

As Reported by the House Judiciary Committee

126th General Assembly  
Regular Session  
2005-2006

H. B. No. 144

Representative Buehrer

—

**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.

21  
22  
23  
24

(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.

25  
26  
27  
28  
29  
30  
31  
32

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:

33  
34  
35

(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:

36  
37  
38  
39

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

40  
41

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

42  
43  
44

(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.

45  
46  
47  
48  
49  
50  
51

(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.~~

83  
84  
85  
86  
87  
88  
89  
90  
91  
92  
93  
94

(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.

95  
96  
97  
98  
99  
100  
101  
102

(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.

103  
104  
105

(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.

106  
107  
108

(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

109  
110  
111  
112  
113

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