

Alabama Rules of Evidence

Article V. Privileges

Rule 507.

Trade secrets.

A person has a privilege, which may be claimed by the person or the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. If disclosure is directed, the court shall take such protective measures as the interest of the holder of the privilege and of the parties and the interests of justice require.

Advisory Committee's Notes

This rule is taken almost verbatim from Rule 507, Unif.R.Evid.507. Compare Fed.R.Evid. 508 (not enacted). A right to the protection given by this rule, albeit qualified, finds historic recognition nationally. See 8 J. Wigmore, *Wigmore on Evidence* § 2212(3) (McNaughton rev. 1961). The privilege belongs to the owner of the trade secret and may be claimed by the owner or the owner's agent or employee.

While no trade secret privilege, assertable at trial, has been recognized under preexisting Alabama law, such a privilege is consistent with the policy found in other, related principles. See C. Gamble, *McElroy's Alabama Evidence* § 361.02 (4th ed. 1991). First, it furthers the spirit of Alabama's Trade Secrets Act, which calls for "injunctive and other equitable relief as may be appropriate with respect to any actual or threatened misappropriation of a trade secret." Ala. Code 1975, § 8-27-4(1)(a). Additionally, it fosters the policy underlying the pretrial concept contained in Ala.R.Civ.P. 26(c). Under Rule 26(c), whenever knowledge of matters is sought by deposition, production, or inspection, the court may enter any order that will protect a party from:

"[A]nnoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: ... (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way...."

The purpose of Rule 507 is to extend the underlying policy of Ala.R.Civ.P. 26(c)(7) to the trial stage of litigation. Rule 507 does not affect or alter in any way the scope or procedure of discovery.

Discretion is vested in the court to disallow the privilege if nondisclosure of the trade secret would "tend to conceal fraud or otherwise work injustice." Factors to be considered in deciding whether to require disclosure are "the dangers of abuse, good faith, adequacy of protective measures, and the availability of other means of proof." Fed.R.Evid. 508 (not enacted) advisory committee's note.

As with other privileges, the party asserting the trade secrets privilege has the burden of demonstrating that a bona fide trade secret exists and that the need to prevent disclosure outweighs the benefit of disclosing relevant evidence.

Even when disclosure is required, however, the court is charged to take such precautionary measures to protect the trade secret as are suggested by balancing the interests of the privilege holder, the parties, and justice. While the rule does not undertake to limit judicial ingenuity in fashioning protective measures, the drafters of the proposed, but never enacted, Federal Rule of Evidence 508 furnished a comprehensive summary of case law examples:

“Perhaps the most common is simply to take testimony in camera. Annot., 62 A.L.R.2d 509. Other possibilities include making disclosure to opposing counsel but not to his client, *E. I. du Pont de Nemours Powder Co. v. Masland*, 244 U.S. 100, 37 S.Ct. 575, 61 L.Ed. 1016 (1917); making disclosure only to the judge (hearing examiner), *Segal Lock & Hardware Co. v. FTC*, 143 F.2d 935 (2d Cir.1944); and placing those present under oath not to make disclosure, *Paul v. Sinnott*, 217 F.Supp. 84 (W.D.Pa.1963).” Fed.R.Evid. 508 (not enacted) advisory committee’s note.