



David M. Gold

Final Analysis
Legislative Service Commission

Sub. S.B. 19

126th General Assembly
(As Passed by the General Assembly)

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

Reps. Willamowski, Blessing, Calvert, Flowers, Schneider, Seitz, Setzer, Webster

Effective date: *

ACT 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 Legislative Service Commission had not received formal notification of the effective date at the time this analysis was prepared. Additionally, the analysis may not reflect action taken by the Governor.*

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.

CONTENT AND OPERATION

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

Continuing law

Continuing 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.)

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

The act 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 act--employee assistance professionals

The act 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

Continuing 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 act reenacts the invalidated provision.

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
Passed House (63-33)	10-19-05	pp. 1751-1753
Senate concurred in House amendments (21-10)	10-25-05	pp. 1659-1660

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