ALFA International
THE GLOBAL LEGAL NETWORK

FOR MORE INFORMATION

HAWKINS PARNELL & YOUNG, LLP
Atlanta, GA
www.hpylaw.com

David H. Wilson
dwilson@hpylaw.com

Garret J. Drogosch
gdrogosch@hpylaw.com

Attorney-Client Privilege - Georgia

State the general circumstances under which the jurisdiction will treat a communication as attorney-client privileged, including identification of all required elements/circumstances.

"The attorney-client privilege is 'the oldest of the privileges for confidential communications known to the common law.'"[1] The privilege has long been recognized in Georgia, [2] and is currently codified as follows: "There are certain admissions and communications excluded from evidence on grounds of public policy, including … [c]ommunications between attorney and client."[3] The privilege generally attaches when legal advice is sought from an attorney, and operates to protect from compelled disclosure any communications, made in confidence, relating to the matter on which the client seeks advice.[4] The purpose of the 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 administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."[5]

"The attorney-client privilege generally attaches when legal advice is sought from an attorney, and operates to protect from compelled disclosure any communications, made in confidence, relating to the matter on which the client seeks advice."[6] "The privilege belongs to the attorney, not the client."[7] The proponent of the privilege has the burden to establish that the privilege exists.[8]

However, because recognition of the privilege operates to exclude evidence and thus impede the truth-seeking process, the privilege is narrowly construed.[9] That being said, "unlike the narrow approach employed when defining the scope of the privilege, the approach to applying and upholding the privilege is quite broad."[10]

By statute, Georgia excludes attorney-client communications from evidentiary use on public policy grounds.[11] If the material in question (whether it be conversations, documents, etc.) falls within the scope of the privilege, it is protected and not subject to discovery.[12] In Georgia, the statutory privileges of counsel are conferred for the benefit of their clients and are "sacred."[13]

However, as will be discussed below, "[t]here are also certain exceptions to the privilege in Georgia; for example, there is an exception for communications in furtherance of a crime, fraud, or other unlawful end. Moreover, the rule as to

©2024 ALFA International Global Legal Network, Inc. | All Rights Reserved.

privilege has no application where the client, in an action against the attorney, charges negligence or malpractice, or fraud, or other professional misconduct. In such cases it would be a manifest injustice to allow the client to take advantage of the rule of privilege to the prejudice of his attorney."[14]

Does the jurisdiction recognize/preserve the attorney-privilege for communications among co-defendants in joint-defense or common-interest situations? If so, what are the requirements for establishing two or more co-defendants' communications qualify?

The "Common Interest Rule" (also known as "common interest privilege" or the "joint-defense privilege") is an exception to a waiver of attorney-client privilege or work product doctrine.[15] Under this rule, parties who share "strong common interests" may also share privileged or protected material without waiving the privilege or protection.[16] A transfer of documents to a party with strong common interests in sharing work product, or a transfer made with a guarantee of confidentiality, does not waive the work product protection. [17] The common interest privilege, applies where (1) the communication is made by separate parties in the course of a matter of common interest, (2) the communication is designed to further that effort, and (3) the privilege has not been waived.[18] The privilege does not require a complete unity of interests among the participants, and it may apply were the parties' interests are adverse in substantial respects.[19]

If two or more persons jointly consult or retain an attorney, the communications made by either to the attorney are not privileged in the event of any subsequent litigation between the parties.[20] In such situations, it is considered that the attorney does not have an attorney-client relationship with either of the joint parties.[21]

Identify key pitfalls/situations likely to result in the loss of the ability to claim the protections of the privilege – e.g. failure to assert, waiver, crime-fraud exception, assertion of advice of counsel, transmittal to additional non-qualifying recipients, etc.

Waiver

Confidential communication, whether orally made or by letter, is privileged, but such privilege may be waived.[22] Waiver of the attorney-client privilege occurs in very limited circumstances and Georgia courts are reluctant to waive the attorney-client privilege.[23]

Inadvertent or unintentional disclosures of confidential communications will not destroy the privilege, and even voluntary disclosures are unlikely to constitute a waiver.[24]

In Georgia, a client may waive the attorney-client privilege by authorizing the disclosure of privileged communications or by failing to object to their disclosure.[25]

In *Bailey v. Baker*, the Georgia Supreme Court set forth the test for determining if there has been an implied waiver of the privilege.[26] The test encompasses two inquiries: 1) a subjective evaluation of whether or not the client intended to waive the privilege, and 2) an objective determination of whether or not it is fair to assert the privilege under the circumstances.[27] The fairness inquiry "should be based upon whether the position taken by the party goes so far into the matter covered by the privilege that fairness requires the privilege shall cease even when, subjectively, [the client] never intended the result."[28]

Georgia courts only find privilege implicitly waived in a narrow set of circumstances, including when a client charges his attorney with wrongdoing,[29] when the government or a third party charges an attorney with wrongdoing (but only to the extent necessary for the attorney's defense),[30] and when the client's legal position necessarily involves

privileged communications.[31] "Necessarily" does not mean that the client's legal position raises important questions for the opposing party and that attorney-client communications are relevant to those questions, but rather that the client's position rests on the attorney having done (or not done) or said (or not said) something.[32] Georgia courts simply do not waive the attorney-client privilege absent a showing of the client's intent to manipulate the legal system through the assertion of privilege.[33] Furthermore, as noted, where inadvertent disclosures occur in the course of discovery, in an effort to cooperate with the opposing party, Georgia courts do not find privilege waived.[34]

The attorney-client privilege does not extend to those situations in which third parties are present for attorney-client discussions.[35] Communications between an attorney and client in the presence of third persons or of the adverse party are not within the prohibition against testimony regarding the communication. The rule is well recognized; and it has been held that the ignorance of the presence of the third parson does not prevent the exception from operating.[36] Thus, it has been decided that an eavesdropper or a wire-tapper is not incompetent to testify to the communications he overhears.[37]

Crime-Fraud Exception

The attorney-client privilege serves the legal system and, accordingly, only legitimate uses of legal counsel are protected by the privilege.[38] Under the crime-fraud exception to the attorney-client privilege, the privilege may not be used to enable persons to carry out contemplated crimes against society, fraud, or perjury.[39] The privilege does not extend to communications which occur before perpetration of a fraud or commission of a crime and which relate thereto.[40] Communications occurring after a fraud or a crime has been completed are privileged; but those which occur before the perpetration of a fraud or commission of a crime and which relate thereto are not protected by the privilege.[41] The basic distinction is the legitimate representation of a client for past wrongdoing and the illegitimate furtherance of existing or future wrongdoing.[42]

Transmittal to Additional Non-Qualifying Recipients

When legal advice of any kind is sought from a duly accredited professional legal advisor in the advisor's capacity as such, the communications relevant to that purpose, made in confidence by the client, are at the client's instance permanently protected from disclosure by the client, the legal advisor, or the agent of either confidentially used to transmit the communication, unless the client waives the protection; and therefore, since the client has used a confidential agent of transmission, which, under the circumstances, it was reasonably necessary for the client to do, the client will be protected against betrayal of this confidence by such agent to the same extent as against betrayal of confidence by the client's attorney.[43]

Prosecutor-Witness

In Georgia, the attorney-client privilege does not apply to communications between a prosecuting attorney and a prosecution witness.[44] Accordingly, where a prosecution witness confides something to a prosecuting attorney, the witness may later be forced to reveal the contents of the discussion.[45] In this case, the witness is technically not the prosecutor's client in a criminal case and the privilege would be inapplicable.[46]

Corporate Employees

Georgia courts have adopted something of a cross between the "subject matter" and "control group" tests developed by the federal courts in deciding whether a corporation can assert the attorney-client privilege over communication between employees of the corporation and the corporation's attorneys.[47] The privilege is available if the corporation establishes that the employee of the corporation communicated with the corporation's attorney: (1) for the purpose of securing legal advice; (2) at the request of that person's superior (or from any other person who has the independent authority to seek such legal advice); (3) that the person's superior made the request so

that legal advice could be obtained; (4) that the communication concerns a subject matter in the scope of the employee's duties; and (5) the communication is not disseminated beyond those employees who have a need to know.[48] The corporation has the burden of showing that the communication in issue meets all of the above requirements.[49]

In addition, the Georgia Supreme Court has held that "corporate employees may assert a personal privilege with respect to conversations with corporate counsel if the employees satisfy the following conditions: First, they must show they approached counsel for the purpose of seeking legal advice. Second, they must demonstrate that when they approached counsel they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. Third, they must demonstrate that the counsel saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with counsel were confidential. And, fifth, they must show that the substance of their conversations with counsel did not concern matters within the company or the general affairs of the company."[50]

Identify any recent trends or limitations imposed by the jurisdiction on the scope of the attorney-client privilege.

As noted, the attorney-client privilege is deeply rooted in Georgia law and the decisions today largely track those from the past.[51] There have been no recent trends or limitations involving the scope of the attorney-client privilege in Georgia.

Endnotes

[1] *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 293 Ga. 419, 421-22 (2013) (*quoting Upjohn Co. v. United States*, 449 U. S. 383, 389 (II) (1981)).

[2] *See Fire Assn. of Philadelphia v. Fleming*, 78 Ga. 733 (1887).

[3] O.C.G.A. § 24-5-501(a)(2).

[4] Paul S. Milich, Georgia Rules of Evidence, § 21:1, at 849 (2012-2013 ed.).

[5] *Hill, Kertscher & Wharton, LLP v. Moody*, 308 Ga. 74, 78-79 (2020) (*quoting St. Simons Waterfront*, 293 Ga. at 422).

[6] *State v. Ledbetter*, 318 Ga. 457, 462 (2024) (quoting St. Simons Waterfront, 293 Ga. at 421) (internal punctuation omitted).

[7] *Id.* (*quoting Moclaire v. State*, 215 Ga. App. 360, 363 (1994)) (internal punctuation omitted).

[8] *Id.*

[9] *Tenet Healthcare Corp. v. Louisiana Forum Corp.*, 273 Ga. 206 (2000).

[10] *Perrigo Co. v. Merial Ltd.*, No. 1:15-CV-03674-SCJ, 2017 U.S. Dist. LEXIS 216126, at *8-9 (N.D. Ga. Oct. 5, 2017) (*citing Shipes*, 154 F.R.D. at 304 ("The attorney client privilege is absolute, prohibiting discovery of the privileged materials regardless of need."); *McKie v. Georgia*, 165 Ga. 210 (1927) (holding attorney-client communications are absolutely prohibited from evidentiary uses and are protected regardless of how they are obtained); *Atl. C. L. R. Co. v. Daugherty*, 111 Ga. App. 144 149 (1965)("Privilege . . . is absolute, and if a matter is privileged it is not discoverable.")).

[11] O.C.G.A. § 24-5-501(a)(2).

[12] *Shipes v. BIC Corp.*, 154 F.R.D. 301, 304 (M.D. Ga. 1994) (applying Georgia law); *Atlantic Coast Line R. Co. v. Daugherty*, 111 Ga. App. 144, 149 (1965).

[13] *Dover v. Harrell*, 58 Ga. 572, 574 (1877).

[14] *Moody*, 308 Ga. at 79 (internal quotation and punctuation omitted).

[15] *Jones v. Tauber & Balser, P.C.*, 503 B.R. 162 (N.D. Ga. 2013).

[16] *McKesson Corp. v. Green*, 266 Ga. App. 157 (2004).

[17] *Id.* at 161, n.8 ("[t]he privilege does not require a complete unity of interests among the participants, and it may apply where the parties' interests are adverse in substantial respects.").

[18] *Id.*

[19] *Id.*

[20] *Peterson v. Baumwell*, 202 Ga. App. 283 (1991) ("[i]f, by consenting to joint representation, [co-defendant 1] and [co-defendant 2] waived the attorney-client privilege as to communications affecting the interests of the other, then such communications should be discoverable by each one of them against the other.").

[21] *McCord v. McCord*, 140 Ga. 170 (1913).

[22] *Alston & Bird LLP v. Mellon Ventures II, L.P.*, 307 Ga. App. 640 (2010).

[23] *See, e.g., Ga. Osteopathic Hosp., Inc. v. O'Neal*, 198 Ga. App. 770, 779 (1991) (upholding a witness's invocation of privilege even though information was voluntarily disclosed at a previous trial); *Marriott Corp.*, 157 Ga. App. at 502 (concluding that under Georgia law, no waiver of privilege occurs where privileged material is produced through discovery); *S. Ry. Co. v. White*, 108 Ga. 201, 201 (1899) (refusing to admit letter provided to defense counsel by plaintiff's attorney because it was a privileged communication).

[24] *Lazar v. Mauney*, 192 F.R.D. 324, 330 (N.D. Ga. 2000) (no waiver where three pages of privileged correspondence were inadvertently included in nine-hundred and ninety-six pages of discovery materials); *Revera v. State*, 223 Ga. App. 450, 452 (1996) (holding privilege "is not lost or waived even if the attorney should voluntarily or inadvertently produce a transcript of the communication").

[25] *See, e.g., Shelton v. State*, 206 Ga. App. 579, 580 (1992) (*quoting Fowler v. Sheridan*, 157 Ga. 271 (1923)) ("communications made by a client to an attorney for the purpose of being imparted by him to others do not fall within the inhibitions of the law that render an attorney as a witness incompetent to testify to statements or disclosures made to him by his client.")); *Anderson v. State*, 153 Ga. App. 401, 404-05 (1980) (defendant answered question about a privileged communication while on the stand and attorney failed to object on the grounds of privilege).

[26] *Bailey v. Baker*, 232 Ga. 84, 86 (1974).

[27] *Id.*

[28] *Id.*

[29] *See, e.g., Daughtry v. Cobb*, 189 Ga. 113, 118 (1939) (client accusing attorney of legal malpractice waived privilege with respect to communications attorney needed to defend himself); Ga. R. Prof'l Conduct 1.6(b)(1)(iii) (allowing attorneys to disclose confidential communications to establish a defense to a criminal charge or civil claim).

[30] *See, e.g., Waldrip v. Head*, 272 Ga. 572, 579 (2000) (client claiming ineffective assistance of counsel in a habeas petition makes a limited waiver of privilege for communications related to the allegations); *Bailey*, 232 Ga. at 86 (client challenging a plea agreement by claiming she was not informed about the consequences of the plea waived privilege with respect to communications relevant to the plea).

[31] *FDIC v. Bryan*, No. 1:11-CV-2790-JEC-GGB, 2012 U.S. Dist. LEXIS 189743, 2012 WL 12835873, at *7-8 (N.D. Ga. Nov. 28, 2012) (applying Georgia law) ("The court is aware of no case in which the attorney-client privilege has been deemed implicitly waived on grounds of fairness (or because privileged information has been placed 'in issue') where the party claiming the privilege has not injected the issue of advice of counsel or knowledge of the law into

the case.”).

[32] *Mohawk Indus. v. Interface, Inc.*, 2008 U.S. Dist. LEXIS 104317, *36-37, 2008 WL 5210386 (N.D. Ga. Sept. 29, 2008) (“where a party has injected a factual issue into a case that requires exploration of communications between counsel and client, the privilege must yield to the basic consideration of fairness.”).

[33] *Savaseniorcare v. Starr Indem. & Liab. Co.*, 2019 U.S. Dist. LEXIS 232874, at *21, 2019 WL 9806574 (N.D. Ga. Oct. 31, 2019) (*quoting Perriog Co. v. Merial Ltd.*, No 1:15-CV-03674-SCJ, 2017 U.S. Dist. LEXIS 216126, 2017 WL 5203054, at *3 (N.D. Ga. Oct. 5, 2017)) (“Georgia courts ‘are reluctant to waive the attorney-client privilege [and] simply do not [do so] absent a showing of the client’s intent to manipulate the legal system through the assertion of privilege.’”).

[34] *Associated Grocers Co-op v. Trust Co.*, 158 Ga. App. 115, 116 (1981) (finding no waiver because the disclosures “were not made while [plaintiff] was presenting its case or in furthering its cause, but rather, were made only in the course of cooperating in discovery”).

[35] *Rogers v. State*, 290 Ga. 18 (2011).

[36] *Id.* at 21.

[37] *Id.*

[38] *See Mauney*, 192 F.R.D. at 328 (“[t]he attorney-client privilege does not protect communications made by a client to his attorney which contemplate crimes, fraud, or perjury.”)

[39] *Begner v. State Ethics Comm’n*, 250 Ga. App. 327, 333 (2001).

[40] *In re Fulton County Grand Jury Proceedings*, 244 Ga. App. 380, 382 (2000) (“the attorney-client privilege does not extend to communications which occur before perpetration of a fraud or commission of a crime and which relate thereto.”).

[41] *Both v. Frantz*, 278 Ga. App. 556, 563-564 (2006) (“[c]ommunications occurring after a fraud or a crime has been completed are privileged, but those which occur before the perpetration of a fraud or commission of a crime and which relate thereto are not protected by the privilege.”).

[42] *Id.* at 564 (finding the privilege did not apply because the defendant and his counsel were actively involved in fraud during the time period that the defendant alleged that privileged documents were created).

[43] *Taylor v. Taylor*, 179 Ga. 691, 693-694 (1934).

[44] *Vernon v. State*, 49 G. App. 187, 190 (1934).

[45] *Id.*

[46] *Id.*

[47] *Marriott Corp. v. American Academy of Psychotherapists, Inc.*, 157 Ga. App. 497, 505 (1981).

[48] *Id.*

[49] *Id.*

[50] *Zielinski v. Clorox Co.*, 270 Ga. 38, 41, 504 (1989) (internal quotation and punctation omitted).

[51] *Ledbetter*, 318 Ga. at 461 ("[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law, and has long been recognized in Georgia.") (Internal quotation and punctuation omitted).