



Sub. H.B. 365*
125th General Assembly
(As Reported by H. Judiciary)

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

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 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 in a new exemption 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.
- Provides that if neither the spouse of a patient nor the executor or administrator of that patient's estate gives express consent, testimony or the disclosure under the new exemption of the patient's medical records by a physician, dentist, or other health care provider is a permitted use or disclosure of protected health information and an authorization or opportunity to be heard is not required.
- Permits an interested party who objects to testimony or the disclosure under the new exemption of a communication between a patient who has

* *This analysis was prepared before the report of the House Judiciary Committee appeared in the House Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

since died and the deceased patient's physician or dentist to seek a protective order pursuant to Civil Rule 26.

- Prohibits a person to whom protected health information is disclosed under the new exemption from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which the information was requested and requires the person to return the protected health information to the covered entity or destroy the protected health information, including all copies made, at the conclusion of the litigation or proceeding.
- 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. The bill 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 "**Current 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.

The bill states that this exemption from the testimonial privilege does not require a mental health professional to disclose psychotherapy notes, as defined in 45 C.F.R. 164.501.¹ (R.C. 2317.02(B)(1)(e)(i) and (iii).)

¹ 45 C.F.R. 164.501 states that "psychotherapy notes" means notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record. Psychotherapy notes excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.

The bill further provides that if neither the spouse of a patient nor the executor or administrator of that patient's estate gives express consent under the provision described above in (1)(b) under "Current law," testimony or the disclosure of the patient's medical records by a physician, dentist, or other health care provider under the new exemption from the testimonial privilege discussed in the prior paragraph is a permitted use or disclosure of protected health information, as defined in 45 C.F.R. 160.103,² and an authorization or opportunity to be heard is not required. However, an interested party who objects to testimony or the disclosure of a communication between a patient who has since died and the deceased patient's physician or dentist pursuant to that new exemption may seek a protective order pursuant to Civil Rule 26. A person to whom protected health information is disclosed pursuant to that new exemption may not use or disclose the protected health information for any purpose other than the litigation or proceeding for which the information was requested and must return the protected health information to the covered entity or destroy the protected health information, including all copies made, at the conclusion of the litigation or proceeding. (R.C. 2317.02(B)(1)(e), (ii), (iv), and (v).)

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 "Current 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
Reported, H. Judiciary	---	---

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² 45 C.F.R. 160.103 provides that "health information" means any information, whether oral or recorded in any form or medium, that: (1) is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse, and (2) relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.