Basic Information on Georgia's Advocate Privilege Law
O.C.G.A. 24-5-509

Drafted August 22, 2012

INTRODUCTION

During its 2012 session, the Georgia General Assembly passed a bill – House Bill 711 – which contains provisions giving advocates and volunteers working at domestic violence and sexual assault programs privilege in their communications with the victims they serve. This bill was signed into law by Governor Nathan Deal and is contained within the Georgia Code at 24-5-509. The law goes into effect on January 1, 2013.

The purpose of this document is to outline the specific provisions of the advocate privilege law and how it applies to domestic and sexual assault program advocates and volunteers. The document will also provide answers to some frequently-asked questions about the new law.

NOTE: This document has been created for informational purposes only and does not constitute legal advice. Please contact an attorney to obtain advice for a particular issue or problem.

THE BASICS

In layman's terms, the advocate privilege law states that no current or former employee or volunteer ("agent") of a domestic violence or sexual assault program ("program") can be forced to give court testimony or provide to a court records pertaining to any victim they have served, except in very narrow circumstances as outlined in the law. The exact language can be found at O.C.G.A. 24-5-509(b), excerpted as follows:

> *No agent of a program shall be compelled to disclose any evidence in a judicial proceeding that the agent acquired while providing services to a victim, provided that such evidence was necessary to enable the agent to render services…* [O.C.G.A. 24-5-509(b)]

THE QUALIFICATIONS

In order to qualify for the privilege, a person must meet **ALL** of the following criteria:

1) Be a current or former employee or volunteer at a program that has as its primary purpose to either a) provide services to family violence victims and their families or b) provide services to sexual assault victims and their families [O.C.G.A. 24-5-509(a)]
2) Must have completed a minimum of 20 hours of training in family violence and sexual assault intervention and prevention at a Criminal Justice Coordinating Council (CJCC) certified victim assistance program. [O.C.G.A. 24-5-509(a)]
3) The family violence or sexual assault program for which the person worked or volunteered cannot be one that is under the direct supervision of a law enforcement agency, prosecuting attorney's office, or a government agency. [O.C.G.A. 24-5-509(a)]

EXERCISING THE PRIVILEGE

When parties to a criminal or civil case seek information for disclosure in court, they do so by filing a subpoena, which is then issued by the court. Domestic violence and sexual assault programs need to have a written protocol in place on how to handle such subpoenas. Even if you have never been subpoenaed, it is best to assume that it will happen in the future. Most domestic violence and sexual assault programs receive state or federal funds that require them to keep victim information confidential, so having a policy in place helps ensure that your program is fully compliant with these terms of your federal funding.

First, it is essential that your program identify an attorney who is ready to respond at a moment's notice in case you are subpoenaed. Subpoenas are often issued in a manner that gives your program very little time to respond. Therefore, it is critical that you have an attorney who is familiar with the advocate privilege law who can adequately respond to such legal actions.

The following is a suggested protocol for handling subpoenas:

1) **Make sure that the subpoena was issued in accordance with the law.** Service of subpoena is invalid unless it is done either in person, via registered or certified mail, or via statutory overnight delivery.

2) **Inform the executive director of your program.** Since this is a legal action, it is important that you inform your executive director as soon as possible.
3) **Inform the victim** about whom testimony is being ordered.
4) **File a motion to quash the subpoena.** You will need an attorney to file this motion on your behalf. Sample motions to quash can be obtained from the Director of Public Policy at GCADV.

Upon receipt of the motion to quash, the court may take one of several courses of action. It may grant the motion to quash the subpoena, thereby making the subpoena for testimony null and void. The court may, however, hold a pretrial hearing or a hearing outside the presence of a jury to determine whether the evidence being requested is subject to factors outlined in the statute that make such evidence subject to disclosure – see limitations listed below, O.C.G.A. 24-5-509(b)(1) and (b)(2). If the court then finds by a preponderance of the evidence that these factors are met, the court must order that evidence be produced for the court under seal, meaning that it does not become a part of public court records.

THE EXCEPTIONS AND LIMITATIONS

The privilege afforded to advocates and volunteers is *not absolute*. It is a *qualified* privilege, in that there are certain limitations and exceptions.

Limitations

Advocates and volunteers may be compelled to testify or offer up victim records if **ALL** of the following factors are met, depending on whether it is a criminal or civil case:

In a criminal proceeding [O.C.G.A. 24-5-509(b)(2)],

1) The evidence sought is material and relevant to the issue of guilt, degree of guilt, or sentencing for the offense charged or a lesser included offense;
2) The evidence is not sought solely for the purpose of referring to the victim‘s character for truthfulness or untruthfulness; provided, however, that this subparagraph shall not apply to evidence of the victim's prior inconsistent statements;
3) The evidence sought is not available or already obtained by the party seeking disclosure; **AND**
4) The probative value of the evidence sought substantially outweighs the negative effect of the disclosure of the evidence on the victim.

In a civil proceeding [O.C.G.A. 24-5-509(b)(1)],

1) The evidence sought is material and relevant to the factual issues to be determined;
2) The evidence is not sought solely for the purpose of referring to the victim’s character for truthfulness or untruthfulness; provided, however, that this subparagraph shall not apply to evidence of the victim’s prior inconsistent statements;
3) The evidence sought is not available or already obtained by the party seeking disclosure; **AND**
4) The probative value of the evidence sought substantially outweighs the negative effect of the disclosure of the evidence on the victim.

Exceptions

Here are the exceptions to advocate privilege in Georgia:

1) **Advocates and volunteers are still mandated to report incidents of suspected child abuse and neglect.** However, this mandate ends at reporting, which means that advocates and volunteers are not required to divulge information beyond that which is given in the incident report. In fact, giving up information about a victim or their children without a narrowly-crafted, time-limited consent for release of information may place your program in direct violation of the terms of the federal funding it receives.
2) **A victim can waive the privilege**, thereby giving the advocate or volunteer authorization to give court testimony or provide to the court records pertaining to the victim. When you inform victims when subpoenas for advocate testimony or records are issued, some may feel that the information you have to offer will be helpful to the case. When this situation arises, it is imperative that you carefully review with the victim the pros and cons of providing testimony on her behalf. While you may have information to share that may be helpful to her case, you may also have information that could seriously hurt her case. Once you are on the witness stand, you will be subjected to cross-examination and may be asked to testify as to information that the victim would rather you not share. You may, at that time, invoke your privilege. However, the likelihood is increased that you may be compelled to share that information. If the victim understands and is willing to take this risk, you should craft a very narrow, time-limited waiver of privilege spelling out exactly the type of information you are authorized to share (e.g. attendance at support group meetings.)