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# Voluntary Client Testimony as a Privilege Waiver: Is Ohio's Law Caught in a Time Warp

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# VOLUNTARY CLIENT TESTIMONY AS A PRIVILEGE WAIVER: IS OHIO'S LAW CAUGHT IN A TIME WARP?

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## I. INTRODUCTION

Your client just spent the day on the witness stand at trial, giving her side of the facts that support her claim. You did not ask her about her conversations with you or any of her other attorneys, and they never came up. But, just to be safe, you prefaced several of your more general questions with the limitation that she was to answer without revealing any discussions with you or her other attorneys.

The next day, your adversary calls you to the stand as a witness. In the heated exchange that follows, she explains to the judge that, under Ohio law, your client's voluntary testimony waived the attorney-client privilege. Specifically, she points to Ohio Revised Code § 2317.02(A)(1), which provides that, "if the client voluntarily testifies . . . , the attorney may be compelled to testify on the same subject."[1] Outraged, you respond that your client's testimony went nowhere near the substance of attorney-client privileged communications, so there cannot possibly be a waiver. As to the statute, you explain that its reference to the "same subject" limits its application to instances where, unlike here, the client reveals the substance of

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[1] OHIO REV. CODE ANN. § 2317.02(A)(1) (West 2011).

attorney-client communications, which waives the privilege and, thus, allows examination of the attorney "on the same subject." Who wins this argument? The short answer: It may not be you.

As detailed in Part II below, the sentence in Ohio Revised Code § 2317.02(A) on which your adversary focused can be traced to a provision in Ohio's first code of civil procedure, which was enacted in 1853.[2] That code of civil procedure eliminated the common law "interested witness rule," which provided that interested witnesses—anyone with an interest in the litigation including parties—were incompetent to testify based on concerns about the risk of perjury.[3] However, it exacted a heavy price for this new ability of parties to testify. Specifically, voluntary testimony was "to be deemed a consent to the examination" of the witness's "attorney . . . on the same subject."[4] Presumably, this was intended to address the common law's concerns about perjury by interested witnesses. Part II also describes subsequent modifications to this provision up through its incorporation into the current Ohio attorney-client privilege statute, Ohio Revised Code § 2317.02(A), as well as the manner in which courts interpreted this language through the first half of the twentieth century.

Part III of this Article describes more recent decisions addressing claims that, based on Ohio Revised Code § 2317.02(A), voluntary testimony waives the attorney-client privilege. It concludes that, while it rarely occurs, there is a risk that a court will find that the statutory attorney-client privilege waiver provision, enacted in 1853 to address concerns underlying the common law's now-long-forgotten "interested witness rule," remains in effect.

Part IV examines the extent to which a rule that waiver occurs in such circumstances can be reconciled with the policies underlying the attorney-client privilege and criminal defendants' right to testify in their own defense. It concludes that a rule that voluntary testimony results in a broad waiver of the attorney-client privilege cannot be reconciled with modern justifications for the attorney-client privilege. Finally, Part V outlines proposals to conform Ohio law to modern concepts of privilege waiver.

## II. THE WAIVER THROUGH VOLUNTARY TESTIMONY STATUTE: ITS ORIGIN, EVOLUTION, AND APPLICATION BEFORE 1960

Ohio statutorily adopted English common law both when Ohio was a territory and again after becoming a state on March 1, 1803.[5] English common law courts regularly recognized the attorney-client privilege in the eighteenth and early nineteenth centuries.[6] We have not located reported Ohio decisions directly

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[2] *See infra* Part II.A.

[3] *See infra* notes 23-24 and accompanying text.

[4] *See infra* note 30 and accompanying text.

[5] 1 THE STATUTES OF OHIO AND OF THE NORTHWEST TERRITORY, ADOPTED OR ENACTED FROM 1788 TO 1833 INCLUSIVE 190 (Salmon P. Chase ed., 1833) [hereinafter CHASE] (statute passed on July 14, 1795; adopting common law for the Ohio territory); *id*. at 512 (statute passed on February 14, 1805; adopting common law for the State of Ohio and, in § 2, repealing analogous 1795 territorial law).

[6] *See generally* 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2290-91 (John T. McNaughton rev., Little, Brown & Co. 1961) (discussing the history of the attorney-

addressing the attorney-client privilege before 1850. Nevertheless, other American courts, on which Ohio courts frequently relied during this era,[7] regularly recognized the attorney-client privilege in the first half of the nineteenth century.[8]

Reported decisions from that time, however, do not reflect consideration of the effect of voluntary testimony as a potential waiver of the attorney-client privilege. This dearth of authority is likely the result of the fact that the interested witness rule barred privilege-holders from testifying at all in most circumstances where the issue of waiver through voluntary testimony might have arisen.[9] Specifically, at common law in the eighteenth and early nineteenth centuries, witnesses with a pecuniary interest in the action, including parties, were incompetent to testify based on a presumed need to avoid opportunities for perjured testimony, and criminal defendants, while permitted to testify, could not testify under oath.[10]

The "interested witness rule" came under attack in England in the first half of the nineteenth century from Jeremy Bentham, among others.[11] He argued that the rule's presumed benefit—excluding perjured testimony—carried with it too great a cost in terms of excluding relevant evidence, particularly when cross-examination and the jury's awareness of the interest reduced the potential that fact-finding would be based on perjured testimony.[12] The reformers ultimately prevailed. The rule disqualifying interested witnesses was abolished in England for (1) non-party witnesses in civil and criminal actions by Lord Denman's Act in 1843; (2) civil parties by Lord Brougham's Act in 1851; and (3) criminal defendants by the Criminal Evidence Act of 1898.[13]

Before 1850, Ohio courts regularly excluded interested witnesses as incompetent to testify, following the English common law rule.[14] On March 23, 1850, the Ohio

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client privilege and explaining that the privilege dates back to the reign of Queen Elizabeth); Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1069-87 (1978) (tracing the development of the privilege in English common law from the seventeenth through the nineteenth centuries).

[7] *See, e.g.*, Lessee of Glover's Heirs v. Ruffin, 6 Ohio 255 (1834) (citing and relying on decisions from other jurisdictions); McGregor & Co. v. Kilgore, 6 Ohio 358 (1834) (same); Morris v. Edwards, 1 Ohio 189 (1823) (same); Kerr v. Mack, 1 Ohio 161 (1823) (same).

[8] *See, e.g.*, Jenkinson v. Indiana, 5 Blackf. 465 (Ind. 1840); Aiken v. Kilburne, 27 Me. 252 (1847); Hatton v. Robinson, 31 Mass. (14 Pick.) 416 (1833); Crisler v. Garland, 19 Miss. (11 S. & M.) 136 (1848); March v. Ludlum, 3 Sand. Ch. 35 (N.Y. Ch. 1845); Moore v. Bray, 10 Pa. 519 (1849).

[9] *See generally* 2 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 575-87 (James H. Chadbourne rev., Little, Brown & Co. 1979) (describing history of interested witness rule); Ferguson v. Georgia, 365 U.S. 570, 573-87 (1961) (describing history of interested witness rule in criminal actions).

[10] *Ferguson*, 365 U.S. at 573-87.

[11] 7 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM (RATIONALE OF JUDICIAL EVIDENCE PART 2) (1843).

[12] *Id.* at 919-21.

[13] Joel N. Bodansky, *The Abolition of the Party-Witness Disqualification: An Historical Survey*, 70 KY. L.J. 91, 93 (1981-82).

[14] *See, e.g.*, Dille v. Woods, 14 Ohio 122 (1846) (reversing where interested witness's testimony was admitted); Armstrong v. Deshler, 12 Ohio 475 (1843) (affirming exclusion of

General Assembly passed a statute that was based on Lord Denman's Act and removed the competency limitation on interested third-party witnesses, as well as on parties called on cross-examination in courts of law, but it retained the rule that parties seeking to testify voluntarily were incompetent.[15] On March 18, 1851, the General Assembly extended this rule to chancery actions.[16]

### *A. The 1853 Ohio Code of Civil Procedure*

On March 11, 1853, the Ohio General Assembly enacted the Code of Civil Procedure ("1853 Ohio CCP"),[17] which included over six hundred sections. Days later, the General Assembly enacted two additional lengthy codes, a probate code and one governing practice before justices of the peace.[18] Not surprisingly given this volume of legislative activity in such a short period, the 1853 Ohio CCP was not developed from scratch in Ohio and was not even the work of Ohio's General Assembly. Instead, the 1853 Ohio CCP was prepared by three commissioners: William Kennon, William S. Groesbeck, and Daniel O. Morton (collectively "Ohio

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interested witness's testimony); Marshall *ex rel* Kearny v. Thrailkill's Ex'r, 12 Ohio 275 (1843) (reversing judgment based on interested witness's testimony).

[15] 2 THE PUBLIC STATUTES AT LARGE OF THE STATE OF OHIO: FROM THE CLOSE OF CHASE'S STATUTES, FEBRUARY, 1833, TO THE PRESENT TIME 1522 (Maskell E. Curwen ed., 1853) [hereinafter CURWEN] (statute passed on March 23, 1850, adopting Lord Denman's rule in actions at law), *repealed* Ch. 1202, § 606 (Mar. 11, 1853). Chapter 975 provided:

> Sec. 1. *Be it enacted, etc*., That a party to any action at law, in any of the courts of this State, may be examined as a witness by the adverse party, or by either one of several adverse parties; and for that purpose may be compelled to attend at the trial, if residing within the county where such suit is pending, or to give a deposition if without such county, in the same manner, and subject to the same rules of examination, as other witnesses are compelled to testify.
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> Sec. 2. A person for whose immediate benefit any such action may be prosecuted or defended, may be examined as a witness in the same manner, and subject to the same rules of examination as provided in the preceding section.
>
> Sec. 3. No person offered as a witness shall be excluded by reason of his or her interest in the event of the action; but this section shall not apply to a party in the action, nor to any party for whose immediate benefit such action is prosecuted or defended, nor to any assignee of a thing in action, assigned for the purpose of making him a witness.
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> Sec. 4. This act shall take effect from and after the first day of July next [July 1, 1850].

*Id.* (footnotes omitted). Footnote one of Chapter 975 as reprinted in Curwen's PUBLIC STATUTES AT LARGE, which does not appear in the session laws, stated that "[t]his act is substantially copied from Lord Denman's Act, which with the English decisions upon it, will be found in 9 Western Law Journal, 326." *Id*.

[16] 2 CURWEN, *supra* note 15, at 1597.

[17] 3 CURWEN, *supra* note 15, at 1938.

[18] *Id*. at 2041, 2052.

Commissioners on Practice and Pleadings").[19] They were appointed pursuant to Ohio's 1851 Constitution, which called for appointed commissioners to "revise the practice, pleadings, forms and proceedings of the courts of record" in Ohio.[20]

The Ohio Commissioners on Practice and Pleadings' January 1853 report to the General Assembly acknowledged that they were "chiefly indebted to the extraordinary labors of the New York commissioners upon practice and pleadings," but also were "assisted by those of Kentucky, Missouri, Indiana, Massachusetts, and other States, where the example of New York has been in a great degree followed."[21] In the respects that are pertinent here, the 1853 Ohio CCP was adapted from the proposed (but never enacted) December 1850 Final Report of the New York State Commissioners on Pleadings and Practice, often referred to as the "Field Commission" after Commissioner David Dudley Field ("Field Commission" or "1850 Field Code").[22]

The three provisions of the 1853 Ohio CCP most relevant here—sections 310, 314(4), and 315—are closely analogous to provisions in the 1850 Field Code. First, § 310 of the 1853 Ohio CCP abolished the interested witness rule for parties to most civil actions,[23] providing that:

> No person shall be disqualified as a witness, in any civil action or proceeding, at law, by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of a crime; but such

[19] William Kennon was a member of the United States House of Representatives (1829-33; 1835-37), a common pleas judge (1840-47), a delegate to the convention that drafted Ohio's 1851 Constitution, and sat on the Supreme Court of Ohio (1854-56). Lawrence Kestenbaum, *Index to Politicians*, THE POLITICAL GRAVEYARD, http://politicalgraveyard.com/bio/kennedy-kensey.html#R9M0J2SF8 (last visited May 5, 2011). William S. Groesbeck was a delegate to the convention that drafted Ohio's 1851 Constitution, a member of the United States House of Representatives (1857-59), and a member of the Ohio Senate (1862-64). *Id.*, http://politicalgraveyard.com/bio/gritzmacher-grosfeld.html#R9M0IYTRC (last visited May 5, 2011). Daniel O. Morton was the Mayor of Toledo, Ohio (1849-50) and later the United States District Attorney for Ohio (1853-57). *Id.*, http://politicalgraveyard.com/bio/morton.html (last visited May 5, 2011).

[20] OHIO CONST. art. XIV, § 2 (repealed 1953).

[21] OHIO COMMISSIONERS ON PLEADINGS AND PRACTICE, REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADINGS: CODE OF CIVIL PROCEDURE iv (Columbus, Osgood & Blake 1853) [hereinafter 1853 OHIO COMMISSIONERS' REPORT].

[22] COMMISSIONERS ON PRACTICE AND PLEADINGS, THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW YORK (Weed, Parson & Co. 1850) [hereinafter 1850 PROPOSED FIELD CODE]. New York adopted a code of civil procedure based on the New York Commissioners on Practice and Pleadings' 1848 report and amended its code based on the 1849 revision of that report, but it never adopted the 1850 Proposed Field Code, which was issued in December 1850. Mildred V. Coe & Lewis W. Morse, *Chronology of the Development of the David Dudley Field Code*, 27 CORNELL L.Q. 238 (1942).

[23] Parties still were incompetent "where the adverse party is the executor, or administrator, of a deceased person, when the facts to be proved, transpired before the death of such deceased person." 3 CURWEN, *supra* note 15, at 1986.

> interest or conviction may be shown for the purpose of affecting his credibility.[24]

The wording of § 310 closely tracked the wording of an 1849 Connecticut statute and, in substance, had the same effect as § 1708 of the 1850 Field Code.[25] Furthermore, reflecting the significance of the "interested witness rule" in that era, the reports of both the Ohio Commissioners on Pleadings and Practice and the Field Commission included lengthy comments with these sections explaining that the risk of perjury created by admitting testimony from interested witnesses was (1) offset by the jury's ability to consider the interests involved, as well as the adverse party's ability to explore the testimony on cross-examination, and (2) outweighed by the benefits of admitting such highly-relevant testimony.[26]

Second, § 314(4) of the 1853 Ohio CCP rendered attorneys "incompetent to testify . . . concerning any communication made to him by his client in that relation, or his advice thereon, without the client's consent."[27] Although set forth in terms of the attorney's incompetence to testify and not as a privilege for confidential attorney-client communications, this is the initial Ohio legislative enactment

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[24] *Id*.

[25] REVISED STATUTES OF THE STATE OF CONNECTICUT 86 (Case, Tiffany, and Co. 1849) provided that:

> No person shall be disqualified as a witness in any suit or proceeding at law, or in equity, by reason of his interest in the event of the same, as a party or otherwise; or by reason of his conviction of a crime; but such interest or conviction may be shown for the purpose of affecting his credit.

Section 1708 of the 1850 Field Code abolished the interested witness rule for parties. 1850 PROPOSED FIELD CODE, *supra* note 22, § 1708 ("All persons, without exception, otherwise than as specified in the next two sections [relating to those of unsound mind, children under 10 years of age, and certain confidential communications], who, having organs of sense, can perceive, and perceiving can make known their perceptions to others, may be witnesses. Therefore neither parties, nor other persons who have an interest in the event of an action or proceeding, are excluded, nor those who have been convicted of crime, nor persons on account of their opinions on matters of religious belief: although in every case, the credibility of the witness may be drawn in question . . . .").

[26] 1853 OHIO COMMISSIONERS' REPORT, *supra* note 21, at 128-41; 1850 PROPOSED FIELD CODE, *supra* note 22, at 715-25.

[27] Section 314 of the 1853 OHIO CCP provided:

> The following persons shall be incompetent to testify: (1) Persons who are of unsound mind at the time of their production for examination. (2) Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly. (3) Husband and wife, for or against each other, or concerning any communication made by one to the other during the marriage, whether called as a witness while that relation subsisted or afterwards. (4) An attorney, concerning any communication made to him by his client in that relation, or his advice thereon, without the client's consent. (5) A clergyman or priest, concerning any confession made to him in his professional character, in the course of discipline, enjoined by the church to which he belongs, without the consent of the person making the confession.

3 CURWEN, *supra* note 15, at 1986-87.

recognizing something resembling the common law attorney-client privilege. The 1850 Field Code had a similar provision, § 1710, which provided:

> There are, particular relations, in which it is the policy of the law to encourage confidence, and to preserve it inviolate, therefore, a person cannot be examined, as a witness, in the following cases: . . . An attorney cannot, without the consent of his client, be examined, as to any communication made by the client to him, or his advice given thereon, in the course of professional employment.[28]

Third, § 315 of the 1853 Ohio CCP provided that the client can waive § 314(4)'s prohibition against attorneys testifying as to attorney-client communications.[29] Under § 315, "[i]f a person offer[s] himself as a witness, that is to be deemed a consent to the examination also of an attorney . . . on the same subject, within the meaning of" § 314(4).[30] Section 315, which had no explanatory comment from the Ohio Commissioners on Practice and Pleadings, was nearly identical to § 1711 of the 1850 Field Code, which provided: "If a person offer himself as a witness, that is to be deemed a consent to the examination also, of a[n] . . . attorney . . . on the same subject, within the meaning of the [second] subdivision[] of the last section."[31] And, just as the Ohio Commissioners on Pleadings and Practice included no explanatory comment with § 315 of the Ohio CCP, the Field Commission had none explaining § 1711 of the Field Code.

Thus, the 1853 Ohio CCP did three things: (1) for the first time, it made parties competent to voluntarily testify in most civil actions; (2) it rendered attorneys incompetent to testify as to communications from, and advice provided to, their clients; and (3) it provided that a person's voluntary testimony was "deemed a consent to the examination also of an attorney . . . on the same subject."[32] Section 315 of the 1853 Ohio CCP did not define the scope of the "same subject" as to which the attorney could be examined. However, the implied consent to the attorney's examination in § 315 was triggered by the mere fact that the privilege-holder "offer[ed] himself as a witness," as opposed to the privilege-holder providing testimony as to the substance of communications with the attorney.[33]

Given that the waiver-triggering event was voluntarily testifying, rather than testifying about the substance of attorney-client communications, a normal reading of the scope of the consented-to examination of the attorney on the "same subject" might be that it extended to all matters as to which the voluntarily-testifying

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[28] 1850 PROPOSED FIELD CODE, *supra* note 22, § 1710.

[29] Section 315 of the 1853 OHIO CCP provided:

> If a person offers himself as a witness, that is to be deemed a consent to the examination also of an attorney, clergyman, or priest, on the same subject, within the meaning of the last two subdivisions of the preceding section.

3 CURWEN, *supra* note 15, at 1987.

[30] *Id.*

[31] 1850 PROPOSED FIELD CODE, *supra* note 22, § 1711.

[32] *See* 1853 OHIO COMMISSIONERS' REPORT, *supra* note 21, at 142.

[33] *Id.*

privilege holder testified, rather than being limited to any attorney-client communications about which the person may have voluntarily testified. Moreover, interpreting the implied privilege waiver broadly in this manner would, at least in a general sense, tend to reduce the risk of perjured testimony that, in connection with their respective statutory proposals allowing parties to voluntarily testify, so troubled the Ohio and New York commissioners.

### *B.* King v. Barrett *(1860)*

The Supreme Court of Ohio first interpreted §§ 314(4) and 315 of the 1853 Ohio CCP in the context of voluntary client testimony in 1860 in *King v. Barrett.*[34] There, the plaintiff promissory note holder sued three defendant makers of the notes.[35] The plaintiff testified voluntarily, and one of the defendants sought to examine the plaintiff's attorney concerning related attorney-client communications on the theory that, under § 315, the plaintiff's voluntary testimony was a "consent" to examining the attorney.[36] The trial court sustained an objection, prohibiting the questioning.[37]

The Supreme Court of Ohio reversed and began its analysis by noting that the 1853 Ohio CCP had "materially changed the rule of the common law, as to the competency of witnesses" by eliminating the interested witness rule in § 310.[38] After quoting §§ 314 and 315, the court found that, because the plaintiff had testified voluntarily that

> he waived all the protection which the law would otherwise have afforded to communications made by him to his attorney, pertinent to the issue on trial. Those communications were no longer privileged, and having made himself a witness, and given evidence generally in the case, he was bound, upon proper inquiry, to tell the *whole* truth, and his testimony became liable to the application of all the usual tests of truth, and to impeachment, like that of any other witness, and for this purpose his attorney might be called to prove statements and admissions which his client, as a witness, denied. Indeed, we are satisfied that his attorney might then be called to prove such admissions, as evidence in chief.[39]

Thus, *King* found that a party's voluntary testimony resulted in a broad waiver under § 315 extending to "communications made by him to his attorney, pertinent to the issue on trial."[40] In explaining that result, *King* focused on § 315's express wording and perjury-related concerns such as the obligation "to tell the *whole* truth" and the need to be "liable to the application of all the usual tests of truth, and to impeachment, like that of any other witness."[41]

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[34] King v. Barrett, 11 Ohio St. 261 (1860).

[35] *Id*. at 262.

[36] *Id*. at 262-64.

[37] *Id*. at 263.

[38] *Id.* at 263-64.

[39] *Id.* at 264 (italics in original).

[40] *Id.*

[41] *Id.* (italics in original).

### *C.* Duttenhofer v. Ohio *(1877)*

In 1867, the Ohio General Assembly eliminated the interested witness rule for criminal defendants, making them competent to voluntarily testify on their own behalf and bringing Ohio's criminal law in line with its civil law following the passage of § 310 of the 1853 Ohio CCP.[42] A decade later, the Supreme Court of Ohio, in *Duttenhofer v. Ohio*, considered whether a criminal defendant's voluntary testimony allowed the prosecution to call the defendant's attorney and examine him regarding otherwise confidential attorney-client communications.[43] There, the trial court had allowed the prosecution to call and cross-examine the defendant's attorney regarding testimony the defendant had voluntarily provided on direct.[44]

Reversing, the Supreme Court of Ohio began by articulating:

> It is . . . a general rule of jurisprudence, that 'where an attorney is employed by a client professionally, to transact professional business, all the communications that pass between the client and the attorney in the course and for the purpose of that business are privileged communications, and that the privilege is the privilege of the client and not of the attorney.'[45]

Then, after noting that § 315 of the 1853 Ohio CCP "provides, that, if a person offer himself as a witness, that is to be deemed a consent to the examination also of the attorney, on the same subject," the court observed that "[t]he code of criminal procedure contains no such provision," and concluded that "no such waiver ought to be implied," which it found to be the majority rule.[46]

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[42] Act of Apr. 17, 1867, ch. 1220, 1867 Ohio Laws 260, *superseded by* Act of May 6, 1869, ch. 1710, 1869 Ohio Laws 287. Chapter 1220 provided that:

> Sec. 1. *Be it enacted by the General Assembly of the State of Ohio*, That in the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes or offenses, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presumption against him, nor shall any reference be made to, nor any comment upon, such neglect or refusal.
>
> Sec. 2. This act shall take effect and be in force from and after its passage.

*Id.*

[43] Duttenhofer v. Ohio, 34 Ohio St. 91 (1877).

[44] *Id.* at 94.

[45] *Id.* (quoting Herring v. Clobery, 41 Eng. Rep. 565 (1842); Pearse v. Pearse, 63 Eng. Rep. 950 (1846)).

[46] *Id.* at 95. The Supreme Court of Ohio in *Duttenhofer* noted that, following privilege holders' voluntary testimony, no waiver of the attorney-client privilege had been found in *Barker v. Kuhn*, 38 Iowa 392 (1874), *Bigler v. Reyher*, 43 Ind. 112 (1873), *Bobo v. Bryson*, 21 Ark. 387 (1860), or *Hemenway v. Smith*, 28 Vt. 701 (1856), while a waiver had been found in *Woburn v. Henshaw*, 101 Mass. 193 (1869). *Duttenhofer*, 34 Ohio St. at 95.

### *D. The 1878 Ohio Code of Civil Procedure*

In March 1875, the Ohio General Assembly directed the Governor to appoint a new commission to revise and consolidate all of Ohio's statutes.[47] Those commissioners—Michael A. Daugherty, Luther Day (replaced in February 1876 by John S. Brasee), and John W. Okey (replaced in November 1877 by George B. Okey)[48]—were known as the Commissioners to Revise and Consolidate the Statutes ("Ohio Revision Commissioners").[49] They divided the statutory universe into political, civil, remedial, and penal statutes and addressed the code of civil procedure in the remedial section.[50]

The Ohio Revision Commissioners prepared a proposed code of civil procedure ("1878 Ohio CCP") which the General Assembly enacted on May 14, 1878,[51] repealing the 1853 Ohio CCP.[52] The 1878 Ohio CCP retained the 1853 Ohio CCP's

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[47] 4 THE STATUTES OF THE STATE OF OHIO IN CONTINUATION OF CURWEN'S STATUTES AT LARGE AND SWAN & CRITCHFIELD'S REVISED STATUTES ARRANGED IN CHRONOLOGICAL ORDER SHOWING THE ACTS IN FORCE, REPEALED, OBSOLETE OR SUPERSEDED WITH REFERENCES TO THE JUDICIAL DECISIONS CONSTRUING THE STATUTES AND A COMPLETE ANALYTICAL INDEX 3452 (J.R. Sayler ed., 1876) [hereinafter SAYLER].

[48] Michael A. Daugherty had been an Ohio Senator (1870-72). HERVEY SCOTT, A COMPLETE HISTORY OF FAIRFIELD COUNTY, OHIO 1785-1886, at 112 (Columbus, Sherbert & Lilley 1887). Luther Day had been an Ohio Senator (1863-64) and had served on the Supreme Court of Ohio (1865-75). HISTORY OF PORTAGE COUNTY, OHIO 819 (Chicago, Warner, Beers & Co. 1885). Day resigned from the Ohio Revision Commission to become a member of the Supreme Court of Ohio Commission (1876-79). *Id.* He was replaced on the Ohio Revision Commission by John S. Brasee. Edgar B. Kinkead, *A Sketch of the Supreme Court of Ohio*, 7 THE GREEN BAG 105, 117 (1895). John W. Okey resigned from the Ohio Revision Commission upon his election to serve on the Supreme Court of Ohio (1878-85). *Id.*; *Justices of the Supreme Court of Ohio 1803 to the Present*, THE SUPREME COURT OF OHIO & THE OHIO JUDICIAL SYSTEM, http://www.supremecourt.ohio.gov/SCO/formerjustices/default.asp (last visited Apr. 9, 2011). John W. Okey was replaced on the Ohio Revision Commission by his son, George B. Okey. Kinkead, *supra* note 48, at 117.

[49] SAYLER, *supra* note 47, at 3452.

[50] 1 THE REVISED STATUTES & OTHER ACTS OF A GENERAL NATURE OF THE STATE OF OHIO IN FORCE JAN. 1, 1880, at vii (Michael A. Daugherty et al. eds., 1879) [hereinafter REVISED STATUTES].

[51] S.B. 115, 63d Gen. Assemb., Reg. Sess., 1878 Ohio Laws 597.

[52] *Id.* tit. I, div. III, ch. 3, § 1, 1878 Ohio Laws 597, 794 (repealing the 1853 Ohio CCP). Before it was replaced by the 1878 Ohio CCP, § 314 of the 1853 Ohio CCP was amended twice. In 1866, new subparagraphs (6) and (7) were added to what had been § 314 of the 1853 Ohio CCP, both of which related to estate disputes. 2 SAYLER, *supra* note 47, at 909. In 1870, the attorney-client privilege subparagraph, which had been § 314(4) of the 1853 Ohio CCP, was moved to become the third (rather than the fourth) subparagraph and was expanded to include physicians. 3 SAYLER, *supra* note 47, at 2375, 2378-79. Following the 1870 amendment, what had been § 314(4) of the 1853 Ohio CCP rendered incompetent to testify "[a]n attorney concerning any communication made to him by his client in that relation or his advice thereon, without the client's express consent, or a physician concerning any communication made to him by his patients in that relation, or his advice thereon without his patient's consent." *Id.* Given that § 315 of the 1853 Ohio CCP expressly referred to the "last two subdivisions of the preceding section," one could argue that, after two new subparagraphs were added as the "last two subdivisions of the preceding section" in 1866, § 315 no longer

rule that interested persons, including parties, were competent to testify.[53] And, using language very close to that of the current Ohio privilege statute, it provided that certain "persons shall not testify in certain respects," including "[a]n attorney, concerning a communication made to him by his client in that relation, or his advice to his client," but "the attorney . . . may testify by express consent of the client . . . ; and if the client . . . voluntarily testif[ies], the attorney . . . may be compelled to testify on the same subject."[54]

There were differences between the attorney-client privilege provisions in the 1853 Ohio CCP and the 1878 Ohio CCP. While one section in the 1853 Ohio CCP—§ 314(4)—made attorneys incompetent to testify and another—§ 315—provided that the client's voluntary testimony was "deemed to be consent" to examining the attorney on the "same subject," the 1878 Ohio CCP had only a single analogous provision.[55] In addition, the 1878 Ohio CCP's provision was not phrased in terms of the attorney being "incompetent" to testify but, instead, stated that the attorney "shall not testify," which is more akin to a privilege.[56] Further, it dropped the "deemed to consent" language that had preceded § 315's directive permitting the attorney to testify on the "same subject" and replaced it with "may be compelled to testify on the same subject."[57]

One might attempt to ascribe substance to the 1878 Ohio CCP's changes in statutory language, particularly the elimination of the "deemed to consent" language, but it is not clear that those changes can reasonably bear that weight. Generally, and apart from the statutory language itself, there appears to be no written evidence that the 1878 Ohio CCP substantially modified the attorney-client privilege provisions of the 1853 Ohio CCP. To the contrary, the session laws adopting the 1878 Ohio CCP cite to § 314 and § 315 of the 1853 Ohio CCP in brackets following the 1878 Ohio CCP's attorney-client provision.[58] Further, the Ohio Revision Commissioners' final report included a footnote reference to and description of the holding in *King v. Barrett* following § 5241 and made no reference to *Duttenhofer v. Ohio*, which had been decided only one year earlier.[59] That report also commented, in the 1878 Ohio CCP, "the principal part of the code of civil procedure, prepared by [the 1853 Ohio

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applied to attorney-client communications. That reading, however, ignores § 315's express references to "an attorney, clergyman, or priest," which likely make it untenable.

[53] S.B. 115 tit. I, div. III, ch. 3, § 1. That section provided: "All persons are competent witnesses except those of unsound mind, and children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." *Id.*

[54] *Id.* tit. I, div. III, ch. 3, § 2(1).

[55] *Id.*

[56] *Id.*

[57] *Id.* Further, and as a result of the 1870 amendment described in footnote 52, the 1878 Ohio CCP had a parallel rule for physician-patient communications that was not included in section 314 of the 1853 Ohio CCP.

[58] *Id.* § 2(5).

[59] 2 REVISED STATUTES, *supra* note 50, at 1278.

Commissioners on Practice and Pleadings] remain[ed] substantially as it was reported by those commissioners in 1853."[60]

For decades after 1878, there were no substantive modifications to Ohio's attorney-client privilege statute, although it was renumbered as part of two general statutory reshufflings. Specifically, Ohio enacted the Ohio Revised Code in 1880, which was the first general codification of Ohio statutes,[61] and the 1878 Ohio CCP's attorney-client provision became Ohio Revised Code § 5241. In 1910, Ohio rearranged its statutes again, this time into the Ohio General Code,[62] and the attorney-client privilege statutory provision became Ohio General Code § 11494, but there were no substantive changes.[63]

### *E.* Spitzer v. Stallings *(1924)*

After *Duttenhofer v. Ohio*, the Supreme Court of Ohio did not address the issue of privilege waiver through voluntary testimony again until 1924, when it decided *Spitzer v. Stallings*.[64] The *Spitzer* plaintiffs alleged that two defendants bought corn from them and failed to pay for it.[65] One defendant denied that he was a party to the sale, but the plaintiffs' direct testimony described facts that, in their view, established his involvement.[66] That defendant then attempted to cross-examine the

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[60] 1 REVISED STATUTES, *supra* note 50, at xi.

[61] *See* 4 SAYLER, *supra* note 47, at 3452 (act that provided for codification project that resulted in 1880 Ohio Revised Code); *see also* 1 REVISED STATUTES, *supra* note 50, at iii-xii (Ohio Revision Commissioners' description of the project to codify Ohio's statutes).

[62] S.B. 2, 78th Gen. Assemb., Reg. Sess. (Ohio 1910), *reprinted in* 1-4 THE GENERAL CODE OF THE STATE OHIO (W.H. Anderson Co. 1910).

[63] As enacted in 1910, the attorney-client privilege statute in OHIO GEN. CODE § 11494 provided that:

> The following persons shall not testify in certain respects: I. An attorney, concerning a communication made to him by his client in that relation, or his advice to his client; or a physician, concerning a communication made to him by his patient in that relation, or his advice to his patient. But attorney or physician may testify by express consent of the client or patient; and if the client or patient voluntarily testifies, the attorney or physician may be compelled to testify on the same subject.

3 THE GENERAL CODE OF THE STATE OHIO 2463 (W.H. Anderson Co. 1910).

[64] Spitzer v. Stallings, 142 N.E. 365 (Ohio 1924). We note that, in 1920, the Supreme Court of Ohio made a passing reference to the issue in *Swetland v. Miles*, 130 N.E. 22, 23 (Ohio 1920). *Swetland* considered whether an attorney could testify about his deceased client's intent during an action to contest the client's will. *Id.* In analyzing OHIO GEN. CODE § 11494, the court stated that the Legislature "closed the door of all courts to the receipt" of communications between attorney and client "no matter how much light they might throw upon the controversy, no matter how much logical connection they may have with the issue of facts to be proven or disproven." *Swetland*, 130 N.E. at 23. But, having closed the door, the court noted that the Legislature provided two circumstances where it might be reopened: (1) with express consent of the client; and (2) if the client voluntarily testifies. *Id.* at 23. In *Swetland*, however, the parties agreed that neither of the events had occurred. *Id.*

[65] *Spitzer*, 142 N.E. at 365.

[66] *Id.*

plaintiffs about admissions they purportedly had made to their attorney concerning the defendant's lack of involvement in the sale, but the trial court sustained the plaintiffs' privilege objection.[67] The defendant also called the plaintiffs' attorney and attempted to explore those issues, but the trial court again sustained a privilege objection.[68] Finding that the plaintiffs' voluntary testimony waived their attorney-client privilege claims under Ohio General Code § 11494, the intermediate appellate court reversed, and the Supreme Court of Ohio affirmed.[69]

The *Spitzer* court framed the issue as "whether a confidential communication made by a party to his attorney loses its privilege if such party becomes a voluntary witness at the trial and testifies generally to matters necessary to establish his cause of action, without referring in any way to the communications between him and his attorney."[70] The plaintiffs in *Spitzer* had argued that Ohio General Code § 11494 addressed situations in which the client testified about "the subject of the communications between client and attorney, and not to the subject of the controversy."[71] Rejecting this claim, the court said that the plaintiffs' argument required reading the statute "as if it read thus: 'If the client voluntarily testifies to such communication or advice, the attorney may be compelled to testify on the same subject,'" which "construction would be nothing short of judicial legislation, and would be putting into the language of the statute something which the Legislature omitted."[72] *Spitzer* acknowledged that the common law and the laws of many other states were to the contrary, but found that the issue before it "involve[d] the interpretation of a legislative act" and was "a question of the application of language entirely free from ambiguity to a given state of facts."[73]

Looking to § 315 of the 1853 Ohio CCP and its own interpretation of § 315 in *King v. Barrett*, the *Spitzer* court found "that there has been no change of language [of § 315] which would make" inapplicable *King*'s holding that, by testifying voluntarily, a party "thereby loses this privilege, and, under [§ 315 of the 1853 Ohio CCP], consents to the examination of his attorney touching such admissions as a pertinent to the issue."[74] *Spitzer* also found that a waiver on those facts was required by the rule of statutory construction that "[w]here a statute that has been construed by the courts has been reenacted in the same, or substantially the same, terms the Legislature is presumed to have been familiar with its construction, and to have adopted it as part of the law."[75] According to the *Spitzer* court, the Ohio General Assembly reenacted § 315 of the 1853 Ohio CCP in the 1878 Ohio CCP without significant modifications and with knowledge of *King*'s holding; thus, the General

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[67] *Id*.

[68] *Id*.

[69] *Id*. at 368.

[70] *Id.* at 366.

[71] *Id.*

[72] *Id.*

[73] *Id*.

[74] *Id*. at 367.

[75] *Id.*

Assembly implicitly endorsed and adopted *King*'s holding.[76] *Spitzer* also rejected the claim that *Duttenhofer v. Ohio* overruled *King v. Barrett* because *Duttenhofer*, a criminal case, did not apply § 315 of the 1853 Ohio CCP.[77]

*Spitzer* left at least some uncertainty in this area because the court, at the very outset, assumed "that the testimony of the attorney, if he were permitted and required to divulge the communications, would tend to contradict the testimony of the party already offered . . . ."[78] Similarly, *Spitzer* noted that, although "[i]t is said that, if the rule of exclusion is not applied, parties many times would not dare to testify at all. This can only be so upon the theory that the client has not told his attorney the truth."[79] These statements not only reflect the concern about client perjury that was at the core of § 315 of the 1853 Ohio CCP, but suggest that, for reasons not fully explained in the opinion,[80] the *Spitzer* court may have believed that the plaintiffs had perjured themselves in their direct testimony, which, today, might implicate the crime-fraud exception to the attorney-client privilege, as well as an attorney's ethical obligation not to present testimony that is known to be false.[81] Nonetheless, *Spitzer* (1) flatly rejected the claim that voluntary testimony waives the attorney-client privilege only when the testimony discloses the substance of privileged communications, and (2) applied the court's 1860 decision in *King v. Barrett* to an attorney-client privilege statute that bears little difference from today's version.[82]

### *F. Developments After* Spitzer *and Before 1960*

In 1929, the Ohio General Assembly made the civil rules of evidence applicable to criminal actions by amending the General Code so that the "rules of evidence in civil causes," where applicable, "govern in all criminal cases."[83] In the following decade, the Supreme Court of Ohio twice addressed claims that voluntary testimony waived the physician-patient privilege, first in *Harpman v. Devine*[84] and then in *Baker v. Industrial Commission of Ohio*.[85] Although those actions did not involve alleged waivers of the attorney-client privilege, *Harpman* and *Baker* nonetheless are instructive because waivers through voluntary testimony of both the physician-

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[76] *Id.*

[77] *Id.*

[78] *Id.* at 366.

[79] *Id.* at 368.

[80] The *Spitzer* defendant apparently made a proffer of the excluded testimony and about what the attorney-client communications would show. *Id.* at 366. It is unclear, however, what, if any, factual basis the defendant had for that proffer.

[81] *See infra* notes 143-44 and accompanying text.

[82] Changes in the Ohio attorney-client privilege statute after 1924 are discussed *infra* notes 102 & 157-58 and accompanying text. As explained there, those changes are not substantive.

[83] Amended S.B. No. 8, 88th Gen. Assemb., Reg. Sess., 1929 Ohio Laws 123, 185. In 1930, this statute was codified as OHIO GEN. CODE § 13444-1. Since the 1953 revision of Ohio's statutes, it has been codified as OHIO REV. CODE § 2945.41.

[84] Harpman v. Devine, 10 N.E.2d 776 (Ohio 1937).

[85] Baker v. Indus. Comm'n of Ohio, 21 N.E.2d 593 (Ohio 1939).

patient and attorney-client privileges were addressed in Ohio General Code § 11494 (and its predecessors) in the same paragraph and with identical language.[86]

In *Harpman*, decided in 1937, the plaintiff alleged that the defendant negligently hung a fire hose so that, when the wind blew, it broke a window and injured the plaintiff.[87] The plaintiff testified on direct examination about his general health, and the trial court sustained a privilege objection to the defendant's questioning of the plaintiff's physician, which the court of appeals found to have been error.[88] The Supreme Court of Ohio reversed, finding that voluntary testimony does not create a waiver "unless the patient first voluntarily testifies in respect" to "what the patient has said to his physician and what the physician has said to the patient."[89] To support this conclusion, the court first pointed to a United States Supreme Court decision interpreting Arizona's physician-patient privilege statute.[90] Then, the court purported to distinguish *King v. Barrett* and *Spitzer v. Stallings* because "[t]he privilege between physician and patient may be waived but the waiver must be distinct and unequivocal" and observed that, "[w]hile statutes in other jurisdictions are not in all respects like the Ohio statute, nevertheless the principle regarding a waiver is practically the same."[91]

In *Baker*, decided in 1939, the plaintiff had injured his leg and voluntarily testified about his leg's condition, as well as the fact that he had been referred to a particular physician.[92] The trial court permitted questioning regarding the plaintiff's communications with that physician.[93] The jury returned a defense verdict, the plaintiff appealed, and the intermediate appellate court reversed.[94] In an opinion authored by Justice Myers, who had also authored the majority opinion in *Harpman*, the Supreme Court of Ohio affirmed.[95] Explaining this result, the court observed that "[n]owhere in his direct or voluntary testimony did the plaintiff testify as to any

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[86] *See supra* notes 52, 54, & 63. Although the attorney-client and physician-patient privileges both were subject to Ohio General Code § 11494's provision relating to waiver through voluntary testimony, the physician-patient privilege is more easily and routinely waived than the attorney-client privilege. This is true because, in actions involving personal injuries, the plaintiff's filing of the action places his or her physical condition at issue and, thus, waives the physician-patient privilege. *See* OHIO REV. CODE ANN. § 2317.02(B)(1)(a)(iii) (West 2011). While the attorney-client privilege and physician-patient privilege were addressed in the same paragraph of Ohio's privilege statute from the time the physician-patient privilege was added in 1870, the physician-patient privilege was moved to a separate paragraph in 1975. Amended Substitute H.B. No. 682, 111th Gen. Assemb., Reg. Sess., 1975 Ohio Laws 2809, 2813 (moving physician-patient privilege to a new paragraph (B) and relettering other paragraphs).

[87] *Harpman*, 10 N.E.2d at 777.

[88] *Id*. at 777-78.

[89] *Id*. at 779.

[90] *Id*. (quoting Ariz. & N.M. Ry. Co. v. Clark, 235 U.S. 669, 676 (1915)).

[91] *Id*. at 780.

[92] *Baker*, 21 N.E.2d at 593.

[93] *Id.*

[94] *Id*.

[95] *Id*. at 597.

oral communications between himself and [the physician]. Because he did not voluntarily testify as to any oral communications, there was no waiver in respect to such subject."[96]

As Justice Zimmerman pointed out in his dissents in both cases, *Harpman* and *Baker* clearly rejected a rule that merely testifying voluntarily results in a waiver as to all issues on which there is voluntary testimony and, instead, applied a rule that a waiver occurs only when voluntary testimony discloses privileged communications.[97] As explained in Part IV below, this is a perfectly sensible rule, but it was one that *King* and *Spitzer* considered at some length and rejected as being inconsistent with the statutory language.[98]

In the 1940s and 1950s, some intermediate Ohio appellate courts applied the rule in *Harpman*,[99] while others followed *Spitzer*.[100] In addition, Ohio rearranged its statutes again in 1953, and Ohio General Code § 11494 became Ohio Revised Code § 2317.02. Although the physician-patient privilege has since been moved to a separate paragraph, substantially modified,[101] and there have been other changes to

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[96] *Id.* at 596.

[97] *Harpman*, 10 N.E.2d at 781-82 (Zimmerman, J., dissenting); *Baker*, 21 N.E.2d at 597 (Zimmerman, J., dissenting).

[98] *Compare Harpman*, 10 N.E.2d at 779 ("Not having voluntarily testified respecting any 'communications' or 'advice' from Dr. Fusselman, there was no waiver under the statute."), *and Baker*, 21 N.E.2d at 597 ("[With] respect to any oral communications between the plaintiff and Dr. Phillips there was no waiver for the reason that the plaintiff had not voluntarily testified in respect thereto."), *with* King v. Barrett, 11 Ohio St. 261, 264 (1860) ("In the case before us, Barrett, being a party, voluntarily offered himself as a witness generally, in his own behalf. In so doing, he waived all the protection which the law would otherwise have afforded to communications made by him to his attorney, pertinent to the issue on trial."), *and* Spitzer v. Stillings, 142 N.E.2d 365, 366 (Ohio 1924) ("If the Legislature meant the word 'subject' to be confined to the subject of the communication between the client and the attorney, it could easily have so stated, and, in the absence of that limitation, it is more probable that it was intended to include the subject-matter of his testimony generally.").

[99] *See* Foley v. Poschke, 32 N.E.2d 858, 861 (Ohio Ct. App. 1949) ("Although the Supreme Court of Ohio, in its opinion [in *Harpman*], states that [*King* and *Spitzer*] can be distinguished, it is not easy to distinguish them . . . . We deem it our duty follow the decision in the *Harpman* case . . . as being the latest expression of the Supreme Court of Ohio on this question."), *aff'd on other grounds*, 31 N.E.2d 845 (Ohio 1941).

[100] *See In re* Roberto, 151 N.E.2d 37, 41 (Ohio Ct. App. 1958) ("The rule should be . . . that when a patient testifies voluntarily for the purpose of perpetuating testimony by way of deposition as has been related herein, but does not testify as to the physician's findings upon examination and his diagnosis of her condition, . . . that the physician can be required to answer inquiries relating thereto because the patient waived the privilege attaching thereto by testifying generally to her condition and treatment."); Rospert v. Old Fort Mills, Inc., 78 N.E.2d 909, 913 (Ohio Ct. App. 1947) ("When the plaintiff offered himself as a witness as to the value of the use, then any statement he made to his attorney as to the value of the use is not protected by Section 11494, General Code.").

[101] *See* Amended Substitute H.B. No. 682, 111th Gen Assemb., Reg. Sess., 1975 Ohio Laws 2809, 2813 (moving physician-patient privilege to a new paragraph (B)); OHIO REV. CODE ANN. § 2317.02(B) (West 2010) (current version of physician-patient privilege).

the attorney-client privilege statute,[102] the language relating to the effect of voluntary testimony on the attorney-client privilege that is the focus of this Article has remained the same.

## III. RECENT DECISIONS ADDRESSING WAIVER THROUGH VOLUNTARY TESTIMONY

A rule that a client's voluntary testimony, even if no privileged communications are disclosed, waives the attorney-client privilege with respect to subjects addressed in the testimony is highly unusual in the United States. In the middle of the twentieth century, at least five other states had privilege statutes that were, in this respect, similar to Ohio's: North Dakota, Oklahoma, Oregon, South Dakota, and Wyoming.[103] Since then, all of those states except Wyoming have adopted new

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[102] *See infra* notes 157 & 158. OHIO REV. CODE ANN. § 2317.02 now provides that "[t]he following persons shall not testify in certain respects:"

> (A)(1) An attorney, concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client. However, 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.
>
> The testimonial privilege established under this division does not apply concerning a communication between a client who has since died and the deceased client's attorney if the communication is relevant to a dispute between parties who claim through that deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction, and the dispute addresses the competency of the deceased client when the deceased client executed a document that is the basis of the dispute or whether the deceased client was a victim of fraud, undue influence, or duress when the deceased client executed a document that is the basis of the dispute.
>
> (2) An attorney, concerning a communication made to the attorney by a client in that relationship or the attorney's advice to a client, except that if the client is an insurance company, the attorney may be compelled to testify, subject to an in camera inspection by a court, about communications made by the client to the attorney or by the attorney to the client that are related to the attorney's aiding or furthering an ongoing or future commission of bad faith by the client, if the party seeking disclosure of the communications has made a prima facie showing of bad faith, fraud, or criminal misconduct by the client.

*Id.*

[103] The collection of state attorney-client privilege statutes in the 1961 edition of Wigmore's treatise *Evidence in Trials at Common Law* reflected that North Dakota, Oklahoma, Oregon, South Dakota, and Wyoming had attorney-client privilege statutes that were, in this respect, similar to Ohio's. 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292 n.2 (John T. McNaughton rev., Little, Brown & Co. 1961) (quoting N.D. REV. CODE § 31-0107 (1943) ("'If a person testifies as a witness to any subject which comes within the protection' of [the statutory attorney-client privilege], 'it is a consent to his attorney's examination on the same subject matter.'"); OKLA. STAT. ANN. tit. 12, § 385 (West 1959) ("The following persons shall be incompetent to testify: . . . 4. An attorney, concerning any communications made to him by his client, in that relation, or his advice thereon, without the client's consent. . . . 6. . . . Provided, that if a person offer himself as a witness, that is to be deemed a consent to the examination; also, if an attorney . . . on the same subject."); OR. REV.

statutes or rules that do not provide that a client testifying voluntarily results in a privilege waiver.[104]

Indeed, we suspect this rule is largely unknown, even to most attorneys practicing in Ohio courts, and that it is invoked in only a very small percentage of instances in which it potentially might be applied. Certainly, the current statutory language does not highlight the issue and could be construed to support a rule that waivers occur only when voluntary testimony discloses the substance of otherwise privileged communications. Further, when both sides are offering voluntary testimony, rational litigants could easily decide that the potential costs of advancing this argument outweigh the likely benefits based on a "mutually assured destruction" rationale. For at least these reasons, parties in proceedings in Ohio courts rarely seek to invoke this rule, and decisions where it is applied are uncommon.

Nonetheless, in recent years courts applying Ohio law have applied the waiver through voluntary testimony rule on multiple occasions. For example, in 1983, the Supreme Court of Ohio applied the rule in *Westervelt v. Rooker*.[105] There, the

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STAT. § 44.040(2) (1957) ("If a party . . . offers himself as a witness, it is deemed a consent to the examination also of [his] . . . attorney . . . on the same subject."); S.D. CODIFIED LAWS § 36.0102 (1939) ("If a person offer himself as a witness he thereby waives any privilege he might otherwise claim, which would prevent the examination of his attorney . . . on the same subject."); WYO. STAT. ANN. § 3-2602 (1945) ("The following persons shall not testify in certain respects: 1. An attorney, concerning a communication made to him by his client in that relation, or his advice to his client; . . . but the attorney . . . may testify by express consent of the client . . . ; and if the client . . . voluntarily testify, the attorney . . . may be compelled to testify, on the same subject."")). Most courts interpreting these statutes have found broad privilege waivers based on voluntary client testimony. *E.g.*, Sitton v. Peyree, 241 P. 62, 65 (Or. 1925) (under Oregon's attorney-client privilege statute, the client "removed the seal of secrecy by taking the witness stand in his own behalf"); Gerlinger v. Frank, 145 P. 1069, 1070 (Or. 1915) (affirming trial court's decision to allow an attorney to testify because the client had already testified on the same subject); *In re* Young's Estate, 116 P. 95, 97 (Or. 1911) (the client "having voluntarily gone upon the stand as a witness upon the general subject, waived the right" to object to the examination of the client's attorney on that same subject). Others, however, read the statutes more narrowly to require that the client's testimony disclose the otherwise privileged communications. *E.g.*, Hudson v. Blanchard, 294 P.2d 554 (Okla. 1956) (patient waived physician-patient privilege only when voluntary testimony referenced the communications with the physician), *overruled by* Robinson v. Lane, 480 P.2d 620, 622 (Okla. 1971).

[104] North Dakota, Oklahoma, Oregon, and South Dakota have adopted attorney-client privilege statutes or rules based on Rules 502 and 510 of the Uniform Rules of Evidence. N.D. R. EVID. 502, 511 (West 2011); OKLA. STAT. ANN. tit. 12, §§ 2502 & 2511 (West 2011); OR. REV. STAT. §§ 40.225 & 40.280 (2011); S.D. CODIFIED LAWS §§ 19-13-1 to -5, 19-13-26 to -27 (2011). As reflected in footnote 162 below, Rules 502 and 510 of the Uniform Rules of Evidence do not provide that voluntarily testifying waives the attorney-client privilege. Wyoming's statute, although renumbered, has not changed in this respect. WYO. STAT. ANN. § 1-12-101 (2011) ("(a) The following persons shall not testify in certain respects: (i) An attorney or a physician concerning a communication made to him by his client or patient in that relation, or his advice to his client or patient. The attorney or physician may testify by express consent of the client or patient, and if the client or patient voluntarily testifies the attorney or physician may be compelled to testify on the same subject."). We have not located decisions explaining the scope of waiver covered by the phrase "on the same subject" in the Wyoming statute.

[105] Westervelt v. Rooker, 447 N.E.2d 1307 (Ohio 1983).

plaintiff testified at trial regarding his version of the accident that was at issue.[106] Over an objection, defense counsel on cross-examination was permitted to ask about the plaintiff's discussions with his counsel that had occurred during a recess.[107] Following a defense verdict, the plaintiff appealed, and the court of appeals reversed based in part on its conclusion that the trial court erred in permitting inquiry into the attorney-client communications that occurred during the recess.[108] The Supreme Court of Ohio reversed the intermediate appellate court.[109] Citing *Spitzer* and *King*, the court disposed of this issue in two sentences:

> [P]revious pronouncements of this court have held that where a party testifies in any trial, such party may be cross-examined by the opposing party concerning communication with his attorney on any subject pertinent to his claim or defense, even though the fact of communications that have passed between them has not been referred to by such party in direct examination. Therefore, we conclude that the trial court properly permitted the cross-examination.[110]

In 2002, an intermediate Ohio appellate court applied the waiver through voluntary testimony rule in *Amer Cunningham Co., L.P.A. v. Cardiothoracic & Vascular Surgery of Akron*.[111] *Amer Cunningham* involved a dispute between a law firm and its former client over unpaid legal fees.[112] During discovery, the plaintiff law firm subpoenaed Frank Lettieri, an attorney formerly employed at the firm who had performed legal services for the defendant.[113] Lettieri moved to quash the subpoena based on the attorney-client privilege and the work product protection.[114]

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[106] *Id*. at 1307.

[107] *Id.* at 1310.

[108] *Id*.

[109] *Id*.

[110] *Id*. (citations omitted). The fact that the attorney-client communications at issue in *Westervelt* occurred during a recess while the plaintiff was testifying could, depending on the facts, have provided a different basis for overcoming the privilege. Many courts bar communications between the witness and others, including the witness's attorney, during recesses under the so-called "rule on witnesses." *See* Perry v. Leeke, 488 U.S. 272 (1989) (judge's bar on communications between criminal defendant and his counsel during 15-minute recess did not violate defendant's Sixth Amendment right to counsel); Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Pa. 1993) (in civil action, barring communications with counsel during breaks in deposition); *but see* Geders v. United States, 425 U.S. 80 (1976) (bar on communications between defendant and his counsel during overnight recess that occurred during his testimony denied defendant his Sixth Amendment right to counsel). Although there is no indication in the Supreme Court of Ohio's opinion that such an instruction was given by the *Westervelt* trial court, if one was given, then violating the trial court's order would have been an independent basis for ordering disclosure.

[111] Amer Cunningham Co., L.P.A. v. Cardiothoracic & Vascular Surgery of Akron, No. 20899, 2002 Ohio App. LEXIS 4182, at *3 (Ohio Ct. App. Aug. 7, 2002).

[112] *Id*. at *1.

[113] *Id*. at *2.

[114] *Id*.

The law firm then moved to compel, and the trial court granted the motion, finding that the deposition testimony of defendant's president had waived the privilege.[115]

On appeal, Lettieri argued that the testimony of defendant's president did not waive the privilege because it occurred during cross-examination in a deposition and, thus, was not "voluntary" under Ohio Revised Code § 2317.02(A).[116] Rejecting a bright line rule that testimony given on cross-examination is not voluntary, the appellate court held that whether testimony elicited on cross-examination is "voluntary" for these purposes requires "a court . . . [to] consider the facts of the case before it, specifically the questions and answers from the deposition, and then decide if the testimony concerning the relevant information was voluntary."[117] Based on the incomplete record before it, the appellate court affirmed the trial court's waiver ruling, finding that the defendant had failed to establish that the testimony was not "voluntary."[118] Thus, under the *Amer Cunningham* rationale, merely submitting to cross-examination in a deposition could result in a waiver through voluntary testimony under Ohio Revised Code § 2317.02(A).[119]

In 2008, another intermediate Ohio appellate court applied the waiver through voluntary testimony rule in *Air-Ride, Inc. v. DHL Express (USA), Inc.*, a breach of contract action.[120] There, the defendant produced a two-page e-mail between one of its in-house counsel and an employee.[121] The plaintiff's counsel discovered the e-mail and notified the defendant's counsel, who moved for its return as having been inadvertently produced, when the plaintiff's counsel refused to return it.[122] The trial court denied the defendant's motion based on its conclusion that, by attaching an affidavit that addressed the same subjects to a motion for summary judgment, the

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[115] *Id*. The appellate court's description of Dr. Kamienski's deposition is brief, but apparently he answered questions about discussions he had had with Lettieri. *Id*. at *8. According to the appellate court, Dr. Kamienski answered all of the posed questions without the imposition of any objections on privilege grounds, discussed the requested topics, and clarified his answers when necessary. *Id*. at *9.

[116] *Id*.

[117] *Id*.

[118] *Id*. at *9-10.

[119] Other Ohio courts have held that testimony given on cross-examination is not voluntary testimony and does not constitute a waiver of the privilege under OHIO REV. CODE ANN. § 2317.02 (West 2011). *E.g*., Carver v. Deerfield Twp., 742 N.E.2d 1182, 1190 (Ohio Ct. App. 2000) (holding that testimony provided during a deposition upon cross-examination is not voluntary testimony and does not result in waiver of the attorney-client privilege under OHIO REV. CODE § 2317.02); Woyczynski v. Wolf, 464 N.E.2d 612, 616 (Ohio Ct. App. 1983) ("waiver of the privilege will not be presumed from the fact that the client was called to testify as on cross-examination, because this is not considered to be 'voluntary testimony' within the meaning of the statute"); *but see* Rubel v. Lowe's Home Centers, Inc., 580 F. Supp. 2d 626, 628-29 (N.D. Ohio 2008) (when party elected to introduce issue during his deposition on cross-examination and testimony was not forced from him, the party waived the attorney-client privilege under OHIO REV. CODE § 2317.02).

[120] Air-Ride, Inc. v. DHL Express (USA), Inc., No. 2008-01-001, 2008-Ohio-5669, ¶ 2 (Ohio Ct. App. Nov. 3. 2008).

[121] *Id*.

[122] *Id*. ¶ 4.

defendant had waived the attorney-client privilege under Ohio Revised Code § 2317.02(A).[123]

Affirming, the appellate court noted that, before the e-mail was produced, the defendant had submitted an affidavit in support of a summary judgment motion that addressed the same subject matters that were the focus of the two-page e-mail at issue.[124] Looking to definitions of "testimony" articulated in *Crawford v. Washington*,[125] which addressed the Sixth Amendment's Confrontation Clause,[126] the *Air-Ride* court concluded that the defendant's summary judgment affidavit was "testimony" for purposes of Ohio Revised Code § 2317.02(A).[127] Thus, the court concluded that, "[w]hen the affidavit was filed, [the defendant] waived any claimed privilege over attorney-client communications on that particular subject."[128]

As the decisions in *Westervelt*, *Amer Cunningham*, and *Air-Ride* reflect, there is a meaningful risk that a court could find that, under Ohio Revised Code § 2317.02(A), a client's voluntary testimony waives the attorney-client privilege with respect to otherwise privileged communications relating to the subject matters on which the client testifies. And, as discussed above, there is some support for this result in Ohio Revised Code § 2317.02(A)'s language, the legislative history (such as it is), and the Supreme Court of Ohio's decisions in *King* and *Spitzer*.[129] Furthermore, the *Amer*

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[123] *Id.* The trial court also found that, on those facts, the inadvertent production resulted in a waiver under a five-factor balancing analysis. *Id.* The intermediate appellate court affirmed that determination. *Id.* ¶ 29.

[124] *Id.* ¶ 11.

[125] Crawford v. Washington, 541 U.S. 36 (2004).

[126] In *Crawford*, the trial court had, over the defendant's objection that it violated the Sixth Amendment's Confrontation Clause, permitted the prosecution to play a police tape recording of the defendant's wife because there were sufficient indicia of reliability to pass muster under the hearsay rules. *Id.* at 40. The Court found that, "even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers falls squarely within that class." *Id.* at 53 (footnote omitted). It then reversed the defendant's conviction because "[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68.

[127] *Air-Ride, Inc.*, 2008-Ohio-5669, ¶¶ 9, 11.

[128] *Id.* ¶ 11; *see also* Rubel v. Lowe's Home Centers, Inc., 580 F. Supp. 2d 626, 628 (N.D. Ohio 2008) (party's affidavit testimony waived the attorney-client privilege "as to any subject to which he testified and pertinent to his claim"); Gialousis v. Eye Care Assoc., Inc., No. 05 MA 163, 2007-Ohio-120, ¶¶ 20, 24 (Ohio Ct. App. Mar. 12, 2007) (voluntary testimony through an affidavit waived the attorney-client privilege with regard to the subject matter of the testimony).

[129] There are, of course, substantial counterarguments. For example, one could advocate a different rule based on: (1) the Supreme Court's rulings in *Harpman* and *Baker*; (2) the claim that the 1878 Ohio CCP's wording was substantively different from § 315 of the 1853 Ohio CCP and, thus, they can be read differently; (3) the claim that *Spitzer* appeared to assume that the clients had perjured themselves, which today could have allowed the same result by, perhaps, the crime-fraud exception; and (4) the policy arguments outlined in the next section. Further, while the Supreme Court of Ohio found that the Ohio attorney-client privilege statute departed from and was contrary to the common law in this context in *King* and *Spitzer*, the court has imported common law concepts into Ohio's law of privilege in other contexts. *See,*

*Cunningham* and *Air-Ride* courts took expansive approaches to defining when the "client voluntarily testifies" for purposes of Ohio Revised Code § 2317.02(A), which creates additional risk and uncertainty.

## IV. AN ASSESSMENT OF THE WAIVER THROUGH VOLUNTARY TESTIMONY RULE

Assuming the rule in Ohio is that when a client voluntarily testifies he or she waives the attorney-client privilege with respect to otherwise privileged communications that relate to the same subject matters, can such a rule be reconciled with, and does it further, the policies that underlie the attorney-client privilege? As detailed below, in our view, it does not for multiple reasons.

First, the basic purpose of the attorney-client privilege is "to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'"[130] It "is founded on the premise that confidences shared in the attorney-client relationship are to remain confidential."[131] "[B]y protecting client communications designed to obtain legal advice or assistance, the client will be more candid and will disclose all relevant information to his attorney, even potentially damaging and embarrassing facts."[132] As Chief Justice Burger observed in *Upjohn Co. v. United States*:[133]

> [I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.[134]

The waiver through voluntary testimony rule seriously undermines these policies. At the time of the attorney-client communication, it is nearly impossible for either the attorney or the client to reliably assess whether the client will need to testify voluntarily on the same subjects at some point in the future. This is particularly true given that "voluntary testimony" may extend to simply responding to cross-examination in a deposition, as it did in *Amer Cunningham*.[135]

The decision of the United States Supreme Court in *Swidler & Berlin*[136] is instructive. There, Vincent Foster, who worked in the Clinton White House, had met with his personal attorney shortly before Foster committed suicide, and the

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*e.g.*, Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp., 937 N.E.2d 533, 538-44 (Ohio 2010) (describing multiple common law exceptions to Ohio's attorney-client privilege).

[130] Ohio *ex rel.* Toledo Blade Co. v. Toledo-Lucas Cnty. Port Auth., 905 N.E.2d 1221, 1226 (Ohio 2009) (quoting Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998)).

[131] *Id.* (quoting Moskovitz v. Mt. Sinai Med. Ctr., 635 N.E.2d 331, 349 (Ohio 1994)).

[132] *Squire, Sanders & Dempsey*, 937 N.E.2d at 537 (quoting State *ex rel.* Leslie v. Ohio Hous. Fin. Agency, 824 N.E.2d 990, 994 (Ohio 2005)).

[133] Upjohn Co. v. United States, 449 U.S. 383 (1981).

[134] *Id.* at 393.

[135] *See supra* notes 111-19 and accompanying text.

[136] *Swidler*, 524 U.S. 399.

Independent Counsel sought Foster's attorney's notes.[137] The Independent Counsel contended that the privilege should give way when communications are sought posthumously in a criminal investigation and that such a rule would have "minimal impact."[138] The Court disagreed, observing that:

> [A] client may not know at the time he discloses information to his attorney whether it will later be relevant to a civil or a criminal matter, let alone whether it will be of substantial importance. Balancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application. For just that reason, we have rejected use of a balancing test in defining the contours of the privilege.[139]

Separately, the Independent Counsel argued that, given the number of exceptions to the privilege, "the impact of one more exception" would be "marginal."[140] Again, the Court did not agree:

> The established exceptions [to the privilege] are consistent with the purposes of the privilege, while a posthumous exception in criminal cases appears at odds with the goals of encouraging full and frank communication and of protecting the client's interests. A "no harm in one more exception" rationale could contribute to the general erosion of the privilege.[141]

A rule that voluntary testimony waives the privilege, like the exception the Independent Counsel proposed in *Swidler & Berlin*, is not "consistent with the purposes of the privilege" and "appears at odds with the goals of encouraging full and frank communication and of protecting the client's interests."[142]

Second, the policy that the waiver through voluntary testimony rule was designed to further—reducing the risk that witnesses will commit perjury—can be (and is) served in several other ways. To the extent that a client commits perjury, the crime-fraud exception to the attorney-client privilege, if properly invoked and established, may strip away the privilege from communications that were made in contemplation and furtherance of the perjury.[143] Ethics rules bar attorneys from "offer[ing] evidence that the lawyer *knows* to be false" and, if the lawyer "has offered material evidence and the lawyer comes to *know* of its falsity, the lawyer shall take *reasonable* measures to remedy the situation, including, if necessary, disclosure to

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[137] *Id.* at 401-02.

[138] *Id.* at 408.

[139] *Id.* at 409.

[140] *Id.*

[141] *Id.* at 409-10 (citations omitted).

[142] *Id.*

[143] *See generally* Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp., 937 N.E.2d 533, 538-39 (Ohio 2010); Boone v. Vanliner Ins. Co., 744 N.E.2d 154 (Ohio 2001) (superseded by statute); Moskovitz v. Mt. Sinai Med. Ctr., 635 N.E.2d 331 (Ohio 1994); *see also* United States v. Zolin, 491 U.S. 554 (1989).

the tribunal."[144] Furthermore, the safeguards for discerning the truth that were advanced in support of abolishing the witness rule in the first half of the nineteenth century—the ability to subject testimony to cross-examination and the fact finder's awareness of a witness's interests—continue to apply.[145]

Third, for criminal defendants the waiver through voluntary testimony rule creates substantial tension between the right to testify on the one hand, and the right to counsel on the other. *Duttenhofer* found that the waiver through voluntary testimony rule did not apply in a criminal action, but reached that conclusion because § 315 of the 1853 Ohio CCP applied only in civil proceedings.[146] Since the enactment of the predecessor to Ohio Revised Code § 2945.11 in 1929, that no longer is true. Thus, in *Ohio v. Crissman*,[147] the Ohio appellate court proceeded cautiously, noting that "if the defendant in a criminal case voluntarily testifies, his attorney may be compelled to testify on the same subject *unless barred by constitutional rights of the defendant*."[148] *Crissman* then noted that, "as a matter of good practice, the use of defense counsel as a witness for the state should be avoided where at all possible in criminal cases" and, when "circumstances justify . . . use of defense counsel as a witness for the state," it should be "for limited purposes."[149] Even assuming the prosecutors follow this "good practice," it may be difficult to determine whether a defendant chose to forego taking the witness stand based on a concern that if he or she did, the prosecution would have the unfettered right to cross-examine defense counsel on the same subjects.

## V. POSSIBLE CHANGES TO OHIO'S PRIVILEGE STATUTE

Ohio's privilege statute, Ohio Revised Code § 2317.02, is something of a hodgepodge. The statute has been amended nearly thirty times in the past thirty-five years.[150] For over a hundred years until the mid-1970s, it had addressed only four privileges: those for communications between (1) attorneys and clients; (2) doctors and patients; (3) clergymen and penitents; and (4) husbands and wives.[151] Since the mid-1970s, the statute has been amended to recognize new privileges for communications with (1) podiatrists and osteopaths;[152] (2) school guidance

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[144] OHIO R. PROF. CONDUCT 3.3(a)(3) (2011) (italics in original).

[145] *See supra* notes 11-13 and accompanying text.

[146] Duttenhofer v. State, 34 Ohio St. 91, 95 (1877).

[147] State v. Crissman, 287 N.E.2d 642 (Ohio Ct. App. 1971).

[148] *Id.* at 649 (emphasis added).

[149] *Id.*

[150] *See* OHIO REV. CODE ANN. § 2317.02 (West 2010) (explaining legislative history).

[151] 3 SAYLER, *supra* note 47, at 2375, 2378-79. The 1853 Ohio CCP addressed communications between husbands and wives (§ 314(3)), attorneys and clients (§ 314(4)), and clergymen or priests and penitents (§ 314(5)). *Id.* In 1870, the paragraph in § 314 addressing attorneys and clients was expanded to also include communications between physicians and patients. *Id.*

[152] Amended H.B. 1426, 111th Gen. Assemb., Reg. Sess., 1976 Ohio Laws 3840, 3843 (amending OHIO REV. CODE § 2317.02(B) to expressly include podiatrists and osteopaths).

counselors;[153] (3) chiropractors;[154] (4) critical stress management teams;[155] and (5) employee assistance professionals.[156] Further, three amendments have modified the conditions under which the attorney-client privilege is waived or inapplicable,[157] and another addressed the application of the attorney-client privilege in the context of insurance bad faith claims.[158]

Notwithstanding the General Assembly's "tweaking" in recent decades, Ohio's attorney-client privilege statute is a partial, antiquated codification that coexists with, but does not replace, the common law attorney-client privilege.[159] Ohio's privilege

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[153] Amended Substitute H.B. 205, 115th Gen. Assemb., Reg. Sess., 1984 Ohio Laws 2246, 2247-48 (adding new paragraph (G) to OHIO REV. CODE § 2317.02 relating to communications with school guidance counselors). *See also* Amended Substitute H.B. 374, 124th Gen. Assemb., Reg. Sess., 2002 Ohio Laws 10042, 10057 (expanding types of counselors subject to OHIO REV. CODE § 2317.02(G)).

[154] Substitute H.B. 506, 123d Gen. Assemb., Reg. Sess., 2000 Ohio Laws 5453, 5469-70 (adding, among other things, new paragraph (J) to OHIO REV. CODE § 2317.02 recognizing privilege for communications with chiropractors). *See also* Amended Substitute S.B. 281, 124th Gen. Assemb., Reg. Sess., 2002 Ohio Laws 3791, 3815-17 (making minor modifications to OHIO REV. CODE § 2317.02(J)).

[155] Substitute S.B. 19, 126th Gen. Assemb., Gen. Sess., 2005 Ohio Laws 639, 646 (adding, among other things, new paragraph (K) to OHIO REV. CODE § 2317.02 relating to communications with critical stress management team members).

[156] *Id.* (adding, among other things, new paragraph (L) to OHIO REV. CODE § 2317.02 relating to communications with employee assistance professionals).

[157] Amended H.B. 576, 100th Gen. Assemb., Reg. Sess., 1953 Ohio Laws 313 (amending OHIO REV. CODE § 2317.02(A) to allow surviving spouse or executor to waive privilege for deceased clients); Amended Substitute H.B. 529, 116th Gen. Assemb., Reg. Sess., 1988 Ohio Laws 4865, 4871 (making the waiver provisions of what now is OHIO REV. CODE § 2151.421, which relates to reporting child neglect and abuse, applicable to waive the attorney-client privilege under OHIO REV. CODE § 2317.02(A)); Substitute H.B. 144, 126th Gen. Assemb., Reg. Sess., 2006 Ohio Laws 5941, 5942 (adding new paragraph to OHIO REV. CODE § 2317.02(A) making the attorney-client privilege inapplicable to deceased client's communications that are "relevant to a dispute between parties who claim through that deceased client").

[158] Amended Substitute S.B. No. 117, 126th Gen. Assemb., Reg. Sess., 2006 Ohio Laws 2274, 2281 (adding new subparagraph (2) to OHIO REV. CODE § 2317.02(A) relating to insurance bad faith claims and making former paragraph (A) new subparagraph (A)(1)).

[159] Very generally, communications that fall within the express language of the attorney-client privilege statute, OHIO REV. CODE § 2317.02, are governed by the statute, but, if the statute does not apply, the common law applies. Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp., 937 N.E.2d 533, 538 (Ohio 2010) (citing State *ex rel.* Leslie v. Ohio House Fin. Agency, 824 N.E.2d 990, 994 (Ohio 2005)). Thus, if the statutory privilege applies, it typically governs the scope of the privilege. *See* State *ex rel.* Toledo Blade Co. v. Toledo-Lucas Cnty. Port Auth., 905 N.E.2d 1221, 1227 (Ohio 2009). And, in situations not addressed by OHIO REV. CODE § 2317.02, the common law generally defines the nature and scope of the privilege. *Id.*; *see also* State v. McDermott, 651 N.E.2d 985, 987-88 (Ohio 1995) (discussing distinctions between scope of statutory and common law attorney-client privilege); Grace v. Mastruserio, 912 N.E.2d 608, 612-15 (Ohio App. Ct. 2007) (same). Further, Ohio courts have incorporated common-law concepts into their interpretations of the statutory attorney-client privilege. *E.g.*, *Squire, Sanders & Dempsey, L.L.P.*, 937 N.E.2d at

statute raises several practical problems for Ohio practitioners. For example, Ohio courts have found that the identical language means different things in different paragraphs of Ohio Revised Code § 2317.02.[160] Moreover, because the attorney-client privilege is governed by statute in some situations and common law in others, the scope of the privilege can vary greatly depending on which set of rules govern in a particular scenario.[161]

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544 (stating that "Ohio recognizes common-law exceptions to the privilege" and identifying common-law exceptions to the privilege); Moskovitz v. Mount Sinai Med. Ctr., 635 N.E.2d 331, 349 (Ohio 1994) (noting that the statutory privilege does not apply when the advice sought by the client relates to a future unlawful transaction); Lemley v. Kaiser, 452 N.E.2d 1304, 1310 (Ohio 1983) (observing that "[i]n the determination [of] whether a communication by a client to an attorney should be afforded the cloak of privilege, much ought to depend on the circumstances of each case" and looking to decisions from New York and Pennsylvania courts to determine the scope of Ohio's statutory attorney-client privilege (internal quotations omitted)).

[160] *Compare supra* Part II.F (discussing Ohio Supreme Court's analysis of the phrase "on the same subject" in context of the physician-patient privilege) *with supra* Parts II.B-C & E (discussing Ohio Supreme Court's analysis of the same phrase in the context of the attorney-client privilege). Indeed, in his dissent in *Harpman*, Justice Zimmerman noted that the majority's interpretation of the phrase "on the same subject" in the subsection of Ohio's privilege statute addressing communications between doctors and patients was "expressly disapproved" by the Ohio Supreme Court in *Spitzer* when it was analyzing the meaning of the same phrase in the subsection of the statute addressing communications between attorneys and clients. Harpman v. Devine, 10 N.E.2d 776, 782 (Ohio 1937) (Zimmerman, J., dissenting).

[161] A communication's privileged status has been found to depend on whether the statutory or common law privilege applies. For example, in *State v. Post* a criminal defense attorney employed a polygraph examiner to examine his client in preparation for the defense in a murder case. State v. Post, 513 N.E.2d 754, 760 (Ohio 1987). During the examination, the client confessed to the murder. *Id*. During a hearing on a motion *in limine*, the client's cellmate testified that the client told him that he had confessed to the polygraph examiner. *Id.* The prosecutor then sought to question the polygraph examiner about the client's confession. *Id*. The trial court held that, while the client's communications to the polygraph examiner may have been initially privileged, by disclosing their contents to the cellmate, a third party, the client waived any privilege associated with them. *Id*. The Supreme Court of Ohio affirmed the trial court's decision, stating that "[w]e hold 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." *Id.* at 761.

In contrast, in *State v. McDermott*, which also involved a murder trial and a disclosure of privileged communications to a third party, the Supreme Court of Ohio concluded that there was no waiver of the privilege. State v. McDermott, 651 N.E.2d 985, 988 (Ohio 1995). There, the police arrested McDermott five years after the murder of Elmwood McKown. *Id.* at 986. The prosecutor subpoenaed the attorney who had represented McDermott at the time of the murder to testify about conversations he had with McDermott immediately after the murder. *Id*. During pre-trial hearings to determine whether the attorney-client privilege had been waived, the prosecutor called two witnesses to the stand who testified that McDermott had told them that he had admitted to his attorney that he had killed McKown. *Id.* When the prosecutor called the attorney to the stand at the trial, the attorney refused to answer the prosecutor's questions for which he was held in contempt and jailed for two days. *Id.* The Supreme Court of Ohio reversed the trial court's decision. *Id.* at 988. The court stated that, under OHIO REV. CODE § 2317.02(A), there are only two ways to waive the attorney-client privilege: (1) the client expressly consents, or (2) the client voluntarily testifies. *Id.* at 987.

Rather than further amending Ohio's oft-modified privilege statute that, in many respects, dates back over a hundred years, one solution would be for the General Assembly to repeal the current attorney-client privilege statute and replace it with a modern, reasonably comprehensive attorney-client privilege rule based on Rules 502 and 510 of the Uniform Rules of Evidence.[162] Under Rules 502 and 510 of the

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Because the statute provides the exclusive means by which privileged communications directly between an attorney and a client can be waived and it was undisputed that McDermott neither consented nor voluntarily testified, the court held that McDermott did not waive the privilege by disclosing the content of his communications with his attorney to multiple third parties. *Id.* at 988.

*McDermott* recognized a tension with *Post*, but distinguished *Post* because *Post* involved a communication between a client and an agent of an attorney (i.e., the polygraph examiner), which "are not protected by the statute" and, instead, are governed by common law. *Id.* at 987-88. Under the common law, the privilege may be waived by disclosing the content of privileged communications to a third party. *Id*. In contrast, the communications in issue in *McDermott* were directly between an attorney and his client, and so, pursuant to OHIO REV. CODE § 2317.02(A), could be waived only with McDermott's express consent or by him voluntarily testifying on the same subject matter. *Id*.

[162] Rule 502, governing lawyer-client privilege, provides:

> (a) Definitions. In this rule: (1) "Client" means a person for whom a lawyer renders professional legal services or who consults a lawyer with a view to obtaining professional legal services from the lawyer. (2) A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. (3) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any State or country. (4) "Representative of the client" means a person having authority to obtain professional legal services, or to act on legal advice rendered, on behalf of the client or a person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client. (5) "Representative of the lawyer" means a person employed, or reasonably believed by the client to be employed, by the lawyer to assist the lawyer in rendering professional legal services.
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> (b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client: (1) between the client or a representative of the client and the client's lawyer or a representative of the lawyer; (2) between the lawyer and a representative of the lawyer; (3) by the client or a representative of the client or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; (4) between representatives of the client or between the client and a representative of the client; or (5) among lawyers and their representatives representing the same client.
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> (c) Who may claim privilege. The privilege under this rule may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. A person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege, but only on behalf of the client.

Uniform Rules of Evidence, the client's voluntary testimony is not a broad waiver of the attorney-client privilege and, instead, generally waives the privilege only when it discloses the substance of the privilege communications.[163] This would, among other things, allow Ohio courts to tap into the substantial reservoir of decisions from other jurisdictions interpreting Rules 502 and 510.

An alternative solution would be to repeal Ohio Revised Code § 2317.02(A) and leave the attorney-client privilege solely to "principles of the common law." This is the approach Congress took with Federal Rule of Evidence 501.[164] Adopting a

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> (d) Exceptions. There is no privilege under this rule: (1) if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known was a crime or fraud; (2) as to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by transaction inter vivos; (3) as to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer; (4) as to a communication necessary for a lawyer to defend in a legal proceeding an accusation that the lawyer assisted the client in criminal or fraudulent conduct; (5) as to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; (6) as to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients; or (7) as to a communication between a public officer or agency and its lawyers unless the communication concerns a pending investigation, claim, or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to act upon the claim or conduct a pending investigation, litigation, or proceeding in the public interest.

UNIF. R. EVID. 502 (1999). Rule 510 provides for waiver of privilege:

> (a) Voluntary disclosure. A person upon whom these rules confer a privilege against disclosure waives the privilege if the person or the person's predecessor, while holder of the privilege, voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.
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> (b) Involuntary disclosure. A claim of privilege is not waived by a disclosure that was compelled erroneously or made without an opportunity to claim the privilege.

UNIF. R. EVID. 510 (1999).

[163] *See* UNIF. R. EVID. 510(a).

[164] FED. R. EVID. 501 provides in relevant part:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

And, even in federal courts applying federal common law, the attorney-client privilege is no longer exclusively a matter of common law since the September 2008 effective date of FED. R. EVID. 502, which addresses some aspects of the attorney-client privilege. Under OHIO R. EVID. 501, the common law applies when a statute does not: "The privilege of a witness, person, state or political subdivision thereof shall be governed by statute enacted by the

privilege rule similar to Federal Rule of Evidence 501 should not be a radical change, as Ohio courts have already developed a substantial body of case law setting forth rules governing the attorney-client privilege in situations not expressly governed by the statutory privilege.[165] Moreover, by switching from the unique language of Ohio's current privilege statute to principles of common law, Ohio courts would be able to take advantage of other courts' guidance on these issues without being limited by the language in Ohio Revised Code § 2317.02(A).

A third option would be to modify the language of Ohio Revised Code § 2317.02(A) to clearly provide that voluntary testimony waives the attorney-client privilege only in situations where the testimony reveals the content of the privileged communication. New Mexico and Kansas previously had attorney-client privilege statutes that, in the respects relevant here, were similar to Ohio Revised Code § 2317.02(A), but with important differences.[166] Specifically, those states' statutes made it reasonably clear that the privilege was waived only when the client's testimony referred to the substance of attorney-client communications. The New Mexico attorney-client privilege statute provided that, "[i]f a person offers himself as a witness and voluntarily testifies *with reference to the communications specified in this section*, that is a consent to the examination of the person to whom the communications were made as above provided."[167] The Kansas statute, in turn, provided that, "if a person without objection on his part *testifies concerning any such communication*, the attorney . . . communicated with may also be required to testify on the same subject as though consent had been given."[168] Along the lines of New Mexico's and Kansas's now-superseded statutes, Ohio Revised Code § 2317.02(A)(1) could be revised to read: "[I]f the client voluntarily ~~testifies~~ reveals

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General Assembly or by principles of common law as interpreted by the courts of this state in the light of reason and experience." *Id.*

[165] Ohio's common law governing the attorney-client privilege is probably more in line with how the average practitioner thinks the privilege operates than the statutory privilege. For example, the common law privilege recognizes that it can be waived by placing privileged communications in issue or by disclosing their contents to third parties. *See, e.g.*, Grace v. Mastruserio, 912 N.E.2d 608, 614-15 (Ohio Ct. App. 2007) (holding that, in situations not governed by OHIO REV. CODE § 2317.02(A), the test set forth in *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975), should be used to determine if a party's actions impliedly waived the attorney-client privilege); State v. Post, 513 N.E.2d 754, 761 (Ohio 1987) (holding that a client's disclosure of privileged communications between him and an agent of his attorney to a third party waive the privilege). In contrast, the statutory privilege appears to protect communications in situations where a practitioner might think there is no protection, such as when the client has repeatedly disclosed the content of the communications to third parties, and to not protect communications in situations where a practitioner would likely think the communications are protected, such as when a party voluntarily testifies without disclosing the substance of otherwise privileged communications. *See* discussion *supra* Parts II.B-C & E.

[166] In 1993, New Mexico adopted a new attorney-client privilege statute modeled on Uniform Rule of Evidence 502. *See* N.M. R. EVID. 11-503. In 1963, Kansas substantially revised its privilege statute and removed any reference to waiver based on voluntary testimony. *See* KAN. STAT. ANN. § 60-426 (West 2011).

[167] N.M. STAT. ANN. § 38-6-6(D) (1953) (emphasis added).

[168] KAN. GEN. STAT. ANN. § 60-2805 (1949) (emphasis added).

the substance of attorney-client communications in a non-privileged context . . . , the attorney may be compelled to testify on the same subject."[169]

## VI. CONCLUSION

The question of whether Ohio should retain the waiver through voluntary testimony rule—assuming that is the current rule—is neither close nor difficult. The relevant statute dates back to the middle of the nineteenth century when Ohio enacted its first code of civil procedure, and if it in fact leads to a waiver, has been substantively unchanged in the intervening one hundred fifty plus years. The rule undermines the policies the attorney-client privilege was designed to further, and the policy on which the rule apparently was based—preventing perjured testimony—no longer has the primacy it did in the mid-nineteenth century and, in any event, is addressed in several other ways. Ohio's General Assembly would be well advised, as described in the prior section, to repeal or revise Ohio Revised Code § 2317.02(A)(1) so as to clearly disavow a rule that the mere act of a client giving voluntary testimony waives the attorney-client privilege.

[169] A related, but distinct issue that is beyond the scope of this article is whether testimony that places otherwise privileged communications at issue waives the privilege or falls within an exception. *See, e.g.*, Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp., 937 N.E.2d 533 (Ohio 2010) (addressing attorney self protection exception to the privilege).