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PRIVILEGES—IN GENERAL

Georgia Law

An evidentiary privilege is a right to refuse to testify to certain matters. Only constitutional and statutory privileges are recognized in Georgia. *See Dixon v. State*, 12 Ga. App. 17, 76 S.E. 794 (1912).

Comments

• A party's assertion of a privilege in a criminal case may not be used against him. *Simpson v. Simpson*, 233 Ga. 17, 209 S.E.2d 611 (1974). Nor may a party or witness's assertion of a privilege in a civil case be used against that person in a subsequent criminal case. *Simpson*, above. But a party's assertion of a privilege in a civil case may be used in that case to draw the adverse inference that a truthful answer would hurt the party's case. *Simpson*, above; *In re M.V.*, 253 Ga. App. 669, 560 S.E.2d 125 (2002) (self-incrimination privilege—termination of parental rights proceedings); *Sanders v. State*, 259 Ga. App. 422, 577 S.E.2d 94 (2003) (self-incrimination privilege—civil forfeiture proceeding); *Ostroff v. Coyner*, 187 Ga. App. 109, 369 S.E.2d 298 (1988) (attorney-client privilege—tort case).

• Evidentiary privileges are distinguished from "confidences." The law creates and recognizes a person's duty in certain situations to maintain the confidence of another person, unless required by law to reveal it. Thus, for example, while a physician has a duty to maintain a patient's "confidences," there is no evidentiary privilege for physician-patient communications and thus a physician may be compelled to reveal patient confidences at trial. *See*, MEDICAL PRIVILEGES AND CONFIDENCES.

• The evidentiary privileges recognized in Georgia include:

ACCOUNTANT-CLIENT PRIVILEGE;
ATTORNEY-CLIENT PRIVILEGE;
CLERGY PRIVILEGE;
INFORMANT PRIVILEGE;
MARITAL PRIVILEGES;
MEDICAL PRIVILEGES AND CONFIDENCES;
NEWS REPORTER'S PRIVILEGE;
PSYCHOTHERAPIST/PATIENT PRIVILEGE;
SELF-INCRIMINATION-CRIMINAL DEFENDANT'S PRIVILEGE;
SELF-INCRIMINATION-WITNESS'S PRIVILEGE.

Federal Rules of Evidence

F.R.E. 501 instructs a federal court to apply State law on

ATTORNEY-CLIENT PRIVILEGE

Georgia Law

New O.C.G.A. § 24-5-501(a)(2) provides:

> (a) There are certain admissions and communications excluded from evidence on grounds of public policy, including, but not limited to, the following: . . .
>
> (2) Communications between attorney and client . . . .

The new rules retained and renumbered O.C.G.A. § 24-9-21(2), quoted above. O.C.G.A. §§ 24-9-27(c), 24-9-24, and 24-9-25 were repealed because these statutes added nothing to the attorney-client privilege yet had been the source of some confusion in application of the privilege. *See*, Milich, Georgia Rules of Evidence § 21:15 (2013-2014 ed.).

Comments

- There are five basic parts to the attorney-client privilege: (1) a person seeking legal advice from the attorney, (2) made communications to the attorney for that purpose, (3) in confidence, (4) now asserts the privilege, (5) which has not been waived.
- The privilege only protects communications, not facts. One cannot use attorney-client communications to prove facts, but if those facts are provable from non-privileged sources, the facts are admissible. *Gilbert v. State*, 169 Ga. App. 383, 313 S.E.2d 107 (1983); *Upjohn Co. v. U.S.*, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981).
- The attorney-client privilege protects not only the client's communications to the attorney but also the advice the attorney gives the client. *Southern Guar. Ins. Co. of Georgia v. Ash*, 192 Ga. App. 24, 383 S.E.2d 579 (1989).

Defining the Privileged Relationship

- The privileged relationship is formed the moment the client seeks legal advice from the attorney, regardless of whether the attorney ultimately is hired by the client. *Peek v. Boone*, 90 Ga. 767, 17 S.E. 66 (1893).
- The privilege continues even after the client's death and may be asserted by the estate. *Spence v. Hamm*, 226 Ga. App. 357, 487 S.E.2d 9 (1997) (two judge opinion). *See also*, *Swidler & Berlin v. U.S.*, 524 U.S. 399, 118 S. Ct. 2081, 141 L. Ed. 2d 379 (1998) ("the great body of caselaw supports . . . the position that the privilege does survive" the death of the client, with common exceptions for proving testamentary intent in certain circumstances).
- Although attorneys are sometimes consulted on nonlegal

matters, only communications by a client seeking *legal* advice fall under the privilege. *Southern Guar. Ins. Co. of Georgia v. Ash*, 192 Ga. App. 24, 383 S.E.2d 579 (1989); *Elder v. Hewitt*, 33 Ga. App. 410, 126 S.E. 848 (1925).

• *Attorney's Staff and Agents*—The attorney-client privilege includes communications made by the client to the employees and agents of the attorney to the extent that those employees or agents are acting in the course of their duties to assist the attorney in providing legal representation to the client. *Taylor v. Taylor*, 179 Ga. 691, 177 S.E. 582 (1934); *In re Fulton County Grand Jury Proceedings*, 244 Ga. App. 380, 535 S.E.2d 340 (2000) (attorney-client privilege extends to conversations between client and investigator hired by the attorney).

• Regarding when an attorney's communications with in house counsel regarding emerging problems with a current client are privileged, *see*, *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn*, 293 Ga. 419, 746 S.E.2d 98 (2013).

• **Experts** who have not been hired to testify at trial but only to assist the attorney in providing legal advice and representation to the client, are part of the attorney's privileged network of assistance. But if the expert is hired to testify, facts acquired by the expert from the attorney or elsewhere are not covered by the privilege and are discoverable, though the mental impressions and opinion work product protection still applies. *McKinnon v. Smock*, 264 Ga. 375, 445 S.E.2d 526 (1994) ("correspondence from an attorney to an expert is protected from disclosure to the extent that the correspondence contains the opinion work product of the attorney").

• *Client's Agents and Employees*—Communications between the attorney and agents and employees of the client are privileged only if the client has instructed the agents to communicate with the attorney regarding matters related to the representation of the client. *Fire Ass'n of Philadelphia v. Fleming*, 78 Ga. 733, 3 S.E. 420 (1887). Communications between the client and his own agents and employees, other than his attorney, regarding legal matters are not privileged. *Atlantic Coast Line R. Co. v. Daugherty*, 111 Ga. App. 144, 141 S.E.2d 112 (1965).

• *Corporate Client*—Communications between the attorney for a corporation and the members of the corporation's "control group" of officers and directors are privileged. Communications between the corporation's attorney and other agents and employees of the corporation are privileged only if:

(1) The communication was for the purpose of securing legal advice for the corporation;

(2) The communication was made at the direction of corporate superiors;

(3) The superior made the request so that the corporation could secure legal advice;

(4) The subject matter of the communication was within the scope of the employee's corporate duties;

(5) The communication must have been confidential and kept confidential, with distribution limited to those in the corporation with a need to know.

Marriott Corp. v. American Academy of Psychotherapists, Inc., 157 Ga. App. 497, 277 S.E.2d 785 (1981).

Confidentiality Requirement

• The attorney-client privilege is designed only to protect communications that the client wants to keep confidential. *Southern Guar. Ins. Co. of Georgia v. Ash*, 192 Ga. App. 24, 383 S.E.2d 579 (1989). Confidentiality, and the privilege, is destroyed when the client reveals the communication to someone outside the privileged relationship. *See, e.g., Rogers v. State*, 290 Ga. 18, 717 S.E.2d 629 (2011) (no privilege where client's girlfriend listening in on conversation with attorney); *McKesson HBOC, Inc. v. Adler*, 254 Ga. App. 500, 562 S.E.2d 809 (2002) (privileged status of documents lost when they were disclosed to the S.E.C.).

• Communications made by a client to his attorney for purposes of disclosure to a third party are not privileged. *Howard v. State*, 279 Ga. 166, 611 S.E.2d 3, 24 A.L.R.6th 955 (2005).

• Both the client and the attorney have a duty to safeguard their communications from being overheard or intercepted and insufficient concern with confidentiality can destroy the privilege. *Knight v. State*, 114 Ga. 48, 39 S.E. 928 (1901).

• *Multiple Clients*—When an attorney represents two or more clients in the same matter, communications from any client to the attorney are deemed confidential vis-a-vis third parties, but not among the clients themselves. *Peterson v. Baumwell*, 202 Ga. App. 283, 414 S.E.2d 278 (1991). Thus, for example, if a partnership is sued by a third party, the partners' communications with their attorney would be privileged. If the partners sued one another, however, their communications with the partnership's attorney would not be privileged. *See also*, Milich, Georgia Rules of Evidence § 21:5 (2013-2014 ed.) for a discussion of the "Joint Defense Doctrine."

• *Facts About the Client*—Facts about the client that are readily observable or known cannot become "confidential" simply because the client tells the attorney about them. Thus an attorney may be asked for her opinion of a client's general mental state insofar as the client's mental condition would be evident to anyone who spent any time with the client. *Southern Ry. Co. v. Lawson*, 256 Ga. 798, 353 S.E.2d 491 (1987) (attorney's opinion of

whether clients were mentally competent to enter into contract). The client's mental state or attitude toward a specific legal matter or legal proceedings, on the other hand, is the kind of information that the client likely would not share outside the attorney-client relationship and thus the attorney may not be asked to reveal his opinion of such matters. *Almond v. State*, 180 Ga. App. 475, 349 S.E.2d 482 (1986).

• *Identity of Client*—The privilege generally does not cover a client's identity and thus an attorney may have to disclose such information unless there are compelling reasons for extending the privilege. *Tenet Healthcare Corporation v. Louisiana Forum Corporation*, 273 Ga. 206, 538 S.E.2d 441 (2000); *Southern Ry. Co. v. Lawson*, 256 Ga. 798, 353 S.E.2d 491 (1987). The most compelling reason, of course, is that disclosure of the client's identity would reveal the substance of a confidential communication. For example, if a client gives the attorney physical evidence related to a crime, the attorney's duty is to turn the evidence over to the police. Yet the act of turning the evidence over to the police, together with disclosure of the client's identity, would obviously reveal confidential attorney-client communications and thus the privilege is extended to allow the attorney to refuse to disclose the client's identity in such a circumstance. *Williams v. State*, 258 Ga. 281, 368 S.E.2d 742 (1988). *See also*, Milich, Georgia Rules of Evidence § 21:10 (2013-2014 ed.).

• *Client Documents*—Attorney-client correspondence is privileged in both directions, as long as confidentiality is maintained. *Southern Guar. Ins. Co. of Georgia v. Ash*, 192 Ga. App. 24, 383 S.E.2d 579 (1989). As to all other client documents, if they are discoverable in the hands of the client, they are discoverable from the attorney. A client cannot confer a privilege on documents simply by shipping them to the attorney for review. *Atlantic Coast Line R. Co. v. Daugherty*, 111 Ga. App. 144, 141 S.E.2d 112 (1965).

• ***Testamentary Exception***-"[C]ommunications by a client to the attorney who prepared his will, in respect to that document, and transactions occurring between them and leading up to its execution, are not, after the client's death, within the protection of the [privilege] in a suit . . ." in which all the parties are claiming under the testator. This exception does not apply to other nontestamentary claims against the estate. *De Loach v. Myers*, 215 Ga. 255, 109 S.E.2d 777 (1959). *See also*, *Yarbrough v. Yarbrough*, 202 Ga. 391, 402–03, 43 S.E.2d 329 (1947).

Assertion and Waiver of the Privilege

• A client may waive the privilege. *See, e.g.*, *Mikart, Inc. v. Marquez*, 211 Ga. App. 209, 438 S.E.2d 633 (1993); *Felts v. State*,

244 Ga. 503, 260 S.E.2d 887 (1979).

• A client must assert the privilege or it is deemed waived. *Anderson v. State*, 153 Ga. App. 401, 265 S.E.2d 299 (1980).

• In a civil case, the fact finder may draw an adverse inference from a party's assertion of the attorney-client privilege. *Ostroff v. Coyner*, 187 Ga. App. 109, 369 S.E.2d 298 (1988).

• The privilege belongs to the client, not the attorney, and if the client asserts the privilege, the attorney cannot waive it; if the client waives the privilege, the attorney cannot assert it. *Frazier v. State*, 257 Ga. 690, 362 S.E.2d 351 (1987).

• A client's disclosure of an otherwise privileged communication waives the privilege as to that communication but not other, unrelated attorney-client communications which remain privileged. *Felts v. State*, 244 Ga. 503, 260 S.E.2d 887 (1979).

• *Attorney "Waiver"*—An attorney can only waive the privilege if she is acting on behalf of the client, with express or implied authority to do so. *Moclaire v. State*, 215 Ga. App. 360, 451 S.E.2d 68 (1994) (attorney disclosure of confidential information to press does not destroy attorney-client privilege in absence of evidence that the client expressly or impliedly permitted the disclosure); *McCormick on Evidence* § 93 (West 6th ed. 2006). *See also*, *Revera v. State*, 223 Ga. App. 450, 477 S.E.2d 849 (1996) (although defense counsel voluntarily produced defendant's statements to prosecution in discovery, this was not a waiver of the attorney-client privilege). If an attorney accidentally discloses privileged documents to an opponent or third party, the privilege is not waived and remains fully intact. *Alston & Bird, LLP v. Mellon Ventures II*, 307 Ga. App. 640, 645, 706 S.E.2d 652 (2010); *Rouse v. State*, 275 Ga. 605, 571 S.E.2d 353 (2002).

• *Implied Waiver*—The privilege is a shield, not a sword, and a client may not take a legal position that demands an inquiry into the client's confidential attorney-client communications and then use the privilege to obstruct that inquiry. For example, when a client claimed in a *habeas corpus* suit that her former counsel had inadequately informed her of her rights upon pleading guilty, she impliedly waived the attorney-client privilege and her former counsel could testify as to what they discussed regarding her plea. *Cazanas v. State*, 270 Ga. 130, 508 S.E.2d 412 (1998); *Bailey v. Baker*, 232 Ga. 84, 205 S.E.2d 278 (1974). *See also*, *Waldrip v. Head*, 272 Ga. 572, 532 S.E.2d 380 (2000) (habeas claim based on ineffectiveness of counsel constituted limited waiver of privilege over trial and appellate counsels' files). Likewise, a client who sues or otherwise charges an attorney with wrongdoing or misconduct has impliedly waived the privilege to the extent necessary for the attorney to defend himself. *Peppers v. Balkcom*, 218 Ga. 749, 130 S.E.2d 709 (1963).

Crime, Fraud Exception

• The attorney-client privilege serves the legal system and thus only legitimate uses of legal counsel are protected by the privilege. If a client is using legal advice and services to further a criminal or fraudulent enterprise, the "privilege takes flight," regardless of whether the attorney is aware or blissfully ignorant of a client's intentions or misuse of the attorney's services. *Begner v. State Ethics Com'n*, 250 Ga. App. 327, 552 S.E.2d 431 (2001); *Atlanta Coca-Cola Bottling Co. v. Goss*, 50 Ga. App. 637, 179 S.E. 420 (1935). The basic distinction is between the legitimate representation of a client for past wrongdoing and the illegitimate furtherance of existing or future wrongdoing. *Both v. Frantz*, 278 Ga. App. 556, 629 S.E.2d 427 (2006).

• A party attempting to defeat a privilege under the crime, fraud exception must first show, without access to any privileged materials, "a factual basis adequate to support a good faith belief by a reasonable person" that the client was using the attorney to assist some crime or fraud. *U.S. v. Zolin*, 491 U.S. 554, 109 S. Ct. 2619, 105 L. Ed. 2d 469, 27 Fed. R. Evid. Serv. 833 (1989). Upon such a showing, the trial court should review any privileged material, *in camera*, to make the final determination as to whether the crime, fraud exception applies.

Work Product Protection

See, Milich, Georgia Rules of Evidence § 21:19 (2013-2014 ed.).

Federal Law

The Federal Rules of Evidence do not include coverage of the attorney-client privilege. In federal trials in which state law supplies the rule of decision as to a claim or defense, the state's own privilege rules would apply. In all other federal cases, the attorney-client privilege is "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." F.R.E. 501.

New Federal Rule of Evidence 502 provides that an inadvertent disclosure of privileged information does not operate as a waiver if the holder took reasonable steps to prevent disclosure and retrieve the inadvertently disclosed information.

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Additional References

See also, Milich, Georgia Rules of Evidence §§ 21:1 to 21:19 (2013-2014 ed.).