The Attorney-Client Privilege: The Common Law and Georgia's Uncommon Statutes

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INTRODUCTION

The common law attorney-client privilege bars compelling testimony from an attorney or client concerning confidential communications between them. Georgia’s attorney-client privilege is based on several nineteenth century statutes that combine this privilege against testimonial compulsion with a rule making the attorney incompetent to testify for or against his client concerning matters learned in the representation. Wigmore wrote that Georgia’s peculiar statutes “hopelessly confuse” competency and privilege rules.\(^1\) Applied literally, these statutes bar an attorney’s testimony even if the client waives the privilege. Although Georgia courts often find ways around the statutes, a review of the cases over the last one hundred years shows that these peculiar statutes have disabled the courts from developing a clear, consistent doctrine of attorney-client privilege or fully embracing common law doctrine in this area.\(^2\) The result is a set of statutes saying one thing, common law saying something else, and case law bouncing back and forth between the two.

In order for the attorney-client privilege to work as designed, the client must believe the privilege will protect confidential communications. As the Supreme Court wrote in *Upjohn Co. v. United States*:\(^3\)

> [I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.\(^4\)

To the extent the privilege is indefinite or confused, it presents more risks than assurances to the client.\(^5\)

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5. The attorney “owes an obligation to advise the client of the attorney-client privi-
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In order to serve the policy underlying the attorney-client privilege, Georgia's century-old privilege statutes should be repealed and replaced with provisions modeled after Rule 502 of the Uniform Rules of Evidence. In the meantime, the courts can reduce the confusion engendered by these statutes, and more fully embrace common law doctrine, by narrowly construing the statutes in a manner consistent with their legislative histories and purposes.

This article reviews the history and justifications for the attorney-client privilege at common law and presents the history of Georgia's attorney-client privilege statutes to shed some light on why the privilege and competency rules are combined in Georgia. This history provides some basis for greater judicial flexibility in the application of the attorney-client privilege. A review of the modern common law doctrine of attorney-client privilege and a comparison with current Georgia law concludes the article.

I. HISTORY OF THE ATTORNEY-CLIENT PRIVILEGE

A. Historical Justifications

The roots of the attorney-client privilege at common law date from twelfth-century England when attorneys first were recognized as a distinct professional class acting as confidential agents for their clients. As more legal business was conducted in royal courts, sometimes great distances from the litigants, the need arose for advocates who knew the procedures and personnel of these courts and who could speak the courts' language — French. The nature of these duties required men of learning; the higher functionaries of the emerging legal profession were gentlemen in the historical sense of that term.

It was not until the sixteenth century that English courts began the practice of compelling witnesses to testify in court or by deposition. Soon thereafter, the courts were asked if attorneys could be compelled to testify against their clients. The earliest cases

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7. In addition, Roman law respected the advocate's duty of fidelity to the client. See Radin, The Privilege of Confidential Communications Between Lawyer and Client, 16 Calif. L. Rev. 487, 488 (1928).
9. Id.
10. 8 J. Wigmore, supra note 1, § 2190, at 65 (citing Statute of Elizabeth, 1562—63, 5 Eliz., ch. 9, § 12).
11. Id. at 66 n.22. The modern role of counsel as a courtroom advocate for the client
recognizing an attorney-client privilege were motivated by concern for the attorney's honor rather than the client's confidences.\textsuperscript{12} Because the attorney pledged his oath to keep his client's secrets, any testimony by the attorney would violate that oath and degrade the attorney's honor.

The "attorney's honor" justification for the attorney-client privilege could not, and did not, last long.\textsuperscript{13} The justification could not last for two reasons. First, the rule was merely reactive; it responded to the fact that attorneys had pledged their honor to protect their clients' secrets. However, once attorneys and clients were informed that future communications between them would not remain secret in a court of law, attorneys would know not to put their oaths and honor in jeopardy of such compelled disclosure. Second, if attorneys were privileged because they swore they would keep a secret, then any witness who similarly swore himself to secrecy also should enjoy a privilege. There was, in fact, an attempt to launch such a privilege, but it did not succeed for the obvious reason that the state's power to compel testimony is worthless if any witness can avoid compulsion by swearing he pledged an oath of secrecy.\textsuperscript{14} The courts found that the peace and business of the realm were more important than the witness's voluntary pledge of secrecy.\textsuperscript{15}

Within these two flaws to the attorney's honor justification for the privilege lay the seeds of the modern justification. True, the law could tell attorneys and clients not to expect confidentiality, but is this desirable? Ordinary witnesses should not be allowed to

\begin{footnotesize}

\footnotesize{\textsuperscript{12} See, e.g., Taylor v. Blacklow, 3 Bing. N.C. 235, 249, 132 Eng. Rep. 401, 406 (C.P. 1836); 8 J. Wigmore, supra note 1, \S 2290, at 543.}

\footnotesize{\textsuperscript{13} 8 J. Wigmore, supra note 1, \S 2290, at 543.}

\footnotesize{\textsuperscript{14} Id. \S 2286, at 531 n.16.}

\footnotesize{\textsuperscript{15} See id. \S 2190.}

You must know that all subjects, without distinction of degrees, owe to the king tribute and service, not only of their deed and hand, but of their knowledge and discovery. If there be anything that imports the king's service, they ought themselves undemanded to impart it; much more, if they be called and examined, whether it be of their own fact or of another's, they ought to make direct answer.

Id. at 66–67 (quoting Sir Francis Bacon in the Countess of Shrewsbury's Trial, 2 How. St. Tr. 769, 778 (1612)). \textit{See also} id. \S 2286.

\end{footnotesize}
hide behind oaths of secrecy and thereby deny the courts information necessary to discover the truth. But should attorneys be treated like ordinary witnesses? Exploring the flaws in the original "honor" justification highlights the real issue: what is the proper role of the attorney in representing clients in civil and criminal cases?

B. Modern Justification

By the early eighteenth century, the courts began justifying the attorney-client privilege as necessary to the proper functioning of the attorney.16 According to this "need to know" justification, if the attorney could not keep secrets, the client would be reluctant to divulge them to the attorney. This result would impose inevitable limitations on the attorney's ability to advise and plead for his client.

There are two important assumptions in this "need to know" justification. First, without the privilege, clients may withhold important information from the attorney. This proposition has not gone unchallenged. There exists no empirical evidence that the attorney-client privilege significantly affects the flow of information between attorney and client.17 Arguably, most clients have only a dim awareness of the privilege, and their motives for revealing or concealing information are likely independent of any privilege. Perhaps the true effect of the privilege is not what the client sees, but what he does not see. He does not see attorneys routinely called to testify against their clients, or attorneys "Mirandizing" their clients before the first attorney-client interview. Without the privilege, the attorney would look more like a friendly policeman than a dedicated advocate.18

Jeremy Bentham, one of the privilege's earliest critics, argued that an attorney has no need to hear evidence from his client that hurts his client's case except when the client or attorney wishes to construct a false defense or otherwise impede the truth-finding

16. Id. § 2290, at 543.
17. See, e.g., Morgan, Some Observations Concerning a Model Code of Evidence, 89 U. Pa. L. Rev. 145, 152 (1940); 8 J. WIGMORE, supra note 1, § 2291.
18. See Shuman & Weiner, The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege, 60 N.C.L. Rev. 893, 916—29 (1982) (study found that although informing patients of the privilege did not significantly increase their willingness to communicate with the psychotherapist, informing the patient that there was no privilege decreased the patient's willingness to discuss matters of potentially legal significance).
process. Bentham's argument underscores the second assumption behind the need to know justification for the privilege: attorneys should be dedicated advocates who do battle, within the rules, against whomever opposes their clients. Bentham took the social utilitarian view that the role of the attorney must be to serve society first. To the extent any personal or professional privilege leads to the loss of important evidence, it harms the greater social good. But Bentham's argument is built on hindsight. True, once an attorney learns confidential information that, if revealed, would alter the result in a particular case, it is morally difficult for the attorney to justify keeping the secret and watching the system fail. Were it not for the attorney-client privilege, however, the attorney may never have heard that confidence in the first place. In this sense, the privilege does not significantly diminish the amount of information reaching attorneys because the very kind of information excluded is that which the client likely would keep from the attorney if there were no privilege.

In the isolated case, it might appear unjust that the privilege bars evidence crucial to discovery of an important truth. Yet the privilege must be applied uniformly in all cases. If courts could overrule the privilege whenever the information was deemed critical to obtaining the truth, clients might decide to withhold information from their attorneys rather than run the risk that their confidences might be admitted into evidence.

Bentham could not understand why attorneys needed to know the secret confessions of their clients. But Bentham never practiced law. There are at least three major aspects of practicing law that work optimally only if confidential information is not with-

21. "English judges have taken care to exempt the professional members of the partnership from so unpleasant an obligation as that of rendering service to justice." 5 J. BENTHAM, supra note 19, at 302.
23. Bentham conceded that attorneys will learn things from their clients with a privilege that they would never learn without one, but wondered why an attorney needs to know such things. Bentham worried that the idea of attorneys sharing the dirty little secrets of thieves and murderers was not an uplifting image for the legal profession. See C.W. EVERETT, THE EDUCATION OF JEREMY BENTHAM (1931).
24. C.W. EVERETT, supra note 23 (Bentham was called to the bar but never practiced.).
held by the client: case assessment, case confidence, and damage control.

Whether a client has a slip and fall claim, tax problem, or murder charge against him, the attorney needs full and accurate information to make a considered assessment of the strengths and weaknesses of his client's position. Without a privilege, every attorney would have the duty to inform his client that anything the client said could be repeated by the attorney and used against him in a court of law. Such information likely would have a chilling effect on the client's willingness to share all the relevant facts with his attorney and thus substantially diminish the attorney's ability to make an accurate case assessment.

Moreover, if the attorney knows the client may be withholding important information, the attorney cannot have confidence in his case assessment and is likely to act tentatively in advising the client or making tactical legal decisions. Finally, only when the attorney knows all the facts, including the worst, can he prepare for the presentation of damaging evidence should it arise from a separate source.25

For the same reasons, the client needs the freedom to share confidences with the attorney without the threat such confidences will be repeated in court. The client needs the best case assessment possible by an attorney fully prepared on all the facts, good and bad. Worse, without a privilege, the responsibility would fall on the client to make the legal judgments concerning which facts should and should not be shared with the attorney. Particularly when the client is undereducated or lacks good judgment, this responsibility would constitute a minefield for the client and a nightmare for the attorney. Careful counsel might have to advise such a client to say nothing rather than run the risk that the client might say something incriminating that the attorney could be compelled to repeat in court. Effective, zealous advocacy would be impossible in such circumstances.

The attorney is not entirely the alter-ego of the client, however. The attorney's role as zealous advocate still competes with the attorney's role as an officer of the court. In theory, these roles do not conflict. Both attorney and client are bound to the law throughout, and this requirement restricts the attorney no more than it restricts the client. In practice, however, the boundaries of legitimate advocacy are sometimes hard to delineate, and the attorney who

25. See, e.g., In re Shargel, 742 F.2d 61, 63 (2d Cir. 1984).
most zealously represents his client runs the risk of stepping over blurry lines into inappropriate conduct.26

C. Other Justifications

The primary justification for the privilege is the attorney’s need for full and accurate information from the client. Although this need to know justification has eclipsed the attorney’s honor justification, the two overlapped for a long time causing substantial confusion.27 Today, similar confusion is caused by competing and additional justifications for the attorney-client privilege.

These other justifications have focused on privacy and professionalism. The former recognizes a privacy interest on the part of the client concerning confidences shared with the attorney.28 Using the attorney-client privilege to protect this privacy interest extends the privilege somewhat further than the need to know justification. The emphasis shifts from encouraging full disclosure to the attorney to protection against unnecessary intrusions by the legal system into private matters.

The complexity of the legal system requires those ensnared in it to seek professional assistance. This assistance enables citizens to protect their individual rights and stay within the law. But the system ought not exact as a price for this assistance the loss of the client’s privacy. Only by allowing a party a confidential advocate does the system make up for its complexity and provide a more even playing field.29

While few would question that a client has a privacy interest, this fact alone is not a sufficient basis for remolding the attorney-client privilege to serve that interest. Using privacy as the primary justification for the privilege leads to awkward shifts in traditional privilege doctrine. For example, a corporation does not have the same kind of privacy interest as an individual, so arguably the privilege would be narrower for corporate clients. Because plaintiffs, by definition, invite the public courts to help resolve their

27. 8 J. Wigmore, supra note 1, § 2290, at 543–44 ("a turbid and confused volume of rulings abounded").
problems, they might have a weaker claim for privacy than the defendants they drag into court. Moreover, since a privacy interest may be subject to other individual or societal interests, these interests must be balanced in each individual case to determine if the privilege should apply.

In short, the practical ramifications of shifting to a privacy justification for the privilege are quite radical. The privacy rationale is better suited as a justification for the American system of dedicated advocacy than as the primary principle underlying a workable attorney-client privilege.

In addition to privacy interests, some see the attorney-client privilege as offering at least some protection for professional ethics. No one suggests that the privilege should incorporate the standards and scope of the Model Code of Professional Responsibility, yet there exists the temptation to blend ethical issues into an analysis of the privilege. This temptation springs from the generalization that the privilege is supposed to protect the attorney-client relationship.

The privilege was not designed to serve such a broad mission, however. So many varied issues fall under the heading of protecting the attorney-client relationship that distinct, particularized rules are required to deal with each different issue. For example, should a criminal defense attorney be compelled to testify regarding his client’s mental competence to stand trial? This question raises a privilege issue as well as an issue concerning the propriety of calling defense counsel to testify when testifying might compromise his effectiveness as an advocate. Even if the subject matter were not privileged, the ethical issue remains and should be considered separately according to its own principles and rules. Keeping the issues and analyses separate assures less confusion in both areas.

In sum, the attorney-client privilege should be limited to serving its traditional master: the attorney’s need to know all the facts, good and bad, relevant to the performance of his duties. The rules developed to facilitate this single objective are relatively clear and consistent. The objective is amenable to a relatively simple two-part test for analyzing cases on the edges of the privilege: (1) Is the communication one that the client would reasonably believe his at-

torney needs in order to properly represent his legal interests? (2) Is the communication one that, were it not for the privilege, the client likely would withhold from his attorney?

II. THE GEORGIA STATUTES

Georgia has no less than four statutes that address the attorney-client privilege. O.C.G.A. § 24-9-21 states:

There are certain admissions and communications excluded on grounds of public policy. Among these are . . . communications between attorney and client . . . .

O.C.G.A. § 24-9-27(c) states:

No party or witness shall be required to make discovery of the advice of his professional advisers or his consultation with them.

O.C.G.A. § 24-9-24 states:

Communications to any attorney or to his employee to be transmitted to the attorney pending his employment or in anticipation thereof shall never be heard by the court. The attorney shall not disclose the advice or counsel he may give to his client, nor produce or deliver up title deeds or other papers, except evidences of debt left in his possession by his client. This Code section shall not exclude the attorney as a witness to any facts which may transpire in connection with his employment.

Finally, O.C.G.A. § 24-9-25 states:

No attorney shall be competent or compellable to testify for or against his client to any matter or thing, the knowledge of which he may have acquired from his client by virtue of his employment as attorney or by reason of the anticipated employment of him as attorney. However, an attorney shall be both competent and compellable to testify for or against his client as to any matter or thing, the knowledge of which he may have acquired in any other manner.

These statutes are at the center of a confusing and indefinite picture of the attorney-client privilege in Georgia. These four

35. See W. Agnor, supra note 2, § 6-3; T. Green, supra note 2, §§ 179, 195.
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statutes raise several questions: (1) Why are there four separate statutes? (2) O.C.G.A. §§ 24-9-24 and 24-9-25 clearly do not overlap perfectly; which takes precedence? (3) Why does O.C.G.A. § 24-9-25 make an attorney incompetent to testify when the attorney-client privilege normally only bars compelling an attorney to testify to confidential communications?

O.C.G.A. §§ 24-9-21, 24-9-27, and 24-9-24 are from the Code of 1860, also known as the Original Code of 1863.36 The Code of 1860 was the result of a comprehensive effort to organize the statutes and to codify the common law and equity principles then existing in Georgia.37 The legislature appointed a commission to compile and organize existing law but not to create new law. The legislature adopted the commissioners' work essentially in total; only three changes were made among thousands of provisions.38

This history has created a unique status for statutes originating in the Code of 1860. Georgia courts sometimes have treated provisions from this Code differently from provisions originating elsewhere. In Rogers v. Carmichael39 the Georgia Supreme Court wrote, "[I]t should be kept in mind that the codifiers had no authority to originate new matter for legislative sanction."40 "[A]fter all," wrote an earlier court, "[t]he Code of 1860 is but a compendium of the common law."41 These cases suggest that when common law provisions of the Code of 1860 vary from the courts' inter-

36. Code of Ga. of 1860 §§ 3-10-2-3720, 3721, § 2-9-2-3035 (Seals 1861). As discussed in the following note, the Code of 1860 is often referred to as the Code of 1863 because the Civil War delayed its publication several years.

37. The codification movement flowered in the mid-19th century. Its promoters, like David Dudley Field, creator of the Field Code of Civil Procedure, admired the uniformity and accessibility of the Code Napoleon. Georgia was a very early participant in the movement, following Alabama's example. In 1858, the legislature appointed three commissioners, Richard Clark, Thomas Cobb, and David Irwin, to prepare a Code which should "as near as practicable, embrace in a condensed form, the laws of Georgia." The Code was completed in 1860 and adopted by the legislature in December of that year. Due to the war, however, publication was delayed several years. See Clark, The History of the First Georgia Code, in REPORT OF THE SEVENTH ANNUAL MEETING OF THE GEORGIA BAR ASSOCIATION 144 (1890).

The codification movement waned after the turn of the century. The codes had limited effect. As one commentator notes, "Courts and lawyers treated some code provisions in accordance with ingrained common-law prejudices. In some cases, the codes' provisions were construed away; more often, they were simply ignored." L. FRIEDMAN, A HISTORY OF AMERICAN LAW 354 (1973).

38. See Clark, supra note 37.


pretations of the common law, the courts' interpretations will prevail since the intent of the Code was to restate, not to freeze, the common law.

Conversely, O.C.G.A. § 24-9-25 is not a product of the Code of 1860 but rather a "normal" statute passed in 1887. Given the history of the Code of 1860 and the courts' subsequent qualifications concerning the force of those statutes, it is logical to conclude that O.C.G.A. § 24-9-25 takes precedence over the three 1860 statutes.

O.C.G.A. § 24-9-25 not only extends a privilege to attorney-client communications, but also renders an attorney incompetent to testify for or against his client regarding any matter within the relationship. Wigmore called this statute "peculiar," and it clearly is inconsistent with traditional common-law privilege principles which have never addressed an attorney's competence to testify.

This combination of testimonial incompetency and the privilege against testimonial compulsion has caused confusion regarding the attorney-client privilege as well as other privileges in Georgia. Read literally, O.C.G.A. § 24-9-25 seals the attorney's lips even if the client waives the privilege. Some Georgia courts have ignored this provision and allowed an attorney to testify if the client waived the privilege. Other courts have moved in the opposite direction and extended the statute to make the client, as well as the attorney, incompetent to testify concerning attorney-client communications.

42. 1887 Ga. Laws 30 (codified as amended at O.C.G.A. § 24-9-25 (1982)).
43. 8 J. Wigmore, supra note 1, § 2314; see also 6 J. Wigmore, supra note 1, § 1911, at 784 n.10.
44. See, e.g., Braxley v. State, 17 Ga. App. 196, 202-03, 86 S.E. 425, 428 (1915); G. Gober, Gober's Georgia Evidence § 1453(A) (1928); W. Agnor, supra note 2, §§ 3-9, 6-3.
45. See W. Agnor, supra note 2, §§ 3-9, 6-3; T. Green, supra note 2, §§ 179, 195; Southern Shipping Co. v. Oceans Int'l Corp., 174 Ga. App. 91, 93, 329 S.E.2d. 263, 265 (1985).
47. See, e.g., Braxley, 17 Ga. App. 196, 86 S.E. 425 (1915). In Braxley, the court admits that the statute does not expressly make the client incompetent, as it does the attorney, but the court construes the client's incompetence from the general tone of the statute. The court notes that although some states treat "the client's power to testify [as] a matter of privilege . . ., [t]he code announces a different rule in this State." Id. at 203, 86 S.E. at 428; see also Campbell v. State, 149 Ga. App. 299, 299, 254 S.E.2d 389, 390 (1979) ("Testimony of a client as to advice given to him by his counsel is incompetent and properly excluded.") (citing Braxley, 17 Ga. App. at 202-05, 86 S.E. at 428-29, cert. denied, 444 U.S. 933 (1979)).
A review of early nineteenth century witness competency doctrine is necessary to understand why privilege and competency rules were combined in Georgia’s statute. Until the mid-1800s, there existed a category of witness incompetency now mostly forgotten. This category barred the testimony of any witness who had a direct interest in the outcome of the case. Parties, their spouses, and anyone else with a significant stake in the litigation were incompetent to testify. 48 The testimony of these witnesses was excluded because the oath of anyone with an interest in the litigation was considered untrustworthy. 49 Moreover, an opponent could not compel the testimony of a party, thereby “preserv[ing] the party from temptation to [commit] perjury.” 50

Thus, when an 1850 Georgia statute made an attorney neither competent nor compellable to testify to matters relating to the representation, it merely expressed the then-prevailing view that a party should not be allowed to evade his own incompetence by calling his attorney to testify regarding what the client told him. 51 Furthermore, an opponent was not allowed to compel testimony from the attorney that could not be compelled from the party-client. 52

The attorney-client privilege, then as now, existed for the protection of the client and was personal to the client. Thus the privilege could be waived by the client. Witness incompetency rules, on the other hand, were designed to protect the integrity of the trial process and thus could not be waived by any party.

In 1857, Georgia began allowing parties to compel the testimony of their opponents. 53 The Evidence Act of 1866 removed most of the remaining restrictions on a party testifying in his own behalf. 54 The same Act repealed attorney incompetency and permitted an attorney to testify for or against his client, though the attorney still could not be compelled to do so. 55 It was logical to repeal the

49. Id.
50. Id. at § 330.
55. Id. The Act of 1850 relating to the privilege was repealed by the Act of 1859. 1859 Ga. Laws 18. The 1859 Act was in turn repealed by the Act of 1866. 1866 Ga. Laws 139. See Willis v. West, 60 Ga. 613 (1878); see also Fire Ass’n v. Fleming, 78 Ga. 733, 3 S.E. 420 (1887).
attorney incompetency rule at the same time as the party incompetency rule since the former existed only to help enforce the latter.

In 1887 the statute was amended to the present language of O.C.G.A. § 24-9-25; it included the attorney's blanket incompentence to testify concerning knowledge acquired from the client.\textsuperscript{56} The question is why, after attorney and party incompetency were abolished in 1866, did attorney incompetency creep back into the statute in 1887?

There is scant legislative history for the 1887 Act. The House and Senate Journals for the 1886-87 session note the law's passage by overwhelming margins, but include no discussion of the purpose for the change.\textsuperscript{57} A report to the 1888 meeting of the Georgia Bar Association gives one reason for the change.\textsuperscript{58} The Evidence Act of 1866 had made all persons competent to testify except as otherwise provided. The provision "nor shall any attorney be compellable to give evidence for or against his client" was added by amendment shortly before the General Assembly adjourned.\textsuperscript{59} Intended or not, the amendment prohibited compelling an attorney to testify not only to matters acquired in the attorney-client relationship, but to any other matters as well. Applied literally, if an attorney who witnessed a murder was hired by the murderer, the state could not compel him to testify against his client. Thus one purpose for the 1887 law was to allow compelling "an attorney to testify as to all matters of which he may have acquired knowledge otherwise than by reason of the relationship of attorney-client."\textsuperscript{60}

This purpose does not explain why the legislature made the attorney "incompetent" to testify to confidential attorney-client communications though it apparently was recognized that the 1887 statute restored "the law to the condition in which it was prior to the Act of 1866."\textsuperscript{61} It is unclear why lawmakers would want to restore the pre-1866 law of attorney incompetency when the ration-

\textsuperscript{56} 1887 Ga. Laws 30; see also Freeman v. Brewster, 93 Ga. 648, 21 S.E. 165 (1894); Lewis v. State, 91 Ga. 168, 16 S.E. 986 (1892).
\textsuperscript{57} See Journal of the House, General Assembly of 1886, at 519; Journal of the Senate, General Assembly of 1887, at 99.
\textsuperscript{58} See Report of the Committee of Judicial Administration and Remedial Procedure, in Report of the Fifth Annual Meeting of the Georgia Bar Association 181 app. at 10 (1889).
\textsuperscript{60} Id.
\textsuperscript{61} Id.
The courts should read O.C.G.A. § 24-9-25 narrowly, within its historical context. The original purpose of attorney testimonial incompetency was to keep the client from using the attorney to testify to that which the client was neither competent nor compellable to reveal himself. Applying the same purpose to the 1887 statute, the legislature only restored attorney incompetency for situations in which the party-client is either incompetent or not compellable.63

When a party is both competent and compellable, as in a modern civil case, using the attorney to testify to matters within the relationship does not evade any legal limitations on the client’s testifying because there are no such limitations. Thus, the testimony does not offend the historical purpose behind rules limiting an attorney’s competence.

This interpretation of the 1887 statute, now codified at O.C.G.A. § 24-9-25, also clarifies the role of waiver. The attorney-client privilege can be waived since it is personal to the client, but testimonial incompetency of a witness cannot.64 If the client asserts the privilege, he cannot be compelled to testify as to attorney-client confidences, and therefore his attorney is incompetent to testify to the same. But if the client waives the privilege and thereby makes himself compellable to testify as to attorney-client communications, the attorney is then both competent and compellable to testify to such communications.

In sum, four very old statutes have posed interpretive difficulties for Georgia courts over the last 125 years. The resulting confusion is unnecessary. The three privilege statutes from the Code of 1860 should be read as restatements of common law existing at that time, not as limits to the common law’s development in modern Georgia courts. The 1887 statute, O.C.G.A. § 24-9-25, should be

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62. One might speculate that the incompetence feature was added to the 1887 statute because the legislature, as a matter of public policy, wished to discourage an attorney from acting as both witness and advocate in the same case. See S. Greenleaf, supra note 48, § 386. However, the 1887 statute expressly permits an attorney to testify for or against his client as to matters learned outside the relationship. See 1887 Ga. Laws 30. This allowance is inconsistent with an intent to prohibit the attorney from mixing the roles of witness and advocate.

63. The Act of 1866 did not remove all restrictions on party competency and compulsion. The criminal defendant’s privilege against self-incrimination, for example, was unaffected. 1866 Ga. Laws 138, 139; see O.C.G.A. § 24-9-20 (1982). See also Ga. Constr. art. I, § 1, ¶ 16. Thus a criminal defendant who refuses to testify cannot use his attorney to tell his story to the jury.

64. See supra text accompanying notes 48-52.
III. THE DOCTRINE OF THE ATTORNEY-CLIENT PRIVILEGE: A COMPARISON OF COMMON LAW AND GEORGIA LAW

Although controversy exists at the periphery of the attorney-client privilege, the basic principles of the doctrine are well established at common law. For a working definition of the privilege, one might paraphrase Wigmore: When legal advice is sought from an attorney, any communications relating to that purpose, made in confidence by the client, are at the client's insistence permanently protected from disclosure by the client or attorney unless the protection is waived.66

The privilege does not exclude facts per se; rather, it excludes the use of attorney-client communications to prove facts. For example, a client involved in an automobile accident tells his attorney the light was red. The opponent can question the client regarding the color of the traffic signal but cannot ask the client or his attorney what the client told the attorney regarding the color of the light.67

The following discussion of the attorney-client privilege covers the main doctrinal components of the privilege: (1) a definition of the privileged relationship; (2) the requirement of confidentiality; (3) the assertion and waiver of the privilege; and (4) the inapplica-

65. See T. Green, supra note 2, § 195; see also infra text accompanying notes 52—56.
67. As the United States Supreme Court wrote:
[T]he protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, "What did you say or write to the attorney?" but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.
bility of the privilege for communications in furtherance of crime, fraud, or other wrongdoing.

A. Defining The Privileged Relationship

1. Attorney and Client

Only communications made within an attorney-client relationship are covered by the privilege. The relationship is formed the moment the client seeks the attorney's professional services, regardless of whether the attorney is ultimately hired. The client must be seeking legal advice. The privilege does not cover communications made to an attorney while seeking nonlegal advice.

A client cannot force a relationship on an attorney who declines representation. Once an attorney tells a person he cannot or will not advise or represent him, any attorney-client relationship between them is terminated and with it, the privilege. In ambiguous situations, the test is whether the client reasonably believed that the attorney was giving him legal advice.

A recent Georgia Supreme Court decision presents a rather narrow application of this test. In Spence v. State, the accused was a nineteen-year-old charged with the murder of his mother. On the night of his arrest and twice while in jail, he spoke to his brother-

68. Peek v. Boone, 90 Ga. 767, 17 S.E. 66 (1893). But when there appears no expectation of formally retaining the attorney at the time the communication is made, there is no privilege. See Brown v. Matthews, 79 Ga. 1, 4 S.E. 13 (1887). "They must be the offspring of the relation, present or prospective, not of taking or expecting to take the fruits of such a relation without forming it." Id. at 8, 4 S.E. at 15.

69. See Colman v. Heidenreich, 269 Ind. 419, 381 N.E.2d 866 (1978) (statements made to attorney concerning matters unrelated to the legal representation are not privileged).

70. See, e.g., United States v. Aronson, 610 F. Supp. 217, 221 (S.D. Fla. 1985), aff'd, 781 F.2d 1580 (1986); Attorney Gen. of the United States v. Covington & Burling, 430 F. Supp. 1117, 1121 (D.D.C. 1977); Elder v. Hewitt, 33 Ga. App. 410, 126 S.E. 849 (1925). Some cases suggest that when an attorney acts as a subscribing witness to a contract there is no protected attorney-client relationship and the attorney can testify as to the mental capacity of the maker as well as to the maker's knowledge or ignorance of the contents of the documents. See, e.g., Jones v. Smith, 206 Ga. 162, 164—65, 56 S.E.2d 462, 465 (1949). Faced with the same situation, most courts find that an attorney-client relationship does exist, but that the attorney's function as subscribing witness is, by its very nature, nonconfidential, and thus not privileged on that basis. 8 J. Wigmore, supra note 1, §§ 2296, at 567 n.2, 2303.

71. See 8 J. Wigmore, supra note 1, § 2304.

72. A logical extension of this principle is that if the client reasonably believed the individual from whom he is seeking legal advice is an attorney, the privilege applies even though the individual is not authorized to practice law. 8 J. Wigmore, supra note 1, § 2302; Dabney v. Investment Corp. of Am., 82 F.R.D. 464 (E.D. Pa. 1979).

in-law, an attorney. The prosecution wanted the attorney brother-in-law to testify to what the defendant told him, and the defendant asserted the privilege. The brother-in-law testified he felt he was acting only as a family friend and told the defendant he should hire a lawyer. Relying heavily on this testimony, the court held the defendant could not have reasonably believed that the brother-in-law was representing him, and thus the conversations were not privileged.\footnote{Spence v. State, 252 Ga. 338, 343—44, 313 S.E.2d 475, 479—80 (1984).}

The court's approach interprets "representation" too narrowly to accommodate the needs of the attorney-client privilege. It is true that the brother-in-law told the defendant to hire a lawyer and thus made it clear that he could not, or would not, represent the defendant throughout the criminal proceedings. Nevertheless, the brother-in-law also gave the defendant legal advice. There is no evidence the attorney warned the defendant that their conversations were not privileged.\footnote{Id.; see also Peek v. Boone, 90 Ga. 767, 17 S.E. 66 (1893); cf. Commonwealth v. Hutchinson, 290 Pa. Super. 254, 434 A.2d 740 (1981) (court upheld attorney-client privilege when statement made after relationship had ended was a reiteration of privileged communication).} As Justice Weltner asked in his dissent: "What, I inquire, could Spence — staring out from behind the bars of the Richmond County jail — 'reasonably believe' . . . to be the function of his lawyer brother-in-law?"\footnote{Spence, 252 Ga. at 347, 313 S.E.2d at 482 (Weltner, J., dissenting). See also Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978).}

It should not matter whether the client believed the attorney's advice was given as part of a long term or purely temporary relationship. If the defendant seeks and receives legal advice from the attorney, the reasons for the attorney-client privilege come into play. In order for the defendant to receive good legal advice, he must feel free to disclose all facts to the attorney. Disclosure is encouraged by removing the defendant's fear that his confidential communications will be used against him. An attorney does not have to give advice, but if he does, he thereby solicits the client's confidence. Thus the definition of legal "representation" in Georgia should be broad enough to include situations like Spence in which the client is seeking and receiving legal advice for the purpose of making decisions pending the selection and arrival of permanent counsel.

A second issue raised in Spence concerns the difficulty in distinguishing between communications made inside or outside the at-
torney-client relationship when the attorney is also a friend or nonlegal adviser of the client. Some authorities say the communication must be necessary to the seeking of legal advice to come within the attorney-client relationship. But as Wigmore adds: "It should be clear... that the actual necessity of making a particular statement... cannot determine the answer, for the client cannot know what is necessary or material, and the object of the privilege... is that he should be unhampered in his quest for advice."78

2. Agents of the Attorney and Client: The Privileged Network

The scope of the attorney-client relationship includes, by necessity, the network of agents and employees of both the attorney and client, acting under the direction of their respective principals to facilitate the legal representation.79 The attorney’s privileged network includes administrative and legal assistants, from file clerks to law clerks.80 Courts generally hold that outside experts hired by the attorney to assist in collecting facts or understanding the client’s case are also part of the privileged network.81 The outside experts cannot be asked about communications with the attorney or client if the answers would reflect client confidences. But the experts, like the attorney, may be asked about matters learned from sources other than the client.82 The privilege offers more protection when the expert is hired by the attorney rather than the client. When hired by the attorney, communications between the expert and the client are covered, as are communications between the expert and the attorney, since the expert is an agent of the attorney. When the expert is hired by the client, however, his communications with the attorney are covered to the extent they are authorized by the client, but communications with the client, his

77. See 8 J. Wigmore, supra note 1, § 2310.
78. Id.
80. O.C.G.A. § 24-9-24 (1982); Taylor v. Taylor, 179 Ga. 691, 177 S.E. 582 (1934); Dabney v. Investment Corp. of Am., 82 F.R.D. 464 (E.D. Pa. 1979); 8 J. Wigmore, supra note 1, § 2301. To the extent the attorney's agent is acting outside that capacity, the privilege does not operate. If, for example, a client met his attorney's file clerk for lunch and discussed the details of his case, this would not be privileged.
principal, are not ordinarily covered.\textsuperscript{83}

When an expert is hired to testify, he is performing a “witness” function rather than an “attorney-agent” function. What the expert witness sees and hears is meant to provide the basis for his opinion testimony and thus is not privileged.\textsuperscript{84}

The privileged network of the client includes any agents or employees the client needs and uses to assist communication with the attorney.\textsuperscript{85} This network includes not only speaking agents of the client, but also agents or employees who are directed by the client to speak to the attorney from personal knowledge regarding matters within the scope of their agency or employment.\textsuperscript{86} Thus, if an employee witnesses an accident and is ordered by his employer to make a report to the attorney, that communication is privileged.\textsuperscript{87}

If a bystander to the same accident, who is not an agent of the client, relays information regarding the accident to the attorney, that communication is not privileged since the witness does not work for the client.\textsuperscript{88} If the employee’s communication was not privileged, the client, who presumably controls the employee, might have him sanitize his report to the attorney or filter it through the client, causing the attorney to lose needed information. On the other hand, when the witness is not the client’s employee, the privilege is not required since the client does not control the witness.

An agent’s communications with his principal are not privileged.\textsuperscript{89} Thus, if the employee in the above example submitted a


\textsuperscript{84} The lack of privilege in this situation can be described in two different ways. First, since the witness will base his testimony on the communications, they were not meant to be confidential. C. McCormick, \textit{supra} note 28, \S\ 89 n.15. Second, if the expert bases his testimony in part on privileged information, calling the expert to testify would constitute a waiver of the privilege. Alexander v. State, 358 So. 2d 379, 386 (Miss. 1978). \textit{See also} Bailey v. Meister Brau, Inc., 57 F.R.D. 11 (N.D. Ill. 1972) (using privileged documents to refresh recollection of witness constitutes waiver); Beverage Mktg. Corp. v. Ogilvy & Mather Direct Response, Inc., 563 F. Supp. 1013 (S.D.N.Y. 1983) (work product protection does not apply to materials relied upon by testifying expert).

\textsuperscript{85} See, e.g., Fire Ass’n of Philadelphia v. Fleming, 78 Ga. 733, 3 S.E. 420 (1887); 8 J. Wigmore, \textit{supra} note 1, \S\ 2317, at 618.


\textsuperscript{87} What the employee saw is not privileged, but neither he nor his attorney can be asked to disclose what the employee told the attorney. \textit{Upjohn}, 449 U.S. at 394–97.

\textsuperscript{88} 8 J. Wigmore, \textit{supra} note 1, \S\ 2317.

\textsuperscript{89} See, e.g., Atlantic Coast Line R.R. v. Daugherty, 111 Ga. App. 144, 150, 141 S.E.2d 112, 116 (1965). The work-product doctrine may limit discovery of such state-
written report to the client, forwarding that report to the attorney would not make the report privileged since the report itself was not a communication with the attorney.\textsuperscript{90}

3. \textit{Corporate Client}

Courts have had little difficulty agreeing that the privilege must apply to an attorney-corporate client relationship.\textsuperscript{91} Defining the nature and scope of the privilege in the corporate context has not been so easy. The attorney's duty is to the corporation. Yet the corporation is only a legal entity, and the attorney must rely on the officers and employees of the corporation to provide the direction and information necessary to fulfill that duty.\textsuperscript{92}

At first, courts tended to view any communications between corporate employees and the corporate attorney as privileged.\textsuperscript{93} This broad application of the privilege struck many courts as unnecessarily exclusionary.\textsuperscript{94} Attempts to refine the attorney-corporate client privilege led to the "control group test."\textsuperscript{95} Only communications by corporate employees with control of, or a substantial hand in, corporate decisions likely affected by legal advice were privileged on the ground that only such individuals personified the corporation.\textsuperscript{96}

The control group test proved too narrow, however. The United States Supreme Court, in \textit{Upjohn Co. v. United States}, rejected

\textsuperscript{90} Likewise, statements made by an insured to a claims adjustor generally are not privileged even though they are later transmitted to the attorney. C. \textsc{McCormick}, supra note 28, \S 91, at 220 n.17; Atlantic Coast Line R.R. v. Daugherty, 111 Ga. App. 144, 141 S.E.2d 112 (1965); Gottlieb v. Bresler, 24 F.R.D. 371 (D.D.C. 1959). If the attorney directs the insured to make the statement to the adjustor for the purpose of informing the attorney, the privilege applies. C. \textsc{McCormick}, supra note 28, \S 91; cf. Asbury v. Beerbower, 589 S.W.2d 216, 217 (Ky. 1979) (statements by insured to adjustor before attorney was retained were privileged since statements were taken in expectation of providing them to an attorney once one was retained).

\textsuperscript{91} See United States v. Louisville & Nash. R.R., 236 U.S. 318, 336 (1915); Fire Ass'n of Philadelphia v. Fleming, 78 Ga. 733, 3 S.E. 420 (1887); see also C. \textsc{McCormick}, supra note 28, \S 87.

\textsuperscript{92} For the application of the attorney-client privilege in shareholder derivative suits, see Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971).

\textsuperscript{93} C. \textsc{McCormick}, supra note 28, \S 87, at 208.


\textsuperscript{96} \textit{Upjohn}, 449 U.S. at 390 (quoting General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), cert. denied, 372 U.S. 948 (1963)).
the control group test, stating: "Such a view, we think, overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."\textsuperscript{97}

As discussed above, even when the client is an individual, the privilege covers not only his communications to his attorney, but also communications by agents of the client acting under the client's direction, even if that information originated with the client.\textsuperscript{98} 

\textit{Upjohn} extends this principle to the corporate client situation. The emphasis is not on the person who makes the communication to the attorney but rather on the reason the communication was made.

Georgia courts recognized but did not seriously wrestle with the attorney-corporate client privilege until shortly after \textit{Upjohn} was decided. In \textit{Marriott Corp. v. American Academy of Psychotherapists, Inc.},\textsuperscript{99} the Georgia Court of Appeals adopted what it called a modified subject matter test taken from the Eighth Circuit's opinion in \textit{Diversified Industries, Inc. v. Meredith}.\textsuperscript{100} Under \textit{Marriott}, the privilege covers communications between corporate counsel and the corporate "control group" as well as communications from corporate employees outside the control group if all of the following five requirements are met:

1. The communication was for the purpose of securing legal advice for the corporation. Without this "purpose test" there exists no link between the communication and the privileged relationship between the corporation and its legal advisor.

2. The communication was made at the direction of corporate superiors. Whether the client is a corporation or the sole proprietor of a business, only communications made or directed by the client to the attorney are privileged. The reason for this rule goes back to the basic test for whether a communication should be privileged. That is, would the client likely withhold this kind of communication from the attorney were it not for the privilege? When the communication by a lower-level employee is not authorized, the client corporation has no control over and thus no ability to

\textsuperscript{97} \textit{Id.} at 390.

\textsuperscript{98} See \textit{supra} notes 85—90 and accompanying text.


\textsuperscript{100} 572 F.2d 696 (8th Cir. 1977) (en banc). The \textit{Upjohn} Court did not offer a new test to replace the rejected control group test, but its analysis of \textit{Upjohn}'s privilege claim follows the \textit{Meredith} test. \textit{Upjohn}, 449 U.S. at 394—97.
withhold the communication. The privilege is not necessary to encourage communication over that which the client has no control.\textsuperscript{101}

(3) The superior made the request so that the corporation could secure legal advice. The attorney-corporate client relationship only covers the attorney’s function as legal advisor and advocate. Therefore, using a corporate attorney to collect information for nonlegal purposes is not privileged.\textsuperscript{102}

(4) The subject matter of the communication is within the scope of the employee’s corporate duties. This requirement is identical to the test for whether an employee’s statement can be considered an admission by his employer under the Federal Rules of Evidence.\textsuperscript{103} The reasoning is the same; when the employee speaks with knowledge about affairs of the corporation, his knowledge is imputed to the corporation. The privilege only protects the communication of that which the client corporation “knows.”

(5) The communications must have been confidential and kept confidential, with distribution limited to those in the corporation with a need to know. Because the privilege is only designed to encourage communications the client wishes to keep secret, the client’s failure to safeguard confidentiality will destroy the privilege. Generally, corporations can provide managers internal access to privileged documents without destroying the privilege if the managers’ responsibilities include the use of such documents.\textsuperscript{104} Distribution of the documents outside the corporation, other than to the attorney or his agents, usually destroys confidentiality.\textsuperscript{105}

\textsuperscript{101} Some cases add that the law should have no interest in encouraging middle and lower-level employees to contact corporate counsel directly about the corporation’s business, instead of reporting to its chief officers, who are primarily responsible for the corporation’s affairs. See, e.g., United States v. Upjohn, 600 F.2d 1223, 1227 (6th Cir. 1979).


\textsuperscript{103} Fed. R. Evid. 801(d)(2)(iv).

\textsuperscript{104} 2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE, § 211, at 809–10 (1977).

\textsuperscript{105} See, e.g., In re John Doe Corp., 675 F.2d 482, 488 (2d Cir. 1982).
4. The Joint Defense Doctrine

When one attorney represents a number of clients in a common matter, confidences exchanged within the joint representation are privileged and only can be waived jointly.\(^{106}\) When two attorneys separately represent clients who have a joint interest, such as co-defendants in a criminal case or joint obligors on a contract, disclosure of confidential information to the “allied” attorney may be privileged under the joint defense doctrine.\(^{107}\) The joint defense doctrine applies when clients have such an identity of interest that joint planning of their legal representation is a natural option, and the communications were made for the purpose of evaluating or planning joint action.\(^{108}\)

There are two main reasons for the joint defense doctrine. First, one attorney can represent two clients with common interests most effectively by pooling the clients’ information and planning joint strategies. This situation presents no privilege problem because the attorney represents both clients. Retaining a single attorney is not always practical or desirable, however. The joint defense doctrine first emerged in criminal cases, in which it is often necessary to retain separate attorneys for each co-defendant. Without the joint defense doctrine, a party who retained separate counsel on a joint matter would be penalized by losing the privilege necessary to plan a joint defense.

Second, as complex multi-party civil litigation increases, coordination of resources and strategy becomes important not only to competent lawyering but also to the efficiency with which these giant lawsuits work their way through the courts.\(^{109}\)

B. The Confidentiality Requirement

Because the privilege is needed only to encourage disclosure of information the client otherwise might keep secret, only confiden-
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Partial client communications are privileged. Therefore, information the client intends to reveal or cannot help but reveal to third parties is not privileged.\footnote{110}

The privilege primarily covers what the client tells the attorney. Since what the attorney tells the client often contains or reflects client confidences, the privilege usually covers such statements as well.\footnote{111} Some courts find no privilege if disclosure of the attorney's communication to the client clearly would not reveal anything the client said to the attorney.\footnote{112} Other courts are more fearful of opening doors that might lead to discovery of a client's confidences and generally prohibit inquiry into anything the attorney told the client relating to the representation.\footnote{113}

The client does not have to request confidentiality. Confidentiality is presumed when the client solicits legal advice in a confidential setting.\footnote{114} Whether the presence of persons other than the attorney or client destroys confidentiality depends on the function of these other persons. If they are present as agents or assistants to the attorney, confidentiality is undisturbed. If agents, friends, or relatives of the client are needed to assist the client in the matter at hand, then confidentiality is not compromised.\footnote{115}

Communications that the client intends to reveal to third parties are not privileged even if they are not subsequently revealed. Neither may the client retrospectively impart confidentiality to communications that were not confidential when made.\footnote{116}

\footnote{111} 8 J. Wigmore, \textit{supra} note 1, § 2320; \textit{In re} Fischel, 557 F.2d 209, 211 (9th Cir. 1977).
\footnote{112} \textit{See}, e.g., Brinton v. Department of State, 636 F.2d 600, 604 (D.C. Cir. 1980) (attorney could be asked whether he informed client of information received from public agency), cert. denied, 452 U.S. 905 (1981).
\footnote{114} 8 J. Wigmore, \textit{supra} note 1, § 2311.
\footnote{115} C. McCormick, \textit{supra} note 28, § 91; \textit{Proposed Fed. R. Evid.} 503(a)(4) (J. Schmerz ed. 1974) ("A communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.").
\footnote{116} C. McCormick, \textit{supra} note 28, § 91.
1. Overheard or Intercepted Communications

Wigmore argued that any disclosures to a third party, intended or not, constitute a loss of the privilege as to that communication; for example, even if someone stole a client's letter to his attorney, the privilege was lost.117 Wigmore felt the law only promised not to compel disclosure and left the attorney and client responsible for safeguarding their confidences from others. But in today's world of electronic listening devices, computer snooping, and telephone taps, safeguarding attorney-client confidences from a determined eavesdropper may require facilities or technology unavailable to the average attorney. Most courts have recognized this problem and have rejected the notion that one can acquire admissible evidence by stealing the adversary's confidences.118 However, failure of the attorney or client to take reasonable safeguards to preserve confidentiality still will result in a loss of the privilege.119 An attorney and client who communicate where they can be heard by others without the aid of any listening device might anticipate they will be overheard, and thus their conversation lacks the confidentiality required for the privilege.120

2. Multiple Clients

When an attorney represents multiple clients on the same matter, the clients' communications to the attorney are presumed confidential vis-a-vis third parties, but not as to one another. Thus, in a subsequent action between the clients, evidence of what either told the attorney is not privileged.121

The multiple client rule can raise a problem in the insurance defense context. For example, a liability carrier hires an attorney to represent the insured. The attorney has two clients and communication with either is privileged from the outside world. But what

117. 8 J. Wigmore, supra note 1, §§ 2325—26.
120. See, e.g., Profitt v. State, 315 So. 2d 461, 465 (Fla. 1975); 2 J. Weinstein & M. Berger, supra note 82, § 503(b)(2).
if the insured tells the attorney information that might be relevant in a declaratory judgment action by the insurance company against the insured to support a denial of coverage? Can the insurance company compel the attorney to testify as to the insured's statements?¹²² Most courts answer in the affirmative.¹²³ Because the insurance company and the insured each know that the attorney represents both on the same general matter, they cannot expect confidentiality as to one another. This type of "limited confidentiality"¹²⁴ poses some problems. The privilege is designed to allow the client to share information with the attorney and thus facilitate competent legal representation. The insurance company's policy promises the insured competent legal representation.¹²⁵ If the insured knows that the company may hear the confidences he tells his attorney, he may be reluctant to communicate fully with his attorney.¹²⁶ This result is antithetical to the purpose of the privilege.

3. **Facts About the Client**

Facts about the client that are by nature public, such as the client's physical appearance, handwriting, or mannerisms, are not privileged.¹²⁷ However, the language of O.C.G.A. § 24-9-25 suggests a broader view. That section extends the privilege to "any matter or thing, the knowledge of which [the attorney] may have acquired from his client by virtue of his employment as attorney . . . ."¹²⁸ This language would appear to cover any facts "as to which the attorney has acquired his knowledge by his own observation where

¹²² The dilemma works in reverse; for example, the insurance company may tell the attorney something that could be relevant to the insured's bad faith claim against the insurance company for failure to settle within policy limits.
¹²⁴ C. McCormick, supra note 28, § 91.
¹²⁵ See 7C J. Appleman, INSURANCE LAW & PRACTICE §§ 4682, 4687 (W. Berdal ed. 1979).
¹²⁶ Counsel are well advised to tell the insured at the start of their relationship that anything said may get back to the insurance company. Even this prudent admonition, however, dampens the atmosphere of trust and confidence the privilege is supposed to engender.
¹²⁷ 8 J. Wigmore, supra note 1, § 2306. Wigmore distinguishes the situation in which the client reveals to the attorney a scar not normally visible in public (a privileged communicative act) from that in which the attorney notices a scar on the client's forehead (a nonprivileged, nonconfidential fact about the client); see also In re Walsh, 623 F.2d 489 (7th Cir. 1980), cert. denied, 449 U.S. 994 (1980); C. McCormick, supra note 28, § 88; 2 J. Weinstein & M. Berger, supra note 82, § 503(b)(3).
this observation was a result of his professional employment.”129 McCormick criticizes statutes that extend the privilege in this manner.130 Georgia cases have alternately embraced and ignored the breadth of this statute. One case interprets O.C.G.A. § 24-9-25 as “not confined merely to communicated matters.”131 Another line of cases holds that the attorney’s opinion of the client’s mental state, learned through representation of the client, is not covered by the privilege because such information is not “acquired from” the client.132

For example, in Southern Railway Co. v. Lawson,133 a train struck the plaintiffs’ son. The plaintiffs subsequently signed a release relieving the railroad from liability. They later sought to invalidate the release on grounds of mental incompetency. Their attorneys were allowed to testify to the mental condition of their clients, and the court held that this testimony did not encompass privileged matter.134 However, in Almond v. State,135 a prosecuting attorney used defense counsel to testify to the mental competence of the accused to stand trial, and the court of appeals condemned the practice. The court held, in part, that O.C.G.A. § 24-9-25 was violated because counsel’s opinion was based on information gathered during the professional relationship.136

The common law and the policy behind the privilege support those Georgia cases that read O.C.G.A. § 24-9-25 narrowly. The client’s mental state, rational or irrational, coherent or crazed, is a condition the client cannot reasonably hope to keep confidential. The client’s mental state is not the kind of fact that, but for the privilege, would never be shared with the attorney.

The Almond case shows how principles of privilege and attorney-witness competency do not always overlap. From the standpoint of the privilege, defense counsel’s testimony is not barred because it does not concern a confidential communication from the

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130. C. McCormick, supra note 28, § 89 (“such an extension finds no justification in modern day policy, and perhaps is a carryover from the days when the privilege was thought of primarily for the protection of the honor of the profession”).
131. Taylor, 179 Ga. at 692, 177 S.E. at 583.
134. Southern, 256 Ga. at 801, 353 S.E.2d at 494–95 (citing Smith v. Smith, 222 Ga. 694, 152 S.E.2d 550 (1966)).
client. From the standpoint of attorney-witness competency, allowing the prosecution to call defense counsel to testify to the mental competence of his client to stand trial so undermines the attorney's role and effectiveness as advocate as to recommend a rule barring such a practice. The source of such a rule, however, is not the attorney-client privilege.\textsuperscript{137}

4. Identity of Client and Fact of Employment

Traditionally, the privilege generally does not bar compelling an attorney to reveal the client's identity and the fact or general nature of their professional relationship.\textsuperscript{138} Georgia follows this rule.\textsuperscript{139} The rule is justified on several grounds. When the identity of the client and the fact of employment are necessary to establish the foundation for asserting the privilege, a party must disclose them.\textsuperscript{140}

Moreover, there often exists no expectation of confidentiality regarding such information, particularly when a party retains the attorney to represent him in a proceeding or negotiation in which the client's identity will become apparent.\textsuperscript{141} However, when the client approaches the attorney for advice on a matter that may or may not proceed further, such as a spouse contemplating divorce or a client who fears he may be a suspect in a criminal investigation, the client may have an express or implied interest in maintaining

\textsuperscript{137} The Almond situation raises serious ethical issues concerning an attorney who reveals any information gained in the relationship that might be detrimental to the client. See, e.g., Model Code of Professional Responsibility DR 4-101(A) (1980). In addition to the attorney's obligations to the client and the profession, the Almond situation also raises issues concerning the apparent integrity and fairness of the judicial process. Compelling an attorney to testify against his client can reduce the attorney's credibility as an advocate and makes the judicial process seem less than evenhanded. For these reasons, some courts hold, particularly in criminal cases, that an attorney should not be compelled to testify against his client except in cases of proven necessity and, of course, when the testimony would not include privileged matters. See cases cited infra notes 151—52.

\textsuperscript{138} C. McCormick, supra note 28, § 90; 8 J. Wigmore, supra note 1, § 2313; see also United States v. Jones, 517 F.2d 666, 670—71 n.2 (6th Cir. 1975).


\textsuperscript{141} 8 J. Wigmore, supra note 1, § 2313; Saltzburg, Communications Falling Within the Attorney-Client Privilege, 66 Iowa L. Rev. 811, 820—24 (1981).
complete confidentiality. Without a privilege protecting the client's identity in such situations, the client might forego legal advice altogether. In addition, revelation of the client's identity may incriminate the client if other facts already show that he has violated the law.

Courts have struggled with these issues because they raise serious ethical considerations in addition to privilege issues. In Baird v. Koerner, for example, it was known that the attorney made anonymous restitution payments to the Internal Revenue Service (IRS) for his client. The IRS sought the identity of the client. The court held the privilege barred disclosure since disclosure would incriminate the client and that fact was apparent at the time the client sought the attorney's assistance.

Critics argue that the issue in Baird is not whether the client intended his identity to remain confidential but whether the law should protect this kind of confidential communication. The test for whether confidential communications should be covered by the privilege is not whether the communications will harm the client, but whether they were reasonably necessary to obtain legitimate legal services. Using an attorney as a mailman to the IRS in order to draw a curtain of secrecy around the source of possible illegality arguably does not fall within the scope of legal services that the privilege was designed to protect.

In general, courts will bar disclosure of the client's identity or the fact of the attorney's employment if such disclosure would reveal the substance of confidential attorney-client communications. Some courts protect the client's identity when the information already known is such that identification of the client

142. See In re Grand Jury Proceedings (Pavlick), 663 F.2d 1057, 1060 (5th Cir. Unit A Dec. 1981), rev'd, 680 F.2d 1026 (5th Cir. Unit A 1982) (en banc); Baltes v. Doe I, 57 U.S.L.W. 2268 (Fla. Cir. Ct. Oct. 13, 1988) (No. CL-88-1145-AD) (identity of client sought in connection with hit and run accident, held privileged when client insisted that his name be kept confidential and attorney's disclosure of the name would necessarily reveal confidential communications linking client to the accident); Saltzberg, supra note 141 at 821-23.

143. 279 F.2d 623 (9th Cir. 1960).

144. Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960); see also Tillotson v. Boughner, 350 F.2d 663 (7th Cir. 1965).

145. See, e.g., C. McCormick, supra note 28, § 90; Saltzberg, supra note 141, at 823-24.

146. See, e.g., C. McCormick, supra note 28, § 90; Saltzberg, supra note 141, at 823-24.

147. See, e.g., In re Osterhout, 722 F.2d 591, 593 (9th Cir. 1983); Colton v. United States, 306 F.2d 633, 637 (2d Cir. 1962).
would constitute the last link in a chain of evidence exposing the client to criminal liability. 148

Other courts protect the client's identity when disclosure would implicate the client in the criminal matter for which he originally sought the attorney's advice. 149 Thus, when the client approaches the attorney to seek advice concerning potential criminal liability, he clearly expects confidentiality to the degree that his seeking such advice will not, in itself, incriminate him. Absent such protection, the client may feel compelled to forego legal advice. The privilege does not apply, however, when the identity of the client or the fact of employment was learned in a matter not directly related to the threat of criminal charges. In this situation, it is unlikely that the client would forego seeking legal advice on one matter because his seeking such advice might incriminate him in a wholly different context.

Courts find it easier to extend the privilege when it serves some larger public interest. For example, courts have not hesitated to protect the client's identity when the client was a "whistle-blower" or other informant seeking confidentiality for his own protection. 150

In criminal cases, the compelled disclosure of the client's identity or his employment of an attorney often tests the limits of the attorney-client privilege. Because ethical issues and constitutional issues are also involved in compelling these disclosures, 151 some courts require that the prosecution show a need to obtain the information from the attorney in order even to reach the privilege question. 152 This requirement also has been applied to civil cases,

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148. See, e.g., In re Grand Jury Proceedings (Harvey), 769 F.2d 1485, 1487 (11th Cir. 1985); In re Grand Jury Proceedings (Pavlick), 680 F.2d 1026, 1027 (9th Cir. Unit A 1982) (en banc); In re Grand Jury Proceedings (Twist), 689 F.2d 1351, 1352—53 (11th Cir. 1982).


150. See, e.g., In re Kaplan, 8 N.Y.2d 214, 168 N.E.2d 660, 203 N.Y.S.2d 836 (1960); C. McCormick, supra note 28, § 90.

151. The constitutional issues are framed in terms of compelling the attorney to testify against the client in a criminal case, thus interfering with the client's sixth amendment right to counsel. See, e.g., United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. 1985). An additional constitutional issue concerns the possible violation of the accused's right against self-incrimination. See, e.g., In re Grand Jury Proceedings (Twist), 689 F.2d 1351 (11th Cir. 1982). The ethical issues include the appropriateness of and manner in which counsel calls the opposing attorney to testify in any matter against his own client. See, e.g., United States v. Klubock, 639 F. Supp. 117 (D. Mass. 1986).

152. See, e.g., In re Grand Jury Subpoena Duces Tecum (Custodian of Records), 697
prompted by the courts’ desire to avoid troublesome ethical, privilege, and attorney work-product issues.\textsuperscript{153}

5. Location of Client

Generally, information concerning a client’s address or location is not privileged because in most cases there is no client expectation of confidentiality and such information usually is not necessary to enable the attorney to render legal assistance.\textsuperscript{154} By the same logic, however, when circumstances indicate that the client wishes to keep his whereabouts confidential, as when the client is trying to avoid apprehension by the police or service of process, it would seem that his whereabouts should be privileged.\textsuperscript{155} However, most claims of privilege against revealing the client’s location fail on their facts.\textsuperscript{156}

In \textit{West v. Fields},\textsuperscript{157} the court compelled an attorney to disclose his client’s location so that the petitioner in equity could serve him with legal process.\textsuperscript{158} Ordinarily, if the client was hiding from a process server and told his attorney his whereabouts to facilitate legal assistance, the client’s location would embody a confidential communication that should be privileged.\textsuperscript{159} Without such a privilege, the client likely would not tell his attorney where he was, making legal representation more difficult. Thus, with or without the privilege, the court likely would not learn the client’s whereabouts through the attorney. If the communication is privileged, the attorney cannot tell; if it is not privileged, he probably would not know.\textsuperscript{160}


\textsuperscript{156} See, e.g., \textit{Dike} v. \textit{Dike}, 75 Wash. 2d. 1, 448 P.2d 490 (1968); \textit{Dike} v. \textit{Dike}, 75 Wash. 2d. 1, 448 P.2d 490 (1968); \textit{Ex Parte Schnei-}

\textsuperscript{157} See, e.g., \textit{Dike} v. \textit{Dike}, 75 Wash. 2d. 1, 448 P.2d 490 (1968); \textit{Ex Parte Schnei-}


\textsuperscript{159} West v. \textit{Fields}, 181 Ga. at 155--55, 181 S.E. at 663--64; see also supra note 138.

\textsuperscript{160} \textit{West} is not necessarily inconsistent with this reasoning. In \textit{West}, the court had
6. Other Facts Related to the Representation

Details of the representation concerning fees, dates of meetings, and the general nature of the legal services ordinarily are not privileged when revelation of such details would not reveal the substance of confidential attorney-client communications. Normally, facts about fees and dates of meetings do not embody any confidential communications between attorney and client. Questions regarding the general subject matter of the representation are more problematic. Some courts conclude that one cannot disclose the subject matter of the representation without revealing the substance of confidential attorney-client communications. Most cases permitting disclosure are justifiable on specific grounds other than a general rule denying the privilege.

7. Client Documents

Documents written by the client or his authorized agent for the express purpose of informing the attorney about a matter for which the client seeks legal representation are privileged and not discoverable from the attorney or client. Sharing any other kind of document with the attorney raises two separate issues: (1) whether the opponent can compel production of documents in the reason to believe that the attorney had invented the client (the attorney and the alleged client were co-defendants). Thus, compelling disclosure was justified as necessary to establish the fact that an attorney-client relationship existed.


163. See, e.g., United States v. Long, 328 F. Supp. 233 (E.D. Mich. 1971) (When the government questioned a client's deduction of attorney fees on tax returns, the government was allowed to inquire of the attorney concerning the general subject matter of representation to see if the matter was tax related. This holding can be justified under the theory that a client waives any privilege over this information by claiming a deduction which requires him to keep records supporting this deduction and to assist in the verification of his deduction); Bailey v. Baker, 232 Ga. 84, 205 S.E.2d 278 (1974) (When a petitioner claimed that her guilty plea was not knowing and intelligent, the state was allowed to ask her attorney whether he discussed elements of the crime with his client. In claiming that her plea was not knowing and intelligent, the client implicitly asserted, in part, that her attorney did not give her the information needed to make such a plea. This implicit assertion waived the privilege as to what the attorney told her regarding the plea.).

attorney's possession; and (2) whether the opponent can compel the attorney's testimony about the documents he reviewed.

As to the first issue, if the documents would be discoverable in the hands of the client, they are discoverable from the attorney.\(^{165}\) A client cannot confer a privilege on documents simply by giving them to the attorney. But if the client's privilege against self-incrimination, for example, bars compelling production of the documents from him, the attorney could not be compelled to produce them either.

The second issue addresses whether the attorney can be compelled to disclose what he saw in the documents. Since the client is using the documents to communicate with the attorney, disclosure generally cannot be compelled. As Wigmore remarked, there is no viable distinction between the client telling the attorney what is in the documents, which is clearly privileged, and showing him the documents.\(^{166}\)

8. Physical Evidence Received From the Client

Difficult issues arise in cases regarding an attorney's knowledge of physical evidence brought to him by his client. Consider, for example, the following three situations: (1) A client gives the attorney a knife, indicating that he used it to kill someone; must the attorney turn the knife over to the police? (2) If the attorney turns it over to the police, can he be compelled to reveal who gave it to him? (3) A client tells his attorney he killed someone and threw the knife in his backyard. The attorney retrieves the knife and turns it over to the police; must the attorney reveal where he found it?

While the first situation raises both an ethical and a privilege issue, only the latter will be addressed here. Merely turning over the evidence to the police, without more, does not involve disclosure of any client communication and thus does not violate the privilege.\(^{167}\) The prosecution, however, may not reveal at trial that the attorney turned the evidence over to the police and thereby

\(^{165}\) See, e.g., Fisher v. United States, 425 U.S. 391, 403—04 (1976); United States v. Davis, 636 F.2d 1028 (5th Cir. Unit A Feb. 1981); Colton v. United States, 306 F.2d 633, 639 (2d Cir. 1962); 8 J. Wigmore, supra note 1, § 2307.

\(^{166}\) 8 J. Wigmore, supra note 1, § 2308; C. McCormick, supra note 28, § 89; but see Saltzburg, supra note 141, at 829—35.

\(^{167}\) See People v. Nash, 110 Mich. App. 428, 313 N.W.2d 307 (1981) (privilege not violated by attorney turning over physical evidence to police in murder case but police not allowed to testify that items came from defendant's attorney).
invite the inference that the attorney's client was the original source of the evidence.168

The second situation is covered by the privilege and the attorney cannot be compelled to reveal the identity of the person who gave him the knife.169 Were there no privilege in this situation, the client would not likely deliver the evidence to the attorney. This result would be undesirable for two reasons: the legal representation suffers because the attorney is deprived of material information and society suffers since the evidence might never see the light of day.

Some commentators worry that if the privilege covers such acts, criminals might be able to launder evidence by giving it to an attorney to turn over to the government before the government finds it in a context more incriminating to the client.170 While this concern is plausible, it is not sufficiently realistic to outweigh the privilege. A person intent on disposing of physical evidence need not use an attorney to do so. Indeed, transferring the item to the attorney may increase the risk of linkage to the client since the evidence will have to be turned over to the authorities. The authorities may find connections to the client independent of any information from the attorney.

In the third situation, the attorney's knowledge of the knife's location was first acquired in confidential communications with his client. When the attorney turns the knife over to the police, he may not be compelled to reveal what his client told him. The attorney must, however, reveal where he found the knife. The privilege does not apply to underlying facts but to the use of confidential communications to prove those facts. In this example, since the attorney retrieved the knife himself, he knows its location from personal knowledge. If asked where the knife was located, he can respond from personal knowledge without disclosing a confidential communication.171 Of course, the attorney cannot be compelled to reveal the confidential client communications that led him to look

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168. Williams v. State, 258 Ga. 281, 285, 368 S.E.2d 742, 747 (1988) (quoting State v. Olwell, 64 Wash. 2d 828, 834, 394 P.2d 681, 685 (1964) ("By thus allowing the prosecution to recover such evidence, the public interest is served, and by refusing the prosecution an opportunity to disclose the source of the evidence, the client's privilege is preserved and a balance is reached between these conflicting interests.").

169. But see Hughes v. Meade, 453 S.W.2d 538 (Ky. 1970) (attorney required to disclose source of stolen property delivered to him).

170. Saltzburg, supra note 141, at 838.

for the knife in that location.\textsuperscript{172}

Had the client retrieved the knife and mailed it to the police, the attorney could not be compelled to reveal what he knew about its location. But when the attorney removes the evidence, he is going beyond legal advice and advocacy and is acting as a nonlegal agent for the client. This role is not a necessary part of legal representation and thus is not protected by the privilege.

Moreover, the removal of the knife by the attorney prevents the authorities from finding it in that location. Thus, to classify that information as privileged may enable the attorney, in effect, to destroy evidence, a particularly useful tactic if the knife was retrieved from the client's backyard.\textsuperscript{173}

The urge to extend the privilege to exclude the attorney's personal knowledge of the knife's location is based on the notion that, were it not for the client's confidential communication, the attorney would not have known where to find the knife. The attorney's personal knowledge of the knife's location, however, is no different from the attorney's knowledge gained from a witness whose identity was supplied by the client. Yet there exists no question at common law that the attorney's knowledge gained from that witness is not privileged even though, were it not for the client's communication, the attorney would not have known of the witness.\textsuperscript{174}

C. Assertion and Waiver of the Privilege

1. Waiver Under the Common Law

Since the privilege is designed to allow the client to share information with his attorney without fear of its disclosure, the privilege is for the benefit of the client. As the holder of the privilege, the client and only the client may assert or waive the privilege.\textsuperscript{175}

\textsuperscript{172} In People v. Belge, 83 Misc. 2d 186, 372 N.Y.S.2d 798 (Onondaga County Ct. 1975), the defense attorney found and examined two dead bodies based on information disclosed by his client. A statute required that anyone who knew that a death had occurred without proper burial must report it to the authorities. The court held the statute did not apply to the attorney in light of supervening privilege and ethical considerations. Arguably, requiring the attorney to disclose the existence and location of the corpses would not have disclosed confidential communications since the attorney could speak from personal knowledge as to their existence and location without revealing anything the client said or the client's identity.

\textsuperscript{173} Meredith, 29 Cal. 3d at 686, 631 P.2d at 48, 175 Cal. Rptr. at 614 ("[W]e cannot extend the attorney-client privilege so far that it renders evidence immune from discovery and admission merely because the defense seizes it first.").

\textsuperscript{174} See 8 J. Wigmore, supra note 1, § 2317(2); C. McCormick, supra note 28, § 89.

\textsuperscript{175} 8 J. Wigmore, supra note 1, § 2321; C. McCormick, supra note 28, § 92; see,
The client must assert the privilege or it is deemed waived.\textsuperscript{176} The client has the burden of proving that the communications were made in the course of an attorney-client relationship.\textsuperscript{177} If the client does not immediately object to disclosure of privileged communications, the law will presume he intends to lift the veil of confidentiality from them for his own benefit.\textsuperscript{178}

The client can always waive the privilege.\textsuperscript{179} The privilege only protects those communications the client wishes to remain confidential. Thus, a third party who would prefer that the client assert the privilege has no recourse if the client waives it.

A party can appeal the erroneous exclusion of evidence due to a claim of privilege.\textsuperscript{180} A party whose assertion of the privilege was erroneously overruled may appeal the admission of the evidence.\textsuperscript{181} But if the holder of the privilege is a nonparty whose assertion of the privilege was erroneously overruled, parties to the action cannot raise this error on appeal.\textsuperscript{182} In this situation, there is no error vis-a-vis any party, since the privilege is held by a nonparty. The parties are in no different position than had the holder waived the privilege, a matter over which they had no control.

A client waives the attorney-client privilege whenever he discloses privileged communications or fails to object to their disclosure in his presence.\textsuperscript{183} The waiver covers attorney-client communications concerning the subject matter disclosed; the privilege is maintained, however, over unrelated attorney-client communica-

\footnotesize{e.g., Kight v. State, 181 Ga. App. 874, 875, 354 S.E.2d 202, 204 (1987). When the client is a corporation, the privilege can only be waived by management, typically the directors. See, e.g., Commodities Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985); C. McCormick, supra note 28, §§ 92—93. Only the client or his authorized agent can assert or waive the privilege. C. McCormick, supra note 28, § 92. The client's attorney is presumed to have authority to assert the privilege in the client's absence and, in fact, has a duty to do so. Fisher v. United States, 425 U.S. 391, 402 n.8 (1976); Model Code of Professional Responsibility DR 4-101 (1980). In the client's absence, a third party, including the judge, can assert the privilege in the client's behalf, pending communication to ascertain the client's wishes. C. McCormick, supra note 28, § 92.

178. C. McCormick, supra note 28, §§ 73, 93.
179. C. McCormick, supra note 28, §§ 92—93.
180. C. McCormick, supra note 28, § 92.
181. Id.
182. Id.; 8 J. Wigmore, supra note 1, § 2321.
tions.\textsuperscript{184} When a client calls his attorney as a witness to testify to facts not learned in attorney-client communications, the privilege is not waived.\textsuperscript{185}

Whether an attorney's disclosure of confidential communications constitutes a waiver depends on whether the attorney had authority to effect the waiver. If the attorney had express authority from the client, he may waive the privilege on the client's behalf.\textsuperscript{186} If the attorney had no authority to waive the privilege, the privilege remains intact.\textsuperscript{187}

An attorney may have implied authority to waive the privilege in two kinds of situations: (1) disclosure made for the purpose of settlement negotiations or case management; and (2) inadvertent disclosure by the attorney in responding to a discovery request. The attorney is impliedly authorized to exercise professional judgment in deciding when and where it may be to his client's advantage to disclose an otherwise privileged matter.\textsuperscript{188} The courts usually limit the waiver under such circumstances to the communication disclosed unless the partial disclosure was an effort to mislead the opponent.\textsuperscript{189} This implied authority is but part of the attorney's general authority to make tactical decisions concerning the representation without obtaining a specific, express authorization from his client.\textsuperscript{190}

Sometimes privileged materials accidentally enter the stream of documents produced for the opposition in response to a discovery.

\textsuperscript{184} 8 J. Wigmore, supra note 1, § 2327; C. McCormick, supra note 28, § 93; see Felts v. State, 244 Ga. 503, 505, 260 S.E.2d 887, 889 (1979).

\textsuperscript{185} See Southern Ry. v. Lawson, 256 Ga. 798, 801, 353 S.E.2d 491, 495 (1987); 8 J. Wigmore, supra note 1, § 2327; C. McCormick, supra note 28, § 93.

\textsuperscript{186} C. McCormick, supra note 28, § 93.

\textsuperscript{187} 8 J. Wigmore, supra note 1, § 2325; see, e.g., Schnell v. Schnell, 550 F. Supp. 650, 653 (S.D.N.Y. 1982); Schetter v. Schetter, 239 So. 2d 51 (Fla. 1970).

\textsuperscript{188} 8 J. Wigmore, supra note 1, § 2325; see, e.g., United States v. Martin, 773 F.2d 579, 583—84 (4th Cir. 1985); United States v. Mierzwicki, 500 F. Supp. 1331, 1334 (D. Md. 1980); but see Schnell, 550 F. Supp. at 653 (record did not establish that attorney was authorized to waive privilege in testimony before SEC); Southern Ry. v. White, 108 Ga. 201, 204, 33 S.E. 952, 953 (1899).


\textsuperscript{190} See R. Mallen & V. Levit, Legal Malpractice §§ 106, 125, 214 (2d ed. 1981).
demand. Outside of Georgia, many courts hold that this disclosure constitutes a waiver of any privilege concerning the documents produced, but not necessarily a waiver with respect to additional privileged documents or communications. This result is justified on three grounds. First, the privilege only protects against compelled disclosure of attorney-client communications since this provides all the protection the client needs to feel free to consult with his attorney. As with all aspects of the attorney’s representation, the client assumes the risk of his attorney’s incompetence or carelessness. Second, since the attorney is responding to the discovery request, the disclosure is made while the attorney is acting with the implied authority of his client to manage the case. Mistakes made while acting within that authority are imputed to the client. Finally, the law should discourage attorney practices that do little to safeguard client confidences. If inadvertent disclosure had no evidentiary consequences, counsel might become more lax in reviewing documents prior to production than they would if they knew they were waiving the privilege for any documents produced.

On the other hand, in cases involving thousands of documents, it may be prohibitively expensive to guarantee zero mistakes in reviewing each document for the privileged material. While carelessness cannot be excused, recently some courts have found no waiver when the attorney’s response to a massive deadline production request inadvertently included a small amount of privileged material.

If the client charges the attorney with wrongdoing, by lawsuit, other complaint, or as part of the client’s own proceedings, the client thereby waives the attorney-client privilege so far as is necessary for the attorney to defend his own conduct. The attorney may also reveal confidential communications to the extent neces-


193. See, e.g., Weil v. Investment Indicators, Research and Management, 647 F.2d 18 (9th Cir. 1981); Transamerican Computer Co. v. IBM Corp., 573 F.2d 646 (9th Cir. 1978); SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 519 (D. Conn. 1976).

nary to collect fees owed by the client. The privilege is a shield, not a sword.

Similarly, when the client takes a legal position that necessarily raises a question about an attorney-client communication, the privilege is impliedly waived. For example, in Bailey v. Baker, a petitioner in a habeas corpus proceeding maintained she was so inadequately informed by the court of the consequences of pleading guilty that she could not have made a "voluntary and intelligent" plea. Because what her attorney told her about the consequences of her plea was relevant to whether she made a "voluntary and intelligent" plea, she waived the privilege in asserting this claim. If a client takes a position that implies his attorney did or failed to do or say something, he waives the privilege so far as necessary to allow the opposition the opportunity to disprove that point.

If the attorney is charged with wrongdoing by a third party, he may disclose privileged communications to defend himself and his professional reputation, even over the client's objection. This cannot, and need not, be justified as some form of implied waiver. Instead, this disclosure finds support in the primary principles behind the attorney-client privilege. The privilege is designed to encourage confidential attorney-client communications, but this assumes the attorney is willing to listen. If the price of listening includes being unable to defend himself, his freedom, or his livelihood from attack, an attorney might shy away from certain kinds of cases in which perfectly defensible actions by the attorney might, if questioned, be indefensible due to the privilege.

2. Waiver of the Privilege in Georgia

O.C.G.A. § 24-9-25 not only makes confidential attorney-client communications privileged, but also makes the attorney incompetent to repeat them in court. This statute has caused confusion concerning waiver of the attorney-client privilege. This confusion

196. 8 J. Wigmore, supra note 1, § 2327.
199. See also United States v. Glass, 761 F.2d 479 (8th Cir. 1985); United States v. Woodall, 438 F.2d 1317, 1324—25 (5th Cir. 1970) (en banc).
201. Rosen, 735 F.2d at 576.
drew Wigmore’s scorn but some sympathy from McCormick, who wrote:

It is not surprising that the courts, often faced with statutes drafted in terms of obsolete theories, and reaching these points rarely and usually incidentally, have not worked out a consistent pattern of consequences of this accepted view that the rule is one of privilege, and that the privilege is the client’s.

_Braxley v. State_ illustrates one application of O.C.G.A. § 24-9-25. In _Braxley_, a criminal defendant objected to a witness revealing conversations with that witness’s attorney. The court of appeals allowed the defendant to cite the admission of this testimony as error even though the witness, not the defendant, held the privilege and made no effort to assert it. The court acknowledged that Georgia’s rule is different from other states’ and not actually a privilege statute. Instead, the statute, on grounds of public policy, completely bars any disclosure of confidential attorney-client communications. The _Braxley_ court’s interpretation entails that a client may not waive this statutory exclusion of evidence.

Perhaps because the _Braxley_ interpretation of the statute leaves Georgia law on waiver completely at odds with common-law doctrine, many subsequent cases have ignored it and recognized the doctrine of waiver. In _Gilbert v. State_, for example, the court quotes the pertinent Georgia statutes and then applies an analysis of privilege assertion and waiver completely in line with common law privilege doctrine.

Yet _Braxley_ is not dead. In the 1979 case of _Campbell v. State_, the criminal defendant wished to cross-examine a coconspirator regarding the witness’s discussions with his counsel. The trial court excluded this evidence, viewing it as incompetent. The court of appeals affirmed, citing _Braxley_, but added that it

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202. See, e.g., 3 J. Wigmore, *supra* note 1, §§ 2321 n.1, 2324 n.3, 2314 n.2.
206. _Id._ (interpreting O.C.G.A. § 24-9-21 (1982)).
found no waiver of the privilege. The Campbell court covered both bases: the Braxley interpretation that waiver is impossible and the common law approach.

The confusion surrounding O.C.G.A. § 24-9-25 is discussed in Southern Shipping Co. v. Oceans Int’l Corp. As the Georgia Court of Appeals wrote: “While the language of this statute [O.C.G.A. § 24-9-25] seems unambiguous, its interpretation by the courts of this State has often not been clear or consistent.” The statute’s interpretation has not been clear or consistent because the “unambiguous” language of the statute suggests a scheme for protecting attorney-client communications that is alien to modern common law doctrine and is practically unworkable.

The statute literally bars the client from waiving the privilege to allow his attorney to testify in his behalf. Denying a criminal defendant the right to put on an attorney’s testimony in his own behalf could raise sixth amendment problems. Because a literal application of the rule has unattractive implications, modern Georgia courts have not interpreted the statute strictly; but neither have they found a way to build a consistent doctrine of waiver around a set of statutes that appear hostile to common-law doctrine.

D. Communications for the Purpose of Furthering a Crime, Fraud, or Other Wrong

The common law has long recognized that the attorney-client privilege does not cover communications made for the purpose of furthering a crime, fraud, or other unlawful end. The law pro-

212. Id. at 299—300, 254 S.E.2d at 390.
214. Southern Shipping Co. v. Oceans Int’l Corp., 174 Ga. App. at 93, 329 S.E.2d at 265. (The trial court disqualified trial counsel because counsel would be a witness in the case; the case was remanded to consider what effect O.C.G.A. § 24-9-25 has on an attorney’s competency to testify.)
215. The sixth amendment of the United States Constitution gives an accused the right to call witnesses in his own behalf. U.S. Const. amend. VI. See Washington v. Texas, 388 U.S. 14, 22 (1967). In Bobo v. State, 256 Ga. 357, 349 S.E.2d 690 (1986), the court’s opinion, signed by three justices, held that a testimonial privilege, in this case the psychiatrist-patient privilege, may have to yield to a criminal defendant’s right of confrontation. Three justices concurred in the result but disagreed that absolute privileges should be balanced against the defendant’s constitutional protections. The seventh justice dissented in a manner that suggests he does not favor a balancing approach.
216. As Professor Green wrote: “[T]he statutory language of disqualification in terms of competency will, until expunged from the Code, continue to be a stumbling block for the unwary.” T. Green, supra note 2, § 195.
217. 8 J. Wigmore, supra note 1, §§ 2298, 2299; C. McCormick, supra note 28, § 95;
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sects and encourages the attorney's confidential relationship with the client only to the extent necessary to serve the legitimate ends of the arrangement. If a client uses an attorney to further any existing or future crime, he subverts the system set up for his protection. Protection of such communications would constitute a "perversion of the privilege." 218

Generally, the communications must have been made in furtherance of a crime or fraud, and the client must have known or reasonably should have known that he was using the attorney to further an unlawful end. 219 This latter requirement preserves the client's reasonable expectations of confidentiality. Thus, for example, if a client inquires into the legality of particular conduct, and is told it is illegal, the communication is privileged if the client does not thereafter engage in the conduct. 220 The client has a legitimate expectation of confidentiality in seeking professional advice on how to avoid illegal conduct. However, if the client seeks the information to aid in the planning or concealment of an illegal act, he knows he is using the attorney to further a crime. This knowledge destroys the privilege.

It follows that it does not matter whether the attorney is a

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The exception traditionally has been limited to furtherance of crime or fraud. See, e.g., Unif. R. Evd. 502(d)(1) (1974). Some courts have applied it to furtherance of tortious conduct. See, e.g., Diamond v. Stratton, 95 F.R.D. 503 (S.D.N.Y. 1982) (The attorney's letter denying insurance coverage was held to be in furtherance of insurance company's tort of intentional infliction of emotional distress; thus the privilege was destroyed.); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1172 (D.S.C. 1975); 8 J. Wigmore, supra note 1, § 2298; C. McCormick, supra note 28, § 95. In Georgia, one might expect this issue to arise in connection with a "Yost" abuse of process claim in which a Yost plaintiff seeks to discover communications between defendant and his attorney on the grounds that, because the defendant used the attorney to help commit the tort, the privilege is destroyed. Yost v. Torok, 256 Ga. 92, 344 S.E.2d 414 (1986); see, e.g., Western Fuels Assoc. v. Burlington N. Ry., 102 F.R.D. 201, 205 (D. Wyo. 1984).

218. C. McCormick, supra note 28, § 95; see also Clark v. United States, 289 U.S. 1, 15 (1933) (Justice Cardozo wrote, "The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law.").

219. 8 J. Wigmore, supra note 1, § 2298; C. McCormick, supra note 28, § 95; Unif. R. Evid. 502 (d)(1) (1974); see, e.g., In re Grand Jury Subpoena Duces Tecum (Rich), 731 F.2d. 1032, 1038 (2d Cir. 1984); In re International Sys. & Control Corp. Sec. Litig., 693 F.2d 1235, 1243 (5th Cir. 1982).

220. C. McCormick, supra note 28, § 95, at 229 n.2.
knowing co-conspirator or an innocent dupe in his client’s wrongdoings. It is the client’s knowing misuse of the attorney that invalidates the privilege.\textsuperscript{221} Although each matter the attorney handles for the client is, by itself, legitimate, the privilege is lost if those activities are part of a larger, illegal scheme.\textsuperscript{222} If the client has used the attorney to further an unlawful purpose, the privilege is destroyed as to all communications with the attorney related to that purpose.\textsuperscript{223}

The crime or fraud exception rests on a distinction between the legitimate representation of a client for past wrongdoing and the illegitimate furtherance of existing or future wrongdoing.\textsuperscript{224} But this distinction is not always clear in practice; the concealment of a past crime, for instance, is one problem area. A client charged with or suspected of committing a crime often will seek an attorney’s advice not only about his constitutional rights, but also about what he should say, how he should act, and how he should handle certain physical evidence. It is a crime to conceal evidence, obstruct justice, or give perjured testimony. To the extent the client is planning any of these acts and uses the attorney’s knowledge to assist in such conduct, the court may invalidate the privilege.\textsuperscript{225}

The party who asserts the crime or fraud exception to defeat the privilege must show a prima facie case of unlawful purpose.\textsuperscript{226} The party may ask the court to review privileged matter \textit{in camera} to look for further evidence of illegality or fraud. This request raises

\textsuperscript{221} 8 J. Wigm\textsuperscript{er}, \textit{supra} note 1, § 2298; \textit{see}, e.g., United States v. Hodge & Zweig, 548 F.2d 1347, 1354 (9th Cir. 1977); Fidelity-Phenix Fire Ins. Co. v. Hamilton, 340 S.W.2d 218 (Ky. 1960) (The insured went to an attorney, told the truth about the circumstances of a fire, and was advised that there was no coverage. The client went to a second attorney, lied about certain facts, and the attorney pursued the case. The privilege with the first attorney was invalidated.).

\textsuperscript{222} \textit{See}, e.g., United States v. Hovarth, 731 F.2d 557, 562 (8th Cir. 1984); United States v. Loften, 518 F. Supp. 839 (S.D.N.Y. 1981).

\textsuperscript{223} \textit{See}, e.g., \textit{In re} Grand Jury Proceedings (Fine), 641 F.2d 199 (5th Cir. Unit A Mar. 1981); \textit{In re} Sealed Case, 676 F.2d 793, 814—15 (D.C. Cir. 1982).

\textsuperscript{224} C. McCormick, \textit{supra} note 28, § 95.

\textsuperscript{225} \textit{See}, e.g., United States v. Dyer, 722 F.2d 174 (5th Cir. 1983) (Defendant, a public official charged with extortion, had his attorney send a letter and the money he allegedly extorted back to the victim. The defendant said he was only testing the victim to see if he would try to bribe an official. The government sought a superseding indictment claiming the return of money constituted obstruction of justice, and the court enforced a subpoena of the attorney to testify to communications regarding the action.).

\textsuperscript{226} \textit{See}, e.g., Clark v. United States, 289 U.S. 1, 15 (1933); \textit{In re} Grand Jury Subpoena Duces Tecum (Rich), 731 F.2d 1032 (2d Cir. 1984); \textit{In re} Grand Jury Proceedings (Twist), 689 F.2d 1351, 1352 (11th Cir. 1982); Atlanta Coca-Cola Bottling Co. v. Goss, 50 Ga. App. 637, 179 S.E. 420 (1935).
two issues: (1) should the court consider the materials reviewed in camera as part of the prima facie case or require the proponent to make a prima facie case independent of any privileged materials, and (2) how much evidence of wrongdoing should the court require before allowing an in camera review?

The courts disagree on the first issue.\textsuperscript{227} Requiring that a party make a prima facie case entirely from nonprivileged material seems unnecessarily restrictive. Sometimes the privileged material is so central to the illegality that proving a prima facie case without it is virtually impossible.\textsuperscript{228}

The second issue also provokes disagreement.\textsuperscript{229} One side argues that the privilege only protects the evidentiary use of attorney-client confidences and thus is not violated by any in camera disclosure to the trial judge for the purpose of determining whether the privilege applies. The other side argues that there exists a privacy interest behind the privilege as well. Most clients probably do not appreciate the distinction between using confidential communications as evidence at trial and revealing them to the judge in camera. If the purpose of the privilege is to encourage the client to confide in his attorney, unnecessary disclosure in any context undermines that goal. Moreover, if a party need only assert the crime or fraud exception to get the judge to review confidential material, this will increase such assertions as counsel search for possibly incriminating material. A middle course would require some independent evidence of crime or fraud before the court undertakes an in camera review to determine, based on all the evidence, whether the privilege is destroyed.\textsuperscript{230} This middle course should lessen unnecessary intrusion into attorney-client confidences while recognizing that otherwise privileged material can be very probative of criminal or fraudulent acts and intentions of the client.

Some commentators are uncomfortable with the scope of the crime or fraud exception, particularly when attorneys are subpoe-
naed to testify before a grand jury. Some of this discomfort is caused by a fear that prosecutors have found defense attorneys to be a rich source of evidence against their own clients. An increasing use of defense attorneys as witnesses against their clients could upset the balance between prosecution and defense advocacy that assures the accused a zealous, independent advocate.

This unease, however, has more to do with ethical and constitutional issues than with the attorney-client privilege. Neither the policy nor the privilege are offended by requiring disclosure of client confidences related to the client’s effort to engage in continued or future wrongdoing. The privilege is designed only to encourage the lawful use of the legal system. The law has no interest in encouraging full and open communications between an attorney and client when the client engages the attorney’s assistance to carry out illegal activity. Moreover, the client should have no expectations that such communications could remain privileged. Even a criminal should know intuitively that the law would not allow him to use an attorney as a confidential advisor for ongoing criminal activity.

Conclusion

The primary, traditional justification for the attorney-client privilege is to enhance the flow of communications between an attorney and client by freeing the client from the fear that statements made to his attorney in confidence will be repeated in court. The common law doctrine of the attorney-client privilege has developed around this justification and, despite a few areas of contention, that doctrine is relatively clear and settled.

Georgia has not fully embraced this common-law doctrine because the state’s nineteenth-century privilege statutes seem to point in a different direction, particularly in regard to the doctrines of confidentiality and waiver. By combining the privilege with a rule of testimonial incompetency, the statutes have left a one-hundred-year trail of confusion in these areas. Ideally, the legislature should repeal the privilege statutes and replace them with statutes similar to the Uniform Rule of Evidence 502.

(a) Definitions. As used in this rule:
meantime, Georgia courts can begin reducing the confusion by con-

(1) A “client” is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(2) A representative of the client is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.

(3) A “lawyer” is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

(4) A “representative of the lawyer” is one employed by the lawyer to assist the lawyer in the rendition of professional legal services.

(5) A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(a) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between himself or his representative and his lawyer or his lawyer’s representative, (2) between his lawyer and the lawyer’s representative, (3) by him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

(c) Who may claim the privilege. The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer’s representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(n) Exceptions. There is no privilege under this rule:

(1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) Breach of duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer;

(4) Document attested by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(5) Joint clients. As to a communication relevant to a matter of common interest between or among two or more clients if the com-
struing the statutes to fully embrace modern common-law doctrines of confidentiality and waiver.

Of the four Georgia privilege statutes, three are products of the Code of 1860 which codified then-existing common law. Georgia courts appropriately have not felt as bound to the literal expressions in these restatements of nineteenth-century common-law as they have to statutes enacted in the normal fashion. To the extent these three privilege statutes are inconsistent with common law doctrine, the courts can and should ignore them.

O.C.G.A. § 24-9-25 is a normally enacted statute; it renders an attorney incompetent to testify to information acquired from his client in the attorney-client relationship. However, the courts can construe this statute in a manner that overcomes its two major inconsistencies with common-law attorney-client privilege doctrine. First, the statute’s clause “acquired from his client” should be read narrowly to mean “acquired through confidential communications from the client,” thus clarifying that the privilege does not extend to matters learned as a result of, but not in, attorney-client communications. Second, the attorney-incompetency provision in the statute should be read in light of its historical context and purpose and thereby be limited to the relatively rare situations in which a client refuses to testify, cannot be compelled to do so, and tries to use his attorney’s testimony to disclose facts the attorney could have learned only from the client.

In all other situations, if the client is competent and compellable to testify to attorney-client communications, then the attorney is also. Thus, when a client waives the privilege in any way, both the client and the attorney are competent and compellable to testify to matters that have been waived.

Although Georgia courts generally have used common sense in applying the privilege, the absence of a better defined statute or doctrine leaves the landscape confused and indefinite. Predictability is important to the attorney-client privilege because the privi-

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munication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients or

(6) Public officer or agency. As to a communication between a public officer or agency and its lawyers unless the communication concerns a pending investigation, claim, or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation, or proceeding in the public interest.

Id.
The assumption that the client's knowledge of its protective knowledge frees him of any fears that what he confides to his attorney will be used against him. To the extent the application of the privilege is unsettled and unpredictable, the privilege cannot do its job; the client does not know if his communications will be protected or not. The adoption of common-law doctrine regarding the attorney-client privilege into modern law will increase predictability and thereby foster greater confidence in the attorney-client relationship.