Privileged Communications in Ohio and What's New on the Horizon: Ohio House Bill 52 Accountant-client Privilege

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I. INTRODUCTION

Privileges have existed for centuries in one form or another and have become an integral and important part of the modern legal world. However, with evolving societal views and the relative change in importance of certain relationships, additional privileges are developing and slowly being recognized by the legal system. One very important privilege that is currently being considered in Ohio is an accountant-client privilege. Ohio finally appears to be catching up with a large number of other states that have already recognized the beneficial effects such a privilege can have on businesses who are involved in litigation and of the importance the accountant-client relationship.

The goal of this Comment is to provide a general background on privileges, to discuss justifications and various aspects of the major testimonial privileges Ohio currently recognizes under Ohio Revised Code (ORC) § 2317.02, and to analyze Ohio House Bill 52 concerning the accountant-client privilege. Part II

1 See infra, Section II discussing the definition, history and rationale of privileges. This background information will assist in providing an understanding of how these rationales and justifications are applied to privileges recognized in Ohio.
2 Id. The accountant-client privilege is an example of a relatively new privilege that is currently being recognized by statutes in various jurisdictions across the United States.
3 See infra note 7 and accompanying text.
4 Twenty-four states have some form of a CPA/Client privilege, sixteen of which have the same language as the Ohio Bill that is currently moving through the legislature. Privilege Bill Passes Ohio House: CPA/Client Privilege Bill Moves to the Senate, OHIO CPA NEWSLETTER, (Ohio Society of Certified Public Accountants), July 1997, at 1.
5 See infra notes 11 to 36 and accompanying text in Section II.
6 See infra notes 37-112 and accompanying text in Section III. ORC Section 2317.02 is titled "Privileged Communications." OHIO REV. CODE ANN. § 2317.02 (Anderson 1991). This Comment is not intended to discuss recognized privileges outside of the scope of § 2317.02, such as the 5th Amendment privilege against self-incrimination or various privileges associated with governmental employment.
7 See infra notes 113-141 and accompanying text in Section IV. House Bill (HB) 52, as introduced by the 122nd General Assembly is designed to “[c]reate a general accountant-client testimonial privilege relative to a client’s communications to an accountant in that relationship and the accountant’s advice to the client.” H.B. 52 Bill Analysis, Legislative Service Commission, H.B. 52, 122nd General Assembly, (OH 1997). It also "specifies circumstances under which the testimonial privilege does not

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will provide a historical background and the existing rationale for privileges in general.\(^8\) Part III will break down ORC § 2317.02 into the major privileges recognized in Ohio.\(^9\) The background and rationale of these most common privileges will be discussed, including notable aspects such as waiver and various court interpretations. Part IV of the Comment is designed to analyze Ohio House Bill 52, to discuss current problems due to the absence of an accountant-client privilege, and to articulate support for the Bill and the potential benefits its passage will provide.\(^10\) Aside from providing a theoretical overview of the primary recognized testimonial privileges under ORC § 2317.02, this Comment proposes that Ohio House Bill 52 should be passed due to the beneficial impact of an accountant-client privilege in Ohio.

II. PRIVILEGES IN GENERAL

A. History of Privileges

A privilege has been defined as, “a special legal right, exemption, or immunity granted to a person or class of persons. In the law of evidence, it is the right to prevent disclosure of certain information in court, especially when the information was originally communicated in a professional or confidential relationship.”\(^11\) It generally refers to “a statutory prohibition against compelled testimony of confidential communications.”\(^12\)

apply and the accountant may testify or be compelled to testify with respect to the communications or advice.” In general, the bill would allow protection from subpoena privileged communications between Certified Public Accountants (CPA’s) and their clients or employers. Ohio Society of Certified Public Accountants, supra note 4, at 1. Thus, the CPA could ensure to their clients that disclosure of sensitive information within the confines of the language of the bill would not only be confidential, but also privileged. Id. This means that the, “CPA could not be forced to betray the client’s or employer’s confidences.” Id. However, this “testimonial privilege does not apply to the general work products of CPA’s including, but is not limited to, tax returns, audit reports and financial statements.” Id.

\(^8\) See supra note 1 and accompanying text.
\(^9\) See supra note 2 and accompanying text.
\(^10\) See supra note 3.

\(^11\) BLACK’S LAW DICTIONARY 501 (Pocket ed. 1996). “The word privilege comes from the Latin words privata lex, a prerogative given to a person or group of persons.” Brian Domb, Note, I Shot the Sheriff, But Only My Analyst Knows: Shrinking the Psychotherapist-Patient Privilege, 5 J.L. & HEALTH 209, 211 (1990/91). It has also been defined as “the right to keep certain information from being used as evidence.” Id; see also Susan O. Scheutzow & Sylvia Lynn Gillis, Confidentiality and Privilege of Peer Review Information: More Imagined Than Real, 7 J.L. & HEALTH 169, 179 (1992/93).
Traditionally, a privilege was considered a “judicially recognized point of honor among lawyers in England.” Traditionally, a privilege was considered a “judicially recognized point of honor among lawyers in England.”13 Originally, the only privileges judicially recognized at common law were between an attorney-client and husband-wife.14 However, these few judicially-created privileges eventually gave way to what is now the dominant source of privileges; ones that are statutorily-defined.15

To avoid a popular confusion, it is important to understand that a clear difference exists between a privilege and confidentiality. Phyllis Coleman, Creating Therapist-Incest Offender Exception to Mandatory Child Abuse Reporting Statutes-When Psychiatrist Knows Best, 54 U. CIN. L. REV. 1113, 1135 (1986). “Confidentiality refers to a . . . duty to keep certain communications secret. These communications are privileged only if a statute provides . . . [that the receiver of the information] should not be compelled to disclose them in a legal proceeding without the [provider of the information’s] consent.” Id. More than confidentiality is needed to support a privilege. Domb, supra, at 212. Thus, “confidentiality is a professional duty to refrain from speaking about certain matters, while a privilege is a relief from the duty to speak in court proceedings.” Id.; see also Scheutzow & Gillis, supra, at 192 (discussing the differences between the concepts of confidentiality and privilege).

12 Coleman, supra note 11, at 1135. “Rules of testimonial privilege excuse competent witnesses from disclosing relevant information in order to promote and strengthen certain relationships. A testimonial privilege reflects society’s preference for protecting the privacy of certain relationships over the state’s fact-finding interest.” Id.; see also Jeffrey Begens, Comment, Parent-Child Testimonial Privilege: An Absolute Right or An Absolute Privilege?, 11 U. DAYTON L. REV. 709, 709-10 (1986).

13 Domb, supra, note 11, at 211. It developed out of the rationale, that in some legal scenarios the opponent could not call the client, so it is only fair that the opponent could not call the client’s lawyer to testify against him. Id. Some legal commentators feel “evidentiary privileges . . . originat[ed] from competing professional jealousies, impeding the pursuit of the truth and serving no important societal goal [in that] privileges originate from the political influence of those who benefit from them.” Id. Consistent with this view is, as one author put it, “‘the poor man’s only privilege is perjury.’ ” Id.

14 MCCORMICK ET AL., MCCORMICK ON EVIDENCE § 75 (Cleary Student ed. 1984); see also Domb, supra note 11, at 211. “At common law no privilege is created by the ‘mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation.’ ” Scheutzow & Gillis, supra note 11, at 179.

15 MCCORMICK ET AL., supra note 14, § 75. The legislatures began codification of existing common law privileges in the late 1820’s. This was after a period in which no new privileges developed aside from the attorney-client and husband-wife. Id. This was due to concerns that privileges hindered litigation due to restraining the fact-finding process. Id. The legislature’s codifying privileges was based on the rationale that “legitimate claims to confidentiality are more equitably received by a branch of government not preeminently concerned with the factual results obtained in litigation . . . .” Id. Also, it was perceived that the legislatures were a better forum to balance the competing interests associated with privileges. Though codification of privileges provided considered societal interests involved, many legal commentators felt privileges
In general, a privilege is an exception to the normal full disclosure of information that is due from a witness and traditionally, has been deemed to include four fundamental conditions before qualifying as such.\textsuperscript{16} If these conditions are not met, then there will be no justification for the privilege and should be constrained to a very narrow scope. \textit{Id.} Current developments in privileges show that every state has a statutorily-based privilege for attorney-client and husband-wife. \textit{Id.} at § 76.2. Most contain some form related to physician-client, governmental information, clergy-penitent. \textit{Id.} Some states contain privileges related to journalist-source, accountant-client, psychotherapist-patient, counselor-counselee, as well as for social workers, nurses, school teachers and private detectives. \textit{Id.} Though many attack the need for privileges in some degree or another because of their hindrance to the administration of justice, privileges shall remain in some form or another now and in the future. \textit{Id.} at §77. However, the “Courts have been very reluctant to create common law privileges absent statutory authority and generally strictly construe those privileges that do exist.” Scheutzow & Gillis, \textit{supra} note 11, at 180. The United States Supreme Court has cautioned lower courts in creating privileges and regardless of the origin or type of privilege, “these exceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.” \textit{Id.} (quoting United States v. Nixon, 418 U.S. 683, 710 (1974)). However, one author has noted that it appears with the expansion of liberal civil discovery rules, the courts have also seen an enlargement in the number of recognized privileges. Fleming James, Jr. & Geoffrey C. Hazard, Jr., \textit{Civil Procedure} § 5.9 (3rd ed. 1985). Because of the ability to request documents without specificity and the growing expense and burden on the parties involved, it has led courts to be sympathetic to this problem by accepting privileges and putting limitations on the discovery of sensitive matters. \textit{Id.}

\textsuperscript{16} Scheutzow & Gillis, \textit{supra} note 11, at 179. Wigmore, who is a well-known legal authority on evidence and privileges, states that prior to establishing a privilege against disclosure of certain communications and information, the following four elements must be met:

1- The communications must originate in a confidence that they will not be disclosed.
2- This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3- The relation must be one which in the opinion of the community ought to be sedulously fostered.
4- The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.

thus, no prevention from disclosing the communication and information that the party seeks to protect.\textsuperscript{17}

Also, privileges have been placed into two distinct categories.\textsuperscript{18} The first is professional and the second is nonprofessional.\textsuperscript{19} The professional privilege is "based on the professional counseling relationship between the holder of the privilege and the counselor for the purpose of fostering the effectiveness of the professional services."\textsuperscript{20} The non-professional privilege "seeks to throw a veil of secrecy around certain areas of privacy in order to protect autonomy and dignity."\textsuperscript{21}

B. General Rationale and Policy Behind Privileges

In both the civil and criminal legal arenas, traditionally all information should be disclosed by those who hold it "in order that the truth may be discovered and justice prevail."\textsuperscript{22} A privilege, however, is an evidentiary exception to this

\begin{itemize}
\item \textsuperscript{17} Id.
\item \textsuperscript{18} Begens, supra note 12, at 711; see also Domb, supra note 11, at 212.
\item \textsuperscript{19} Begens, supra note 12, at 711-14; see infra notes 92 -112 and accompanying text regarding the Husband-Wife privilege.
\item \textsuperscript{20} Domb, supra note 11 at 212. This categorization is an outgrowth of the "emphasi[s] [on] the societal interests in the law of privileges rather than embracing the power theory, political explanation or other evidence scholars." Id. This category includes privileges such as the attorney-client, physician-patient, priest-penitent, and others regarding relationships with accountants, journalists, school guidance counselors, psychotherapists and social workers. Begens, supra note 12, at 711-14; see infra notes 38-57 and accompanying text regarding the attorney-client privilege; infra notes 58-76 and accompanying text regarding the physician-penitent privilege; infra notes 77 - 91 and accompanying text regarding the priest-penitent privilege; infra notes 113-141 and accompanying text discussing the accountant-client privilege.
\item \textsuperscript{21} Domb, supra note 11, at 212. The Non-Professional generally includes what is commonly referred to as the marital privilege (husband-wife) and also the 5th Amendment privilege against self-incrimination. Id.; see also Begens, supra note 12, at 711-14.
\item \textsuperscript{22} Belichick v. Belichick, 307 N.E.2d 270, 271 (Ohio Ct. App. 1973) (holding that a dentist did not fall within the definition of "physician" in the statute pertaining to privileged communications and acts, thus a requirement that the dentist make his patient records available to an disinterested auditor for comparison with tax statements filed in connection with his divorce proceeding was not overly burdensome). The court went on to say that "the granting of privileges against disclosure constitutes an exception to this general rule, and the tendency of the courts is to construe such privileges strictly and to narrow their scope since they obstruct the discovery of truth." Id. The court then quoted a portion of McCormick on Evidence, "[Privileges] do not in any way aid the...".
\end{itemize}
general rule that the courts have a right to all the testimonial evidence and relevant facts one can provide when required to testify. 

The general rationale supporting privileges is to protect certain relationships by prohibiting testimony regarding confidential communications between the parties involved. "[T]heir purpose is not to exclude unreliable evidence or to aid the legal system's goal of obtaining truth. Rather, courts recognize evidentiary privileges because excluding certain confidential communications provides some important benefits to society." However, recognition of an ascertainment of truth, but rather they shut out the light. Their sole warrant is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice." Id.; see also Note, The Attorney-Client Privilege and the Corporate Client: Where Do We Go After Upjohn?, 81 MICH. L. REV. 665, 666 (1983) (agreeing with the notion that privileges are viewed in the narrowest scope possible due to their, "clear costs and largely speculative benefits.").

23 Fullmer, supra note 16, at 760. Fullmer used Wigmore's quote for the general rule as, "the public has a right to every man's evidence. Thus, while 'the primary assumption is that there is a general duty to give what testimony one is capable of giving.' " Id.; see also Kerry L. Morse, Note, A Uniform Testimonial Privilege for Mental Health Professionals, 51 OHIO ST. L.J. 741, 741 (1990). One interesting aspect of a privilege is that the it is reserved to the holder. . . ." GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE (2nd ed. 1978). It is the holder who is vested with the privilege, and therefore the one that has the right to assert it if he so chooses. Id. Also, the party that asserts or waives the privilege may be a representative or agent of the actual holder that is vested with it. Id.

24 Jonathan Baumoel, Comment, The Beginning of the End for the Psychotherapist-Patient Privilege, 60 U. CIN. L. REV. 797, 798 (1992). Baumoel also noted that, "[t]he exclusion of evidence based on privileges has always been a controversial subject within American Law . . . however [d]espite the continuing debate over evidentiary privileges, several . . . have become accepted doctrines of American jurisprudence." Id. These relationships have been deemed, "important enough to warrant an incidental encroachment on the efficient administration of justice." Fullmer, supra note 16, at 760. A quote by English Vice-Chancellor Knight Bruce is consistent with the rationale of privileges:

Truth, like all other good things, may be loved unwisely - may be pursued too keenly - may cost too much. And surely . . . the general evil of infusing reserve and dissimulation, uneasiness, and suspicion and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, [is] too great a price to pay for truth itself.

privilege requires a balancing of competing interests. There is the interest of the public, the courts and the discovering parties in obtaining relevant evidence pertaining to the litigation, while on the other hand, there is the opposing interest of society and the resisting party in protecting sensitive and private information.

Three major theoretical perspectives have evolved to support the rationale for the existence of privileges. The first is the Utilitarian Theory in which, "legislatures should create privileges when society is served more by encouraging a particular relationship than when society is hurt by the potential loss of information caused by the privilege." The second is the Privacy

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25 Baumoel, supra note 24, at 798. "Rules which serve to render accurate ascertainment of the truth more difficult, or in some instances impossible, may seem anomalous in a rational system of fact finding. MCCORMICK ET AL., supra note 14, § 72 (interpreting Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting) (noting that "privileges are justified 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.' "). "Their warrant is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some sacrifice of availability of evidence relevant to the administration of justice." Id.

26 JAMES & HAZARD, supra note 15, § 15.9.

27 Id. "Quite often, the evidence that could be derived from these protected sources would be admissible if judged by the usual standards of probative value and trustworthiness." LILLY, supra note 23, § 86. It is the relationships from which the communications are derived that allows society to recognize the importance of protecting, preserving, and fostering this information. It is also noted that there is a price to pay for allowing privileges. Id. First, privileges allow probative, relevant evidence to be suppressed which forces the trier of fact to decide the issues without the help of this information. Id. This then potentially increases the probability that litigated issues will be decided incorrectly. Id. This then leads one to consider if the "privilege [is] worth its price[?]" Id. A second cost is that privileges are based on the assumption that the privilege advances an interest, relationship, or principle that society considers a prevailing value, however there are concerns if the interests that privileges are designed to protect are actually advanced or protected by this legal device. Id.

28 Morse, supra note 23, at 742.

29 Id. In other words, that without such privileges protecting these communications, these relationships cannot be effective. MCCORMICK ET AL., supra note 14, § 72. Public policy supports these communications and relationships. Id.; see also Cathryn C. Dakin, Note, Protecting Attorneys Against Wrongful Discharge: Extension of the Public Policy Exception, 44 CASE W. RES. L. REV. 1043, 1077 (1995). This is the traditional rationale supporting privileges. Morse, supra note 23, at 742. This approach basically adopts Wigmore's four necessary elements that must be established before a privilege can be granted. Id.; see also WIGMORE, supra note 16.
Theory which is premised on the belief that certain communications deserve a privilege because of the privacy interests involved, regardless of whether the privilege helps foster interaction within the relationship. The last rationale is the Power Theory. This theory is premised on the belief that the professions that receive privileges are the ones with the most money and the wealthiest clients who can contribute to lobbying and political movements. All of these theories are used to support or at least justify the reasoning as to why some relationships, whether Professional or Non-Professional, are afforded privileges, while others are not.

Another notable aspect that is extremely important involving privileges is the notion that the holder may waive it either expressly or implicitly. This is used

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30 MCCORMICK ET AL., supra note 14, § 72. Another author has iterated this theory as being, “based on the belief that human relationships are central to human dignity and should be free from state interference . . . [and that] human dignity [is] more . . . [valuable than] accurate litigation.” Morse, supra note 23, at 744. Thus, the individual’s privacy interests weigh greater than both the legal system’s and society’s need for the information. Id. This theory is also seen as an alternative rationale to support some of the privileges justified by the Utilitarian Rationale, such as the attorney-client and husband-wife privileges. MCCORMICK ET AL., supra note 14, § 72.

31 Morse, supra note 23, 744.

32 Id. Theorists claim there has always been a strong nexus between political influence and the privileges that are adopted. Id. This is supported by the fact that privileges developed in the seventeenth century to provide protection for the English elite. Id. However, “professional honor has since been abandoned as a stated justification for creating privileges, [however] several commentators theorize that political strength continues to influence the development of privilege law.” Id. Consistent with this rationale is that since only the wealthiest, most powerful professions receive privileges, then the ones, “with poorer clients do not have the money nor the political clout to lobby for privileges.” Id.

33 Id.

34 Jenkins v. Metropolitan Life Ins. Co., 168 N.E.2d 625, 630 (Ohio Ct. App. 1960), aff’d, 173 N.E.2d 122 (Ohio 1961) (holding that when a widow signs an instrument authorizing the exchange of documents related to the illness of the decedent’s ailment or disability complained of, the insurer may call the physician as a witness to testify, as the widow has effectively waived the privilege). Waiver is defined as, “the voluntary relinquishment or abandonment express or implied of a legal right or advantage; the party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it.” BLACK’S LAW DICTIONARY 659 (Pocket ed. 1996). The Ohio courts have adopted the following language regarding waiver of a privilege:

[a] waiver of privilege as to confidential communications need not be expressed in writing or in any particular form, when not so required by statute, the waiver must be distinct and unequivocal and the

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http://ideaexchange.uakron.edu/akronlawreview/vol31/iss3/6
as a measure of controlling the scope of privileges.\textsuperscript{35} Waiver can occur in a variety of ways and if the holder is not cautious, they may implicitly waive their privilege without truly intending to.\textsuperscript{36}

III. \textbf{OHIO REVISED CODE § 2317.02 – PRIVILEGED COMMUNICATIONS}

Now that the general concepts behind privileges have been articulated, the focus will turn to the statutory privileges that Ohio currently recognizes under ORC § 2317.02.\textsuperscript{37} This section is designed to provide a broad overview of the

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intent to waive must be expressed either by word or act or omission to speak and act. Generally the privilege is waived whenever the person entitled to the protection of the statute voluntarily makes public matters of which a disclosure without his consent is forbidden.
\end{quote}

\textit{Jenkins}, 168 N.E.2d at 630 (quoting 97 C.J.S. Witnesses § 310, at 856).

\textsuperscript{35} Richard L. Marcus, \textit{The Perils of Privilege: Waiver and the Litigator}, 84 MICH. L. REV. 1605, 1605 (1986). The following was quite powerful in gaining an understanding of the significant impact that a privilege has in litigation for it’s holder: “Except for a few privileged matters, nothing is sacred in civil litigation.” \textit{Id.}

\textsuperscript{36} \textit{Id.} Aside from expressly waiving the holder’s privilege, it may occur implicitly in other ways. \textit{Id.} If the communication or matter that is protected by the privilege is put “in issue” it may result in waiver. \textit{Id.} Waiver may also result in discovery if materials related to the issue under protection are inadvertently given to the opponent. \textit{Id.} Also, discussion with nonparties regarding the subject matter of the communication within the privilege may also result in its waiver. \textit{Id.} Also, “[i]n witness preparation, allowing a prospective witness to examine privileged materials that relate to his or her testimony can destroy the protection.” \textit{Id.} at 1606. As this indicates, the holder and his attorney must be aware of the various ways that could result in waiver. The author noted that because of these implicit waivers and lack of scholarly materials on the subject, it is a very “tricky concept.” \textit{Id.} at 1606; see also \textit{LILLY}, supra note 23, § 86.

\textsuperscript{37} ORC Section 2317.02 Privileged communications states the following in part:

\begin{quote}
The following persons shall not testify in certain respects:

(A) An attorney, concerning a communication made to the attorney by the attorney’s client in that relation or the attorney’s advice to the 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 [2151.42.1] of the Revised Code to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject;
\end{quote}
(B)(1) A physician or a dentist concerning a communication made to the physician or dentist by the physician’s or dentist’s patient in that relation or the physician’s or dentist’s advice to the 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 [2151.42.1] of the Revised Code to have waived any testimonial privilege under this division, the physician may be compelled to testify on the same subject.

(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 cleric, 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 clergyman, rabbi, priest, or minister for a religious counseling purpose in the clergyman’s, rabbi’s, priest’s, or minister’s professional character; however, the cleric, 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 clergyman’s, rabbi’s, priest’s, or minister’s sacred trust.

(D) Husband and wife, concerning any communication made by one to the other, or an act done by either in the presence of the other, during convivture, 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, of 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’s 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, a professional counselor, social worker, or registered under Chapter 4757 of the Revised Code as a social work assistant concerning a confidential communication such person received from such person’s client in that relation or the person’s advice to the client...
(H) A mediator acting under a mediation order issued under division (A) of section 3109.052 [3109.05.2] 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 visitation rights in relation to their children.

(I) A communications assistant, acting within the scope of that assistant's authority, when providing telecommunications relay service pursuant to section 4931.32 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 communications relay service.

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

OHIO REV. CODE ANN. § 2317.02 (Anderson 1991). It should be noted that the discussion of this section will focus on the most common privileges (i.e. attorney-client, physician-patient, clergy-penitent and husband-wife). The entire language of §2317.02 is provided in Appendix A to ensure that the scope of the statute is indicated by displaying all of the relevant privileges that Ohio recognizes under this section of the ORC. Privileges not discussed which are recognized by the statute appear in part (E) regarding parties who assign a claim or interests; part (F) a person who if a party would not be allowed to testify regarding property transactions; part (G) for school guidance counselors, professional clinical counselors and social workers; part (H) for mediators involved in domestic-relation cases; part (I) for communications assistants that transliterates conversation from text to voice and voice to text between the end users of a telecommunications relay service, often used for the hearing impaired. Id. at § 2317.02, §3109, §4931. One important aspect of privileges is that there are variations between jurisdictions in both the recognition and scope of recognized privileges. Lilly, supra note 23, § 93 n.1. Thus, because Ohio recognizes a certain privilege in a particular scope, does not mean sister states will define the privilege in the same way. Id. The statute regarding privileges must be prudently researched to avoid erroneous assumptions. Id.
most common privileges within the statute and any notable features each may have.

A. Attorney-Client Privilege

   1. Definition, Rationale and Justifications

       The attorney-client privilege is "[t]he client’s right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and his or her attorney."38 The oldest of the known privileges, it first

38 BLACK'S LAW DICTIONARY 501 (Pocket ed. 1996). This privilege is also referred to as the Client's privilege. Id. Another source defines privilege as: "Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his insistence, permanently protected from disclosure by himself or by the legal adviser, except the protection be waived." Ralph C. Ferrara et al., Internal Corporate Investigations and the SEC's Message to Directors in Cooper Co., 65 U. CIN. L. REV. 75, 96 (1996). Simply stated, "[t]he attorney-client privilege traditionally protects confidential communication between a client and his attorney." Rachel A. Hutzel, Casenote, Evidence: The Crime Fraud Exception to Attorney-Client Privilege—United States v. Zolin, 109 S. Ct. 2619 (Interim ed. 1989), 15 U. DAYTON L. REV. 365, 365 (1990). Under Ohio law, this relationship is deemed both consensual and contractual in nature. John C. Nemeth, Legal Malpractice in Ohio, 40 CLEV. ST. L. REV. 143, 144-45 (1992). The relationship is formed only when both parties consent. Id. Also, the relationship can be expressly or implicitly formed. Id. at 145. "A ‘client’ within the context of an attorney-client relationship is generally defined as ‘one who employs and retains an attorney or counselor to manage or defend a suit or action to which he is a party, or to advise him about some legal matter.’ ” Id. The client, who holds the privilege, may be either a person individually or a corporation. LILLY, supra note 23, § 90. Examples of the formation of the attorney-client relationship aside from expressly stating it, are when the attorney provides advice concerning a legal issue to a party though no representation results or when an attorney is approached by a party interested in obtaining his services. Nemeth, supra at 144-45. The existence of the privileges depends upon the belief of the client that he is consulting the attorney. MCCORMICK ET AL., supra note 14, §88. However, the burden of proof is with the party asserting the existence of a privilege by showing that “consultation [with the attorney] was a professional one.” Id. Also, the payment or agreement to pay a fee is not essential for the existence of the attorney-client relationship which establishes the privilege. Id. Though the privilege is designed to protect certain communications made between the attorney and client, it does not protect the disclosure of facts communicated to the attorney. Upjohn v. United States, 449 U.S. 383, 395 (1981). However, “[a] fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, ‘What did you say or write to the attorney?’ but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a
developed at common law, but currently is almost exclusively controlled by legislative enactment.\(^{39}\)

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statement of such fact into his communication to his attorney." \textit{Id.} at 395-96. Thus, "[t]he privilege does not prevent disclosure by evidence of any relevant event acquired through the usual investigatory or discovery processes; it only prohibits use of attorney-client communications to prove the event." \textit{LILLY, supra} note 23, § 90. "It is sometimes said that all communications between counsel and client are privileged; but this is too general, and is inaccurate. They must relate to the business and interest of the client. The privilege extends only to communications connected with the business in which the attorney has been retained, and not to extraneous matters." \textit{Ex parte Martin}, 47 N.E.2d 388, 396 (Ohio 1943). In determining if the attorney-client relationship has come into existence:

Ordinarily, an attorney may properly be examined as to the existence of the relation of attorney and client between himself and his client, and as to the terms of that relation. Thus, he may be required to state his authority for conducting a suit, or for compromising a claim, as the granting of such an authority necessarily imports permission to disclose its existence. He may also be compelled to disclose the character in which his client employed him, whether as executor, trustee, or on his private account; where the relationship began and ended, and whether he was instructed by one person to follow the direction of another. It is also well settled that an attorney may be examined as to his fee, the contract therefor, and the amount thereof, these matters being deemed to be facts within his own knowledge, rather than confidential communications.

\textit{Id.} Thus, the privilege covers the attorney’s legal advice and opinions which encompass the thoughts and confidences of a client. \textit{Hercules Inc. v. Exxon Corp.}, 434 F. Supp. 136, 144-45 (D. Del. 1977) (holding in part that enumerated documents not containing confidential information and privileged advice are not protected by the attorney-client privilege). However, communications occurring in the normal course of business are not protected by the privilege. \textit{Id.} This reveals that communications are not per se confidential and within the privilege by the mere fact a relationship exists between the attorney and client. \textit{Moskovitz v. Mt. Sinai Medical Ctr.}, 635 N.E.2d 331, 349 (Ohio 1994).

\(^{39}\) \textit{See Upjohn}, 449 U.S. at 389. This case was one of the first to deal with an issue involving the corporate attorney-client privilege. \textit{Id.} at 383. The Court held that the attorney-client privilege exists in the context of communications from employees to in-house counsel and that the work-product doctrine applies to IRS summonses. \textit{Id.} at syllabus para. 1 & 2. The Court also suggested that a case-by-case determination be used in analyzing the corporate attorney-client privilege. \textit{Id.} at 396. The privilege can be traced back to Roman Law but developed in the English courts during the reign of Queen Elizabeth I. \textit{McCORMICK ET AL., supra} note 14, § 87. In Ohio, the attorney-client privilege is codified in § 2317.02(A) of the ORC. \textit{See supra} note 37.
The purpose of the privilege is to "facilitate the administration of justice' by encouraging full and open communications between the client and the attorney." It is premised on the belief that, "confidences shared in the attorney-client relationship are to remain confidential.

The rationale of protecting the client and his attorney from disclosure, is to encourage open and uninhibited discussion of all relevant information regarding the legal matters for which the attorney has been retained. This will then help promote the "administration of justice and preserve the lawful rights of the individual." Also, if the client can fully disclose all relevant information to his attorney regarding legal matters without apprehension of others being informed,


It is designed to encourage a client to divulge all relevant facts without the fear that any of these disclosed facts may later be used against him. State v. McDermott, 598 N.E.2d 147, 149 (Ohio Ct. App. 1991) (finding that the trial court had abused its discretion in compelling an attorney to testify as to the communications with the client for the purpose of determining whether the client had waived the attorney-client privilege). The privilege will then aid in the open "communication between the attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Upjohn, 449 U.S. at 389. Without the privilege, there cannot be the absence of apprehension in the client's consultation with the attorney. See Moskovitz, 635 N.E.2d at 349.

41 Id. (holding in part that, "neither the attorney-client privilege nor the so-called work product exception precludes discovery of insurer's claims file. The only privileged matters contained in the file are those that go directly to the theory of defense of the underlying case in which the decision or verdict has been rendered."). "Trust is the foundation of the attorney-client relationship. When an individual relies on an attorney for legal assistance, that person places his trust not only in the individual attorney, but also in the legal profession itself." Philip F. Downey, Comment, Attorneys' Trust Accounts: The Bar's Role in the Preservation of Client Property, 49 Ohio St. L.J. 275, 275 (1988). It is premised on confidentiality and "[t]he moment confidence ceases, privileges ceases." State v. McDermott, 607 N.E.2d 1164, 1168 (Ohio Ct. App. 1992), overruled on other grounds, 651 N.E.2d 985 (Ohio 1995).

42 Begens, supra note 12, at 712. "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional missions is to be carried out." Upjohn, 449 U.S. at 389. Without the complete disclosure from the client, the attorney will not fully be able to assist the client with his knowledge of the law and skills in its practice. Id.

43 Id.
Then the attorney will be better able to handle the legal matters due to the complete disclosure by the client.\textsuperscript{44}

The attorney-client privilege is primarily supported by two justifications, the Utilitarian Theory and the Privacy Theory.\textsuperscript{45} The Utilitarian Theory as applied specifically to this privilege states that unless there is consent by the client, the law must prevent disclosure of communications between the parties in order to promote "freedom of consultation with legal advisors."\textsuperscript{46} The Privacy Theory is grounded upon the idea of privacy and the freedom of the client in choosing who should be informed of certain information he possesses.\textsuperscript{47}

2. Waiver

\textsuperscript{44} Domb, supra note 11, at 215. Without the privilege, the attorney-client relationship would not be as functional because the client would be hesitant to be completely honest and open with his attorney. Hutzel, supra note 38, at 381.


\textsuperscript{46} Id. This privilege has traditionally been justified under this rationale. Id. Also, this theory recognizes that the legal system requires the use of attorneys to fully assist those that come before the courts so as to ensure the best administration of justice. Id. Thus, if attorneys assist those in need of the court system without the requirement of being compelled to testify as to their communications with their client, individuals will retain attorneys to assist them. Id. at 173. This in turn will enable the legal system to operate more efficiently and properly which will then benefit society as a whole. Id. However, it is also recognized that this privilege "hinders the discovery of the truth and therefore should not be broadly construed." Id. at 174.

\textsuperscript{47} Id. This theory states that the privacy interests exceed the "impairment of truth-seeking that [the attorney-client] privilege may cause" and the client should be able to control whether information about their communications is released or not and to whom. Id. at 177. Also, this Privacy Rationale regarding the attorney-client privilege depends on three values:

'human autonomy regarding personal information, respect for relationships, and respect for the bonds and promises that protect shared information.' If an individual tells his attorney something with the expectation that it will not be disclosed and for some reason the attorney must disclose it, two distinct harms can occur: '(1) embarrassment of having secrets revealed to the public and (2) the forced breach of an entrusted confidence.' These harms are very real to the person whose secret has been revealed and will have a chilling effect on others who may desire to seek assistance of counsel.

Id. at 177-78 (citations omitted); see also, supra note 30 and accompanying text (discussing the Privacy Rationale in further detail in regards to privileges in general).
A critical issue that both attorneys and clients must be fully aware of is the fact that the privilege is not absolute.\textsuperscript{48} The privilege protecting the confidential communications between the parties may be waived.\textsuperscript{49} Waiver may result in numerous ways, including, but not limited to the situation where the client explicitly consents or voluntarily offers testimony on the same subject matter.\textsuperscript{50} The burden of proof rests with the party wishing to exclude the communications from the evidence.\textsuperscript{51}

3. Other Notable Aspects of the Attorney-Client Privilege

Aside from the general rationales, justifications and conduct resulting in waiver, other aspects of this privilege are noteworthy. As previously mentioned, \textsuperscript{48} Mid-American Nat’l Bank and Trust Co. v. Cincinnati Ins. Co., 599 N.E.2d 699, 703 (Ohio Ct. App. 1991) (finding that the insurer did not intend to keep communications confidential and waived attorney-client privilege when it reported part of the contents of independent counsel’s opinion). The court noted that the privilege between the attorney and client may be lost under some circumstances. \textit{Id.} In this case, the attorney-client privilege was deemed lost in regards to related subject matter when there was voluntary partial disclosure of privileged communications. \textit{Id.} at 704.

\textsuperscript{49} Spitzer v Stillings, 142 N.E. 365, 367 (Ohio 1924). The court noted the that there is a limitation on the privilege:

\begin{quote}
Communications made by a client to his attorney, with a view to professional advice or assistance, are privileged; and courts will not require nor permit them to be divulged by the attorney, without the consent of his client, whose privilege it is. But if a party to a suit offers himself as a witness, and gives evidence, generally, in the case, he thereby loses this privilege, and \ldots\ consents to the examination of his attorney touching such admissions as are pertinent to the issue.
\end{quote}

\textit{Id.} (citations omitted).

\textsuperscript{50} \textit{Id.; see also} State v. McDermott, 651 N.E.2d 985, 987 (Ohio 1995) (holding that that ORC §2317.02(A) provides the exclusive means by which privileged communications directly between an attorney and a client can be waived). The Court noted communications between a client and an agent of the attorney are not protected by the statute. \textit{Id.} at 988. Depending on the jurisdiction, waiver may also occur through unintentional disclosures in discovery, by allowing a prospective witness to examine privileged materials relating to their testimony during preparation for trial, or discussion of confidential communications in the presence of a third party. Marcus, \textit{supra} note 35, at 1606. In Ohio, §2317.02(A) controls regarding waiver as mentioned in McDermott. \textit{See supra} note 37 for the language of this section of the ORC to which waiver applies.

\textsuperscript{51} State v. McDermott, 607 N.E.2d 1164, 1169 (Ohio Ct. App. 1992). Generally, the burden of proof for all privileges rests with the party seeking to show that the communications are privileged and should be excluded from evidence. \textit{Id.}
the courts are cautious in finding additional privileges. However, the Ohio courts state that it is critical to apply the principles of ORC §2317.02(A) and to adhere to the spirit of the statute. Outside the explicit language of §2317.02, the Ohio courts have found that client communications made to an attorney in the presence of a third party who was not an agent of the attorney, results in a loss of confidentiality and accordingly, a loss of privilege. However, communications to third parties who are agents of an attorney are afforded privileged protection.

Other issues such as the length of time the privilege endures, as well as ethical and constitutional considerations, have been before the Ohio courts regarding the attorney-client privilege. Regarding duration, once the attorney-client privilege has been established, it survives the client, unless it is waived.

52 Waldmann v. Waldmann, 358 N.E.2d 521, 522 (Ohio 1976). The court found that when the attorney-client privilege exists that enormous protection is given in regards to protecting the address of the client. Id. at 522. Also, filing a complaint does not constitute a waiver of the attorney-client privilege in regards to the client’s subsequent address. Id.

53 Hawgood v. Hawgood, 294 N.E.2d 681, 684 (Ohio C.P. Cuyahoga Co. 1973) (holding that the evidence established that the husband and wife had entered into a valid oral agreement of separation). The rationale is that communications made to an attorney in the presence of a third party are inconsistent with the notion of confidentiality, which is required for the attorney-client privilege to exist. Id. Because the communications are not confidential and therefore not privileged, both the attorney and third person may testify as to the subject matter of the communications. Id.; see also State v. Post, 513 N.E.2d 754 (Ohio 1987) (holding that a client’s disclosure to a third party of communications made pursuant to the attorney-client privilege breaches the confidentiality underlying the privilege, and constitutes a waiver thereof).

54 In re Heile, In re Stevens, 29 N.E.2d 175, 177 (Ohio Ct. App. 1939). The court noted:

Communications between an attorney and the agent of his client are also entitled to the same protection from disclosure as those passing directly between the attorney and his client. The agent as well as the attorney is prohibited from testifying with respect thereto except by consent of the client, and this is true even though the communications are made merely with a view to establishing the relations of attorney and client, and securing professional aid for the principal. Id. The Heile court went on to further announce that if the attorney-client privilege exists, it includes the protection of the name and address of the client. Id.

55 Taylor v. Sheldon, 173 N.E.2d 892, 895 (Ohio 1961) (holding that an attorney who was summoned to prepare a will, but who left without doing so and who was not a witness to the will subsequently made, was not, in absence of waiver, competent to testify, on the
On the constitutional front, an attorney may not divulge privileged information on the basis of his Constitutional First Amendment right of freedom of speech. Ethical considerations also have an impact on the attorney-client privilege and may result in disclosure of confidential information.

B. Physician-Patient Privilege

1. Definition, Rationale and Justifications

The physician-patient privilege is "the statutory right to exclude from evidence in a legal proceeding communications a person made to his or her physician unless that person consents to disclosure." This privilege is entirely statutory and never existed at common law.

56 American Motors Corp. v. Huffstutler, 575 N.E.2d 116, 120 (Ohio 1991) (finding that an attorney had no right to disseminate information protected by the attorney-client privilege). The Court concluded that an attorney has no right under the First Amendment of the United States Constitution or the Ohio Constitution to disclose privileged information. Part of the rationale is that by accepting a license to practice law, an attorney sacrifices a portion of the right to free speech guaranteed under the First Amendment. The Court further noted that in order to protect the privileged information, an injunction may be issued against the attorney if he has already violated the privilege or displays an attitude that it will be violated again.


Under Ohio's DR 7-102(B) . . . attorneys must, in some circumstances, reveal client fraud to the court or to a third person defrauded while the lawyer represented the client, and the rule contains no express exception for the attorney-client privilege. The failure of states like Ohio to include the attorney-client privilege exception can create an important disclosure obligation above and beyond the general obligations to disclose a client's intention to commit a crime or to disclose fraudulent conduct that would constitute a future crime under DR 7-102(B)(1).

58 BLACK'S LAW DICTIONARY 501 (Pocket ed. 1996). This is also known as the doctor-patient and the patient-physician privilege. To establish the privilege, the patient must have voluntarily consulted the physician for either treatment or diagnosis for possible treatment. McCORMICK ET AL., supra note 14, § 99. If the patient did not voluntarily seek the physician's assistance, then the underlying rationale for the privilege does not exist. In re Winstead, 425 N.E.2d 943, 945 (Ohio Ct. App. 1980). That
rationale is the, "promotion of free and full discourse between physician and patient." Id. It is usually immaterial who the physician is employed with. MCCORMICK ET AL., supra note 14, § 99. Communications by the patient that are deemed confidential may be by written document, word of mouth or by exhibiting any body part for examination or treatment by the physician. Ausdenmoore v. Holzback, 106 N.E. 41, 41 (Ohio 1914); see also Baker v. Industrial Commission of Ohio, 21 N.E.2d 593 (Ohio 1939). Regarding oral communications, those made to the doctor by the patient when ill or delirious are also protected out of fairness and understanding that such comments may have never been disclosed but for the sickness and it would be "utterly unfair" to allow a physician to divulge such delirious comments. See Baker, 21 N.E.2d at 595-96. Statutes allowing privilege for confidential communications usually require that the medial practitioner fall squarely within the statutory definition of "physician." Belichick v. Belichick, 307 N.E.2d 270, 273 (Ohio Ct. App. 1973). ORC § 2317.02 uses the definition of physician from §2305.33 of the ORC. OHIo REV. CODE ANN. § 2317.02 (B)(6) (Anderson 1991). When the communications from the client are fraudulent misrepresentations, the physician-client relationship is not established and therefore the privilege will not protect those communications. State v. Stokes, 521 N.E.2d 515, 516 (Ohio Ct. App. 1987).

McCormick et al., supra note 14, § 98. The first statute creating a physician-patient privilege was in 1828 in New York. Id.; see also Domb, supra note 11, at 213. It stated, "No person authorized to practice physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient, in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon." McCormick et al., supra note 14, § 98. Similar acts were later passed in other states in the later 1800's that were closer to modern day language and addressed testimony in legal proceedings. Id. In Ohio, the physician-patient privilege is articulated in §2317.02(B). See supra note 37 for exact language regarding the requirements and the limitations of this privilege. Originally at common law, a patient could not prevent a physician from disclosing confidential communications made between the parties. Begens, supra note 12, at 712. Confidential communications were not protected until legislative enactments. Id. Currently, forty-two states and the District of Columbia establish that physician's cannot disclose confidential communications without the patient's consent. Id.; see also Baumoe, supra note 24, at 801. Though all have the general purpose of protecting confidential communications between the physician and the patient, these statutes vary a great deal in the scope and limitations regarding the privilege. Baumoe, supra note 24, at 801. Though no privilege existed at common law, there was some protection from disclosing confidential information on the basis that a physician would be deterred from divulging such information on the grounds that he could be guilty of breach of honor and of great indiscretion. Robert A. Wade, Note, The Ohio Physician-Patient Privilege: Modified, Revised, and Defined, 49 OHIO ST. L.J. 1147, 1147 (1989). The breach of honor related to the violation a portion of the Hippocratic Oath physicians swear to, which states, "Whatever, in connection with my professional practice, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret." Ginger Mayer McClarren, Comment, The Psychiatric Duty to Warn: Walking a Tightrope of Uncertainty, 56 U. Cin. L. Rev. 269,
The general purpose of the privilege is to encourage the open and frank disclosure of information from the patient to the doctor in order to ensure that the physician provides proper diagnosis and treatment. It is presumed that any obstacles to the patient's disclosure of his illness, affliction or injury may hinder the physician's ability to render proper, quality medical treatment. This privilege is necessary to encourage those needing the help of doctors and medical aid to obtain it "without the fear of betrayal."

The rationale justifying the physician-patient privilege that effective medical assistance depends upon the client's open communication to the physician is premised on three primary bases, the Utilitarian Theory, Privacy Theory and Professional Honor Theory. The Utilitarian Theory approach is founded on the

271 (1987). However, if the physician did disclose confidential communications, it still was not a breach of the physician-patient relationship. Wade, supra note 59, at 1148. The physician-patient relationship is a fiduciary one in regards to the confidential information that is entrusted to the doctor. Hammonds v. Aetna Casualty & Surety Co., 237 F. Supp. 96, 102 (N.D. Ohio 1965). In Ohio, the first statute involving a physician-patient privilege was in 1880. Wade, supra note 59, at 1152. Subsequent modifications involving waiver and other aspects were added over the years until what is the current version under §2317.02(B).

60 Begens, supra note 12, at 714.

61 Catharina J. H. Dubbelday, Comment, The Psychotherapists-Client Testimonial Privilege: Defining the Professional Involved, 34 EMORY L.J. 777, 793 (1985). The privilege is founded upon the fact that a physician can provide better diagnosis and provide more effective treatment if they are aware of all of the relevant facts, circumstances and symptoms related to the malady or injury the patient seeks to have cured. Id.

62 Id.

63 Steven R. Smith, Article, Medical and Psychotherapy Privileges and Confidentiality: On Giving With One Hand and Removing With the Other, 75 KY. L.J. 473, 476 (1986). See supra, notes 28-30 and accompanying text regarding these first justifications for privileges in general. As privileges place burdens upon the judicial system and in ascertaining the truth, supporters of privileges bear a burden of demonstrating the benefits of such privileges. Id. Opponents of the Physician-Patient privilege declare that eliminating it would bear no effect because most patients are unaware that it even exists. Baumoel, supra note 24, at 801. Also, patients do not consider the potential of future litigation when seeking medical advice or treatment or the potential embarrassment or damage to their reputation in comparison to their concern regarding their injury or health. Id. Even Wigmore, a well-respected legal authority of privileges, declares that the physician-patient relationship only met the third out or his four requisite foundational elements that must exist before a privilege is found. Domb, supra note 11, at 214. See supra, note 16 text regarding these four elements. Wigmore,
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belief that the benefits to society from a physician-client privilege outweigh the burdens created by the confidentiality of the communications. The Privacy Theory justifies the privilege on the belief that patients should have control over access to personal information regarding oneself. These privacy interests have also been put in the Constitutional context in that the physician-patient relationship attaches a constitutional right of privacy. Lastly, the Professional Honor Theory justifies the privilege on the premise that "communications were protected by a professional gentleman's honor by not requiring him [physician] to disclose what he promised to keep secret."

2. Waiver

another respected legal commentary on evidence, has stated that, "More than a century of experience with the statutes has demonstrated that the privilege in the main operates not as the shield of privacy but as the protector of fraud. Consequently, the abandonment of the privilege seems the best solution." Id.

Smith, supra note 63, at 477. This approach is premised on Wigmore's four fundamental elements that must be present before a privilege may be established. Id. It appears that this privilege is justified by the existence of these fundamental elements, even though the creator of these elements did not feel that the physician-patient relationship met the requirements. The justification results from the belief that the benefit of more effective medical care that results from the existence of the privilege is more important to society than the costs to the judicial system of prohibiting full disclosure of information.

Id. at 477. Justification comes from the privacy interests of the patients. Id. Autonomy is another related privacy interest in that patients should be able "to make fundamental decisions for oneself without significant governmental interference." Id.

Id. at 479; see also Coleman, supra note 12, at 1142. Though not explicit in the Constitution, the "'right of personal privacy, or a guarantee of certain areas or zones of privacy' in the due process clause of the Fourteenth Amendment" have been recognized by the United States Supreme Court. Id. However, in the constitutional setting, the right to privacy is not absolute and may be overcome by a showing of compelling state interests. Id.

Smith, supra note 63, at 479. Technically, this rationale has been abandoned as a basis for justifying privileges. Id. However, in reality this "professional honor or obligation is still very much a part of the protection of confidentiality." Id. Professional medial ethics support this as they do not allow disclosure of confidential communications unless the law so requires. Id. Protection of the patient's confidential communications has existed for centuries as an ethical obligation in the medical profession. Id. at 480. Also inherent in this justification is the Power Theory in that privileges for the medical profession exist in part because of the political power and lobbying efforts of the profession. Id.; see also supra notes 31-32 and accompanying text (discussing the Power Theory as it applies to privileges in general).
The physician-patient privilege is not absolute and may be waived.\(^6\)\(^8\) Waiver may occur by either express or implied consent and often is specifically addressed by the statutes establishing the privilege.\(^6\)\(^9\) The patient is the holder of the privilege and is the one who may waive it, thus it is their actions in certain circumstances that give rise to the courts determination of whether the privilege has actually been waived.\(^7\)\(^0\)

3. Other Notable Aspects of the Physician-Patient Privilege

ORC §2317.02(B) provides a privilege for physicians and dentists. However, communications between patients and certain other medical related professionals have not been afforded the same protections. Currently, Ohio does not recognize a privilege for confidential communications with pharmacists or the confidentiality of their prescription records.\(^7\)\(^1\) Though a nurses’ work is closely

\(^6\)\(^8\) Waiver is addressed explicitly in §2317.02(B)(1) of the ORC. OHIO REV. CODE ANN. § 2317.02 (Anderson 1991).

\(^6\)\(^9\) Jenkins v. Metropolitan Life Ins. Co., 168 N.E.2d 625, 629 (Ohio Ct. App. 1960), aff'd, 173 N.E.2d 122 (Ohio 1961). In Ohio, a patient may waive their physician-patient privilege in accordance with the statute. \textit{Id.} The statute allows express waiver either orally or written, or implicitly through the voluntary testifying of the patient himself regarding the confidential communications related to the specifics of the party’s medical condition, symptoms or treatment. \textit{Id.} A surviving spouse, executor or administrator may also expressly consent to waive the privilege. \textit{Wade, supra} note 59, at 1154. Also, the patient’s filing of causes of action for malpractice, wrongful death, worker’s compensation, or any other civil action related to the physician-patient relationship results in a compulsory waiver of the physician-patient privilege. \textit{Id.}

\(^7\)\(^0\) Harpm v. Devine, 10 N.E.2d 776, 779 (Ohio 1937). The Court determined that when the plaintiff-patient on direct examination testifies on his general well-being prior to an accident was good without mentioning any communications or treatments by a physician is not a waiver that would allow the physician to testify. \textit{Id.} at 776-77. The Court also found that “merely answering questions as to treatments from a physician in response to questions on cross-examination does not waive the privilege . . . [as] [s]uch testimony is not voluntary within the purview of the statute.” \textit{Id.} at 777. However, though questions about a patient’s medical condition do not constitute waiver on cross-examination, it will result if the patient voluntary testifies on their own behalf regarding communications and treatments given by a physician. York v. Roberts, 460 N.E.2d 326,326-27 (Ohio Ct. App. 1983). Protection of information in medical records is not waived by answering questions on cross examination during a deposition. Mariner v. Great Lakes Dredge & Dock Co., 202 F. Supp. 430, 434 (N.D. Ohio 1962).

\(^7\)\(^1\) Harlin G. Adelman et al., Excerpts from the Second Annual Pharmacy-Law Institute Symposium, \textit{Pharmacist-Patient Privilege and the Disclosure of Prescription Records}, 1 J. PHARMACY & L. 127, 127 (1992-93). Aside from no express privilege stated in ORC §2317.02, the Ohio courts have not “held that such a privilege is implied in any existing
related to doctors, no privilege has been extended to this profession either. Chiropractors in Ohio also do not have a privilege for their communications with patients under ORC §2317.02.

Other miscellaneous issues have also been decided regarding this section of the privileged communications statute. Though given a privilege, a patient’s physician may testify in litigation involving the patient if the “testimony [is] confined to answering hypothetical questions not embracing matters confided to him by his patient or information obtained by him from his physical examination of such patient.”

In the criminal and investigative arena, the physician-patient privilege provided by ORC §2317.02(B) does not preclude disclosure to the grand jury of the medical records of a person under investigation that normally are protected by the physician-patient privilege. The courts

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72 Weis v. Weis, 72 N.E.2d 245, 246 (Ohio 1947) (holding in part that the Ohio privilege statute will be strictly construed and only relationships specifically named therein will be given the privilege, thus communications between a nurse and patient are not given such protection). Though it was argued that the nurse was acting as an agent to a physician, the Court stated only relationships expressly stated are given the privilege, thus nurses have no privilege for confidential communications with their patients unless the nurse was also a physician or surgeon. Id.; see also State v McKinnon, 525 N.E.2d 821 (Ohio Ct. App. 1987).

73 In re Polen, 670 N.E.2d 572, 574 (Ohio Ct. App. 1996) (holding in part that the physician-patient privilege did not apply to chiropractors under §2317.02 of the ORC). The Court said the language in §2317.02 was clear that chiropractors were not included under this statute. Id. Neither section (B)(1) nor section (B)(5) provides any indications that chiropractors are afforded privileged communications. Id.; see supra note 37 for the exact language for these respective sections of ORC §2317.02.

74 Vincenzo v. Newhart, 219 N.E.2d 212 (Ohio Ct. App. 1966), aff’d, 227 N.E.2d 627 (Ohio 1967) (finding that the defendant had a right to call as a witness plaintiff’s attending physician to testify on matters not within the realm of privileged communication, even though plaintiff had not waived the physician-patient privilege). The court reasoned that there are questions that legitimately fall outside the statute’s protection of confidential communications regarding the patient that may be relevant and admissible. Id.

75 In re Grand Jury Investigation of Brink, 536 N.E.2d 1202, 1203 (Ohio Ct. App. 1988) (holding that medical records are not protected by the physician-patient privilege subpoenaed pursuant to a grand jury investigation.) The court determined that the physician-patient privilege does not apply when public interest supporting disclosure in a
have also declared that neither the physician-patient nor the dentist-patient privilege could be invoked to protect records from their respective state board agency’s review during investigations of the health or dental care provider.76

C. Priest-Penitent Privilege

1. Definition, Rationale and Justifications

The priest-penitent privilege bars clergy members from testifying about a confessor’s crime.77 The privilege is purely statutory and never existed at common law.78 The primary purpose is to protect confidential communications

criminal case outweighs interest in enforcing the privilege in the grand jury hearings. Id. Therefore, in the criminal grand jury setting, the court uses a balancing test to determine if society’s need for the information to assist in the prosecution of crime outweighs the patient’s privilege of protection of confidential communications. Id. However, the “Courts may not create a public policy limitation upon the physician-patient privilege in order to allow otherwise clearly inadmissible evidence to be received . . . .” State v. Smorgala, 553 N.E.2d 672, 673 (Ohio 1990).

76 State Medical Bd. v. Miller, 541 N.E.2d 602, 602 (Ohio 1989) (holding that the physician-patient privilege could not be used by a physician to prevent the State Medical Board from compelling production of patient records); see also Ohio State Dental Bd. v. Rubin, 663 N.E.2d 387 (Ohio Ct. App. 1995) (holding that the dentist-patient privilege could not be invoked to prevent the board’s investigation). In both cases, the courts determined that the privilege could not be invoked to hinder investigations into suspected medical/dental wrongdoing. See Miller, 541 N.E.2d at 605-06; Rubin, 663 N.E.2d at 388. In Rubin, the court stated that the privilege should not apply in these board investigations because:

the privilege is in derogation of the common law and must be strictly construed against the party seeking to assert it; medical/dental licensure is not an unqualified right and is therefore subject to reasonable restrictions and revocation by the issuing authority; and policy considerations underlying the physician-patient privilege must be balanced against, and are sometimes outweighed by, other interests, such as the public interest in detecting crimes to protect society.

Id. 77 BLACK’S LAW DICTIONARY 502 (Pocket ed. 1996).

78 Mccormick et al., supra note 14, at §76.2. This privilege is probably one of the most widely adopted privileges throughout the United States. Id. A New York court in 1813 became the first to officially recognize the clergy-communicant (priest-penitent) privilege by refusing to compel a priest to testify about confessional communications. Baumoel, supra note 24, at 801-02. Since that time, “[a]ll fifty states, Puerto Rico and Virgin Islands have statutes granting some form of testimonial privilege to clergy-
made between the confessor and the clergyman.\textsuperscript{79} It is premised on the
"imperative need for confidence and trust . . . and recognizes the human need to
disclose to a spiritual counselor, in total and absolute confidence, what are
believed to be flawed acts or thoughts and to receive priestly consolation and
guidance in return."\textsuperscript{80}

The privilege has been justified under Utilitarian approach in that it is in
society’s best interest to protect the communications between clergy and
confessors by allowing it to be privileged.\textsuperscript{81} It has also been supported by the
communicant communications. Neither scholars nor courts question the legitimacy of the
privilege, and attorneys rarely litigate the issue.” \textit{Id.} (footnotes omitted) Though all the
states recognize this privilege, the statutes “differ markedly from state to state, so that
there is no typical clergy privilege statute.” Mary Harter Mitchell, \textit{Must Clergy Tell?
Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of
Religion}, 71 MINN. L. REV. 723, 740 (1987). In Ohio, the privilege is granted in ORC
§2317.02(C) and applies to clergy, rabbi, priest or regularly ordained, accredited or
licensed ministers of an established and legally cognizable church, denomination or sect.
\textit{OHIO REV. CODE ANN.} § 2317.02 (Anderson 1991); \textit{see supra}, note 37 for full language
of ORC §2317.02(C). Though the privilege was not recognized at common law,
communications by penitents were to remain confidential per the church’s discipline and
the clergymen’s rules of practice. In \textit{re Estate of Soeder}, 220 N.E.2d 547, 568 (Ohio Ct.
App. 1966). An example is the Canon Law of the Roman Catholic Church that is a
collection of the constitution, laws and administrative rules of the ecclesiastical
government and church discipline. \textit{Id.} at 547. These are concerned with “the spiritual
and moral welfare of the community, having as its final end the eternal salvation of souls;
the latter treats temporal and secular interests, the preservation of peace and order, and
the economic, social, political and cultural life of the community.” \textit{Id.}

\textsuperscript{79}\textit{Id.}

\textsuperscript{80} \textit{Trammel v. United States}, 445 U.S. 40 (1980) (holding that apart from confidential
communications, a witness spouse alone has the privilege to refuse to testify adversely
and may be neither compelled to testify nor foreclosed from testifying). It is to “protect
against any disclosure that ‘would violate a sacred or moral trust.’ ” \textit{MCCORMICK ET AL.,
supra} note 14, § 76.2. Therefore, “prohibiting disclosure of confidential information
between the clergyman and penitent will encourage the confessor to speak freely, without
fear of public scorn.” Begens, \textit{supra} note 12, at 713. Usually for the communication to
be protected by the privilege, it must be intended to be confidential, received in the
professional capacity and “must be of a penitential character.” \textit{Id.}

\textsuperscript{81} \textit{MCCORMICK ET AL., supra} note 14, at §76.2. An Ohio court stated it is not in the
best interests of society to allow litigation to prosper at the expense of the spiritual
rehabilitation of the penitent. \textit{In re Estate of Soeder}, 220 N.E.2d at 568. Wigmore, a
well respected legal commentary, accepts this privilege with some reluctance because of
the difficulty in justifying it under the four fundamental elements that partly comprise the
utilitarian theory for privileges. \textit{MCCORMICK ET AL., supra} note 14, § 76.2. \textit{See supra},
notes 16, 28-29 and accompanying text. (discussing the utilitarian theory in general and
belief that there is a possibility that the clergyman would not necessarily testify if called as a witness and "[t]he concept of jailing a clergyman for adhering to the absolute duty imposed upon him by deep religious beliefs is offensive." Also, it is believed that if the privacy of the penitential communications were not respected, society would be harmed by the hindrance and harms upon the development of religious institutions.

2. Waiver

Depending upon the jurisdiction, waiver of the privilege to prevent disclosure of confidential communications between the clergyman and the penitent may be in the hands of either the penitent, the clergyman or both parties. Ohio is one of only two states that places the right to waive and

Wigmore’s requisite elements). Wigmore’s reluctance stems from the fact that penitential communications are made or encouraged and that they most likely will continue to occur regardless of the presence or absence of a evidentiary privilege. McCORMICK ET AL., supra note 14, § 76. Since these communications are likely to occur irrespective of the privilege, it contravenes the Utilitarian theory’s belief that society will benefit by keeping these relationships strong and effective only if the communications remain confidential. Id. However, Wigmore’s acceptance of the privilege is an important factor in its acceptance as a legitimate evidentiary exclusion. David T. Fenton, Statute Note, Texas’ Clergyman-Penitent Privilege and the Duty to Report Suspected Child Abuse, 38 BAYLOR L. REV. 231, 234 (1986). The clergy-penitent privilege has been deemed vital to society and quoted as “so important, indeed so fundamental to the western tradition, that it must be ‘sedulously fostered.' ” Captain Michael J. Davidson, Dept. of Army Pamphlet 27-50-237, The Clergy Privilege, 1992-AUG ARMY LAW 16, 17.

Domb, supra note 11, at 216. Depending upon the jurisdiction, the holder of the privilege may be different. Chad Horner, Note, Beyond the Confines of the Confessional: the Priest-Penitent Privilege in a Diverse Society, 45 DRAKE L. REV. 697, 704 (1997). Some jurisdictions grant the privilege to the penitent, (as with client in the attorney-client relationship) which allows the penitent to invoke the privilege to prohibit the clergyman from testifying. Id.; see also Dubbelday, supra note 61, at 790-91. However some other jurisdictions allow the clergyman to hold “the privilege independently of the penitent, if revealing the penitent’s confidence would violate the tenets of the clergyman’s faith,” but still allows the clergyman to waive the privilege. Domb, supra note 11, at 216.; see also, Dubbelday, supra note 61, at 790-91; Horner, supra note 82, at 704. A small number of states place the privilege in the hands of both the clergyman and the penitent, in which either can assert the privilege and prevent the disclosure of confidential communications. Id.

Dubbelday, supra note 61, at 791.

Julie Ann Sippel, Comment, Priest-Penitent Privilege Statutes: Dual Protection in the Confessional, 43 CATH. U. L. REV. 1127, 1135 (1994); see also, Horner, supra note 82, at 704. Thirty-eight states’ statutes place the penitent with the privilege and the right to waive it. Sippel, supra note 84, at 1135. However, some of the states allow the
enforce the privilege in the hands of both the clergyman and the penitent. However, Ohio places a limitation on the priest's rights in that "[i]f the penitent consents to disclosure, the priest may assert the privilege only to avoid testifying if such disclosure would be "in violation of his sacred trust.""

3. Other Notable Aspects of the Priest-Penitent Privilege

As previously mentioned, in Ohio, both the clergyman and the penitent are holders of the privilege that prevents them from testifying as to the confidential communications made between the parties. However, it is important to acknowledge that the "privilege applies only to a communication made in the understood pursuance of that church discipline which gives rise to the confessional relation, and therefore, in particular to confessions of sin only, not to communications of other tenor." Thus communications not within the spiritual function will not be given the protection of the privilege.

Another important factor exists with the priest-penitent privilege that sets it apart from some of the other privileges. Unlike many other privileged relationships, there currently is no statutory negligence cause of action in Ohio for a clergy member who discloses a penitent's confidential communications outside the legal system. However, a clergyman may be still sued under a professional negligence theory.

clergyman to assert it on behalf of the penitent, while another portion of the states allow the clergyman to testify upon the consent or waiver of the penitent. Eleven states explicitly place the privilege and the discretion to waive it in the hands of the clergyman. The only other state to place the privilege and right to waive it in the hands of both parties is Alabama. 

Sippel, supra note 84, at 1136; see also, supra note 37 for exact language regarding the privilege and the rights regarding waiver. Sippel, supra note 84, at 1136. Thus, the priest or clergyman can only invoke the privilege if it is in violation of one the church's laws or moral beliefs. Id. If it is not such a violation and the penitent waives his privilege, then the priest may not invoke the privilege and will be compelled to testify. Id. See supra notes 82-86 and accompanying text regarding Ohio's priest-penitent privilege and its waiver.

In re Estate of Soeder, 220 N.E.2d 547, 568 (Ohio Ct. App. 1966) (holding that church registration card showing marital status of exceptor who claimed to be surviving widow of decedent but who was shown on card to be single was not privileged and should have been admitted and that the common law marriage was not established).

Id. Alexander v. Culp, 1997 WL 547951 (Ohio App.), at *3-4. There is no statute applicable to a clergyman that is parallel to ORC §4731.22 prohibiting the disclosure of
D. Husband-Wife Privilege

1. Definition, Rationale and Justifications

The husband-wife privilege was one of the few that originally existed at common law, but is now primarily statutory. It has evolved into essentially two privileges; the adverse testimonial privilege and the confidential communications privilege. The adverse testimonial privilege allows one

confidential information. Id. at *3. This is the sole statute that a breach of confidentiality against a doctor is brought under. Id. Thus far, the Ohio Supreme Court, as well as other jurisdictions, have not addressed or not held that such cause of action exists. Id. Past cases have reasoned that it is against public policy to impose such a duty on clergy members because such an action would "entangle the courts in First Amendment areas guaranteeing the freedom to practice religion." Id. Clergy malpractice has been defined as:

the failure to exercise the degree of care and skill normally exercised by members of the clergy in carrying out their religious and professional duties. An action for clergy malpractice is not a theory or ordinary negligence or tort, but a separate and distinct cause of action. A cause of action for clergy malpractice is not available when other torts provide a remedy.

Id.

91 Id. at *4. A professional negligence cause of action may brought against a clergy or any other member of a profession. Id. They do not have to be licensed or governed by ORC §2305.11. Id. These cases have been brought against doctors, attorneys, as well as counselors and social workers. Id. As long as the facts of the case support such a cause of action, it may be brought against a clergy member. Id. The court stated that public policy supports such an action for breach of confidentiality especially since public policy also encourages people to seek religious counseling. Id. Such an action is reasonable as penitent individuals have an expectation that their communications in the spiritual sense will remain confidential. Id.

92 Dubbelday, supra note 61, at 786. The source of the privilege in Ohio is §2317.02(D). OHIO REV. CODE ANN. § 2317.02(D) (Anderson 1991). See supra note 37 for statutory language of this privilege. The marital privilege in general has been referred to by the United States Supreme Court as a testimonial privilege that sweeps more broadly than all others. G. Michael Fenner, Privileges, Hearsay, and Other Matters, 30 CREIGHTON L. REV. 791, 800 (1997). In general, the husband-wife relationship is different from all others protected by privileges in that it based on sexuality and intimacy. Baumoel, supra note 24, at 799.

93 Dubbelday, supra note 61, at 786; see also, David Farnham, The Marital Privilege, 18 NO. 2 LITIGATION 34, 34 (1992); Developments in the Law—Privileged Communications, 98 HARV. L. REV. 1563, 1563-64 (1985).
spouse to refuse to testify against their spouse. The “purpose is to preserve the peace and stability of an existing marriage.”

94 Farnham, supra note 93, at 34. This privilege is also called the privilege against adverse spousal testimony, antimarital facts privilege, and spousal privilege. BLACK’S LAW DICTIONARY 502 (Pocket ed. 1996). It has also been described as, “[t]he privilege allowing a spouse not to testify in criminal case as an adverse witness against the other spouse, regardless of the testimony.” Id.

95 Farnham, supra note 93, at 34. It is a forwarding looking privilege and applies to both grand jury and trial legal proceedings. Id. Married couples should be free from government interference in an otherwise peaceful marriage. Id. It usually applies only in criminal proceedings in which one spouse is a defendant. Steven N. Gofman, Note, “Honey, The Judge Says We’re History”: Abrogating the Marital Privileges Via Modern Doctrines of Marital Worthiness, 77 CORNELL L. REV. 843, 846 (1992). Additional rationale is that a trial places extreme stress on a marriage and compelling adverse testimony of one spouse against the other would cause resentment and damage to the relationship. Id. The rationale has also been stated, “that the law should not force or encourage testimony which might alienate husband and wife, or further inflame existing domestic differences.” Trammel v. United States 445 U.S. 40, 46 (1980). One very important element is that the spouse asserting the privilege prove that the parties are legally married at the time of trial. Gofman, supra note 95, at 846. However, this may not be enough in some jurisdictions as not only must the marriage be legal, it must also be viable. Farnham, supra note 93, at 35. The privilege is designed to protect the viable healthy marriage from discord caused by adversely testifying against the other. Id. The courts have not agreed what “viable” means but have considered factors such as, “the existence and length of any separations, formal or informal, and the consistency of the couple’s actions within the marital relationship.” Id. Two forms of this privilege have developed; (1) the form where one spouse can assert the privilege to prohibit the other spouse from testifying adversely; and (2) the form where the spouse-witness may elect whether or not to testify adversely (often called the ‘Trammel form’ as derived from the holding of Trammel v. United States). Dubbelday, supra note 61, at 787. This latter form allows that spouse to decide whether to voluntarily testify adversely, while leaving the other spouse helpless to prevent it from occurring. Id.; see also, Trammel, 445 U.S. at 40. The adverse spousal testimony privilege is broader than the marital communications privilege, in the sense that it is applicable to all adverse testimony, not just confidential communications. Dubbelday, supra note 61, at 787. However, it is also narrower in a sense as it only applies to all adverse testimony, while the marital communications privilege applies to all confidential communications made between spouses. Id. One fear that many courts have concerning the broadness of the adverse testimonial privilege is that it may be abused. Domb, supra note 11, at 215. An example of this abuse occurred when a defendant to criminal prosecution married the prosecution’s star witness between the preliminary hearing and the trial, which resulted in one spouse asserting the adverse testimonial privilege which precluded the star witness from testifying. Id. The length of the adverse testimonial privilege may vary from jurisdiction to jurisdiction and may not or “may continue until such time as [the] bonds of marriage have been broken by death or dissolution, and is not terminated by mere separation which had not yet resulted in [a]
The confidential communications privilege precludes a spouse from testifying in regards to any confidentially communicated information to the other spouse. The primary purpose is to protect the confidential communications within a marriage because of the recognition that the foundation of a marriage is based on trust and confidence within the relationship.

Though these two privileges are applied differently, the goal of both is to encourage harmony within the marital relationship and both require a determination of the marital status of the party and witness. As well as dissolution decree.”

However, this would appear to hold true only in a jurisdiction that does not consider viability of the marriage. Many jurisdictions that recognize the marriage viability element will not grant the privilege between divorcing spouses. James H. Feldman & Carolyn Sievers Reed, Silences in the Storm: Testimonial Privileges in Matrimonial Disputes, 21 FAMILY L.Q. 189, 236 (1987).

Gofman, supra note 95, at 848. The privilege is also called marital-communications privilege and spousal privilege. BLACK'S LAW DICTIONARY 502 (Pocket ed. 1996). It has also been described as, “[t]he privilege allowing a spouse not to testify about confidential communications made with the other spouse during the marriage.” Id. This confidential information may be adverse or favorable and it may be verbal or otherwise. Gofman, supra note 95, at 848.

Dubbelday, supra note 61, at 789. The communication must be confidential and made within the time the couple was married. Id. However, contrary to the adverse testimonial privilege, the parties do not have to be married at the time of trial, but still may be. Id. Also unlike the adverse testimonial privilege that is almost exclusively used in criminal proceedings, this privilege is applicable in both the criminal and civil legal arenas. Gofman, supra note 95, at 848. This privilege focuses upon the communication itself and is not concerned with the possibility of disrupting the marriage or of the present discord or the demise of marriage. Farnham, supra note 92, at 34. One required element is that the communication was indeed confidential, or in other words that the communicator subjectively intend that the communication not be disclosed. Developments in the Law—Privileged Communications, supra note 93, at 1573. However, it is usually presumed that the communications between spouses was intended to be confidential. Id. Traditionally, either spouse may invoke the privilege regarding confidential communications. Id. at 1571. However, other commentary, including the well-respected evidentiary privilege expert, Wigmore, suggests that, “the privilege was intended to secure freedom from apprehension in the mind of the one desiring to communicate,” it should apply only to the communicating spouse.” Id.

Gofman, supra note 95, at 849. “The [confidential communications privilege] promotes the marital relationship at the time of the communication and the [adverse testimonial privilege] protects the marital relation at the time of trial . . . .” Id. Though the timing of establishing a legal marriage varies between the two, both require that such a marriage be found by the court. Developments in the Law—Privileged Communications, supra note 93, at 1565. Depending on the jurisdiction, an additional requirement that the marriage was viable must also be shown. Id. at 1566. The courts have generally rejected claims of marital privilege for couples engaged to be married and for putative spouses,
requiring similar elements, the rationale for both marital privileges is supported by four theories; (1) the Utilitarian; (2) the Privacy; (3) the Image; and (4) the Power theories. 99 The Utilitarian Theory states that society benefits from the existence of marital privileges as it prevents “marital discord; the confidential communication privilege is said to foster openness between spouses by ensuring that none of their confidences will be revealed in court.” 100 The Privacy Theory justifies the privilege based on the “value of protecting individual rights” of privacy in the nature of family relationships. 101 The Image Theory justifies the but have usually allowed the privilege to attach to common law marriages if the state of residence recognizes such marriages and if it were properly established under that state’s common law marriage requirements. Gofman, supra note 95, at 850-51. Though these privileges are still in full force, they have lost some power in recent times because “’Till death us do part’ is no longer so much a vow as a nod to tradition. Today, an inconvenient marriage can be disposed of as easily as an old car and often with as little concern.” Farnham, supra note 93, at 34. In Ohio, the language of §2317.02(D) appears to be broad enough to encompass both of the adverse testimonial and confidential communications privileges. OHIO REV. CODE ANN. §2317.02(D) (Anderson 1991).

99 Developments in the Law—Privileged Communications, supra note 93, at 1577-89; see supra, notes 28-33 and accompanying text. (regarding three of these theories as applied to privileges in general).

100 Developments in the Law—Privileged Communications, supra note 93, at 1577. This justification is based on the belief that marital harmony is jeopardized when one spouse is essentially pitted against the other in a legal proceeding when required to testify. Id. Under this theory, the marital privilege adheres to Wigmore’s essential elements necessary for all privileges. Id. at 1579; see supra note 16 for Wigmore’s four requisite elements. However, critics of this justification argue that this theory assumes that the laws of evidence are well-known and that the communicating spouse acts in accordance with the possibility the communications could be disclosed in court at some future date. Id. The problem with this it is disputed if people are even aware of the marital privilege to have this forethought. Id. Another argument is that there is “[s]erious doubt . . . as to whether the evidentiary protection produces the supposed effect” of preventing marital discord and promoting marital harmony. LILLY, supra note 23, § 87. Supporters often rebut this claim, arguing that the privilege positively affects those limited number of married couples actually involved in litigation. Developments in the Law—Privileged Communications, supra note 93, at 1580.

101 Developments in the Law—Privileged Communications, supra note 93, at 1583. This is premised on protecting the individual’s fundamental right of privacy and that this privilege operates as a legal safeguard against governmental interference that infringes upon these rights. Id. However, this privacy justification is narrowly interpreted to “the right of an individual to prevent [a] family member from revealing personal information in court.” Id. This narrow scope is due to the fact that an individual does not have a legally cognizable right to prohibit a family member from revealing personal information out of court. Id. This theory is also concerned that without protection in this relationship,
existence of marital privileges on the ground that [they enhance the public acceptance of the legal system . . . [by allowing]] the legal system to avoid situations that would undermine the public’s perception of that system’s legitimacy." 102 The final justification is the Power Theory, in which the legal system is displaying the historic male-dominated structure of society by allowing such a privilege to protect them. 103

2. Waiver

As with all of the other privileges discussed thus far, the husband-wife privilege is not absolute and may be waived. 104 The most prevalent method of waiver is when the communications between spouses is made in the presence of a third party. 105 The third party destroys the concept of confidentiality that is required for the privilege to exist. 106 Ohio also recognizes that the privilege will be waived if the marital relationship no longer exists. 107

individuals “may lose all sense of privacy and become overwhelmed by society’s intrusion on the sanctity of our own personality.” Id.

102 Id. This theory states that forcing spouses to testify against one another unwilling places the system in a “no-win situation” because it would appear unfair. Id. Instead, such problems are avoided by granting the privilege to spouses. Id. Critics say that force this theory to hold true, there must be public awareness of the offensive actions of the system that are avoided by the privilege and even some applications of the marital privilege itself create a poor image. Id. at 1585-86. An example of this is when the privilege is invoked resulting in a criminal defendant avoiding conviction. Id. at 1586.

103 Id. at 1586. “This explanation argues from the premise that the legal institution of traditional marriage supports husband’s domination over wives.” Id. These privileges help to maintain the male power by promoting the institution of marriage in which traditionally the husband exercised virtually total control over his spouse. Id. Also, this is premised that the marital privileges tend to help men more so than women. Id. However, critics argue that “the link between the marital privileges and male power is less precise than the connection with a legal policy that supports only male-dominated marriages . . . .” Id. at 1588.

104 LILLY, supra note 23, § 87.

105 Id. Allowing waiver due to the presence of a third party indicates the court’s “unwillingness to extend protection beyond the private husband-wife relationship.” Id. This applies even when the third party is intentionally brought within the confidences or is even a family member. Id. However, some courts have allowed the privilege to remain in tact when the third party family member is too young to comprehend the communications or if they were not paying attention to the exchange between spouses. Feldman & Reed, supra note 95, at 237. This applies in Ohio in regards to waiver due to the presence of a third party. Dick v. Hyer, 114 N.E. 251 (Ohio 1916).

106 LILLY, supra note 23, § 87

The privilege is also held individually by both the husband and the wife. Either may choose to invoke or waive the privilege afforded to them for protection of their confidential communications, but the privilege may not be supplanted by a third party.

3. Other Notable Aspects of the Husband-Wife Privilege

In Ohio, communications or acts made between spouses in the presence of a third party eliminates the privilege, even if the third party is not living at the time of trial.

Also, the spousal privilege will not apply in the criminal context where the defendant-spouse committed the crime in the presence of both the spouse and a third party or where the accused spouse committed the crime against the other spouse or the child of either.

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108 Diehl v. Wilmot Castle Co., 271 N.E.2d 261 (Ohio 1971). The court held that “since activities of [a] juror and her husband in driving separate cars on [a] public street and in the driveway to a public hospital, reenacting [the] accident which was the subject of [a] trial in which [the] wife was serving, were activities open to general observation by all persons who might be in the area, testimony of husband and wife regarding the experiment was not within [the] ambit of [the] statute according husband and wife privilege not to testify concerning act[s] done by either in the presence of the other, and that the testimony of the husband was evidence aliunde of jury misconduct which could be used to impeach the jury’s verdict.” Id. at 262. The Court further held that the statutory privilege is personal to husband and wife and may not be invoked by a third party. Id. at 263.

109 Id. This is true regarding waiver under ORC §2317.02(D).

110 Sessions v. Trevitt, 1883 WL 175, at *5-6, (Ohio 1883) (holding in part that the “[h]usband and wife are competent to testify concerning any communications made by one to the other, or an act done by one in the presence of the other, during coverture, if the communication was made, or the act done, in the known presence, or hearing, of a third person competent to be a witness, although such third person is not living at the time of the trial). This rationale appears to be that it is the idea of the confidentiality of the communication that is so important for the existence of the privilege and when communications between spouses is made in the presence of a third party, the confidentiality does not exist. Thus, irregardless of whether the third party who heard the communications is alive to testify on what was said between the spouses, the fact that the third party was present is enough to bar the communications from being protected by the privilege.

111 State v. Mowery, 438 N.E.2d 897 (Ohio 1982) (holding that a spouse is a competent witness in a criminal prosecution against the other spouse as to a crime against a third person, not a child of either spouse, where the crime is committed in the presence of the third person as well as in the presence of the testifying spouse). This privilege relates more to criminal arena in which ORC §2945.42 confers a substantive right upon
IV. NEW PRIVILEGE ON THE HORIZON: OHIO HOUSE BILL 52 ACCOUNTANT-CLIENT PRIVILEGE

A. Introduction

Currently, Ohio has no common law or statutory accountant-client privilege that protects the confidential communications between these parties from disclosure in a court of law. The absence of such a privilege has created some difficulties for the accountant in this professional relationship with the client. However, the Ohio Legislature is attempting to remedy these problems through passage of Ohio House Bill 52 that will create a testimonial privilege for the accountant-client relationship.

the accused to exclude privileged spousal testimony concerning a confidential communication made or act done during marriage unless a third party was present or any of the other stated exceptions applied. Id. at 403.

State v. Rahman, 492 N.E.2d 401, 404-05 (Ohio 1986) (finding in part that the testimony of the accused wife related to privileged marital communications should not have been admitted since there was no third person present or within hearing during the conversation and, though the wife was the mother of the victim, she was not present during the commission of the crime, and the victim was not a child under the age of eighteen and was not a physically or mentally handicapped child under the age of twenty-one). ORC §2945.42 also applies in this scenario, but is another indication of the limitations placed on the spousal privilege.

Wagenheim v. Alexander Grant & Co., 482 N.E.2d 955, 961 (Ohio Ct. App. 1983) (holding in part that the accounting firm involved did not breach its duty of confidentiality to the corporation and was not liable to the individual, nor could punitive damages be awarded). Thus, if no privilege exists, the policy of the state requires that a witness testify to the pertinent facts in a judicial proceeding even if such testimony involves the confidential communications from another party. Id. “However, the absence of any accountant-client privilege does not deny a cause of action to the client for the non-judicial disclosure of confidential information obtained during their association.” Id. at 962.

See infra notes 120-124 and accompanying text regarding some of the problems without an accountant-client privilege.

See supra note 4 and accompanying text. On May 29, 1997, the Ohio House of Representatives passed the Bill with an overwhelming vote of 92-4. Id.; see also, Client Privilege Bill Sees Senate Action, OHIO CPA NEWSLETTER, (Ohio Society of Certified Public Accountants), December 1997, at 9. The bill was assigned to the House Civil and Commercial Law Committee which is chaired by Rep. Edward Kasputis (R-Olmsted Twp.) HB 52 - CPA/Client Privilege details, (visited Jan. 10, 1998) <http://www.ohioscpa.com>. The Bill received support when debated on the House floor from Representatives Bill Batchelder (sponsor of the Bill), Don Mottley (R-West Carrollton), C.J. Prentiss (D-Cleveland) and Otto Beatty (D-Columbus). Id. The Bill received its first hearings in the Civil Law Subcommittee of the Ohio Senate Judiciary Committee on May 29, 1997, at 9. The Bill received support when debated on the House floor from Representatives Bill Batchelder (sponsor of the Bill), Don Mottley (R-West Carrollton), C.J. Prentiss (D-Cleveland) and Otto Beatty (D-Columbus). Id.
B. Rational and Goals of the Accountant-Client Privilege

The accountant-client testimonial privilege is designed to protect the confidential communications made between a CPA and client from judicial subpoena. As with other professional privileges, it is primarily to protect the disclosure of advice that the CPA provides to the client regarding certain financial matters. In return, this will allow the CPA to increase their effectiveness, efficiency, and accurateness in regards to advising clients, as well as the public benefit of ensuring that the “complete picture of a potential or existing investment” is indicated through the financial information or advice.

Committee on October 22, 1997. Id. Hearings were to continue through the remainder of 1997. OHIO CPA NEWSLETTER, supra at 9. The Bill is to add a provision (J) to the current section of the ORC §2317.02 for privileged communications. H.B. 52 Bill Analysis, Legislative Service Commission, H.B. 52, 122nd General Assembly, (OH 1997). The proposed language of ORC section (J) is as follows:

(J)(1) An accountant, concerning a communication made to the accountant by a client in that relation or the accountant’s advice to the client, except that the accountant 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 a testimonial privilege under this division, the accountant may be compelled to testify on the same subject.

(2) The testimonial privilege under this division is not affected by an accountant’s participation in a quality review conducted in accordance with §4701.04 of the Revised Code.

(3) The General Assembly intends that the accountant-client testimonial privilege under Division (J)(1) of this section will be construed, interpreted, and applied in a manner consistent with the attorney-client testimonial privilege under Division (A) of this section.

Id. The quality review discussed in Division (J)(2) relates to a current privilege existing that specifies in a civil proceeding, arbitration, or administrative proceeding involving a public accounting firm, the information and documents obtained in the quality review process will not be disclosed, unless the information was otherwise available to the public. Id.


117 Id.
However, as with all privileges, there are limitations and it is to be narrowly construed.\textsuperscript{119}

\textsuperscript{118} HB 52 - CPA/Client Privilege details, supra note 115. This privilege will help ensure that the accountant is receiving the most accurate and complete information from their clients which will allow them to make better and quicker decisions. \textit{Id.} Often it is this critical confidential information that is necessary to the CPA to provide the best advice to the client. \textit{Id.} In numerous instances, confidential information would enable the CPA to complete work more quickly or to assure more appropriate disclosures. \textit{Id.} Even with a lack of privilege such information may not be openly discussed. \textit{Id.} “For example, in connection with any audit or examination of a client’s financial statement by a CPA, a key element is the ‘legal letter’, which is provided to the CPA by the client’s legal counsel commenting on outstanding lawsuits, asserted and unasserted claims, and other matters that may require disclosure in the financial statements.” \textit{Id.}

\textsuperscript{119} Major Provisions, CPA/Client Testimonial Privilege (H.B. 52), supra note 116. This privilege will be construed to fall within the same exceptions as the attorney-client privilege, such as disclosure of fraud or intent to commit a crime. \textit{Id.} This means that the same Court rulings and interpretations made over the last 200 years will apply. HB 52 - CPA/Client Privilege details, supra note 115. The client is the holder of the privilege, not the CPA. Major Provisions, CPA/Client Testimonial Privilege (H.B. 52), supra note 116. Thus, it is the client who may choose to waive the privilege if the client so wishes. \textit{Id.} Also, the privilege is for protection in state judicial proceedings only. \textit{Id.} However, there has been some discussion of creating such a privilege for federal court proceedings. Extension of Confidentiality Privilege to Nonattorneys Discussed at ABA Meeting, 98 TAXDAY Jan. 28, 1998, at Item #M7. The scope of the privilege is narrow, protecting only the confidential verbal discussions between the CPA and client and to the CPA’s notes regarding those communications. HB 52 - CPA/Client Privilege details, supra note 115. The privilege does not apply to the general work products of the CPA, including but not limited to, audit reports, tax returns, and financial statements. \textit{Id.} Thus, the only written materials that are privileged are the notes relating to the confidential communications. \textit{Id.} It also does not extend to the everyday business records of the client such as, “business papers (such as invoices, canceled checks, etc.), audit reports, general work papers, financial reports, tax returns, ledgers or any other information received from, delivered to, or processed by third parties in the ordinary course of business.” \textit{Id.} Historically, no accountant-client privilege was recognized at common-law. Charles Q. Jakob, Note, \textit{Good Bad Press: Observations and Speculations About Internal Revenue Service Accountant-Informants}, 54 OHIO ST. L.J. 199, 202 (1993). However, twenty-four states currently have some form of an accountant-client privilege. \textit{Id.}; see also, supra note 4 and accompanying text. Also, even states that have afforded a privilege to this relationship, there is not a recognized accountant work-product privilege. United States v. Arthur Young & Co., 465 U.S. 805, 806 (1984) (holding that tax accrual work papers were relevant and there was no accountant’s work-product privilege which would preclude enforcement of the summons). Though this is a federal case, this holds true for the states also. \textit{Id.} The federal courts have not yet recognized an accountant-client privilege. Couch v. United States, 409 U.S. 322 (1972). The only real protection that accountants received in not having to disclose confidential information is when the
C. Current Problems Without an Ohio Accountant-Client Privilege

One problem is the expectation of the public. The CPA is required to abide by a strict ethical code that is prescribed by both state law and the professional accounting societies. This creates an expectation from the public that the CPA is bound by these ethical rules to keep client information confidential. This also creates an ethical dilemma in that the CPA is faced with disclosing

accountant is an agent of an attorney who is working on issues related to the litigation. United States v. Kovel, 296 F.2d 918, 921 (2 Cir. 1961) (finding that the attorney-client privilege extends to communications made by a client to an accountant in attorney’s employ incident to the client’s obtaining legal advice from the attorney). This extension of the privilege only applied when the attorney-client relationship was established, an accountant is retained by the attorney, or the accountant renders services that aid the legal services provided to the client and the parties do not waive the privilege. Mark A. Segal, Accountants and the Attorney-Client Privilege, JOURNAL OF ACCOUNTANCY, April 1997, at 53-55. “To enhance the likelihood of privilege, the legal purposes served by the accounting services should be documented as thoroughly as possible at the time the service is sought, provided and billed. Id. at 55. The two most common grounds for not extending the relationship to the agent of an attorney was if it was found to be waived or if the accountant’s services were not sufficiently related to the provision of legal services. Id. at 54. Part of the Court’s rationale for extending the privilege was that the “assistance of these agents being indispensable to [the attorney’s work] and the communications of the client being often necessarily committed to them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney’s agents.” Kovel, 296 F.2d at 921.

Ohio Administrative Code Chapter 4701-11, which was adopted by the State Accountancy Board and is modeled after the American Institute of Certified Public Accountant’s (AICPA) ethical code, requires that “[a] certified public accountant or public accountant shall not disclose any confidential information obtained in the course of a professional engagement except with the consent of the client.” Wagenheim v. Alexander Grant & Co., 482 N.E.2d 955, 962 (Ohio Ct. App. 1983). This is also similar to the Ohio Society of Certified Accountant’s Code of Professional Conduct. OHIO SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS CODE OF PROFESSIONAL CONDUCT § 301(1994). See infra notes 125-141 and accompanying text. (regarding these ethical considerations as justification for the existence of an accountant-client privilege in Ohio).

See Wagenheim, 482 N.E.2d at 958. The existence of both the professional ethical responsibilities and the Ohio Administrative Code gives the public an expectation that such conduct will be adhered to. Id. Thus, without the existence of a privilege to protect these communications the client has more to be concerned with than just the time and money involved with the relationship, but also that the CPA may be asked to testify against their clients. Perry Brothers, IRS Audits Matching Lifestyle with Income Government Agents Look for Extravagance in Search for Hidden, Unreported Income, THE CINCINNATI ENQUIRER, Aug. 19, 1996, at B20.
confidential conversations and advice in court which is at odds with the spirit of the ethical code.\textsuperscript{122}

Also, in the area of tax, the lines of distinction between the accounting and legal professions have been blurred by the fact that both attorneys and accountants provide income tax services and give advice to clients, yet only one profession is afforded a privilege.\textsuperscript{123} This is even a more significant problem now that the larger public accounting firms are providing more legal-type services and the fact that many professionals act as both attorneys and CPA.\textsuperscript{124}

\textsuperscript{122} See Wagenheim, 482 N.E.2d at 959. "Although the duty of confidentiality implied in the accountant-client relationship is favored, such duty is not absolute. Overriding public interests may exist to which confidentiality must yield." \textit{Id.} Thus, in the absence of an accountant-client privilege, the accountant will not be prohibited from revealing in a court of justice information acquired during the relationship. \textit{Id.} at 958.


"Accountant and lawyers have struggled for some time in their attempts to reach a consensus concerning their respective roles in income tax practice." \textit{Id.} "Like accountants, attorneys are often deeply involved in their clients' financial transactions." Gary Lawson & Tamara Mattison, \textit{A Tale of Two Professions: The Third-Party Liability of Accountants and Attorneys for Negligent Representation}, 52 OHIO ST. L.J. 1309, 1315 (1991). "Accountants, no less than attorneys, work for clients." \textit{Id.} at 1334. However, unlike attorneys in Ohio, accountants are not afforded a privilege to protect confidential communications and advice given to the clients. \textit{Id.} at 1314-15. Tax attorneys have been defined as licensed lawyers who specialize in the practice of tax matters. Jim Dillion, \textit{Hiring a Qualified Pro To Do Your Taxes Can Provide a Good Return on the Investment}, DAYTON DAILY NEWS, Feb. 19, 1996, at SmartMoney 8.

Many have their Masters of Law in Taxation and are admitted to the Tax Court in Washington D.C. \textit{Id.} The lawyer has an advantage in that the attorney-client privilege will apply when the attorney is representing the client as a lawyer, not when the attorney is only the preparer of the return. \textit{Id.} CPA's often are the most authoritative tax professionals who must go through a strict licensing requirement. \textit{Id.} Both professionals usually charge by the hour for their services. \textit{Id.}

\textsuperscript{124} Lawson & Mattison, \textit{supra} note 123, at 48. An example of this expanding role of accounting firms is evidenced by Arthur Andersen's services of litigating cases before the Tax Court. \textit{Id.} "Lawyers are quaking in their pinstripes as large accounting firms aggressively recruit tax lawyers in the United States." Seena Simon, \textit{Lawyers Under Attack by CPA's – Accounting Firms Offering New Services}, THE PLAIN DEALER, at 1H. These accounting firms are turning into one-stop shopping for tax advice and consulting. \textit{Id.} "Lawyers can give tax advice, but accountants can't give legal advice . . . . Some say a clear distinction is difficult because tax advice is inherently a 'legal' issue, even if it doesn't involve a lawsuit. Companies can thus hire accounting firms to help them devise strategy and hire lawyers if they get sued." \textit{Id.} "Lawyers have long used the attorney-client privilege as a marketing tool to lure tax clients away from accountants." \textit{Id.}
D. Justifications of Instituting an Accountant-Client Privilege

1. Traditional Theories of Privilege Justification

The accountant-client privilege bill should be passed in Ohio because it satisfies numerous traditional justifications that have been articulated in support of other well-known privileges.¹²⁵ The Utilitarian Theory is the predominant justification and contains Wigmore’s four criteria that must be met to qualify as a privilege.¹²⁶ The accountant-client relationship satisfies these necessary elements and is consistent with this theory’s view that the benefits to society and the business world that derive when certain confidential communications between an accountant and client are protected exceed any burdens placed on litigation and the search for the truth.¹²⁷ The Utilitarian Theory supports the problem of privilege is especially prevalent when a professional is licensed as both a lawyer and CPA, because it is more reasonable to assume that the client will presume that a privilege exists regarding all of the confidential communications made between the parties, however without an accountant-client privilege this is not the case. L. Harold Levinson, Essay, Independent Law Firms That Practice Law Only: Society’s Need, The Legal Profession’s Responsibility, 51 OHIO ST. L.J. 229, 241 (1990). In these circumstances, it is essential that the attorney-CPA explicitly indicate to the client to ensure understanding that different engagements will involve a different role of the attorney-CPA and that this will affect the rules of conduct, confidentiality and expectations by third parties. Id. Thus, the client must be made aware of what hat the professional is wearing so there is understanding that if the professional was functioning as accountant, no privilege will protect their confidential communications from being disclosed in a court of law. See Begens, supra note 12, at n.46. Passing an accountant-client privilege would help eliminate this problem.

¹²⁵ The Utilitarian, Privacy and Image theories have been discussed throughout the Comment and have served to justify privileges in general, as well as the most popular privileges discussed herein; attorney-client, physician-patient, priest-penitent, and husband-wife. See supra notes 16, 17, 29, 45, 46, 63, 64, 81, 99, 100 and accompanying text related to the Utilitarian Theory; supra notes 30, 45, 47, 63, 65, 66, 83, 99, 101 and accompanying text regarding the Privacy Theory; supra, notes 3, 99, 102 and accompanying text related to the Image Theory.

¹²⁶ See supra note 16 for the required elements.

¹²⁷ Wigmore’s first element requiring that the “communications must originate in a confidence that they will not be disclosed” is met in the accountant-client relationship. 8 WIGMORE ON EVIDENCE 527 (McNaughton rev. ed. 1961). Clients discuss a wide range of financial information with their accountants for a variety of reasons. Though much of this information may be “public” in that it is either available from financial statements, creditor reports, annual reports or sent to the Internal Revenue Service, there is a great deal that is solely intended to be confidential. Often existing and prospective business strategies and goals are discussed which will often lead to the accountant advising the client in how financing of capital, any accounting repercussions, tax consequences, etc.
proposition that a "client should be entitled to freely disclose information may result from such strategies. The client discloses this information on a basis of trust and confidentiality with the accountant. It is likely that the client is aware of the ethical and legal requirements of CPAs to keep information confidential. Wigmore's second element is that, "confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties." Id. This is also satisfied in that just as in the attorney-client relationship, the accountant-client relationship is built on a foundation of trust. Confidentiality encourages and fosters uninhibited conversation between the CPA's and the client. However, the client's awareness that the CPA may be compelled to disclose this may hinder the free flow of information between the parties and result in the client not receiving the best advice possible from the CPA. This in turn may lead to poor business decisions, decreases in shareholder value, and adverse impacts on the economy. The third element, that states, "the relation must be one which in the opinion of the community ought to be sedulously fostered" is also satisfied. Id. The accountant-client relationship is essential to the success of many individuals and existing businesses, as well as, to the formation of new businesses. It is this relationship that often determines what are the most beneficial fiscal maneuvers that should be made for the success of a business, as well as, for the financial security of individuals. Also, many potential businesses are launched into reality along the path of professional advice provided by a CPA that will best ensure the business's success. Society fosters this relationship as it provides economic benefits back to society through the birth, growth and success of businesses as well as financial benefits to individuals. Wigmore's fourth factor stating, "the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation" is also met. Id. Disclosing confidential advice, tax strategies, and business goals has a much more adverse impact on the relationship of the accountant and client than a beneficial impact on judicial system's search for the truth. This information is often forward-looking and is irrelevant to the issues being litigated. Disclosing such information will not only damage the relationship of the parties, as well as the client's perception of what confidentiality actually is, or rather is not, in the accounting profession, but also it makes known to the public the individual's or business's strategies for success. This hampers competitive advantages and hurts the performance of the business, thus having a negative impact on the economy.

The accountant-client relationship satisfies the Utilitarian Theory requirements for the existence of this privilege and passage of HB 52 in Ohio. Society holds the need to foster the effectiveness of the relationship by encouraging full disclosure by the clients. Michael L. Waldman, Beyond Upjohn: The Attorney-Client Privilege in the Corporate Context, 28 WM. & MARY L. REV. 473, 479 (1987). This applies whether it is in the context of attorney-client, physician-patient, or accountant-client. All of these professionals need complete disclosure in the relationship so as to provide the best and most accurate service possible. This will not only benefit the client, but also society and the economy. Though there is a presumption against privileging information and the fact that "the public . . . has a right to every man's evidence," Development in the Law – Privileged Communication, supra note 93, at n.16, as with other professional privileges, a narrow scope of protection in the accountant-client relationship is necessary.

http://ideaexchange.uakron.edu/akronlawreview/vol31/iss3/6
concerning his financial status to his accountant without fear that such information will be exposed to the public."\textsuperscript{128}

The Privacy Theory supports the existence of an accountant-client privilege in that the client’s privacy rights are valued and should be protected from blatant governmental intrusions into private relationships that focus on the client’s business strategies and advice.\textsuperscript{129} The privacy rights of the client in avoiding

\textsuperscript{128} Wagenheim v. Alexander Grant & Co., 482 N.E.2d 955, 958 (Ohio Ct. App. 1983). The Court further went on to discuss that this right is not an absolute right, but rather is limited to situations when disclosure is prompted by the supervening interests of the public. \textit{Id}. As this Comment suggests, the best interests for the public is to protect the confidential oral communications between the client and accountant regarding strategy, advice, and similar topics. The benefits to the judicial system will not exceed the burdens to the client caused by disclosure of information that the client confides to the accountant. The Wagenheim court even stated that though limitations should exist, the duty of confidentiality implied in an accountant-client relationship is favored. \textit{Id}. at 959. Consistent with this, Ohio HB 52 only protects confidential oral communications and related notes of those conversations, between the client and accountant. \textit{See supra} note 115. Work product of the accountant is not protected. \textit{Id}. This is a very narrow scope and does not overburden the judicial system’s goal of ascertaining the truth. This privilege is in society’s best interest. “By the strong support in the House, it is apparent that CPA/client privilege is in the best interest of the general public” said Fred B. Miller, CPA, chair of the Society’s Governmental Affairs Advisory Committee and a driving force behind the bill.” \textbf{OHIO CPA NEWSLETTER, supra} note 4.

Some have opposed the privilege in general in that, “[u]nlike attorneys, clergymen, physicians, and others claiming a privilege, accountants are mainly in the business of preparing disclosures for the public or for the IRS.” Denzil Causey & Frances McNair, \textit{An Analysis of State Accountant-Client Privilege Statutes and Public Policy Implications for the Accountant-Client Relationship}, 27 AM. Bus. L. J. 535, 550 (1990). However true this may be, HB 52 is not designed to protect this information that is disclosed, but rather the sensitive confidential business goals and tax strategies discussed between the parties and any related advice the accountant gives in return. This is not the information that is typically disclosed to the public and therefore, this rationale articulated by opponents of the privilege does not justify denying an accountant-client privilege. If HB 52 was not narrow in scope, but rather a broad attempt at protecting otherwise normally public information, then I would concur with this. However, it is the information that the public does not generally know and should not know that is to be protected by the accountant-client privilege.

\textsuperscript{129} \textit{See supra} note 93. The privacy rationale focuses on the fact that “human relationships are central to human dignity and should be free from state interference.” Morse, \textit{supra} note 23, at 744. Thus, select “communications should be protected by a privilege, without considering any greater benefit to society and the legal system.” \textit{Id}. This rationale has been justified using three questions to qualify as a privilege; “(1) whether people have a need to keep certain communications confidential; (2) whether this need is legally cognizable; and (3) whether the privacy interest outweighs the need for the
compelled disclosure of sensitive business strategies, professional advice, as well as breach of confidence, exceed society's interest in obtaining this information in its search for the truth.\textsuperscript{130} The Image Theory also adds support for the accountant-client privilege when applied in conjunction with the aforementioned justifications. This theory supports passage of House Bill 52 due to the Ohio judicial system's desire to avoid situations that would undermine society's perception of the legal system's legitimacy.\textsuperscript{131} The fact that a client cannot entrust his accountant with his

information." \textit{Developments in the Law—Privileged Communication: supra note 93, at 1481.} Regarding part one, client's have a need to keep confidential conversations regarding their financial matters and business strategies from being disclosed in judicial proceedings. Not information that is normally disclosed, but rather the decisions that develop from years of experience, the unique financial situations, individual/organizational goals that the client discusses with the accountant and in return receives advice. Exposing such communications can hinder the working relationship of the parties, expectations of confidentiality and privacy of the client can have a detrimental effect on the individual or business's financial health. If such information is not kept private, clients may not seek the valuable skills of a CPA nor disclose all the available information that is needed by the CPA to provide the best business advice. This will have a negative effect on both the client and the accounting profession. The second privacy element is satisfied because the public has an expectation of privacy and confidentiality when dealing with accountants. Wagenheim v. Alexander Grant & Co., 482 N.E.2d 955, 958 (Ohio Ct. App. 1983). The accountants in turn, have an ethical and legal duty via the Ohio Administrative Code requiring them to refrain from disclosing confidential client information. \textit{Id.} A breach of this duty to the client may give rise to a cause of action. \textit{Id.} The final element is also met to support the accountant-client privilege under the Privacy Theory. \textit{See supra note 127, regarding the Wigmore elements of the Utilitarian Theory.} \textit{Id.} 

\textsuperscript{130} \textit{See Hill, supra note 45, at 178.} Similar to the attorney-client justification under this rationale, balancing interests favors protecting the privacy of the client and accountant over the need for the information. \textit{Id.} "Compelled disclosure is considered inherently wrong because it inflicts two distinct kinds of harm: (1) the embarrassment of having secrets revealed to the public [in the accountant-client relationship it is more likely economic harm or loss of competitive advantage than embarrassment] and (2) the forced breach of an entrusted confidence [which is similar in all professional relationships due to ethical requirements that must be adhered to in the professional relationship.]." \textit{Id.} 

\textsuperscript{131} \textit{Developments in the Law – Privileged Communication: supra note 93, at 1481.} Privileges tend to "enhance public acceptance of the legal system." \textit{Id.} The addition of an accountant-client privilege will achieve the same results as it will show society that the legal system's desire to be consistent with the accounting profession's ethical and legal obligations. Though alone, this theory would not be sufficient to justify the accountant-client privilege, or probably any other privilege for that matter, it adds strength to both the Utilitarian and Privacy justifications for the privilege, as well as, helping justify the Honor Code Theory that strives in resolving the ethical conflicts accounting professionals face [this theory is discussed in the next section].
individual or business financial goals and strategies and in return, receive unique advice to achieve those goals, without fear that it will be forcibly disclosed in the future allows society to perceive that the system is exceeding its authority in searching for the truth. Absent a legal device that will protect the client and keep the judicial system's power in check, society may place less confidence and legitimacy in the courts.

2. Resolving the Ethical Conflict

CPA's currently are required to adhere to a strict ethical standard, as well as Ohio law, prohibiting disclosure of confidential client communications absent consent of the client. However, a conflict arises when the CPA is compelled

\[\text{132 Id. at 1585-86. This matches well with the Privacy Theory in that respecting the privacy of individuals' and businesses' financial strategies and goals that are communicated to an accountant, the judicial system is also enhancing its image in the eyes of society. The System's image is improved or at least maintained by placing limitations on what the System will force to be disclosed to the public.}\]

\[\text{133 Id. Under this theory, without the privilege for the accountant-client relationship, when the System forces disclosure of confidential information, it is placed in a "no-win" situation. Id. The result may be a public perception that the system is unfair. Id.}\]

\[\text{134 In Ohio, specifically related to client confidentiality, CPA's are subject to Ohio Administrative Code §4701-11-02(A) which states, "A certified public accountant shall not disclose any confidential information obtained in the course of a professional engagement except with the consent of the client." Wagenheim v. Alexander Grant & Co., 482 N.E.2d 955, 962 (Ohio Ct. App. 1983); see also Ohio Admin. Code §4701-11-02(A) (1997). Ohio CPAs are expected to comply with the ethical requirement that the Accountancy Board of Ohio promulgates. Kelly v. Accountancy Bd. of Ohio, 624 N.E.2d 292, 295 (Ohio Ct. App. 1993). "It is implied in every contractual relationship between an accountant and his client that a general duty exists not to make extra-judicial disclosures of information acquired in the course of their professional relationship, and that a breach of that duty by an accountant may give rise to a cause of action." Wagenheim, 482 N.E.2d at 961. Aside from the legal requirements, CPA's must also follow the ethical guidelines established by the professional CPA societies. The AICPA Rule 301 titled Confidential Client Information states:}\]

\[\text{A member in public practice shall not disclose any confidential client information without the specific consent of the client.}\]

\[\text{This rule shall be construed (1) to relieve a member of his or her professional obligations under rules 202 [Compliance with Standards] and 203 [Accounting Principles], (2) to affect in any way the member's obligations to comply with a validly issued and enforceable subpoena or summons, or to prohibit a member's compliance with applicable laws and government regulations, (3) to prohibit review of a member's}\]
to testify in court regarding such communications, due to the absence of an accountant-client privilege. The disclosure of the client’s confidential professional practice under AICPA to state CPA society or Board of Accountancy authorization, or responding to any inquiry made by, the professional ethics division or trial board of the Institute or a duly constituted investigative or disciplinary body of a state CPA society or Board of Accountancy.

Members of any of the bodies identified in (4) above and members involved with professional practice reviews identified in (3) above shall not use to their own advantage or disclose any member’s confidential client information that comes to their attention in carrying out those activities. This prohibition shall not restrict members’ exchange of information in connection with the investigative or disciplinary proceedings described in (4) above or the professional practice reviews described in (3) above.

AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS CODE OF PROFESSIONAL CONDUCT § 301 (1992). The Ohio Society of CPA’s has virtually identical requirements in its Rule 301, which reads:

A member in public practice shall not disclose any confidential client information without the specific consent of the client.

This rule shall not be construed (1) to relieve a member of the members professional obligations under rules 202 [Compliance with Standards] and 203 [Accounting Principles], and 203, (2) to affect in any way the member’s obligation to comply with a validly issued and enforceable subpoena or summons, (3) to prohibit review of a member’s professional practice under AICPA or OSCPA authorization, or (4) to preclude a member from initiating a complaint with or responding to any inquiry made by a recognized investigative or disciplinary body.

Members of a recognized investigative or disciplinary body and professional practice reviewers shall not use to their own advantage or disclose any member’s confidential client information that comes to their attention in carrying out their official responsibilities. However, this prohibition shall not restrict the exchange of information with a recognized investigative or disciplinary body or affect, in any way, compliance with a validly issued and enforceable subpoena or summons.

OHIO SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS CODE OF PROFESSIONAL CONDUCT § 301 (1994).
information is totally at odds and inconsistent with the spirit of the ethical requirements CPA’s must abide by. 135

To avoid such ethical conflicts, the passage of an Ohio accountant-client privilege bill may be justified under the Professional Honor Theory, which basically states that professional ethics require that confidences of clients be well maintained. 136 Other professional relationships, such as the attorney-client, physician-patient, and priest-penitent, are all bound by professional ethics of some sort, yet these relationships are afforded a testimonial privilege which assists in eliminating any ethical dilemma that forced disclosure would cause. 137

135 When one body of rules, an ethical code, requires that CPAs must not disclose information and another set of rules, evidentiary that seek all relevant information related to the truth, clash, a CPA is put between an “ethical rock” and an “evidentiary hard-spot.” The passage of Ohio HB 52 creating the accountant-client privilege would make this situation easier and place the CPA in a better situation both personally and with the client. Not only will it sit better with the CPA knowing that limited confidential communications are protected, but it will help maintain the open and trusting relationship and meet the client expectations that CPAs are to keep select information confidential. Though privileges tend to have a narrower scope of protection regarding disclosure of confidential communications than do ethical requirements, Jennifer Cunningham, Note, Eliminating “Backdoor” Access to Client Confidences: Restricting Self-Defense Exception to the Attorney-Client Privilege, 65 N.Y.U. L. REV. 992, 1002 (1990), a sufficient balance can be found. I think the narrow scope of protection on HB 52 suffices in balancing these competing interests. See supra note 115 for language of Ohio HB 52 creating the accountant-client privilege.

136 See Smith, supra note 63, at 479 (indicating that the “professional honor or obligation is still very much a part of the protection of confidentiality . . . [and] is an important basis for privileges.”)

137 The fact that in Ohio, CPAs can protect their clients’ confidential information from disclosure through ethical obligations is not enough; there is a difference between an ethical duty of confidentiality and an accountant-client privilege as far as protection of the client goes. Caosey & McNair, supra note 128, at 538. The attorney-client relationship in Ohio is governed by the ethical Code of Professional Responsibility DR 4-101 which generally requires attorneys to maintain confidential client communications. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1996). DR 4-101, titled Preservation of Confidences and Secrets of a Client, states the following:

(A) “Confidence” refers to information protected by the attorney-client privilege under applicable law, and “secret” refers to other information gained in the professional relationship that the client has requested be held inviolate of the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly: (1) Reveal a confidence or secret of his client. (2) Use a
The fact that these relationships have ethical standards similar to the accounting profession and are afforded a privilege is justification for a similar privilege for the accountant-client relationship. This will aid in resolving ethical conflicts compelled disclosure creates for CPAs that other similarly situated professions are not exposed to.

Confidences or secrets of the client to the disadvantage of the client. (3) Use a confidence or secret of his client for the advantage of himself or a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal: (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them. (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order. (3) The intention of his client to commit a crime and the information necessary to prevent the crime. (4) Confidences or secrets necessary to establish or collect his fee or to defend himself of his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal information allowed by DR 4-101(C) through an employee.

Id. Also, Priests are held to a strict Code of Canon Law, or what is known as a Seal of Confession, that makes it a crime to reveal confessed communications, which can result in excommunication. Sippel, supra note 84, at 1130-31. Physicians are guided by the Hippocratic Oath, as well as the American Medical Association Principles of Medical Ethics which states, “[a] physician shall respect the rights of patients . . . and shall safeguard patient confidences within the constraints of the law.” Smith, supra note 63 at n.13-14; see also McClarren, supra note 59, at 270. The CPA is similarly situated in that the CPA often deals with sensitive information that is expected to be and remain confidential once communicated between the parties, just as in the relationships involving attorneys, priests, and doctors. However, in Ohio, those professionals are given a testimonial privilege to assist in protecting these communications, whereas the CPA is not. This gives rise to an ethical dilemma for CPAs and can be partially resolved through the enactment of Ohio HB 52 establishing the accountant-client privilege. Such a privilege would allow the CPA to protect certain client confidential communications from any disclosure whatsoever without client consent. This is more consistent with their ethical responsibilities and avoids unneeded conflict regarding having to disclose information in court that would normally be disallowed per the profession's ethical standards.
3. Additional Support

Aside from the accountant-client privilege being supported by traditional justifications, as well as ethical considerations, the Power Theory helps explain the existence and need for the privilege. 138 Similar to the legal and medical professions, the accounting profession has a strong political influence. 139 The Power Theory proposes that privileges are adopted due to the political strength of these wealthy, powerful professions and the fact that they serve wealthy and powerful clients, which allows for their political clout necessary for the successful lobbying of privileges. 140 The fact that the accounting profession falls within the wealthier professions helps explain why such a privilege could exist. Also, the fact that the number of states with accountant-client privileges has grown to twenty-four indicating a growing trend that this relationship is deemed important to society and that respect should be given to the confidential communications between these parties. 141

138 See supra note 32 and accompanying text regarding the Power Theory in general.
139 The Power Theory appears to be more of an explanation for why privileges developed more so than a justification for their existence. However, it still provides support as to why Ohio needs an accountant-client privilege or at least an explanation why the privilege would pass. In Ohio, the Ohio Society of CPAs provides political clout for the accounting profession in that it lobbies on a regular basis for laws it believes are in the best interest of both society and the profession. “As was the case in the House, Senate passage will depend largely on the ability of OSCPA’s lobbyists and legislative keypersons to alleviate confusion generated by opponents over what this bill does and does not cover.” Ohio Society of Certified Public Accountants, supra note 115, at 9.

140 See supra note 32. The Power Theory basically purports that the privileges were developed by the parties most likely to benefit from them. Development in the Law—Privileged Communication, supra note 93, at 1493. It more or less “explains privilege law not as an effort to encourage communications or to protect privacy, but as special treatment won by the power of those privileged.” Id. However, it is still a reality that the creation of privileges have been influenced by professional political power and the accounting profession should be treated no differently. It provides services just as valuable to society as do attorneys and physicians, and should be given no less as far as protection of their clients is concerned.

141 Approximately twenty-four states currently have some form of an accountant-client privilege. Ohio Society of Certified Public Accountants, supra note 4, at 1.
V. CONCLUSION

A solid basis to support passage of Ohio HB 52 derives from the existing problems inherent without an accountant-client privilege, as well as support from traditional justifications of well-recognized privileges, ethical considerations, and a growing trend toward identifying the importance of this relationship. Aside from being justified under traditional theories, passage of Ohio HB 52 would help resolve the ethical conflict accountants face without the protection of a privilege. Enacting an accountant-client privilege would protect clients from their accountant being compelled to testify on matters to which an accountant is ethically bound to remain silent.

To balance the competing interests of the accountant-client relationship's need for confidentiality and the judicial system's quest for all relevant evidence to assist in ascertaining the truth, the scope of the privilege should be limited to those oral communications involving financial strategies and advice. Such a limited scope will avoid overly hindering the legal system, but at the same time, protect the confidential communications. This will also better serve society's interest in allowing the CPA to provide more accurate information to the client which will contribute to both the client's personal financial stability and the success of client businesses. However, until Ohio HB 52 is passed, clients and business leaders will always be reluctant to divulge certain information to their CPA's for the fear that it may be used adversely against them in the future. The existence of this fear is beneficial to no one.

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of these privileges varies from essentially the codification of ethical codes to a full testimonial privilege. Jakob, supra note 119, at 202-03. The privileges also vary in the type of accountants that fall within its scope; some protecting all public accountants, while some only certified public accountants. Feldman & Reed, supra note 95, at 234. In Ohio, the proposed bill, "not only affects CPAs in public practice, but it also has a significant impact on those CPAs who practice in a corporate/industry environment. This bill would afford to the employer of a CPA the same privilege as a client of a CPA." Ohio CPA NEWSLETTER, (Ohio Society of Certified Public Accountants), July 1997, at 2. The following are the jurisdictions that currently have some form of accountant-client privilege: Arizona, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Maryland, Michigan, Mississippi, Missouri, Nevada, New Mexico, Pennsylvania, Tennessee, Alaska, Connecticut, Kentucky, Louisiana, Maine, Massachusetts, Montana, North Dakota, Rhode Island, Vermont, Washington, and Puerto Rico. See supra note 116 and accompanying text; see also Causey & McNair, supra note 128, at Appendix: State Statutes.
Appendix A

Ohio Revised Code §2317.02 Privileged Communications Provides:

The following persons shall not testify in certain respects:

(A) An attorney, concerning a communication made to the attorney by the attorney’s client in that relation or the attorney’s advice to the 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 the physician’s or dentist’s patient in that relation or the physician’s or dentist’s advice to the 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 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 2305.11 of the Revised Code, an action for wrongful death, any other type of civil action, or a claim under 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 criminal action concerning any test of the results of any test that determines the presence of 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.

(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 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, an that conforms to section [2317.02.2] 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 2317.4722 [2317.42.2] 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)(b) 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 [2317.42.2] 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 a witness the person who 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.

(4)(a) As used in divisions (B)(1) to (3) 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’ has the same meaning as section 3729.01 of the Revised Code.

(5) Divisions (B)(1), (2), (3), and (4) of this section apply to doctors of medicine, doctors of osteopathic medicine, doctors of podiatry, and dentists.

(6) Nothing in divisions (B)(1) to (5) of this section affects, or shall be construed as affecting, the immunity from civil liability conferred by section 2305.33 of the Revised Code upon physicians who report an employee’s use of a drug of abuse, to the employer of the employee in accordance with division (B) of that section. As used in this division, “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 cleric, 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 clergyman, rabbi, priest, or minister for a religious counseling purpose in the clergyman’s, rabbi’s, priest’s, or minister’s professional character; however, the cleric, 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 clergyman’s, rabbi’s, priest’s, or minister’s sacred trust.

(D) Husband and wife, concerning any communication made by one to the other, or an act done by either in the presence of the other, during converture, 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, of 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’s 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, a professional counselor, social worker, or registered under Chapter 4757 of the Revised Code as a social work assistant concerning a confidential communication such person received from such person’s client in that relation or the person’s advice to the 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 indication or 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 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.
(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 [2151.42.1] of the Revised Code.

(H) A mediator acting under a mediation order issued under division (A) of section 3109.052 [3109.05.2] 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 visitation rights in relation to their children.

(I) A communications assistant, acting within the scope of that assistant's authority, when providing telecommunications relay service pursuant to section 4931.32 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 communications relay service.

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