



H.B. 365

125th General Assembly
(As Introduced)

Reps. Buehrer, Willamowski, Latta, Cirelli, Allen, Seitz, Kearns

BILL SUMMARY

- Provides that the testimonial privilege of an attorney concerning communications made to the attorney by a client or the attorney's advice to a client may be waived by the express consent of the client's guardian or other legal representative if the client is an incompetent.
- Provides that the testimonial privilege of an attorney concerning communications made to the attorney by a client or the attorney's advice to a client does not apply concerning a communication between a deceased client and the deceased client's attorney if the communication is relevant to a dispute between parties who claim through that deceased client.
- Provides that the testimonial privilege of a physician or dentist concerning a communication made to either of them by a patient in that relation or the physician's or dentist's advice to a patient does not apply and either may testify or be compelled to testify 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.
- Removes a provision that specifies that the testimonial privilege of a physician or dentist concerning a communication made to either of them by a patient in that relation or the physician's or dentist's advice to a patient does not apply and that a physician or dentist may testify or be compelled to testify if the patient is deceased and a party to a will contest action requests the testimony and demonstrates that it is necessary to establish the party's rights and a provision that specifies that a physician or dentist may be compelled to testify or to submit to discovery in such a

will contest action 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.

CONTENT AND OPERATION

Privileged communications

The Privileged Communications Law precludes specified persons from testifying in certain respects. The bill waives the physician-patient and attorney-client privilege in probate cases under certain circumstances.

Attorney-client privilege

Current law

Current law provides that an attorney cannot testify 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 to have waived any testimonial privilege, the attorney may be compelled to testify on the same subject (R.C. 2317.02(A)).

Operation of the bill

The bill expands the circumstances in which the testimonial privilege of an attorney does not apply. Under the bill, if the client is an incompetent, the testimonial privilege may be waived by express consent of the client's guardian or other legal representative. The waiver allows an attorney to testify concerning a communication made to the attorney by an incompetent client in that relation or the attorney's advice to an incompetent client.

The bill also provides that the attorney-client privilege does not apply concerning a communication between a deceased client 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. (R.C. 2317.02(A).)

Physician-patient privilege

Current law

With certain exceptions specified in the Privileged Communications Law, a physician or a dentist cannot testify 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. This testimonial privilege does not apply, and a physician or dentist may testify or may be compelled to testify, in any of the following circumstances (R.C. 2317.02(B)(1)(a) to (e)):

(1) 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 the Worker's Compensation Law, under any of the following circumstances: (a) if the patient or the patient's guardian or other legal representative 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, or (c) if a medical claim, dental claim, chiropractic claim, or optometric claim, an action for wrongful death, any other type of civil action, or a claim under the Worker's Compensation Law 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) 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 the Juvenile Court Law or the court-ordered treatment or services are necessary or relevant to dependency, neglect, or abuse or temporary or permanent custody proceedings under that law;

(3) 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;

(4) In any criminal action against a physician or dentist, subject to the requirement that the court require that appropriate measures be taken to ensure that the confidentiality of any patient named or otherwise identified in the patient's medical or dental records that are introduced into evidence is maintained;

(5) In any will contest action under the Probate Law if both of the following apply: (a) the patient is deceased, and (b) 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.

If the testimonial privilege does not apply as described in paragraph (5) above, a physician or dentist may be compelled to testify or to submit to discovery in the will contest action 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 provision must be conducted in accordance with the Civil Rules. (R.C. 2317.02(B)(3)(c).)

Operation of the bill

The bill deletes the provision in paragraph (5) above under "**Existing law.**" It replaces it with a provision that states that the testimonial privilege of a physician or dentist does not apply, and a physician or dentist may testify or may be compelled to testify, 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. (R.C. 2317.02(B)(1)(e).)

The bill also removes the provision that provides that, if the testimonial privilege of a physician or dentist does not apply as provided in paragraph (5) above under "**Existing law.**" a physician or dentist may be compelled to testify or to submit to discovery in the will contest action 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 (R.C. 2317.02(B)(3)(c)).

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	01-06-04	p. 1348

h0365-i-125.doc/kl