Mental Health Treatment for Lawyers
Confidentiality & Privilege Considerations

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This brief paper will discuss whether confidentiality protections typically arising in the mental health counseling setting extend to voluntary peer support groups hosted and used by lawyers. While lawyers may obtain mental health services from a variety of providers, not all types of treatment are afforded the same scope of statutory protection. Such considerations may be an important factor to an attorney when determining which setting best suits his or her needs. Accordingly, using as guides cases such as *Brown v. Howard*, 334 Ga. App. 182 (2015), and *Herendeen v. State*, 268 Ga. App. 113 (2004), this paper will identify the limitations of confidentiality and applicable privileges with respect to certain counseling services, such as peer support groups.

Communications Made to Licensed Mental Health Professionals

Georgia has had a long-standing public policy of allowing for the confidentiality of communications between patient and psychiatrist. The laws governing this arrangement were eventually codified in the former O.C.G.A**.** § 24-9-21 (2012), and currently codified in O.C.G.A. § 24-5-501 (2014).[1] *See also* O.C.G.A**.** § 43-39-16.

Other than disclosing "records indicating" the fact that a patient obtained treatment and the dates treatment was sought, communications between a patient and a statutorily covered provider are privileged and may not be acquired through discovery tools of a party adverse to the patient. *Advantage Behavioral Health Sys. v. Cleveland*, 350 Ga. App. 511 (2019). However, treatment records relating to drug and alcohol conditions are protected by federal law under certain circumstances. *See Sletto v. Hosp. Auth. of Houston Cnty.*, 239 Ga. App. 203, 208 (521 S.E.2d 199) (1999) (Eldridge, J., concurring specially.) *See also Brown*, *supra*. Further, the treating professional is provided a "testimonial privilege" unless the patient either "expressly or impliedly" waives the privilege "as a precondition of discovery." *Kennestone Hosp. v. Hopson*, 273 Ga. 145 (2000).

The privilege "serves . . . important private and public interests by . . . promoting the mental health of the country's citizenry." *Id* quoting *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996). The privilege does so by "encouraging the patient to talk freely without fear of disclosure and embarrassment, thus enabling the psychiatrist to render effective treatment of the patient's emotional or mental disorders." *Id.*

[1] Georgia appellate courts interpreting O.C.G.A. § 24-5-501 still rely on cases, such as *Armstead v. State*, whose decisions were based on O.C.G.A. § 24-9-21. *See*, e.g., *Armstead v. State*, 293 Ga. 243 (2013).

The present-day iteration of the statute now includes the following covered service providers:

Psychiatrist
Licensed Psychologist
Licensed Clinical Social Worker
Clinical Nurse Specialist in Mental Health or Psychiatry
Licensed Marriage and Family Therapist
Licensed Professional Counselor

O.C.G.A. § 24-5-501(a)(7).

In addition, while there is no privilege in Georgia for "general physician-patient communications," Georgia law does extend the privilege to communications made to a doctor who "devotes a substantial portion of his or her time in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction." *Wiles v. Wiles*, 264 Ga. 594 (1994). Moreover, a patient's communications with "agents of a licensed professional counselor," such as an "associate professional counselor," will be protected by the privilege as well. *Gwinnett Hosp. Sys. v. Hoover*, 337 Ga. App. 87 (2016). However, communications made by the patient to nurses or attendants who merely "support the qualifying professional [without] acting as agents" are not covered. *Id.*

Communications Made in Mental Health Peer Groups

Georgia law also addresses whether a covered mental health professional can treat more than one individual during a session. Courts have found the mental health privilege applies to communications between providers and patients arising during joint and group therapy sessions. *See Advantage, supra*. There is no "diminish[ment]" of the psychiatrist-patient privilege just because "the patient sought or contemplated treatment jointly with other persons, or primarily for the benefit of another person who is in treatment by the same psychiatrist." *Mrozinski v. Pogue*, 205 Ga. App. 731 (1992). *See Sims v. State*, 251 Ga. 877 (1984) (statements made by husband during joint psychiatric counseling with wife were privileged).[2] Thus, it is clear from both statutory and case law, that the treatment provider's licensure and primary practice determine if a patient's communications are entitled to protection whether the treatment takes place one-on-one or in the presence of other treatment seekers.

[2] Compare *Karpowicz v. Hyles*, 247 Ga. App. 292 (2000) (mother's statement to licensed clinical psychologist who treated her daughter that she was afraid that her daughter was unable to distinguish fact from reality was not privileged because only daughter, not mother, sought mental health treatment). Also, drug and alcohol treatment records are protected by federal law under certain circumstances. *See Sletto v. Hosp. Auth. of Houston Cnty.*, 239 Ga. App. 203 (1999) (Eldridge, J., concurring specially). *See Brown v. Howard*, 334 Ga. App. 182 (2015).

However, what about communications made in peer group settings that do not include a qualifying professional, such as an attorney mental health support group consisting only of an attorney's peers who do not fall under the covered individuals delineated under O.C.G.A. § 24-5-501(a)(7)? Georgia law is clear: While such groups may provide treatment-goers a degree of confidentiality and privacy with respect to communications exchanged, "the mere fact that a communication is made in confidence is generally considered insufficient" for protection under the privilege. *Lipsey v. State*, 170 Ga. App. 770 (1984).

Confidentiality and privacy have been recognized as necessary to fostering beneficial and unrestrained communication between one seeking mental health services and mental health providers. A lack of confidentiality imperils the effectiveness of mental health counseling as "it is the promise of confidentiality that encourages patients to openly discuss their emotional and mental health issues." *Advantage*, *supra*. Thus, mental health peer groups that desire to provide environments encouraging such free expressions should also eliminate the risk of compulsory disclosure of those communications exchanged within the sessions. To accomplish this, mental health peer groups for lawyers should enlist the services of the aforementioned qualifying professionals to provide the treatment or counseling sought. Alternatively, an attorney who seeks to have his or her peer group communications remain strictly confidential should attend groups led by statutorily covered providers. In that way, the concerned attorney will be able to "talk freely without fear of disclosure and embarrassment . . . thus enabling the [qualifying professional] to render effective treatment" toward the improvement of the attorney's emotional or mental health. *Kennestone, supra*.

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