**Podcast**

**Waiver of Attorney-Client Privilege**

**8/12/24**

**WADE:** Hello folks and welcome to another shiny-new edition of the Good Judge-ment Podcast. I’m your host, Wade Padgett.

**TAIN:** And I’m still Tain Kell.

**WADE:** Today we have one of those pesky topics that come up from time to time and frankly, it’s one of those topics that we think we know how to handle, but we don’t really always know.

**TAIN:** That’s right, Wade, today’s topic is waiver of attorney-client privilege. I encountered this issue recently in a case I was handling as a special master, and I will admit that I ended up doing a good bit of research in order to get it right.

**WADE:** And when Tain does research on *anything,* we end up getting a podcast topic out of it.

**TAIN:** Well, in fairness, I no longer have a fantastic staff attorney like J.B. Bryant. So here is where I have to acknowledge that much of this research comes from a fantastic LEXIS/Nexis Note “Attorney-Client Privilege: Privileged Parties and Waiver”. Thanks LEXIS/Nexis! (Is that enough attribution, Wade? Like an anti-plagiarism “shout out”?)

**WADE:** I certainly hope so! So, Tain, let’s jump into today’s topic.

**TAIN:** Well, getting in the way-back machine, let’s start at the beginning. The attorney-client privilege has its origins in O.C.G.A. §15-19-4 which outlines the duties an attorney has as an attorney at law.

**Duty #3:**

“To maintain inviolate the confidence and, *at every peril to themselves*, to preserve the secrets of their clients”

**Ethical duties:**

**Georgia Rules of Professional Conduct**

##### RULE 1.6 CONFIDENTIALITY OF INFORMATION

1. A lawyer shall maintain in confidence all information gained in the professional relationship with a client, including information which the client has requested to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client, unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, or are required by these rules or other law, or by order of the court.

**Maximum penalty for violation is DISBARMENT!**

**Attorney-Client Privilege and Protected Parties under Georgia Statute and Case Law**

Under Georgia law, “certain admissions and communications” between an attorney and his or her client are protected pursuant to the attorney-client privilege.

[O.C.G.A. § 24-5-501(a)(2)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749).

The privilege protects these communications to ensure that an attorney can represent his or her client with complete information, on the theory that the client will not withhold information out of a fear that it may become public or be disclosed to the opposing party or the court.

See [St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, 746 S.E.2d 98, 103 (Ga. 2013)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749).

Attorney-client privilege exists where (1) there is an attorney client relationship; (2) the communication is one where the client is seeking legal advice; and (3) the communication has been maintained in confidence.

*St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 746 S.E.2d 98, 104 (2013).

The privilege is **narrowly construed** because it operates to exclude evidence, which impedes the truth-seeking process. *Id.* at 102.

**Privilege belongs to the CLIENT**

The attorney-client privilege protects statements made by both the attorney and the client. Yet the privilege belongs to the client, who can choose whether to assert or waive it. The attorney-client privilege binds an attorney to confidentiality, *even after the client’s death*.

[Spence v. Hamm, 487 S.E.2d 9, 11 (Ga. App. 1997)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749).

A party must prove the following four criteria to successfully assert the attorney-client privilege in Georgia:

•The existence of an attorney-client relationship

•The communication in question relates to matters on which legal advice was sought

•The communication has been maintained in confidence –and–

•No exceptions to the privilege are applicable

See St. Simons Waterfront, 746 S.E.2d at 104.

Georgia interprets the attorney-client privilege narrowly, so attorneys should familiarize themselves with the particular issues and considerations regarding **which** communications this privilege may protect.

See [Perrigo Co. v. Merial Ltd., 2017 U.S. Dist. LEXIS 216216, at \*7 (N.D. Ga. Oct. 5, 2017)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749); [Tenet Healthcare Corp. v. La. Forum Corp., 538 S.E.2d 441, 444 (Ga. 2000)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749).. For more information, see [Attorney-Client Privilege: Privileged Communications (GA)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749).

**COMMUNICATIONS PROTECTED**

**Privileged Communications with Licensed Attorneys and Agents of Licensed Attorneys**

In general, the attorney-client privilege requires that one of the parties to a communication be a licensed attorney acting in his or her legal capacity.

 S. Guar. Ins. Co. v. Ash, 383 S.E.2d 579, 583 (Ga. App. 1989).

The attorney-client privilege will not apply when an attorney offers advice as a business partner, friend, family member, or otherwise.

 Id.

To form the appropriate attorney-client relationship, attorneys should ensure that both the attorney and the client—especially when the client is a friend or family member—recognize and acknowledge, preferably in writing, that the attorney is acting in a legal capacity.

***Attorney’s Agents***

Under Georgia law, the attorney-client relationship may extend to a third party when that individual:

•Assists the attorney in his or her representation of a client –or–

•Helps the attorney understand complex principles (e.g., an expert)

Georgia case law recognizes that attorneys need the help of secretaries, law clerks, and experts, such as financial analysts and medical professionals, to provide adequate representation to their clients.

Neuman v. State, 773 S.E.2d 716, 719–20 (Ga. 2015).

Therefore, when such a third party assists you as the attorney in delivering legal assistance to the client, the attorney-client relationship extends to that party.

The types of agents that attorneys may employ to aid in a client’s representation without waiving the attorney-client privilege include:

* •Secretaries
* •Administrative and legal assistants
* •Stenographers
* •Law clerks
* •File clerks
* •Interpreters
* •Private investigators
* •Subject matter experts (e.g., investment bankers, doctors, etc.)

See, e.g., [Spence v. Hamm, 487 S.E.2d 9, 11 (Ga. App. 1997)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749); [Sullivan v. State, 761 S.E.2d 377 (Ga. App. 2014)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749).

The attorney does not have to be present during a conversation between the client and the agent for the attorney-client privilege to apply. The attorney-client privilege protects communications between a client and an attorney’s agent as long as the communication relates to the client’s representation and the agent intends to convey the communication to the attorney.

See Smith v. Smith, 152 S.E.2d 560, 565 (Ga. 1966).

Other communications made at the direction of the attorney would also fall within the attorney-client privilege.

*Social communications* between a client and an attorney’s agent, however, would not be protected.

Id. at 565.

For example, the attorney-client privilege extends to confidential communications between a client and a private investigator when the attorney employed the investigator to collect facts necessary for pending and/or anticipated litigation.

See, e.g., [In re Fulton County Grand Jury Proceedings, 535 S.E.2d 340, 342 (Ga. App. 2000)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749).

**Privileged Communications with Various Types of Clients**

In Georgia, the attorney-client privilege applies to communications made between an attorney or agent and a client. The potentially privilege extends to:

* •Prospective clients
* •Corporate clients
* •Jointly represented clients
* •Clients’ agents
* •Former clients
* •Deceased clients

**WAIVER OF PRIVILEGE**

**Authority to Waive Attorney-Client Privilege**

All communications protected under the attorney-client privilege belong to the client and therefore, only the client has the authority to waive the privilege.

Waldrip v. Head, 532 S.E.2d 380 (Ga. 2000), overruled on other grounds, Duke v. State, 829 S.E.2d 348 (Ga. 2019); Avery v. State, 534 S.E.2d 897, 902 (Ga. App. 2000).

***Client Authorization to Waive Privilege***

Although only the client may waive the attorney-client privilege, the client may authorize his or her attorney to waive the privilege on his or her behalf. Be sure to memorialize this authorization in writing in case an issue arises later in the litigation regarding ATTORNEY’S authority to waive privilege. The client may withdraw this authorization at any time.

A client's authorization allowing his or her attorney to waive privilege does not give the opposing party the ability to demand a waiver.

See [Neuman v. State, 773 S.E.2d 716, 721 (Ga. 2015)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749).

An attorney does not always waive a client's privilege by revealing privileged communications to a third party. If made without the client's authorization, such communications will not automatically be deemed waivers.

[Moclaire v. State, 451 S.E.2d 68, 72 (Ga. App. 1994)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749).

In practice, though, if a client allows an attorney to carry out the representation on his or her behalf, that license operates as implied permission to waive the privilege if and when the attorney finds it in the client's best interests.

[Ga. R. & Regs. St. Bar 1.6(a)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749), Comment 6.

***Disclosure of Privileged Communications to an Attorney's Agent Does Not Waive the Privilege***

Georgia courts recognize that the attorney-client privilege must extend to the network of agents and employees working with or for the attorney or client in order to adequately facilitate legal representation and the free exchange of information between attorney and client.

[Neuman v. State, 773 S.E.2d 716, 719–20 (Ga. 2015)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749); [Davis v. State, 676 S.E.2d 216, 221 (Ga. 2009)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749) (Sears, C.J., concurring).

Accordingly, a client's communications with an expert engaged by his or her attorney to aid in representation do not waive the attorney-client privilege.

[Neuman v. State, 773 S.E.2d 716, 720 (Ga. 2015)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749).

Agents typically include subject matter experts, such as the following:

* •Law clerks
* •Administrative assistants
* •Financial analysts
* •Medical professionals
* •Private investigators

Be aware that this protection does not extend to an expert who serves as a trial witness or who provides the basis for another expert's trial testimony.

***Corporate Attorney-Client Privilege***

If your client is a corporation, partnership, organization, or other entity, the attorney-client privilege belongs to the entity—it does not belong to any officer, director, or other employee of the company. [Zielinski v. Clorox Co., 504 S.E.2d 683, 685 (Ga. 1998)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749). An officer, director, or other employee cannot waive the entity's attorney-client privilege without the entity giving that individual the express power to do so when acting on its behalf. [Zielinski, 504 S.E.2d at 685](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749).

**Types of Waiver**

In general, if a client waives the attorney-client privilege, the waiver applies to all attorney communications as well as relevant documents in trial counsel's files.

[Waldrip v. Head, 532 S.E.2d 380, 386 (Ga. 2000)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749), overruled on other grounds, [Duke v. State, 829 S.E.2d 348 (Ga. 2019)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749).

Note that this waiver can include attorney work product if the higher standards for waiving that protection are met.

**TYPES OF WAIVERS**

***Express Waiver***

To expressly waive attorney-client privilege, a client must disclose privileged communications to an outside third party, whether intentionally or unintentionally. A client may also expressly waive privilege by allowing his or her attorney to disclose privileged communications to an outside third party.

See [Rogers v. State, 717 S.E.2d 629, 632 (Ga. 2011)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749).

Similarly, attorney-client privilege does not protect communications intended to be disclosed to an outside third party. Therefore, if a client conveys information to his or her attorney with the purpose of having the attorney disclose the information to a third party, the client has waived attorney-client privilege in relation to those statements.

[McKesson Hboc v. Adler, 562 S.E.2d 809, 813 (Ga. App. 2002)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749).

***Implied Waiver***

Georgia courts use the term “implied waiver” to refer to decisive, unequivocal conduct by a party from which the court can reasonably infer that the party intended to waive privilege.

[Kennestone Hosp. v. Hopson, 538 S.E.2d 742, 745 (Ga. 2000)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749).

For example, a client's filing of a negligence, malpractice, or other professional misconduct claim against his or her attorney constitutes an implied waiver of that client's attorney-client privilege with that attorney.

[Waldrip v. Head, 532 S.E.2d 380, 388 (Ga. 2000)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749), overruled on other grounds, [Duke v. State, 829 S.E.2d 348 (Ga. 2019)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749). This implied waiver extends to both:

•The “underlying matter or matters to the extent necessary for the attorney to defend against the legal malpractice claim” –and–

•The “client’s communications with other attorneys who represented the client with respect to the same underlying transaction or litigation”

[Hill, Kertscher & Wharton, LLP v. Moody, 839 S.E.2d 535, 536 (Ga. 2020)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749).

Note that Georgia courts do not normally deem silence sufficient to constitute a waiver of privilege unless the person was under an obligation to speak.

[Kennestone Hosp., 538 S.E.2d at 745](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749); see also [Jordan v. Flynt, 240 S.E.2d 858, 863 (Ga. 1977)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749). For example, in *Kennestone Hospital v. Hopson*, the court held that the plaintiff's failure to file a timely objection to a request for psychiatric records did not constitute an affirmative waiver of privilege.

[Kennestone Hosp., 538 S.E.2d at 745](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749).

***Partial Waiver and Subject Matter Waiver***

Partial waiver and subject matter waiver are two ways in which a waiver of privilege can open the door to other privileged communications or documents. Partial waiver allows the waiver of privilege as to part of a communication to waive the privilege as to the entire communication. Subject matter waiver allows the waiver of privilege as to one communication pertaining to a certain subject to waive the privilege as to all communications pertaining to that subject.

***Partial Waiver***

The partial waiver of a privileged communication often leads to the full waiver of that privileged communication.

See [Fulton Nat'l Bank v. Wood, 237 S.E.2d 595, 596 (Ga. App 1977)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749).

For example, in Fulton Nat'l Bank, the Georgia Court of Appeals found that a witness who testified without objection about an attorney's instructions regarding a foreclosure bid could be compelled to answer other questions regarding that attorney communication on cross-examination as long as they also pertained to the foreclosure bid.

[Fulton Nat'l Bank, 237 S.E.2d at 596](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749).

Georgia courts enforce the partial waiver doctrine to avoid the inequity of allowing a party to disclose just the privileged communications that may benefit its position while withholding other privileged communications that hurt its position.

See [Ga. R. & B. Co. v. Lybrend, 27 S.E. 794 (Ga. 1896)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749).

In *Waldrip v. Head*, the Supreme Court of Georgia found that a habeas petitioner who asserts a claim of ineffective assistance of counsel makes a limited waiver of attorney-client privilege. The limited waiver applies only to counsel's documents and files that relate to the specific allegations of ineffectiveness.

[Waldrip, 532 S.E.2d at 387](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749), overruled on other grounds, [Duke v. State, 829 S.E.2d 348 (Ga. 2019)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749).

***Subject Matter Waiver***

The same reasoning underlies the doctrine of subject matter waiver. Pursuant to subject matter waiver, the disclosure of a certain privileged document or communication can subsequently open the door to all privileged documents and communications pertaining to the same subject matter.

See [Fulton Nat'l Bank, 237 S.E.2d at 596](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749).

Like partial waiver, this doctrine ensures that a party to litigation cannot choose to reveal only the privileged communications that help the party's own side of the dispute while concealing other, perhaps harmful, privileged communications.

See [Ga. R. & B. Co. v. Lybrend, 94 S.E. 794, 800 (Ga. 1896)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749).

**Work Product Protection Compared**

In Georgia, courts apply a higher threshold when determining whether the attorney work product protection, as opposed to the attorney-client privilege, has been waived.

[McKesson Hboc v. Adler, 562 S.E.2d 809, 812–13 (Ga. App. 2002)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749).

Courts apply different standards because the two protections have different purposes:

•The attorney-client privilege protects communications between the attorney and his or her client.

•The work product protection protects the adversarial system as a whole by allowing attorneys to prepare cases without worrying that their work will be disclosed to the opposing party.

In order to waive the work product protection, the party seeking the trial preparation material must show:

•A substantial need for the evidence –and–

•That undue hardship will result if the party must develop the evidence by other means

OCGA§9-11-26(b)(3)

If the seeking party meets both criteria, the trial court may order production of the privileged material following an in camera examination to ensure that any mental impressions, conclusions, opinions, or legal theories of the attorney remain undisclosed.

[McKesson Hboc, 562 S.E.2d at 812](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749).

**Waiver in the Litigation Setting**

Attorneys and their clients can waive attorney-client privilege inadvertently during litigation.

***Failure to Object***

During discovery, a party's failure to assert a timely objection to a discovery request does not necessarily result in the waiver of the right to object based on attorney-client privilege.

See [Kennestone Hosp. v. Hopson, 538 S.E.2d 742, 743 (Ga. 2000)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749).

Nevertheless, the best practice is to object to the production of potentially privileged communications or documentation to preserve your right to object to the waiver of attorney-client privilege.

***In Camera Inspection***

Providing documents to a judge for an *in camera* inspection generally does not waive attorney-client privilege. In fact, the judge may order an *in camera* inspection of documents to assess whether they were appropriately withheld on the basis of privilege.

See [S. Guar. Ins. Co. v. Ash, 383 S.E.2d 579, 583 (Ga. App. 1989)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749).

***Refreshing Recollection***

Using privileged written materials to refresh the recollection of a testifying witness at trial will waive the attorney-client privilege for that document.

[O.C.G.A. § 24-6-612(a)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749).

Pursuant to Georgia statute, an adverse party has rights to do the following with respect to written materials used to refresh the recollection of a witness while testifying:

•Have the writing produced at the hearing or trial

•Inspect the document

•Cross-examine the witness on the writing –and–

•Introduce in evidence portions of the document relevant to the witness's testimony

[O.C.G.A. § 24-6-612(a)](https://advance.lexis.com/open/document/openwebdocview/Attorney-Client-Privilege-Privileged-Parties-and-Waiver-GA-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5X4J-F491-JXNB-611S-00000-00&pdcomponentid=500749).

**RECAP**

**WADE:** So, folks, remember that the attorney-client privilege protects the communications of both the attorney and the client.

**TAIN:** Yes, but the privilege BELONGS to the client, so it is his or hers to waive.

**WADE:** The privilege can also apply to communications with staff and other agents, as well as experts and others.

Waivers can be complete, partial, or even subject matter, depending on the circumstances.