EVIDENCE

Institute of Continuing Judicial Education

State Court Judges

Fall Conference

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GEORGIA EVIDENCE

Case law Update
Privileges, Work Product
Judicial Notice

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To program your "clicker" …

Press "GO" or "Ch"
Your light should flash red/orange .
Press **41**
Then press "GO" or "Ch" again.
Your light will briefly flash green if all OK.
If the light flashes red/orange again, start over.

EVIDENCE UPDATE



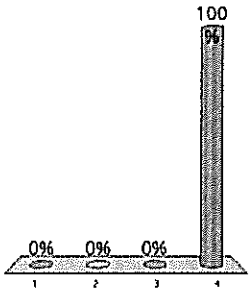
Question # 1

In a products trial, the plaintiff wants the defendant corporation's CEO (who is not a party) to admit on cross that he was paid over $50 million in 2016.

The defense objects, arguing the inquiry is irrelevant and, in any event, fails a Rule 403 balancing.

Which is the best answer?

1. Sustained. Irrelevant to corporate defendant's liability.
2. Trial court should do a Rule 403 balancing.
3. Overruled. Rule 403 does not apply to evidence of bias which "may always be proved." OCGA § 24-6-622
4. Overruled. The jury should know the defendant can afford to pay its CEO such extravagant sums.



Answer: 2

O.C.G.A. § 24-6-622. Impeachment by Proving Bias

"The state of a witness's feelings towards the parties and the witness's relationship to the parties may always be proved for the consideration of the jury."

The CEO's compensation is relevant to show bias of the witness. *Chrysler Group LLC v. Walden*, 339 Ga. App. 733 (2016) (cert. granted).

O.C.G.A. § 24-6-622. Impeachment by Proving Bias

"The state of a witness's feelings towards the parties and the witness's relationship to the parties may always be proved for the consideration of the jury."

The *Walden* court, citing a 1994 case, stated that because of the underlined phrase of the statute, "any concerns regarding prejudice must yield to the statutory mandate," thus suggesting Rule 403 does not apply.

O.C.G.A. § 24-4-403. Balancing Relevance and Negative Effects

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Does Rule 403 apply when a Rule states that certain evidence "shall" be admissible?

State v. Frost, 297 Ga. 296, n.6 (2015) (dicta)

FRE 404 ("is not admissible")
O.C.G.A. § 24-4-404 ("shall not be admissible")

FRE 405(a) ("proof may be made")
O.C.G.A. § 24-4-405(a) ("proof shall be made")

FRE 410 ("is admissible")
O.C.G.A. § 24-4-410 ("shall be admissible")

FRE 605 (trial judge "may not testify")
O.C.G.A. § 24-6-605 (trial judge "shall not testify");

FRE 803 (hearsay exceptions "are not excluded")
O.C.G.A. § 24-8-803 (hearsay exceptions "shall not be excluded")

FRE 901 (authentication "is satisfied ...")
O.C.G.A. § 24-9-901 (authentication "shall be satisfied ...")

"It is the intent of the General Assembly in enacting this Act to adopt the Federal Rules of Evidence, as interpreted by the Supreme Court of the United States and the United States circuit courts of appeal as of January 1, 2013."

Section 1 (from 2011 Ga. Law, Act 52)

Federal courts apply Rule 403 across the board, to nearly all evidence rules.

Question # 2

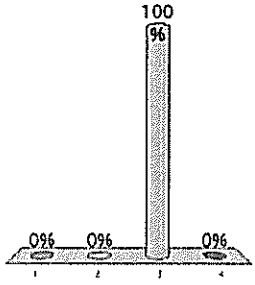
Domestic violence case. Victim claims the accused hit her with his fist, giving her a black eye. Accused claims her injury was due to an accidental fall.

The prosecution will offer evidence that defendant was convicted of assaulting a former girlfriend (not the victim in this case) six months ago.

Defense objects.

Which is the best answer?

1. Overruled. Prior assault, close in time, is "intrinsic" to charged offense. Rule 401.
2. Overruled. Prior assault is admissible under Rule 404(b) to prove identity, motive, and intent.
3. Overruled. Prior assault is admissible under Rule 404(b) to prove absence of mistake or accident.
4. Sustained. Rules 404 and 403.



Answer: 3

"Intrinsic" evidence - "Evidence is intrinsic if it is (1) an uncharged offense which arose out of the same transaction or series of transactions as the charged offense, (2) necessary to complete the story of the crime, or (3) inextricably intertwined with the evidence regarding the charged offense."

Brooks v. State, 298 Ga. 722, n.11 (2016).

E.g., Lupoe v. State, 300 Ga. 233, 245 (2016) (accused's prior participation in gang activities admissible to prove charge under Street Gang Terrorism & Protection Act)

"Intrinsic"

E.g., Satterfield v. State, 339 Ga. App. 15 (2016) (where accused charged with threatening judge with intent to harm, fact that gun was found in accused's car was "intrinsic" to charges).

"Intrinsic"

Compare:

Sanchez-Villa v. State, 341 Ga. App. 264 (2017) (unrelated DEA investigation of defendant for selling drugs was not "intrinsic" to the charges in this case)

Identity

An independent crime or act of the accused is admissible to prove identity only when the other crime or act is so similar as to constitute a signature crime.

Brooks v. State, 298 Ga. 722, 725 (2016) (where the similarities are "commonplace - these [are] not signature crimes" and do not qualify as proof of identity under Rule 404(b))

Moreover, identity must be an issue in the case. *Parks v. State*, 300 Ga. 303 (2016).

Motive

Argument: The prior assault shows defendant's motive to commit the charged assault; namely, his motive to control women with violence.

See, *Smart v. State*, 299 Ga. 414 (2016); *Harris v. State*, 338 Ga.App. 778 (2016).

Motive

Argument: The prior assault shows defendant's ~~motive~~ propensity to commit the charged assault; namely, his ~~motive~~ propensity to control women with violence.

Motive

Argument: "The prior assault shows defendant's ~~motive~~ propensity to commit the charged assault; namely, his ~~motive~~ propensity to control women with violence."

Such logic "would make all prior robberies admissible in any robbery case, all prior murders admissible in any murder case, and so on."

Brooks v. State, 298 Ga. 722, 726 (2016)

Motive

Courts must use care not to conflate "motive" and "character."

The fact that a person has a propensity to act consistent with his or her subjective personality traits is not that person's "motive" for acting that way but simply his or her character.

OCGA § 24-4-404 prohibits the use of a character trait as proof the person "acted in conformity therewith."

Motive

If the defendant claims, as did the accused in our hypothetical (and in *Smart* and *Harris)*, that the woman's death or injury was an accident, then 404(b)'s "absence of mistake or accident" is a better fit for prior violence against another woman.

If the defendant claims that he did not mean to harm the victim, then the prior is admissible to prove intent.

Intent

The issue most often is whether the unrelated crime, offered to prove intent under 404(b), survives a Rule 403 balancing. *Old v. State*, 299 Ga. 65 (2016).

In our hypothetical domestic violence case, the defense is NOT that the accused did not intend to injure the victim. The defense is that he did not injure her at all and her injury was due to an accidental fall.

Parks v. State, 300 Ga. 303 (2016) (where defendant claimed self-defense, his prior conviction for an unrelated aggravated assault was inadmissible under Rule 404(b) to prove knowledge, identity, motive or intent since none of those issues were in dispute — defendant admitted he shot the victim and claimed it was justified in self-defense — therefore, the only use of the prior assault was as prohibited propensity evidence).

Prior DUI offered to prove intent in a DUI case

Jones v. State, _Ga. _, 802 S.E.2d 234 (2017) (Court explains why the accused's prior DUI failed to pass a Rule 403 balancing in this case)

"[W]hether the charged crime is one of general intent is one of the factors, an important one, the trial court may consider when assessing the prosecutorial need for the extrinsic act evidence in question. Logically, if the State's threshold to prove intent as an element of a crime is relatively low, as it likely is when the charged crime is one of general intent, then the probative value of the extrinsic act evidence would necessarily be minimal." ...

Jones, continued ...

"For DUI-less safe, which is a general intent crime, intent may be inferred from showing the defendant drove after consuming alcohol to the extent he was a less safe driver. See *Prine v. State*, 237 Ga. App. 679 (1999); ... OCGA § 16-2-6. For DUI-per se, which is also a general intent crime, intent may be inferred from showing the defendant drove with a ... (BAC) of 0.08 grams or more. ... OCGA § 16-2-6. At trial, the fact that appellant voluntarily drove his vehicle sometime after consuming alcohol was not in dispute. ... In addition, the evidence showed appellant's BAC was well in excess of 0.08 grams. Thus, the probative value of the prior DUI to show intent, as to DUI-less safe or DUI-per se, was very low."

A defense offer to stipulate that intent, identity, etc. are not issues in the case (whether accepted by the prosecution or not) "diminishes the probative value of the" 404(b) evidence.

Hood v. State, 299 Ga. 95 (2016)

Question # 3

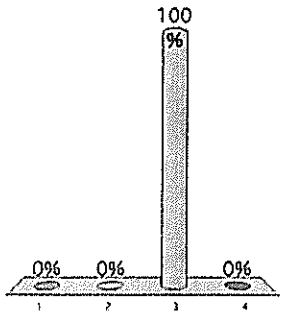
Child abuse case. Child testifies that defendant punched her in the face.

Police officer testifies that in an interview, the child told her that the defendant also kicked her in the stomach.

Defense objects.

Which is the best answer?

1. Sustained. Improper bolstering.
2. Sustained regarding the kicking in the stomach because she did not testify to that.
3. Sustained. Testimonial hearsay.
4. Overruled IF the State gave the defense advance notice of intent to use the pre-trial statement.



Answer: 4

O.C.G.A. § 24-8-820.

Prior out-of-court statements regarding abuse admissible IF

-- child <16 at time of statement

-- notice given to opponent

-- "the child testifies at the trial"

-- the person to whom the statement was made testifies

O.C.G.A. § 24-8-820 is designed to bolster the child's in-court testimony. It is an exception to the general rule against "improper bolstering."

Laster v. State, 340 Ga. App. 96 (2017)

The child's admissible out-of-court statements are not limited to the specific facts testified to by the child on the witness stand.

Morris v. State, 341 Ga.App. 568 (2017)

Pre-2013 version of statute required only that the child be "available to testify"

Current statute requires that "the child testifies at the trial."

Question # 4

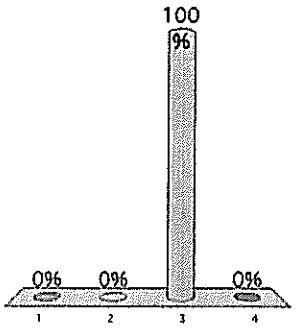
Raul Garcia was convicted of armed robbery. The defense moves for a new trial, offering the affidavit of a juror who claims another juror, during deliberations, repeatedly referred to the accused in derogatory ethnic terms, and said that "Mexicans" always lie and are all criminals.

The prosecution moves to quash the affidavit as attempting to impeach the verdict in violation of OCGA § 24-6-606(b).

Which is the best answer?

The motion to quash the affidavit is ...

1. Granted. The affidavit relates to matters internal to the jury's deliberations. § 24-6-606(b).
2. Granted. The affidavit is hearsay.
3. Denied. Affidavit raises issue of accused's 6th Amendment right to a fair trial.
4. Denied. The court must order a new trial.



Answer: 3

Pena-Rodriguez v. Colorado, 137 S.Ct. 855 (2017):

"The Court now holds that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee."

Two step process:

(1) is there sufficient evidence to conduct a full hearing on a motion for a new trial?

(2) the hearing.

Re: First, threshold step ...

"Not every offhand comment indicating racial bias or hostility will justify ... further judicial inquiry. ... [T]here must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court ..."

Re: Second step ... the hearing

"This case does not ask, and the Court need not address, what procedures a trial court must follow when confronted with a motion for a new trial based on juror testimony of racial bias. ... The Court also does not decide the appropriate standard for determining when evidence of racial bias is sufficient to require that the verdict be set aside and a new trial be granted. *Compare, e.g., Shillcutt*, 827 F.2d at 1159 (inquiring whether racial bias "pervaded the jury room"), *with, e.g., Henley*, 238 F.3d at 1120 ("One racist juror would be enough").

Unsettled issues...

How much racial animus is "too much" in the jury room?

Must the defense show causation?
(constitutional harmless error standard ... beyond a reasonable doubt, the racial animus did not effect the verdict)

May the defense compel a juror to talk about any racial animus in the jury room?

In Georgia, attorneys are allowed to approach jurors post-verdict for the purpose of investigating jury misconduct. *Sears v. State*, 268 Ga. 759 (1997). The attorneys do not have to explain or justify their inquiry to the trial court. *Id.*

However, "anyone seeking to speak with a juror must clearly inform that juror that he or she has the right to choose to answer questions and the right to decline the request." *Sears* at 767.

OCGA § 24-6-606(b) ... (excerpted)

(b) Upon an inquiry into the validity of a verdict ... a juror shall not testify by affidavit or otherwise ... as to any matter or statement occurring during the course of the jury's deliberations ... as influencing the juror to assent to or dissent from the verdict ... or concerning the juror's mental processes in connection therewith; provided, however, that a juror may testify on ... whether extraneous prejudicial information was improperly brought to the juror's attention, whether any outside influence was improperly brought to bear upon any juror, or whether there was a mistake in entering the verdict onto the verdict form.

May the trial court consider a post-conviction juror affidavit that ...

May the trial court consider a post-conviction juror affidavit that ...

Several jurors were drunk during deliberations.

May the trial court consider a post-conviction juror affidavit that ...

Several jurors were drunk during deliberations.

No. Internal.

Tanner v. U.S., 483 U.S. 107 (1987).

May the trial court consider a post-conviction juror affidavit that ...

One of the jurors visited the crime scene and reported back to the jury.

May the trial court consider a post-conviction juror affidavit that ...

One of the jurors visited the crime scene and reported back to the jury.

Yes. External.

Watkins v. State, 237 Ga. 678 (1976).

May the trial court consider a post-conviction juror affidavit that ...

The bailiff told the jury this was the accused's second trial on this charge.

May the trial court consider a post-conviction juror affidavit that ...

The bailiff told the jury this was the accused's second trial on this charge.

Yes. External.

Turpin v. Todd, 268 Ga. 820 (1997).

May the trial court consider a post-conviction juror affidavit that ...

The verdict was not truly unanimous.

May the trail court consider a post-conviction juror affidavit that ...

The verdict was not truly unanimous.

No. Internal.
Muthu v. State, 337 Ga. App. 97 (2016).

Question # 5

In a malpractice case, in response to discovery requests, plaintiff identified persons with knowledge and "may call" witnesses but did not mention Nurse Ratched in any response.

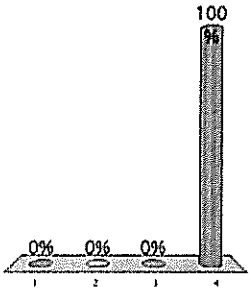
At trial, plaintiff calls Nurse Ratched. The defense objects and moves to exclude her testimony under OCGA § 9-11-37(d).

Which is the best answer?

1. Denied. Court may exclude a witness only where party violated express court order. No court order here.
2. Denied. Sanctions limited to granting a continuance (so defense can depose witness) or mistrial.
3. Granted. Court may exclude when there was a willful concealment of material facts or a witness.
4. Granted. Nurse Ratched is too scary to testify.



medication time.



Answer: 3

When a party objects to a discovery request or gives an evasive or incomplete answer, the opponent must move to compel, win that motion, and then only if the party violates the resulting Order is the court allowed to exclude evidence as a sanction.

Ford Motor Co. v. Conley, 294 Ga. 530, 545, (2014)

But when a party conceals facts or a witness, there is no way for the opponent to know he is being sand bagged and thus no reason to think a motion to compel is needed.

When deliberate, the court may impose the harsh sanction of exclusion.

Resurgens, P.C. v. Elliott, 800 S.E.2d 580 (Ga. 2017).

See also, *Doherty v. Brown,* 339 Ga. App. 567 (2016) (where court set deadline for identification of experts with admonition that failure to comply with deadline could result in exclusion of expert's testimony, no abuse of discretion in excluding expert identified 18 months after deadline)

Question # 6

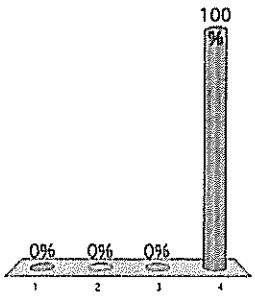
In a product liability case, plaintiff claims the discharge shoot on defendant's lawnmower was defective, causing a tree branch to pierce his leg.

Plaintiff has evidence of an incident last year in which the same model injured someone else. The shoot ejected a rock that bounced up and injured the user's eye.

The defense objects to this evidence.

Which is the best answer?

1. Sustained. Irrelevant in a product liability case.
2. Sustained. This is inadmissible character evidence. OCGA § 24-4-404.
3. Sustained. The prior incident did not involve the same kind of accident since the lawnmower ejected a rock, not a branch.
4. Overruled. The substantially similar previous incident is relevant to prove causation and the dangerousness of the product.



Answer: 4

The "rule of substantial similarity" requires proof that the "other" incident involved a "common design, common defect, and common causation." Immaterial differences do not disqualify the evidence.

Chrysler Group LLC v. Walden, 339 Ga. App. 733, 792 S.E.2d 754 (2016)

See also, *Cooper Tire & Rubber Co. v. Crosby*, 273 Ga. 454 (2001)

Ramos v. Liberty Mut. Ins. Co., 615 F.2d 334, 338-39 (5th Cir. 1980), *decision clarified on denial of reh'g*, 620 F.2d 464 (5th Cir. 1980)

"Evidence of similar accidents might be relevant to ... the lack of safety for intended uses, strength of a product, the standard of care, and causation. . . . Whether a reasonable inference may be drawn as to the harmful tendency or capacity (of a product) from prior failures depends upon whether the conditions operating to produce the prior failures were substantially similar to the occurrence in question."

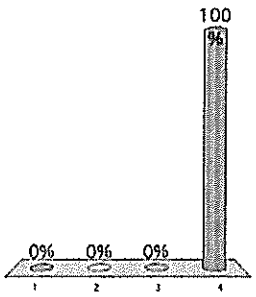
Question # 7

The amount of plaintiff's exposure to asbestos was in dispute. Plaintiff's expert would tell the jury that as long as plaintiff had any exposure (above background), this was a contributing cause of his mesothelioma.

Defense objects.

Which is the best answer?

1. Sustained. The expert's opinion is immaterial since it does not fit the legal standard for causation in Georgia.
2. Sustained. The expert's opinion is too speculative.
3. Overruled. The expert can give an opinion on medical causation and the judge will instruct the jury on legal causation.
4. Overruled. Goes to weight, not admissibility.



Answer: I

Georgia requires a finding that asbestos exposure made a "meaningful contribution" to plaintiff's disease. An expert opinion that tells the jury that *any* exposure is a "contributing" factor, without giving the jury guidance on what would be a "meaningful" contribution is not helpful to the jury and, worse, could confuse the jury.

An expert's opinion must "fit" the legal issues and standards the jury must apply based on the court's instructions.

Scapa Dryer Fabrics, Inc. v. Knight, 299 Ga. 286 (2016)

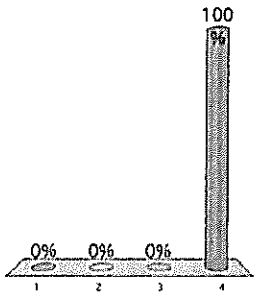
Question # 8

Police officer would testify that when he checked the defendant driver's license on his patrol car computer, he learned that the license had expired.

Defense objects.

Which is the best answer?

1. Sustained. Testimonial hearsay.
2. Sustained. Hearsay without exception.
3. Both 1 & 2.
4. Overruled. The officer is testifying from personal knowledge.



Answer: 2

"When an officer testifies about the results of a computer check of a registration tag or driver's license, the testimony is hearsay."

Taylor v. State, 337 Ga. App. 486, 496 (2016)

The proper method of proof would be "the introduction of a properly authenticated printout of the computer record rather than by the officer's testimony alone."

OCGA §§ 24-9-924(a); 24-8-803(8)(A).

Confrontation Clause (*Crawford*)

- "testimonial hearsay"
- offered by the State
- declarant can't be cross-examined

"Testimonial hearsay"

If the out-of-court statement was not made by or to the police or other agents of the State, it is not "testimonial."

"Testimonial hearsay"

Public records which were not made in connection with a criminal investigation of the defendant are not "testimonial."

See, e.g., State v. Tayman, 960 A.2d 1151 (Maine 2008) (record of license suspension not "testimonial")

Smith v. State, 338 Ga. App. 635 (2016) (intoxilyzer certification not "testimonial")

ATTORNEY/CLIENT PRIVILEGE
AND
WORK PRODUCT PROTECTION



Question # 9

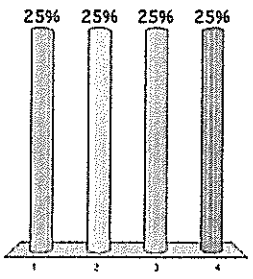
In a personal injury trial, defendant's private investigator testifies on direct that he saw the plaintiff (who is claiming permanent disability) playing tennis.

On cross, plaintiff asks the PI whether he reviewed any documents before testifying. The PI says he reviewed a report he wrote for defense counsel regarding his surveillance of the plaintiff.

Plaintiff asks the court to order disclosure of that report.

Which is the best answer?

1. Denied. Privileged and work product.
2. Denied. Not privileged but it is work product.
3. Granted. Work product rule does not apply to trial, only discovery.
4. Granted. OCGA § 24-6-612 allows opponent to review documents witness used to refresh recollection before testifying.



Answer: 2

No A/C privilege here since no communications by the client to the attorney or the attorney's agents.

Davis v. State, 285 Ga. 343 (2009).

Work product protection applies to trials as well as discovery. *U.S. v. Nobles*, 422 U.S. 225 (1975) ("... the concerns of the work product doctrine do not disappear once trial has begun.")

"Work product" = "documents and tangible things ... prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent)"

O.C.G.A. § 9-11-26(b)(3)

Two levels of work product protection:

(1) facts, data, opinions (other than opinions "concerning the litigation")

(2) "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation"

Level one - (1) facts, data, opinions (other than opinions "concerning the litigation")

Protection is **qualified** and may be trumped by a showing that the party "has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

Level two – "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation"

Protection is **absolute.**

McKinnon v. Smock, 264 Ga. 375, (1994) ("Opinion work product has been described as including such items as an attorney's legal strategy, intended lines of proof, evaluation of the case's strengths and weaknesses, and the inferences drawn from interviews of witnesses.")

O.C.G.A. § 24-6-612(b):

If a witness uses a writing to refresh his or her memory before testifying at trial and the court in its discretion determines it is necessary in the interests of justice, an adverse party shall be entitled to have the writing produced at the trial, to inspect it, to cross-examine the witness on such writing, and to introduce in evidence those portions of such writing which relate to the testimony of the witness. If the writing used is protected by the attorney-client privilege or as attorney work product ... use of the writing to refresh recollection prior to testifying shall not constitute a waiver of that privilege or protection.

Possibility that work product materials might be useful for impeaching the witness is not "substantial need / undue hardship"

Warmack v. MiniSkools Ltd., 164 Ga. App. 737, 740 (1982)

Question # 10

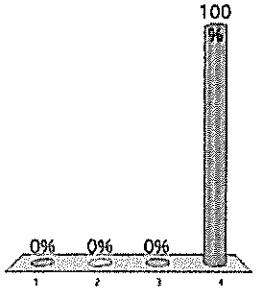
In a partnership dispute, plaintiff hired an accountant to review certain financial records when he suspected defendant was stealing from the business. In subsequent litigation, plaintiff does not intend to call the accountant to testify.

Defendant wants discovery of all the notes and records the accountant prepared in her investigation.

Plaintiff claims attorney-client privilege, accountant-client privilege, and work product protection.

Which is the best answer?

1. Attorney-client – Yes
   Accountant-client – Yes
   Work Product – No
2. Attorney-client – No
   Accountant-client – Yes
   Work Product – No
3. Attorney-client – Yes
   Accountant-client – Yes
   Work Product – Yes
4. Attorney-client – No
   Accountant-client – Yes
   Work Product - Yes



Answer: 4

No attorney/client privilege.

See, General Motors Corp. v. Mosely, 213 Ga. App. 875, 879 (1994) ("In Georgia, communications between principal and agent are not privileged, even if such communications ultimately reach the principal's attorney and are used in preparing the principal's case.")

IF the plaintiff's attorney had hired the (non-testifying) accountant as an aid to providing legal advice, the attorney-client privilege would apply.

U.S. v. Kovel,
296 F.2d 918, 922 (2d Cir. 1961) ("[w]hat is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer.")

See *also, Neuman v. State*, 297 Ga. 501 (2015)

Neuman v. State, 297 Ga. 501, 504 (2015)(" . . . the attorney-client privilege applies to confidential communications, related to matters on which legal advice is being sought, between the attorneys, their agents, or their client, and an expert engaged by the attorney to aid in the client's representation; the privilege is not waived if the expert will neither serve as a witness nor provide any basis for the formulation of other experts' trial testimony.")

Accountant-Client Privilege

OCGA 43-3-32(b) – the accountant-client privilege covers communications from the accountant to the client concerning "any audit or other investigation in a professional capacity and all information obtained ... concerning the business and affairs of clients ..."

The privilege only prevents using the accountant (or attorney) to discover the client's information. The underlying facts of course are not privileged. *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981).

Work Product

O.C.G.A. § 9-11-26(b)(4)(B) does not permit discovery of the product of a non-testifying expert except upon "a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."

However, if the accountant shared her findings with another expert who WILL testify, both any privilege and work product protections may be lost.

Neuman v. State, 297 Ga. 501 (2015)

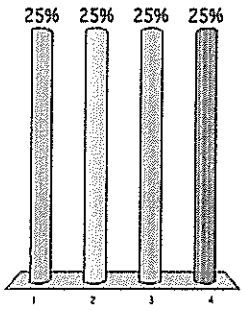
Question # 11

Same partnership dispute case. A month before trial, plaintiff sent a copy of his (non-testifying) accountant's report to the IRS in response to the IRS's investigation of possible tax fraud.

Does this waive any privileges and/or work product protection?

Which is the best answer?

1. Yes.
2. No.
3. Maybe.
4. Both 1 & 2.



Answer: 1

McKesson Corp. v. Green, 266 Ga. App. 157 (2004) ("Disclosure to an adversary, real or potential, forfeits the work product protection. Once a party gives an adversary access to the protected thought processes of counsel, the need for the work product protection disappears.")

See also, McKesson HBOC. v. Adler, 254 Ga. App. 500 (2002) (waiver of A/C privilege when disclosed to SEC)

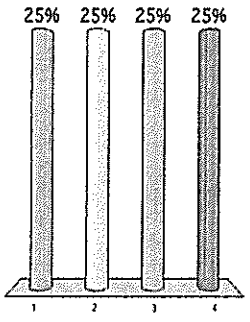
Question # 12

In a malpractice case, plaintiff's standard of care expert testifies. On cross, defense counsel asks the expert to identify and disclose any and all notes or memoranda he wrote or reviewed which relate to his testimony.

Plaintiff objects.

Which is the best answer?

1. Sustained. Work product protection is not waived by the expert testifying.
2. Sustained. This should have been done during discovery.
3. Overruled. Except any opinions concerning the litigation are still protected.
4. Overruled. Opposing counsel can see anything the expert relied on.



Answer: 3

There is no "level one" (qualified) work product protection for the "facts known and opinions held by an expert acquired or developed in anticipation of litigation or for trial." *McKinnon v. Smock*, 264 Ga. 375, 378 (1994).

However, "level two" (absolute) work product (mental impressions/opinions about the litigation) is still protected. *Id.*

O.C.G.A. § 24-7-705

" ... An expert may in any event be required to disclose the underlying facts or data on cross-examination."

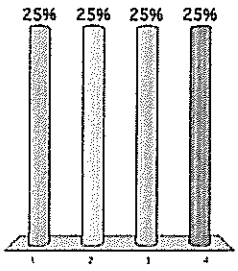
Question # 13

In a contract dispute, plaintiff moves to compel production of an attorney's notes of interviews with defendant (her client) on grounds the defendant was using the attorney's advice to plan the destruction of certain documents related to anticipated litigation.

The defense asserts the A/C privilege over the notes.

Which is the best answer?

1. Motion denied. Spoliation is not a "crime or fraud" and thus that exception to the A/C privilege does not apply.
2. Granted IF plaintiff can first prove, without the notes, that defendant more likely than not was using the attorney to facilitate fraud.
3. Granted. Defendant must produce the notes but they are admissible only if they support the claim of fraud.
4. IF plaintiff can show a prima facie case of fraud, then the court may review the notes *in camera* to determine if the A/C exception applies.



Answer: 4

Intentional spoliation of evidence is, by definition, fraudulent since it is designed to conceal evidence material to the litigation.

In re Sealed Case, 754 F.2d 395 (DC Cir. 1985)

Crime/Fraud Exception

Two step process:

(1) IF the party can show, without access to the privileged materials, "a factual basis adequate to support a good faith belief by a reasonable person" that the client was using the attorney to facilitate a crime or fraud, then the court may review the materials *in camera*.

U.S. v. Zolin, 491 U.S. 554 (1989).

Crime/Fraud Exception

Two step process:

(2) IF the *in camera* review establishes a prima facie case that the client was using the attorney to facilitate a crime or fraud, then the court shall release the materials to the moving party under the crime/fraud exception to the A/C privilege.

Cohen v. Rogers, 338 Ga. App. 156 (2016)

"Prima facie evidence is that which, on its face, is good and sufficient to establish a given fact, though it can routinely be rebutted or contradicted."

Rose v. Commercial Factors of Atl., 262 Ga. App. 528 (2003).

It does not matter whether the attorney was aware or unaware of the client's intentions.

Begner v. State Ethics Commission, 250 Ga. App. 327 (2001).

Question # 14

Auto accident case. Claims adjuster testifies on direct that plaintiff told him he was smoking a joint at the time of the accident.

On cross, Claimant's counsel would ask:

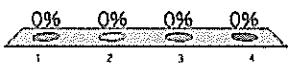
"Isn't it true that you told me on the phone, just a week ago, that [Claimant] never spoke to you about what he was doing at the time of the accident?"

Is this question permissible?

And, if so, and the witness says "No" may counsel testify to what the adjuster said?

Which is the best answer?

1. Yes and No.
2. Yes and Yes.
3. No and No.
4. Who knows?



Answer: I

Yes, counsel may confront a witness on cross with any prior inconsistent statements by the witness but ...

No, counsel may not take the stand and testify to a material issue that pits her credibility against the witness's.

Georgia Rules of Professional Conduct

Rule 3.7(a) "A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) The testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) Disqualification of the lawyer would work substantial hardship on the client."

See, *Martin v. State*, 298 Ga. 259 (2015)

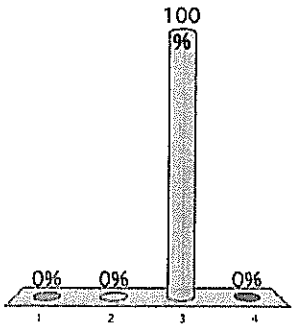
JUDICIAL NOTICE

Question # 15

In a civil jury trial in DeKalb County, plaintiff asks the court to take judicial notice that the Atlanta Braves last won the World Series in 1995.

Which is the best answer?

1. Denied. Its not something the judge necessarily would know.
2. Denied unless plaintiff provides some documentary proof of the facts.
3. Granted. This is something folks in DeKalb commonly know.
4. Are we talking about the Cobb County Braves?



Answer: 3

O.C.G.A. § 24-2-201(b):

A judicially noticed fact shall be a fact which is not subject to reasonable dispute in that it is either:

(1) Generally known within the territorial jurisdiction of the court; or

(2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Issue is NOT whether the judge knows the fact but whether the fact is one of "public knowledge" in the jurisdiction.

In the Interest of S.M., 169 Ga.App. 364 (1983)

Should the court take judicial notice that ...

Only women can get pregnant.

Should the court take judicial notice that ...

Only women can get pregnant.

Yes

Should the court take judicial notice that ...

It rained an inch at Hartsfield-Jackson Airport on June 15, 2011.

Should the court take judicial notice that ...

It rained an inch at Hartsfield-Jackson Airport on June 15, 2011.

Yes, IF proponent provides a source "whose accuracy cannot reasonably be questioned."
OCGA § 24-2-201(b)(2)

Should the court take judicial notice that ...

Matt Ryan is the NFL's best quarterback.

Should the court take judicial notice that ...

Matt Ryan is the NFL's best quarterback.

No. Subjective opinions or disputable matters are not appropriate for judicial notice.

U.S. v. Jones, 29 F.3d 1549 (11th Cir. 1994).

Should the court take judicial notice that ...

HGN testing is a reliable means of detecting intoxication.

Should the court take judicial notice that ...

HGN testing is a reliable means of detecting intoxication.

Yes.

Wrigley v. State, 248 Ga. App. 387 (2001)

But a defendant still may dispute whether the test was done properly in this case.
State v. Tousley, 271 Ga. App. 874 (2005)

Should the court take judicial notice in a criminal trial that ...

The subject crime occurred in Henry County.

Should the court take judicial notice in a criminal trial that ...

The subject crime occurred in Henry County.

No. The court may not take judicial notice of venue in a criminal case.

Calloway v. State, 227 Ga. App. 775 (1997)

Should the court take judicial notice in a criminal trial that ...

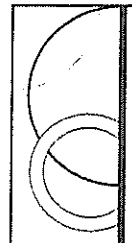
Fingerprints are hard to get and rarely presented at trial.

Should the court take judicial notice in a criminal trial that ...

Fingerprints are hard to get and rarely presented at trial.

No. This appears to be a comment on the evidence (or lack thereof) at trial.

Quiller v. State, 338 Ga. App. 206 (2016) (judge violated §17-8-57 when he told jury that fingerprints are hard to get and rarely presented at trial)



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