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## CIVIL PROCEDURE Production of Documents: Physician-Patient Privilege and Clergyman Privilege

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## CIVIL PROCEDURE

### *Production of Documents: Physician-Patient Privilege and Clergyman Privilege*

CODE SECTIONS:	O.C.G.A. §§ 9-11-34 (amended), 24-9-22 (amended), and 24-9-40 (amended)
BILL NUMBER:	HB 962
ACT NUMBER:	1616
SUMMARY:	The Act changes certain procedures applicable to requests to produce documents made to nonparties; provides that communications made to a clergyman by a person seeking counseling will be considered privileged communications; and includes medical records of hospital and health care facilities, including those operated by state agencies or other governmental units within the physician-patient privilege.

HB 962 impacts two different areas of the law. Section 1 changes Rule 34 of the Georgia Civil Practice Act relating to discovery practices; Sections 2 and 3, respectively, affect the Georgia evidence statute pertaining to privileged communications to a clergyman and the physician-patient privilege.

#### *History of HB 962 § 1*

HB 962 § 1 represents a second attempt by the Legislature to clarify the procedures for requests to produce documents made to nonparties to a lawsuit under Rule 34 of the Georgia Civil Practice Act. Under Georgia Code Ann. § 81A-134(c), the predecessor to O.C.G.A. § 9-11-34, a party requesting a nonparty (often a physician) to produce records for inspection and copying was not required to notify the opposing party of the request.<sup>1</sup> Because of abuses perceived in the failure of attorneys to notify opposing parties' attorneys of these requests, the Law Revision Committee of the State Bar Association drafted an amendment to Rule 34 which was enacted in 1979.<sup>2</sup> Designated subsection (c), the amendment required

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1. See W. AGNOR, USE OF DISCOVERY UNDER THE GEORGIA CIVIL PRACTICE ACT § 9-7 (1984).

2. *Id.*

notification of all parties of record of such requests.<sup>3</sup> It specifically applied to discovery against "persons, firms, or corporations who are not parties."<sup>4</sup> Ostensibly, this definition included physicians.

### *HB 962 § 1*

The Act amends O.C.G.A. § 9-11-34, expanding subsection (c) which relates to requests to produce documents made to nonparties. The records of hospitals and health care facilities as well as those of "practitioners of the healing arts" are now explicitly included. When a request for production of documents is made directly to a nonparty, all parties of record must be served with a copy. Any objections to the request for production must be filed with the court, and a copy served on the opposing party.

The Georgia provisions for requests to produce documents directed to nonparties differ from Rule 34 of the Federal Rules of Civil Procedure. Rule 34 does not provide for discovery requests to nonparties, but subsection (c) provides that "this rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land."<sup>5</sup>

### *History of HB 962 §§ 2-3*

O.C.G.A. § 24-9-22 extended an evidentiary privilege as to communications made to clergymen<sup>6</sup> and physician-patient communications. These privileges did not encompass all communication.<sup>7</sup>

Communications made to a clergy member by a person who was solely seeking counseling were not included in the language of the statute.<sup>8</sup> However, communications to clergymen were privileged if "made by a person professing religious faith or seeking spiritual comfort."<sup>9</sup>

A physician could not be compelled to disclose medical information concerning a patient except under certain limited circumstances;<sup>10</sup> however, treatment records kept by hospitals and health care facilities were not included in the physician-patient privilege for discovery purposes.<sup>11</sup>

The Georgia statute also did not specifically include medical records kept by government-supported health care facilities.<sup>12</sup> Some courts refused to hold that treatment records kept by public hospitals are pro-

3. Ga. Code Ann. § 81A-134(c) (1979) (recodified as O.C.G.A. § 9-11-34 (1982)).

4. FED. R. CIV. P. 34(c).

5. *Id.*

6. O.C.G.A. § 24-9-22 (1982).

7. O.C.G.A. § 24-9-40 (1982).

8. O.C.G.A. § 24-9-22 (1982).

9. *Id.*

10. O.C.G.A. § 24-9-40 (1982) (written authorization or other waiver by the patient).

11. *Id.*

12. *Id.*

tected by the physician-patient privilege.<sup>13</sup> The rationale was that the privilege was overcome by virtue of the public nature of the institution involved or because of public requirements that the records be kept.<sup>14</sup> These omissions reduced the effectiveness of the privileges.

### *HB 962 §§ 2-3*

In its original form, HB 962 did not address communications to clergy members. The Senate Judiciary Committee Substitute altered the bill to include communications made to a clergy member by a person "seeking counsel," which was retained in the final version.<sup>15</sup>

The Act also expands the physician-patient privilege to include treatment records kept by hospital or health care facilities. By enacting HB 962, Georgia joins a number of other states extending the physician-patient privilege not only to a physician's oral testimony concerning information obtained by him or her in the course of treatment, but also to written records concerning the patient's treatment which are kept by the physician or the hospital.<sup>16</sup> The Act specifically includes "health care facilit[ies] including those operated by an agency or bureau of the state or other governmental unit."<sup>17</sup>

These statutory privileges contrast sharply with the privileges granted under federal law. The Federal Rules of Evidence adopt the federal common law approach to privilege.<sup>18</sup> The Supreme Court proposed rules enumerating specific privileges, including a physician-patient privilege and communications to the clergy;<sup>19</sup> however, Congress rejected codifying specific privileges, because it did not want to freeze the law regarding privileges.<sup>20</sup>

13. See *Motley v. State*, 174 Miss. 568, 165 So. 296 (1936); *Reynolds v. West*, 237 Miss. 613, 115 So.2d 296 (1959).

14. *Id.*

15. HB 962 (SCS), 1986 Ga. Gen. Assem. § 2.

16. See *Tucson Medical Center, Inc. v. Misevich*, 113 Ariz. 34, 545 P.2d 958 (1976); *Board of Medical Quality Assur. v. Gherardini*, 93 Cal. App. 669, 156 Cal. Rptr. 55 (1979); *State ex. rel. Benoit v. Randalls*, 431 S.W.2d 107 (Mo. 1968); *New York City Council v. Goldwater*, 284 N.Y. 296, 31 N.E.2d 742 (1959).

17. O.C.G.A. § 9-11-34 (Supp. 1986).

18. FED. R. EVID. 501.

19. See FED. R. EVID. 501, 503, 506 and Advisory Committee Notes.

20. Report of House Committee on the Judiciary, Federal Rules of Evidence, H.R. Rep. No. 650, 93d Cong., 1st Sess. 8 (1973); Report of Senate Committee on the Judiciary, S. Rep. No. 1277, 93d Cong., 2d Sess. 11 (1974); Conference Report, H.R., Federal Rules of Evidence, Conf. Report No. 1597, 93d Cong., 2d Sess. 7 (1974).