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EVIDENCE

Witnesses Generally: Provide for Confidentiality of Certain Communications

CODE SECTION: O.C.G.A. § 24-9-21 (amended)
BILL NUMBER: SB 223
ACT NUMBER: 396
GEORGIA LAWS: 1995 Ga. Laws 858
SUMMARY: The Act extends the scope of privileged communications beyond the psychiatrist-patient relationship and provides for privileged communications between enumerated licensed mental health care professionals and their patients. The privilege of confidentiality extends to discussions between treating professionals to the extent such discussions involve the confidential communications of the patient.
EFFECTIVE DATE: July 1, 1995

History

Certain communications have long been recognized as privileged. The 1933 revision of the Georgia Code protected the following communications as privileged: (1) communications between husband and wife; (2) communications between attorney and client; (3) communications among grand jurors; and (4) secrets of the state.¹ In 1959, the scope of privileged communications was expanded to encompass communications between psychiatrist and patient.² In 1978, a limited privilege was extended to physicians to protect the medical records of patients from release, except on written waiver by the patient or upon court order.³

1. GA. CODE § 38-418 (Harrison 1933) (codified at O.C.G.A. § 24-9-21(1) to (4) (1995)).

2. 1959 Ga. Laws 190 (codified at O.C.G.A. § 24-9-21(5) (1995)).

3. 1978 Ga. Laws 1657, § 1, at 1657-58 (formerly found at O.C.G.A. § 24-9-40 (1982)). The full text of the provision is as follows:

No physician licensed under [chapter 34 of title 43] shall be required to release any medical information concerning a patient, or in the case of a

Traditionally, courts have strictly construed the privilege between psychiatrists and patients. For example, before the privilege may be invoked, the psychiatrist-patient relationship must exist "to the extent that treatment was given or contemplated."⁴ This confidential relationship is established when a patient goes to a psychiatrist on the patient's own accord for the purpose of gaining professional psychiatric assistance.⁵ However, the requisite relationship has not been recognized to exist if the patient seeks psychiatric assistance from a mental health care provider who is not a clinical psychologist or psychiatrist.⁶ Other decisions have held the even narrower view that the privilege does not extend to "a physician in any specialty other than psychiatry."⁷

However, in its recent decision in *Wiles v. Wiles*, the Supreme Court of Georgia held:

[W]e interpret "psychiatrist" in OCGA § 24-9-21 to mean "a person licensed to practice medicine, or reasonably believed by the patient so to be, who devotes a substantial portion of his or her time engaged in the diagnosis and treatment of a mental or emotional condition, including alcohol or drug addiction."⁸

minor, by his or her parents or duly appointed guardian ad litem, except on written authorization or other waiver by the patient or on appropriate court order or subpoena; provided, however, that any physician releasing information under written authorization or other waiver by the patient or under court order or subpoena shall not be liable to the patient or any other person; provided, further, that the privilege shall be waived to the extent that the patient places his care and treatment or the nature and extent of his injuries at issue in any civil or criminal proceeding; and provided, further, that this subsection shall not apply to psychiatrists.

Id.

4. *Massey v. State*, 177 S.E.2d 79, 81 (Ga. 1970).

5. *Kimble v. Kimble*, 239 S.E.2d 676, 676 (Ga. 1977).

6. *Lipsey v. State*, 318 S.E.2d 184, 187 (Ga. Ct. App. 1984) (citing O.C.G.A. §§ 24-9-21, 43-39-16 (1984)). In *Lipsey*, the court stated:

While it is arguable that disclosures made in confidence to mental health professionals other than psychiatrists and psychologists ought to be privileged, the Legislature has not seen to make them so; and the mere fact that a communication is made in confidence is generally considered insufficient to entitle it to a privilege unless the parties bear to each other one of the specific relations recognized as privileged by statute.

Id.

7. *Barnes v. State*, 320 S.E.2d 597, 601 (Ga. Ct. App. 1984).

8. *Wiles v. Wiles*, 448 S.E.2d 681, 684 (Ga. 1994).

Prior to the adoption of SB 223, Georgia was one of a few states that had not extended the confidentiality privilege to communications between patients and mental health care providers other than psychiatrists and psychologists.⁹ In an effort to expand the communications privilege in Georgia, legislation similar to SB 223 was introduced in the 1993 and 1994 sessions of the General Assembly.¹⁰ In 1993, the legislation failed to gain approval because of the difficulty encountered in properly defining the scope of the privilege.¹¹ After seemingly

9. Telephone Interview with Senator Eddie Madden, Senate District No. 47 (Apr. 25, 1995) [hereinafter Madden Interview]. Approximately forty other states have extended the confidentiality privilege to include patient communications with mental health care providers other than psychiatrists and psychologists. *Id.*

10. Telephone Interview with former Rep. John Hammond (Apr. 27, 1995) [hereinafter Hammond Interview]. The motivation behind the legislation was two-fold. *Id.* First, though a small group, the mentally handicapped citizens are among the most fragile and vulnerable citizens in the community and, because of their mental condition, are often the least capable of helping and protecting themselves. *Id.* Effective treatment and diagnosis of mental illness depends upon a free flow of information between the patient and the mental health care provider. *Id.* The lack of privilege for certain providers of mental health counseling had a chilling effect upon this information flow. *Id.* Thus, the proposed legislation was intended to alleviate this problem. *Id.* Second, the then current state of the law created confusion regarding which communications were privileged and which were not. *Id.* At that time, the privilege extended to communications between patients and psychiatrists or psychologists and their employees when therapy was rendered in the office of the psychiatrists or psychologists. *Id.* The privilege did not extend to therapy rendered by a counselor working under the direction of a psychiatrist or psychologist when the services were rendered in an institutional setting or a setting outside the confines of the psychiatrist's or psychologist's office. *Id.* Under these circumstances patients were unable to differentiate between privileged and unprivileged communications. *Id.* This problem was aggravated by the diminished mental capacity of some patients. *Id.* Thus, another focus of the proposed legislation was to clarify this confusion. *Id.*

11. *Id.* In the 1993 legislation, trial lawyers were concerned that the scope of the privilege would be too broad. *Id.* They wanted assurance that lines were drawn appropriately to limit the extent of the privilege. *Id.* They also wanted assurance that the privilege could not be asserted to defeat a malpractice claim. *Id.* Further, they wanted certainty as to who retained the authority to waive the privilege. *Id.* The answer to their concerns was that the privilege belongs to the patient and, even though the patient may suffer some mental incapacity, the privilege is the patient's to waive. *Id.* If the patient has an appointed guardian, the waiver decision devolves to the

resolving the scope problems, the 1994 legislative session ended before the bill could pass the Senate, and the bill was reintroduced in the 1995 session.¹² The effort to statutorily expand the scope of the privilege was also prompted by the strict construction that the courts had given the existing statute.¹³

SB 223

SB 223 was patterned after the legislation that had been previously introduced but failed to gain approval.¹⁴ This bill, as introduced, would have extended the communications privilege between psychiatrist and patient to include “[c]ommunications between a patient and any member of the patient’s treatment team who is a licensed marriage and family therapist, professional counselor, clinical social worker, or clinical nurse specialist in psychiatric or mental health participating in the evaluation, care, or treatment of such patient.”¹⁵ A crucial factor incorporated into the initial bill and an eventual component of the Act is that the privilege extends only to the *licensed* mental health care providers enumerated in the Act.¹⁶ This provision was intended to limit the scope of the newly created privilege.¹⁷

Additionally, in the original bill, the privilege extended to communications between or among mental health care providers or between or among those providers and a psychiatrist regarding a patient’s confidential communications.¹⁸ The Act also contains this provision, allowing treating professionals to communicate freely for the purpose of treatment without waiving the privilege.¹⁹

guardian. *Id.*

12. *Id.*

13. Madden Interview, *supra* note 9; *Lipsev v. State*, 318 S.E.2d 184 (Ga. Ct. App. 1984).

14. Madden Interview, *supra* note 9.

15. SB 223, as introduced, 1995 Ga. Gen. Assem.

16. O.C.G.A. § 24-9-21 (1995); Madden Interview, *supra* note 9.

17. Madden Interview, *supra* note 9.

18. SB 223, as introduced, 1995 Ga. Gen. Assem.

19. O.C.G.A. § 24-9-21(8) (1995); Madden Interview, *supra* note 9. Under prior law, the confidentiality privilege was waived when there was communication between treating professionals regarding a patient’s privileged communication. Madden Interview, *supra* note 9. This aspect of the prior law created barriers to communication and complicated treatment in instances in which a treating professional is prohibited by law from

Further, the bill, as introduced, extended the privilege to

[c]ommunications between a patient and any member of the patient's treatment team who is participating in the evaluation, care, or treatment of such patient as an agent or employee of the Department of Human Resources in a hospital or community mental health facility . . . , if the functions being performed by such member would require the member to be licensed as one of the [enumerated mental health care providers] if such member were not exempt from such licensing because of the member's employment by such department.²⁰

The privilege also included "[c]ommunications between or among any members of such team or between or among any of those members and a psychiatrist, regarding a patient's communication."²¹

Lastly, the original bill proposed an amendment to Code section 43-39-16,²² which would have extended the confidential relations and communications between a licensed psychologist and client in precisely the same manner as the proposed amendment to Code section 24-9-21.²³

In response to the bill as introduced, both the Senate Judiciary Committee and the House Judiciary Committee offered substitute legislation. The Senate committee substitute, in contrast to the bill as introduced, abandoned any revisions to Code section 43-39-16.²⁴ This codification scheme eliminated the redundancy which would have been created by placing one privilege in two titles of the Code.²⁵ Placement in title 24, Evidence, with the other codified privileges, is intended as a more "concise, definite, and substantial" way to codify the privilege.²⁶ Thus, the

prescribing medication for a patient and seeks the assistance of a psychiatrist to prescribe a medication plan. Madden Interview, *supra* note 9.

20. SB 223, as introduced, 1995 Ga. Gen. Assem.

21. *Id.*

22. O.C.G.A. § 43-39-16 is the privileged communications provision contained in the psychologist's practice section of the Code. 1986 Ga. Laws 473 (codified at O.C.G.A. § 43-3-6 (1994)).

23. SB 223, as introduced, 1995 Ga. Gen. Assem. In the original bill, the amendment to Code section 24-9-21 would have extended the confidential communications that occur between psychiatrist and patient. *Id.*

24. Compare *id.* with SB 223 (SCS), 1995 Ga. Gen. Assem.

25. Madden Interview, *supra* note 9.

26. Madden Interview, *supra* note 9.

privilege is less vulnerable to judicial attack and is more likely to be accorded the same respect and strength as the traditionally recognized communications privileges.²⁷

The Senate substitute did not extend the psychiatrist-patient privilege.²⁸ Instead, it created new categories of privilege which encompassed: (1) the “[c]ommunications between patient and a psychologist, licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, or licensed marriage and family therapist”; and (2) the “[c]ommunications between or among any psychiatrist, psychologist, licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, and licensed marriage and family therapist who are rendering mental health treatment or have rendered mental health treatment to a patient, regarding that patient’s communications.”²⁹ New privilege categories were created to assure that the established psychiatrist-patient privilege, already recognized to encompass clinical psychologist-patient communications, would not become vulnerable to judicial elimination by being grouped with the newly recognized communications privileges, which could be challenged in the courts.³⁰

Moreover, while creating new categories of privilege, the Senate committee substitute eliminated the privilege for professional counselors.³¹ The Senate Committee believed that extension of the privilege to licensed professional counselors overextended the privilege because these counselors often provide counseling on vocational and academic matters, which fall outside the realm of psychotherapeutic treatment.³² The Senate committee substitute also eliminated the privilege extended to agents or employees of the Department of Human Resources who are unlicensed and provide mental health services to patients.³³

27. Madden Interview, *supra* note 9.

28. See SB 223 (SCS), 1995 Ga. Gen. Assem.

29. *Id.*

30. Madden Interview, *supra* note 9.

31. SB 223 (SCS), 1995 Ga. Gen. Assem.

32. Madden Interview, *supra* note 9; Telephone Interview with Senator Mary Margaret Oliver, Senate District No. 42 (Apr. 27, 1995) [hereinafter Oliver Interview].

33. SB 223 (SCS), 1995 Ga. Gen. Assem. Georgia law exempts the state government from complying with certain licensing requirements. See, e.g., 1994 Ga. Laws 953 (codified at O.C.G.A. § 43-10A-7(b)(3), (7), (8), (12) (1994)). Under these regulations, the Department of Human Resources

The Senate committee substitute added an immunity from criminal or civil liability for treating professionals who release or retain information in good faith, pursuant to the psychiatrist-patient relationship or the privileges established by the bill.³⁴ The immunity was intended to limit liability to the individual responsible for the unauthorized release of confidential information.³⁵ Thus, treating professionals who discussed the communication, but were not responsible for its release, would not be held liable.³⁶ This provision, however, was omitted from the final version of the Act.³⁷

As a housekeeping matter unrelated to the overall thrust of the bill, the Senate committee substitute proposed to amend Code section 24-9-23, relating to spousal testimony, by adding the provision that the husband-wife communication privilege contained in Code section 24-9-21 should not apply in proceedings in which the husband or wife is charged with a crime against the person of a minor child.³⁸ This amendment was not included in the Act because it was clear from the existing law

(DHR) is exempted from using licensed counselors when it would otherwise be required to use licensed professionals. *Id.* (codified at O.C.G.A. § 43-10A-7(b)(3)(C) (1994)). The DHR wanted either to be exempt from the bill or to have complete privilege. Madden Interview, *supra* note 9. The option to exempt the DHR from the bill was rejected because no privilege would exist between the DHR counselors and their clients. Madden Interview, *supra* note 9. This created the potential for disparate treatment of indigent clients who could not afford to pay for treatment and were forced to use the DHR services. Madden Interview, *supra* note 9. Indigent persons would be accorded no privilege of confidentiality, while the affluent who could afford private treatment would enjoy confidentiality. Madden Interview, *supra* note 9. Similarly, the option of complete privilege was rejected as far too broad and not in keeping with the underlying rationale of the bill to extend privilege to patient communications with licensed mental health care providers. Madden Interview, *supra* note 9. As passed, the Act contains no special provisions for the DHR. *See* O.C.G.A. § 24-9-21 (1995). Thus, the DHR counselors and their patients are extended the same confidentiality privileges as are enumerated in the Act. Madden Interview, *supra* note 9.

34. SB 223 (SCS), 1995 Ga. Gen. Assem.

35. Madden Interview, *supra* note 9.

36. Madden Interview, *supra* note 9.

37. Madden Interview, *supra* note 9. When asked, neither Senator Madden nor Senator Oliver had a specific recollection why this provision was not included in the final version of the Act. Madden Interview, *supra* note 9; Oliver Interview, *supra* note 32.

38. SB 223 (SCS), 1995 Ga. Gen. Assem.

that the husband-wife communication privilege was inapplicable in these circumstances, and the legislators did not want to confuse the current state of the law.³⁹

The House committee substitute created several new categories of privileged communications.⁴⁰ To further strengthen the psychologist-patient privilege and isolate it from possible judicial attack directed at the newly created privileges, a separate category was created for the psychologist-patient privilege.⁴¹ In substance, these categories were essentially the same as those created by the Senate committee substitute; however, the House committee substitute included "licensed professional counselors."⁴² The privilege was limited to communications made within the context of the "psychotherapeutic relationship" or communications regarding a patient's privileged communications "between or among [licensed mental health care professionals] and licensed professional counselor[s] who are rendering psychotherapy or have rendered psychotherapy to a patient."⁴³

In keeping with the intent of the limitation, the House committee substitute defined the "psychotherapeutic relationship" and "psychotherapy" as follows:

[T]he relationship which arises between a patient and a licensed clinical social worker, a clinical nurse specialist in psychiatric/mental health, a licensed marriage and family therapist, or a licensed professional counselor using psychotherapeutic techniques as defined in Code Section 43-

39. Compare SB 223 (SCS), 1995 Ga. Gen. Assem. with O.C.G.A. § 24-9-23 (Supp. 1995); Madden Interview, *supra* note 9.

40. SB 223 (HCS), 1995 Ga. Gen. Assem.

41. *Id.*; Madden Interview, *supra* note 9.

42. SB 223 (HCS), 1995 Ga. Gen. Assem.

43. *Id.* In testimony before the House Judiciary Committee on February 20, 1995, supporting the extension of the privilege to patient-professional counselor communications, the President of the Georgia Mental Health Association suggested that the privilege could be narrowed with respect to these counselors if the privilege were only applicable to therapy sessions; such a limitation would eliminate the concern that the privilege would extend to educational counseling. Record of Proceedings in the House Judiciary Committee (Feb. 20, 1995) (available in Georgia State University College of Law Library). It is the purpose of the legislation to so limit only the privilege applicable to licensed professional counselors. Madden Interview, *supra* note 9.

10A-3 and the term “psychotherapy” means the employment of “psychotherapeutic techniques” by such licensed person.⁴⁴

The General Assembly adopted the House committee substitute with a minor House floor amendment.⁴⁵

In sum, the Act extends the privilege of confidentiality to communications between a patient and licensed psychologists, licensed clinical social workers, licensed professional counselors during the therapeutic relationship, licensed marriage and family therapists, and clinical nurse specialists in psychiatric/mental health.⁴⁶ Moreover, if treating professionals discuss the confidential communications of a patient, that discussion is also privileged.⁴⁷ The Act does not extend the privilege to communications between patients and unlicensed Department of Human Resources counselors or other unenumerated unlicensed counselors.⁴⁸ Lastly, it contains no immunity for treating professionals for their good faith release or retention of privileged information.⁴⁹

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44. SB 223 (HCS), 1995 Ga. Gen. Assem.

45. SB 223 (HCSFA), 1995 Ga. Gen. Assem. The floor amendment struck from the definition of “psychotherapy” the words “by such licensed person.” *Id.* This was done to quell concerns that the verbiage “by such licensed person” created implied authority for licensed professional counselors to conduct testing that they were not permitted by law to conduct. Madden Interview, *supra* note 9.

46. O.C.G.A. § 24-9-21(6), (7) (1995).

47. *Id.* § 24-9-21(8).

48. *See id.* § 24-9-21(7).

49. *Compare id.* § 24-9-21 with SB 223 (SCS), 1995 Ga. Gen. Assem.