offense in question, and that conforms to section 127
2317.022 of the Revised Code, the provider, except to the extent 128
specifically prohibited by any law of this state or of the United 129
States, shall supply to the officer a copy of any of the requested 130
records the provider possesses. If the health care provider does 131
not possess any of the requested records, the provider shall give 132
the officer a written statement that indicates that the provider 133
does not possess any of the requested records. 134

(b) If a health care provider possesses any records of the 135
type described in division (B)(2)(a) of this section regarding the 136
person in question at any time relevant to the criminal offense in 137
question, in lieu of personally testifying as to the results of 138
the test in question, the custodian of the records may submit a 139
certified copy of the records, and, upon its submission, the 140
certified copy is qualified as authentic evidence and may be 141
admitted as evidence in accordance with the Rules of Evidence. 142
Division (A) of section 2317.422 of the Revised Code does not 143
apply to any certified copy of records submitted in accordance 144
with this division. Nothing in this division shall be construed to 145

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. 178

~~(c) If the testimonial privilege described in division (B)(1) 179
of this section does not apply as provided in division (B)(1)(c) 180
of this section, a physician or dentist may be compelled to 181
testify or to submit to discovery in the will contest action under 182
sections 2107.71 to 2107.77 of the Revised Code only as to the 183
patient in question on issues relevant to the competency of the 184
patient at the time of the execution of the will. Testimony or 185
discovery conducted pursuant to this division shall be conducted 186
in accordance with the Rules of Civil Procedure. 187~~

(4) The testimonial privilege described in division (B)(1) of 188
this section is not waived when a communication is made by a 189
physician to a pharmacist or when there is communication between a 190
patient and a pharmacist in furtherance of the physician-patient 191
relation. 192

(5)(a) As used in divisions (B)(1) to (4) of this section, 193
"communication" means acquiring, recording, or transmitting any 194
information, in any manner, concerning any facts, opinions, or 195
statements necessary to enable a physician or dentist to diagnose, 196
treat, prescribe, or act for a patient. A "communication" may 197
include, but is not limited to, any medical or dental, office, or 198
hospital communication such as a record, chart, letter, 199
memorandum, laboratory test and results, x-ray, photograph, 200
financial statement, diagnosis, or prognosis. 201

(b) As used in division (B)(2) of this section, "health care 202
provider" means a hospital, ambulatory care facility, long-term 203
care facility, pharmacy, emergency facility, or health care 204
practitioner. 205

(c) As used in division (B)(5)(b) of this section: 206

(i) "Ambulatory care facility" means a facility that provides 207
medical, diagnostic, or surgical treatment to patients who do not 208

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 239
civil liability conferred by section 307.628 of the Revised Code 240
or the immunity from civil liability conferred by section 2305.33 241
of the Revised Code upon physicians who report an employee's use 242
of a drug of abuse, or a condition of an employee other than one 243
involving the use of a drug of abuse, to the employer of the 244
employee in accordance with division (B) of that section. As used 245
in division (B)(7) of this section, "employee," "employer," and 246
"physician" have the same meanings as in section 2305.33 of the 247
Revised Code. 248

(C) A member of the clergy, rabbi, priest, or regularly 249
ordained, accredited, or licensed minister of an established and 250
legally cognizable church, denomination, or sect, when the member 251
of the clergy, rabbi, priest, or minister remains accountable to 252
the authority of that church, denomination, or sect, concerning a 253
confession made, or any information confidentially communicated, 254
to the member of the clergy, rabbi, priest, or minister for a 255
religious counseling purpose in the member of the clergy's, 256
rabbi's, priest's, or minister's professional character; however, 257
the member of the clergy, rabbi, priest, or minister may testify 258
by express consent of the person making the communication, except 259
when the disclosure of the information is in violation of a sacred 260
trust; 261

(D) Husband or wife, concerning any communication made by one 262
to the other, or an act done by either in the presence of the 263
other, during coverture, unless the communication was made, or act 264
done, in the known presence or hearing of a third person competent 265
to be a witness; and such rule is the same if the marital relation 266
has ceased to exist; 267

(E) A person who assigns a claim or interest, concerning any 268
matter in respect to which the person would not, if a party, be 269
permitted to testify; 270

(F) A person who, if a party, would be restricted under 271
section 2317.03 of the Revised Code, when the property or thing is 272
sold or transferred by an executor, administrator, guardian, 273
trustee, heir, devisee, or legatee, shall be restricted in the 274
same manner in any action or proceeding concerning the property or 275
thing. 276

(G)(1) A school guidance counselor who holds a valid educator 277
license from the state board of education as provided for in 278
section 3319.22 of the Revised Code, a person licensed under 279
Chapter 4757. of the Revised Code as a professional clinical 280
counselor, professional counselor, social worker, independent 281
social worker, marriage and family therapist or independent 282
marriage and family therapist, or registered under Chapter 4757. 283
of the Revised Code as a social work assistant concerning a 284
confidential communication received from a client in that relation 285
or the person's advice to a client unless any of the following 286
applies: 287

(a) The communication or advice indicates clear and present 288
danger to the client or other persons. For the purposes of this 289
division, cases in which there are indications of present or past 290
child abuse or neglect of the client constitute a clear and 291
present danger. 292

(b) The client gives express consent to the testimony. 293

(c) If the client is deceased, the surviving spouse or the 294
executor or administrator of the estate of the deceased client 295
gives express consent. 296

(d) The client voluntarily testifies, in which case the 297
school guidance counselor or person licensed or registered under 298
Chapter 4757. of the Revised Code may be compelled to testify on 299
the same subject. 300

(e) The court in camera determines that the information 301

communicated by the client is not germane to the counselor-client, 302
marriage and family therapist-client, or social worker-client 303
relationship. 304

(f) A court, in an action brought against a school, its 305
administration, or any of its personnel by the client, rules after 306
an in-camera inspection that the testimony of the school guidance 307
counselor is relevant to that action. 308

(g) The testimony is sought in a civil action and concerns 309
court-ordered treatment or services received by a patient as part 310
of a case plan journalized under section 2151.412 of the Revised 311
Code or the court-ordered treatment or services are necessary or 312
relevant to dependency, neglect, or abuse or temporary or 313
permanent custody proceedings under Chapter 2151. of the Revised 314
Code. 315

(2) Nothing in division (G)(1) of this section shall relieve 316
a school guidance counselor or a person licensed or registered 317
under Chapter 4757. of the Revised Code from the requirement to 318
report information concerning child abuse or neglect under section 319
2151.421 of the Revised Code. 320

(H) A mediator acting under a mediation order issued under 321
division (A) of section 3109.052 of the Revised Code or otherwise 322
issued in any proceeding for divorce, dissolution, legal 323
separation, annulment, or the allocation of parental rights and 324
responsibilities for the care of children, in any action or 325
proceeding, other than a criminal, delinquency, child abuse, child 326
neglect, or dependent child action or proceeding, that is brought 327
by or against either parent who takes part in mediation in 328
accordance with the order and that pertains to the mediation 329
process, to any information discussed or presented in the 330
mediation process, to the allocation of parental rights and 331
responsibilities for the care of the parents' children, or to the 332

awarding of parenting time rights in relation to their children; 333

(I) A communications assistant, acting within the scope of 334
the communication assistant's authority, when providing 335
telecommunications relay service pursuant to section 4931.35 of 336
the Revised Code or Title II of the "Communications Act of 1934," 337
104 Stat. 366 (1990), 47 U.S.C. 225, concerning a communication 338
made through a telecommunications relay service. Nothing in this 339
section shall limit the obligation of a communications assistant 340
to divulge information or testify when mandated by federal law or 341
regulation or pursuant to subpoena in a criminal proceeding. 342

Nothing in this section shall limit any immunity or privilege 343
granted under federal law or regulation. 344

(J)(1) A chiropractor in a civil proceeding concerning a 345
communication made to the chiropractor by a patient in that 346
relation or the chiropractor's advice to a patient, except as 347
otherwise provided in this division. The testimonial privilege 348
established under this division does not apply, and a chiropractor 349
may testify or may be compelled to testify, in any civil action, 350
in accordance with the discovery provisions of the Rules of Civil 351
Procedure in connection with a civil action, or in connection with 352
a claim under Chapter 4123. of the Revised Code, under any of the 353
following circumstances: 354

(a) If the patient or the guardian or other legal 355
representative of the patient gives express consent. 356

(b) If the patient is deceased, the spouse of the patient or 357
the executor or administrator of the patient's estate gives 358
express consent. 359

(c) If a medical claim, dental claim, chiropractic claim, or 360
optometric claim, as defined in section 2305.113 of the Revised 361
Code, an action for wrongful death, any other type of civil 362
action, or a claim under Chapter 4123. of the Revised Code is 363

filed by the patient, the personal representative of the estate of 364
the patient if deceased, or the patient's guardian or other legal 365
representative. 366

(2) If the testimonial privilege described in division (J)(1) 367
of this section does not apply as provided in division (J)(1)(c) 368
of this section, a chiropractor may be compelled to testify or to 369
submit to discovery under the Rules of Civil Procedure only as to 370
a communication made to the chiropractor by the patient in 371
question in that relation, or the chiropractor's advice to the 372
patient in question, that related causally or historically to 373
physical or mental injuries that are relevant to issues in the 374
medical claim, dental claim, chiropractic claim, or optometric 375
claim, action for wrongful death, other civil action, or claim 376
under Chapter 4123. of the Revised Code. 377

(3) The testimonial privilege established under this division 378
does not apply, and a chiropractor may testify or be compelled to 379
testify, in any criminal action or administrative proceeding. 380

(4) As used in this division, "communication" means 381
acquiring, recording, or transmitting any information, in any 382
manner, concerning any facts, opinions, or statements necessary to 383
enable a chiropractor to diagnose, treat, or act for a patient. A 384
communication may include, but is not limited to, any 385
chiropractic, office, or hospital communication such as a record, 386
chart, letter, memorandum, laboratory test and results, x-ray, 387
photograph, financial statement, diagnosis, or prognosis. 388

Section 2. That existing section 2317.02 of the Revised Code 389
is hereby repealed. 390

Section 3. Section 2317.02 of the Revised Code is presented 391
in this act as a composite of the section as amended by both Am. 392
Sub. H.B. 374, Am. H.B. 533, and Am. Sub. S.B. 281, all of the 393

124th General Assembly. The General Assembly, applying the 394
principle stated in division (B) of section 1.52 of the Revised 395
Code that amendments are to be harmonized if reasonably capable of 396
simultaneous operation, finds that the composite is the resulting 397
version of the section in effect prior to the effective date of 398
the section as presented in this act. 399