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Bill Analysis
Legislative Service Commission

Sub. S.B. 19

126th General Assembly
(As Reported by H. Judiciary)

Sens. Schuler, Wachtmann, Mumper, Clancy, Hagan, Goodman, Austria, Roberts, Padgett, Niehaus

Rep. Willamowski

BILL SUMMARY

- Subject to exceptions described in the next dot point, provides a testimonial privilege to "critical incident stress management team members," under which such a member cannot testify concerning a communication received from an individual who receives crisis response services from the team member, or the team member's advice to the individual, during a debriefing session.
- Provides that the testimonial privilege summarized in the preceding dot point does not apply if any of the following are true: (1) the communication or advice indicates "clear and present danger" to the individual who receives crisis response services or to other persons, (2) the individual who received such services gives express consent to the testimony, (3) if the individual who received such services is deceased, the surviving spouse or the executor or administrator of the estate of the deceased individual gives express consent, (4) the individual who received such services voluntarily testifies, in which case the team member may be compelled to testify on the same subject, (5) the court *in camera* determines that the information communicated by the individual who received such services is not germane to the relationship between the individual and the team member, or (6) the communication or advice pertains or is related to a criminal act.
- Subject to certain exceptions described in the next dot point, provides a testimonial privilege to an employee assistance professional, under which the professional cannot testify concerning a communication received from a client in the employee assistance professional's official capacity.

- Provides that the testimonial privilege summarized in the preceding dot point does not apply to any of the following: (1) a criminal action or proceeding involving a homicide offense (R.C. 2903.01 to 2903.06) if the employee assistance professional's disclosure or testimony relates directly to the facts or immediate circumstances of the offense, (2) a communication made by a client to an employee assistance professional that reveals the contemplation or commission of a crime or serious, harmful act, (3) a communication that is made by a client who is an unemancipated minor or an adult adjudicated to be incompetent and indicates that the client was the victim of a crime or abuse, (4) a civil proceeding to determine an individual's mental competency or a criminal action in which a plea of not guilty by reason of insanity is entered, (5) a civil or criminal malpractice action brought against the employee assistance professional, (6) when the employee assistance professional has the express consent of the client or, if the client is deceased or disabled, the client's legal representative, or (7) when the testimonial privilege is abrogated under law.
- Reenacts a provision of law that designates the Controlling Board as the legislative body authorized to reject recommendations of a fact-finding panel appointed during the public employment collective bargaining process.

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CONTENT AND OPERATION

Testimonial privilege for critical incident stress management team members and employee assistance professionals

Existing law

Existing law states that persons in certain specified professions cannot testify in certain respects. The specified professions to which this "testimonial

privilege" applies are: (1) attorneys concerning certain communications by a client or advice by the attorney to a client, (2) physicians or dentists concerning certain communications by a patient or advice by the physician or dentist to a patient, (3) members of the clergy, rabbis, priests, or regularly ordained, accredited, or licensed ministers of an established and legally cognizable church, denomination, or sect, when the clergy member, rabbi, priest, or minister remains accountable to the authority of that church, denomination, or sect, concerning certain confessions made, or information confidentially communicated, to the clergy member, rabbi, priest, or minister, (4) husbands or wives, concerning certain communications made by one to the other, or acts done by either in the presence of the other, during coverture, (5) persons who assign a claim or interest, concerning matters in respect to which the person would not, if a party, be permitted to testify, (6) persons who, if a party, would be restricted under R.C. 2317.03, in certain circumstances, (7) school guidance counselors, persons licensed as a professional clinical counselor, professional counselor, social worker, independent social worker, marriage and family therapist or independent marriage and family therapist, or persons registered as social work assistants concerning certain communications received from a client, (8) mediators, in specified circumstances and regarding specified matters, (9) communications assistants, in specified circumstances, concerning a communication made through a telecommunications relay service, and (10) chiropractors in a civil proceeding concerning certain communications made to the chiropractor by a patient or the chiropractor's advice to a patient. (R.C. 2317.02; see **COMMENT** for the specific language of the section.)

Operation of the bill--critical incident stress management team members

The bill provides a "testimonial privilege" to "critical incident stress management team members" (see below) in specified circumstances. It specifies that, except as described in the next sentence, a critical incident stress management team member cannot testify concerning a communication received from an individual who receives crisis response services from the team member, or the team member's advice to the individual, during a "debriefing session" (see below). This testimonial privilege does not apply, though, if any of the following are true: (1) the communication or advice indicates "clear and present danger" to the individual who receives crisis response services or to other persons (for purposes of this provision, cases in which there are indications of present or past child abuse or neglect of the individual constitute a "clear and present danger"), (2) the individual who received crisis response services gives express consent to the testimony, (3) if the individual who received crisis response services is deceased, the surviving spouse or the executor or administrator of the estate of the deceased individual gives express consent, (4) the individual who received crisis response services voluntarily testifies, in which case the team member may be compelled to testify on the same subject, (5) the court *in camera* determines that the information

communicated by the individual who received crisis response services is not germane to the relationship between the individual and the team member, or (6) the communication or advice pertains or is related to a criminal act. (R.C. 2317.02(K)(1) and (2).)

As used in this provision (R.C. 2317.02(K)(3):

(1) "Crisis response services" means consultation, risk assessment, referral, and on-site crisis intervention services provided by a critical incident stress management team to individuals affected by crisis or disaster.

(2) "Critical incident stress management team member" or "team member" means an individual specially trained to provide "crisis response services" (see (1), above) as a member of an organized community or local crisis response team that holds membership in the Ohio Critical Incident Stress Management Network.

(3) "Debriefing session" means a session at which crisis response services are rendered by a critical incident stress management team member during or after a crisis or disaster.

Operation of the bill--employee assistance professionals

The bill provides a "testimonial privilege" to "employee assistance professionals" (see below) in specified circumstances. It specifies that, with certain exceptions, an employee assistance professional cannot testify concerning a communication received by the professional from a client in the professional's official capacity (R.C. 2317.02(L)(1)). The privilege applies to an employee assistance professional who is certified by the Employee Assistance Certification Commission¹ to engage in the employee assistance profession or who has education, training, and experience in all of the following (R.C. 2317.02(L)(2)):

(1) Providing workplace-based services designed to address employer and employee productivity issues;

(2) Providing assistance to employees and employees' dependents in identifying and finding the means to resolve personal problems that affect the employees or the employees' performance;

(3) Identifying and resolving productivity problems associated with an employee's concerns about any of the following matters: health, marriage, family,

¹ *The Employee Assistance Certification Commission is the credentialing body of the Employee Assistance Professional Association, a private entity with offices in Arlington, Virginia.*

finances, substance abuse or other addiction, workplace, law, and emotional issues;

- (4) Selecting and evaluating available community resources;
- (5) Making appropriate referrals;
- (6) Local and national employee assistance agreements;
- (7) Client confidentiality.

The privilege does not apply to any of the following (R.C. 2317.02(L)(3)):

(1) A criminal action or proceeding involving a homicide offense (R.C. 2903.01 to 2903.06) if the employee assistance professional's disclosure or testimony relates directly to the facts or immediate circumstances of the offense;

(2) A communication made by a client to an employee assistance professional that reveals the contemplation or commission of a crime or serious, harmful act;

(3) A communication that is made by a client who is an unemancipated minor or an adult adjudicated to be incompetent and indicates that the client was the victim of a crime or abuse;

(4) A civil proceeding to determine an individual's mental competency or a criminal action in which a plea of not guilty by reason of insanity is entered;

(5) A civil or criminal malpractice action brought against the employee assistance professional;

(6) When the employee assistance professional has the express consent of the client or, if the client is deceased or disabled, the client's legal representative;

(7) When the testimonial privilege is abrogated under law.

Controlling Board as legislative body authorized to reject recommendations of a fact-finding panel

Existing law provides a procedure to govern the settlement of collective bargaining disputes between public employers and the exclusive representatives (unions) representing public employees. If the parties cannot reach an agreement 50 days before the expiration of a collective bargaining agreement, any party may request intervention by the State Employment Relations Board. If an impasse exists or 45 days before the expiration of the collective bargaining agreement if there is one, the Board must appoint a mediator. After a mediator is appointed,

any party may request the appointment of a fact-finding panel to make recommendations regarding unresolved issues. Within seven days after the panel reports its findings and recommendations, the legislative body of the public employer, by a three-fifths vote of its total membership, or the membership of the public employee organization, by a three-fifths vote of its total membership, may reject the recommendations. If neither party rejects the recommendations, they are considered to be agreed upon by the parties. (R.C. 4117.14.)

H.B. 675 of the 124th General Assembly defined "legislative body" to mean the Controlling Board when the state or any of its agencies, authorities, commissions, boards, or other branch of public employment is a party to the fact-finding process (R.C. 4117.14(C)(6)(b)). In July 2005, in *State ex rel. Ohio AFL-CIO v. Taft*, the Franklin County Court of Common Pleas declared this portion of H.B. 675 unconstitutional as a violation of Article II, § 15(D) of the Ohio Constitution, which provides that no bill may contain more than one subject. The present bill reenacts the invalidated provision.

COMMENT

Existing R.C. 2317.02 provides that persons in certain specified professions cannot testify in certain respects (i.e., it grants them a "testimonial privilege"). Specifically, the section states as follows:

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

(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;

(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.

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 2305.113 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.

(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.

(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.

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

(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, independent social worker, marriage and family therapist or independent marriage and family therapist, 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:

(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.

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

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

(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.

(e) The court in camera determines that the information communicated by the client is not germane to the counselor-client, marriage and family therapist-client, or social worker-client relationship.

(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.

(g) The testimony is sought in a civil action and concerns court-ordered treatment or services received by a patient 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.

(2) Nothing in division (G)(1) of this section shall relieve a school guidance counselor or a person licensed or



registered under Chapter 4757. of the Revised Code from the requirement to report information concerning child abuse or neglect under section 2151.421 of the Revised Code.

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

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

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

(J)(1) A chiropractor in a civil proceeding concerning a communication made to the chiropractor by a patient in that relation or the chiropractor's advice to a patient, except as otherwise provided in this division. The testimonial privilege established under this division does not apply, and a chiropractor may testify or may be compelled to testify, 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:

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

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

(c) 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.

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

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

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

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	01-25-05	p. 73
Reported, S. Judiciary on Civil Justice	02-23-05	p. 201
Passed Senate (32-0)	03-01-05	pp. 223-224
Reported, H. Judiciary	10-13-05	p. 1722

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