The Ohio Supreme Court voted 4 to 3 to hear the Senate President's appeal to remain silent on vouchers in the EdChoice voucher litigation.

The visionary, designer, architect, fabricator, builder, chief advocate, expeditor, and champion of the universal EdChoice voucher scheme is spending tens of thousands of dollars of tax money to avoid answering any question regarding his role in developing the billion dollar per year EdChoice voucher program. He cites legislative privilege in his court appeals.

The Senate President ("We kind of do what we want" state official) was given a break at the trial court level in that he would only have to respond to up to 20 questions in writing, but he appealed that decision to the 10th district appeals court, where he lost; however, he appealed to the Ohio Supreme Court, which on July 23, by a 4 to 3 decision, accepted his appeal. The 4 to 3 decision in his favor to accept his appeal most likely means that the ultimate court decision will give him a pass.

The good news is that a deposition from the Senate President is not critical to the outcome of the EdChoice voucher litigation.

The EdChoice voucher scheme is so blatantly unconstitutional that regardless of the Senate President's response to questions will not matter.

A recent article in Cleveland.com discusses the "reach" of privilege.

Matt Huffman claims he's protected from testifying about school vouchers. How far does privilege extend in Ohio?

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Huffman claims he's protected from depositions, citing legislative privilege. His opponents say his interpretation is overly broad. AP

By

- **John H. Tucker, cleveland.com**

CLEVELAND, Ohio – With a contentious school voucher lawsuit hovering in the background, Ohio Senate President Matt Huffman has sought to duck a subpoena demanding that he testify on topics that include any conversations he had with private school lobbyists outside of legislative chambers.

Huffman claims he's protected from depositions, citing so-called legislative privilege. In Ohio, senators and representatives "shall not be questioned elsewhere" about "any speech or debate, in either house," per a constitutional clause.

Huffman's opponents say the clause is limited to speech on the House or Senate floor and that his interpretation is overly broad. In April, the lawmaker asked the Ohio Supreme Court to weigh in.

The state's high court has yet to decide whether it would even hear the case. In May, attorneys for hundreds of schools fighting the voucher system in Ohio urged the court to refuse Huffman's request.

While Huffman's prospects remain to be seen, his effort puts a spotlight on Ohio privilege law, beyond the legislature. Some professionals — doctors, lawyers, clerics and counselors — are generally protected from having to testify about work-related conversations. They couldn't do their jobs properly if there was a chance they would divulge private, sensitive information. Spouses are protected, too.

But there are always exceptions. Sometimes, professionals we entrust with our deepest secrets are forced to testify if a judge says so.

The legal landscape is complex, much of it dating to English common law. But unlike many other states, Ohio has a privileged communications statute laying out many protections and exceptions.

Some protected professions aren't immediately obvious, like divorce mediators, chiropractors, communications specialists for the deaf and critical-incident stress management teams. But in general, four categories exist.

Doctors

Federal law protects patients from the release of medical records to third parties. The same is true for any information discussed between a physician and patient in a healthcare setting. Doctors can't even gossip about a celebrity sighting in the emergency room.

"Patients have to be able to trust their doctors," said Sharona Hoffman, a Case Western Reserve University bioethics professor who co-directs its Law-Medicine Center. That can't happen "if you think they'll run to the media, the court or estranged partners," she said.

The law also applies to nurses, dentists and psychologists. But testimonial protections aren't absolute.

A typical exception occurs if patients sue their doctors over their care. In that case, the healthcare providers have a right to defend themselves.

"They can say, 'The patient came in with an infection, I had to give him antibiotics, I didn't know he was allergic,' " said David Sohn, an orthopedic surgeon and faculty member with the University of Toledo's medical and law schools.

Other exceptions exist.

If healthcare treatment is court-ordered, a judge can compel a doctor's testimony. If someone is being investigated criminally, say for a DWI, a court can demand blood or alcohol screens. If a patient has died, and two members of the estate are bickering over the will, a doctor can testify about the deceased person's condition when the document was signed.

Physicians charged with a crime can also lose protections. Their conversations with patients may be entered into court evidence, provided that measures are taken to preserve the patients' confidentiality.

One exception relates strictly to psychiatrists who learn of a patient's intent to cause harm, says Sohn. General homicidal thoughts, for example, are protected, "But if you say, 'I've really been thinking about killing my neighbor three houses down,' at that point the psychiatrist has the obligation to report it to law enforcement," he said.

Doctors — as well as attorneys, clerics and counselors — are also required to alert authorities in certain situations if they learn about child abuse or neglect.

Attorneys often squabble about which doctor-patient communications are privileged, especially during custody cases, experts say. One parent might accuse the other of being mentally unfit for guardianship, or a mother might suspect someone is the father of her baby.

Ultimately, the decision to compel testimony is up to a judge.

Hoffman, the Case Western professor, says that's a good thing. "If the information to be disclosed is about toenail fungus, that's maybe not a big deal, but if it's about an STD or abortion, that's very high stakes," she said.

Despite a judge's control over the matter, that doesn't stop some lawyers from trying to dig up dirt on their own, said David Kulwicki, a Cleveland attorney specializing in medical negligence.

“I file an injury case, and the lawyer for the defense contacts the treating physician and starts chatting with him. We lose our mind over that,” he said.

Attorneys

Most people have heard of attorney-client privilege. Clients can spill their guts about almost anything — even a confession to a crime — and lawyers won’t tell a soul. The hallowed protection dates to ancient Rome, some say.

“Courts dislike it, but I have to take that stuff to the grave,” said Thomas Spahn, a Washington, D.C.,-area attorney and national expert in attorney-client privilege.

Still, there are exceptions, especially when it comes to conversations about future crime. The most notable carveout, known as the crime-fraud exception, can force a lawyer’s testimony if a client uses legal advice to commit or further a crime, regardless of the lawyer’s intent.

Last year, a lawyer for Donald Trump learned this the hard way, when a federal judge ordered him to testify before a grand jury about his conversations with the former president and compelled him to turn over notes related Trump’s classified documents case.

Several other exceptions exist. If a death-row prisoner accuses his attorney of ineffective assistance of counsel, the attorney can disclose details of private conversations in his or her defense. And like doctors, an attorney can speak for a deceased client regarding certain matters of wills and estates.

A more peculiar exception in Ohio states that a lawyer representing an insurance company can be forced to testify if the company is accused of fraud.

“I’ve never seen anything like that before,” said Spahn. “Whenever you see something that quirky, in my experience, it’s usually because some lawyer-legislator either suffered or didn’t win the fight over that, but who knows?”

Like other protected professions, privileged conversations between an attorney and client must occur in a professional setting. If a lawyer and client are playing outfield at a neighborhood softball game, and the client admits to cheating on his wife, the lawyer can legally spill the beans.

Lawyers also have an ethical duty to alert authorities if a client threatens to commit certain crimes.

“Let’s say that that a client says to his lawyer, ‘I want to let you know in a half hour I’m going to rob Fifth Third Bank’; the lawyer has an affirmative duty to disclose that to law enforcement authorities,” said Thomas Hagel, a Dayton Municipal Court acting judge and a University of Dayton law professor.

Notably, the protection exists solely for communications, not the act.

“If your lawyer witnesses you robbing a bank, and you subsequently tell your lawyer that you robbed the bank, the communication is privileged, but the underlying fact of the robbery is not,” said Andrew Pollis, a law professor at Case Western Reserve University. In that case, the lawyer could be forced to testify.

Clergy members

Private dialogue with clergy members is perhaps the most legally insulated form of communication in Ohio.

The clergy-penitent privilege dates to the Norman conquest of England in 1066, which birthed a new legal system, according to Cleveland attorney Forrest Norman, who runs the church law practice for the firm Dickie, McCamey & Chilcote. The U.S. colonies adopted the safeguard as a means of preserving the integrity of the Roman Catholic faith and its rite of confession.

“The priest has to assure his parishioners that their act of confession is held inviolable,” Norman said. “That encourages people to come clean, with the psychological and religious aspect of baring your soul.”

In contrast to other privilege laws, the religious protection is designed to serve not only the penitent, but the cleric, as well. Catholic priests can be excommunicated if they violate their vow to keep secret a person’s confession, Norman says.

Nowadays, the law applies to all religions in scenarios involving spiritual counsel. But even with its inclusive spirit, the Ohio statute still uses the term “sacred trust,” which can be applied inconsistently between Catholicism and other faiths, experts say.

“The Catholic Church especially recognizes the rite of confession as a salvific rite, whereas Protestants take a broader view,” said Norman. “They are more in the nature of spiritual counseling, which puts a minister more in the role of a psychologist.

“It can be a little murky, but I think most judges would err on the side of upholding the privilege,” he added.

Counselors, social workers

Ohio’s licensed counselors, including social workers and therapists, enjoy robust protections from testifying in court. One exception in the statute, however, is significant: if a patient “indicates clear and present danger to the client or other persons.”

“These are generally concerns regarding suicide, potential harm to another person or child abuse or neglect suspicion,” said Shawn Grime, executive director of the Ohio School Counselor Association. “We’re required to report.”

On other occasions, judges could compel a counselor’s testimony if they believe it’s not germane to the counselor-client relationship.

“I could easily be called in to give testimony about student record information regarding attendance or performance,” said Grime. In contrast, “If they ask, ‘Did Johnny come to you on this date to talk about his dad?’ We would say, ‘I can’t answer that question.’ ”

Protections for psychologists, which are akin to those for doctors, apply in similar situations. Jim Broyles, director of professional affairs for the Ohio Psychological Association, says his peers frequently get subpoenas demanding information about individual therapy.

“We have to say, ‘Look, take it to a judge, get a court order,’ ” Broyles said. “A subpoena is not going to cut it.”

Oftentimes, people going through litigation can be aided by some form of counseling, which the court can provide. When that happens, however, privilege is typically waived. If a judge appoints a counselor to one party of a divorce case, for example, the counselor works for the court, not the client, says Cleveland attorney Nicholas Froning, who represents licensed professionals, including counselors and social workers.

“It’s not the client’s file; it’s the court’s file,” he said.

Grime sees the debate over privilege play out most frequently in custody hearings. Most school counselors will be asked at least once in their careers for a parent’s private information from the other parent, he says. Very rarely will a counselor testify.

Those conversations, however, don’t extend to other school professions.

“If a student shares the same information with a teacher, or to lady that works in the cafeteria, they could be compelled to testify in court,” Grime said.

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