

OPINION NO. 87-005**Syllabus:**

Subject to the exceptions set forth in R.C. 2317.02(G)(1)-(6), R.C. 2317.02(G) prohibits a Rehabilitation Services Commission employee, who is licensed as a professional counselor under R.C. 4757.07 and serves as a professional counselor of RSC clients, from testifying concerning a confidential communication made to him by an RSC client in the professional counselor-client relationship or his advice to his client. (1946 Op. Att'y Gen. No. 931, p. 305, overruled.)

To: Robert L. Rabe, Administrator, Rehabilitation Service Commission, Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, February 4, 1987

I have before me your opinion request relating to communications between clients of the Rehabilitation Services Commission (hereinafter RSC) and RSC employees who are engaged in counseling as civil servants and who are licensed under R.C. Chapter 4757. You have asked whether such communications are privileged communications under R.C. 2317.02(G).

In order to answer your question I must first examine R.C. 2317.02, which states in pertinent part:

The following persons shall not testify in certain respects:

....
(G) A school guidance counselor who holds a valid teacher's certificate from the state board of education as provided for in section 3319.22 of the Revised Code or a person licensed or registered under Chapter 4757. of the Revised Code and rules adopted under it as a professional counselor, counselor assistant, social worker, social work assistant, or independent social worker concerning a confidential communication made to him by his client in that relation or his advice to his client unless any of the following apply:

(1) The communication or advice indicates clear and present danger to the client or other persons. For the purposes of this division, cases in which there are indications of present or past child abuse or neglect of the client constitute a clear and present danger.

(2) The client gives express consent to the testimony;

(3) If the client is deceased, the surviving spouse or the executor or administrator of the estate of the deceased client gives express consent;

(4) The client voluntarily testifies, in which case the school guidance counselor or person licensed or registered under Chapter 4757. of the Revised Code and rules adopted under it may be compelled to testify on the same subject;

(5) The court in camera determines that the information communicated by the client is not germane to the counselor-client or social worker-client relationship.

(6) A court, in an action brought against a school, its administration, or any of its personnel by the client, rules after an in camera inspection that the testimony of the school guidance counselor is relevant to that action.

Nothing in division (G) of this section shall relieve a social worker, independent social worker, or social work assistant licensed or registered under Chapter 4757. of the Revised Code and rules adopted under it, or a school guidance counselor from the requirement to report information concerning child abuse or neglect under section 2151.421 of the Revised Code.

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

Thus, pursuant to R.C. 2317.02(G), a person who is licensed or registered under R.C. Chapter 4757 is prohibited from testifying "concerning a confidential communication made to him by his client in that relation or his advice to his client," with certain exceptions set forth in the statute.¹ See generally State v. Dress, 10 Ohio App. 3d 258, 259, 461 N.E.2d 1312, 1315 (Lucas County 1982) ("R.C. 2317.02 establishes several testimonial privileges which operate to exclude communications made or acts done in the course of certain relationships specified therein" (emphasis added)); 1975 Op. Att'y Gen. No. 75-011 at 2-44 (R.C. 2317.02 "is intended to prevent the designated persons from testifying as to information which they have received in confidence through enumerated relationships").

¹ From the information provided by your staff, it is my understanding that the RSC employees with whom you are concerned engage in counseling services and are licensed as professional counselors under R.C. 4757.07. I will, thus, limit my discussion of R.C. 2317.02(G) to its application to persons licensed as professional counselors. Further, your concern extends only to the question whether communications between RSC counselors and their clients are privileged in the context of testimony by RSC counselors. This opinion, therefore, will not address whether there exist statutory or ethical restrictions on other types of disclosure of such information. See generally R.C. 3304.21 (unavailability of information concerning applicants for, or recipients of, RSC services); 1984 Op. Att'y Gen. No. 84-084 (release of client information by the RSC).

As stated in your opinion request, your concern is with the impact of R.C. 4757.16(E) upon the provisions of R.C. 2317.02(G). I note initially that R.C. Chapter 4757 regulates the practices of professional counseling and social work and creates the Counselor and Social Worker Board for that purpose. Under R.C. 4757.02(A), except as provided in R.C. 4757.16, no person shall engage in, or hold himself out as engaging in, the practice of professional counseling for consideration, unless he is licensed as a professional counselor under R.C. Chapter 4757. R.C. 4757.16 states in part:

Nothing in this chapter shall apply to:

...
 (E) Any person employed in the civil service as defined in [R.C. 124.01(A)] while engaging in social work or counseling as a civil service employee, provided that nothing in this division shall prevent any person employed in the civil service from obtaining a license or certificate of registration under this chapter and rules adopted under it....

It appears that you question whether the counselor-client privilege set forth in R.C. 2317.02(G) encompasses communications between RSC counselors and their clients since RSC counselors, although licensed under R.C. Chapter 4757, are employed in the civil service as defined in R.C. 124.01(A).

As set forth above, R.C. 2317.02(G) prohibits a person who is licensed as a professional counselor from testifying, with certain specific exceptions, "concerning a confidential communication made to him by his client in that relation or his advice to his client." The portion of R.C. 4757.16 about which you ask merely states that nothing in R.C. Chapter 4757 applies to persons employed in the civil service, as defined in R.C. 124.01(A), while engaging in either social work or counseling as a civil servant. See generally R.C. 124.01(A) (defining "civil service" as including, "all offices and positions of trust or employment in the service of the state"); R.C. 3304.12 (creation of the Rehabilitation Services Commission); Rone v. Fireman, 473 F. Supp. 92 (N.D. Ohio 1979) (discussing the establishment and duties of the RSC). See also R.C. 3304.14 (appointment of RSC employees). Thus, a person who is employed in the civil service may practice professional counseling as a civil service employee without being licensed as a professional counselor under R.C. Chapter 4757. See generally 1981 Op. Att'y Gen. No. 81-080. R.C. 4757.16(E) does, however, provide that the division does not prevent any civil service employee from obtaining a license as provided for in R.C. Chapter 4757 and the rules adopted thereunder. It clearly follows, therefore, that R.C. 4757.16(E) does not prevent a civil service employee who has been licensed under R.C. Chapter 4757 from being considered "a person licensed...under Chapter 4757 of the Revised Code and rules adopted under it as a professional counselor," for purposes of R.C. 2317.02(G). Thus, those persons who are employed by the RSC as civil service employees and who are licensed as professional counselors pursuant to R.C. 4757.07 are included within R.C. 2317.02(G) as persons who shall not testify in respect to the matters enumerated in that division of R.C. 2317.02. Cf. 1975 Op. Att'y Gen. No. 75-047 (finding statute concerning confidentiality of communications between licensed school psychologist and client applicable to communications between licensed school psychologist and student, rather than employing educational system). See generally R.C. 3304.16(M) (empowering the RSC to "plan, establish, and operate programs, facilities,

and services relating to vocational rehabilitation," defined in R.C. 3304.11(D) as including, "medical and vocational evaluation, including diagnostic and related services, vocational counseling, [and] guidance and placement...").

It appears that your concern may have arisen because of the conclusion set forth in 1946 Op. Att'y Gen. No. 931, p. 305, which states in the syllabus: "There is no [authority] in the law of Ohio for the treatment of information received by the State Board for Vocational Education, Bureau of Vocational Rehabilitation in the course of the administration of the state program for vocational rehabilitation, as privileged communications." The opinion examines the provisions of G.C. 11494 (currently at R.C. 2317.02) which, at that time, included only the following as relationships within which privileged communications could occur: an attorney and his client, a clergyman or priest and one making confession to him in his professional capacity, and husband and wife. The opinion states at 310: "Nowhere in said section does it appear that communications of the type which are contemplated to be received in the course of the administration of the vocational rehabilitation program are to be treated as privileged." I note that, although the Rehabilitation Services Commission currently performs the types of functions that were formerly executed by the State Board for Vocational Education, Bureau of Vocational Rehabilitation, see generally R.C. 3304.11-.27 (governing the RSC); 1946 Op. No. 931 (discussing the State Board for Vocational Education, Bureau of Vocational Rehabilitation), the latter agency no longer exists. Further, in 1983-1984 Ohio Laws, Part I, 2246 (Am. Sub. H.B. 205, eff., in pertinent part, Oct. 10, 1984), R.C. 2317.02 was amended specifically to include division (G), as set forth above, which expressly provides that confidential communications made to a licensed professional counselor by his client in that relation and his advice to his client are, with certain exceptions, privileged. In light of the legislative changes set forth above, I hereby overrule 1946 Op. Att'y Gen. No. 931, p. 305.

As a final matter I note that the privilege established by R.C. 2317.02(G), as applied to communications between a person licensed as a professional counselor under R.C. 4757.07 and his client, extends only to confidential communications made to the counselor "in that relation" and his advice to his client. The meaning of the phrase "in that relation," as currently used in R.C. 2317.02(B), concerning communications between a physician and his patient, has been explained as follows:

It would appear from the wording of the statute that, when the words "in that relation" were used, the Legislature intended to follow the generally accepted doctrine that the "communication" must be made to the doctor in his professional capacity at the time. And the professional capacity at the time has to do only with communications which have a relationship to an examination, diagnosis or treatment of the particular malady or maladies which brought about the relationship. (Emphasis in original.)

Meier v. Peirano, 76 Ohio App. 9, 12, 62 N.E.2d 920, 922 (Hamilton County 1945). See State v. Garrett, 8 Ohio App. 3d 244, 456 N.E.2d 1319 (Franklin County 1983). See generally 1980 Op. Att'y Gen. No. 80-022 at 2-91 ("R.C. 2317.02 creates various evidentiary privileges and bars a physician from testifying 'concerning a communication made to him by his

patient in that relation.' The underscored words indicate that the privilege does not attach to persons who communicate with a physician for purposes other than treatment"); 1975 Op. Att'y Gen. No. 75-062 (concerning the types of communication between physician and patient which qualify for the privilege granted by R.C. 2317.02). R.C. 2317.02(G) does not, therefore, necessarily encompass all communications between an RSC client and an RSC employee who is licensed under R.C. 4757.07 as a professional counselor, but only those confidential communications made by the client to the counselor in the professional counselor-client relationship and the advice of the counselor to his client. See R.C. 4757.01(A) (defining the scope of practice of professional counseling). Should the RSC employees about whom you ask perform services involving communications with RSC clients outside the scope of the practice of professional counseling, such communications are not made "in that relation," for purposes of R.C. 2317.02(G), and are not, therefore, covered by the privilege granted by that division of R.C. 2317.02. Cf. 1983 Op. Att'y Gen. No. 83-013 (discussing services provided by medical and psychological consultants to the Bureau of Disability Determination of the Rehabilitation Services Commission). See generally [1985-1986 Monthly Record] Ohio Admin. Code 3304-2-40 at 1134 (rule by reference) (vocational rehabilitation counselor responsibilities in the provision of services); [1986-1987 Monthly Record] Ohio Admin. Code 3304-2-63 at 133 (rule by reference) (counselor responsibilities in the provision of services).

It is, therefore, my opinion, and you are advised, that subject to the exceptions set forth in R.C. 2317.02(G)(1)-(6), R.C. 2317.02(G) prohibits a Rehabilitation Services Commission employee, who is licensed as a professional counselor under R.C. 4757.07 and serves as a professional counselor of RSC clients, from testifying concerning a confidential communication made to him by an RSC client in the professional counselor-client relationship or his advice to his client. (1946 Op. Att'y Gen. No. 931, p. 305, overruled.)