

Alabama Rules of Evidence

Article V. Privileges

Rule 503A.

Counselor-client privilege.

(a) *Definitions.* As used in this rule:

(1) The term “client” means a person who, for the purpose of securing professional counseling services, consults with a licensed professional counselor or a certified counselor associate. It also means a person who, for the purpose of securing counseling services as the result of either sexual assault or family violence, consults with a victim counselor.

(2) A “licensed professional counselor” is any person who holds himself or herself out to the public by any title or description of services incorporating the words “licensed professional counselor” or “licensed counselor”; who offers to render professional counseling services to individuals, groups, organizations, corporations, institutions, government agencies, or the general public, implying that the person is licensed and trained, experienced or expert in counseling; and who holds a current, valid license to engage in the private practice of counseling.

(3) A communication is “confidential” if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional counseling services to the client or those to whom disclosure is reasonably necessary for the transmission of the communication.

(4) “Counselor associate” is any person who has been certified by the Alabama Board of Examiners in Counseling to offer counseling services under the supervision of a licensed professional counselor.

(5) “Counseling services” consist of all acts and behaviors that constitute the “practice of counseling” as that term is defined in this rule.

(6) The “practice of counseling” involves the rendering or offering to render counseling services such as, among others, the following methods and procedures employed by the counseling profession:

(A) Counseling. Assisting a person, through the counseling relationship, to develop understanding of personal problems, to define goals, and to plan action

reflecting the person's interests, abilities, aptitudes, and needs as these are related to personal-social concerns, education progress, and occupations and careers.

(B) Appraisal activities. Selecting, administering, scoring and interpreting instruments designed to assess an individual's aptitudes, attitudes, abilities, achievements, interests, and personal characteristics, but not including the use of projective techniques in the assessment of personality.

(C) Counseling, guidance, and personnel consulting. Interpreting or reporting upon scientific fact or theory in counseling, guidance, and personnel services to provide assistance in solving some current or potential problems of individuals, groups, or organizations.

(D) Referral activities. The evaluating of data to identify problems and to determine advisability of referral to other specialists.

(E) Research activities. The designing, conducting, and interpreting of research with human subjects.

(F) Victim counseling. The providing of counseling to victims for any emotional or psychological impact resulting from a sexual assault or family violence.

(7) "Victim counselor" means any employee or supervised volunteer of a victim counseling center or other agency, business, or organization that provides counseling to victims, who is not affiliated with a law enforcement agency or prosecutor's office and whose duties include treating victims for any emotional or psychological condition resulting from a sexual assault or family violence.

(8) "Sexual assault" includes any sexual offense set out in Ala. Code 1975, §§ 13A-6-60 through 13A-6-70.

(9) "Family violence" means the occurrence of one or more of the following acts between family or household members:

(A) Attempting to cause or causing physical harm.

(B) Placing another in fear of imminent serious physical harm.

(10) The designation "family or household members" encompasses children,

spouses, former spouses, persons of the opposite sex living as spouses now or in the past, or persons 60 years of age or older living in the same household and related by blood or marriage.

(11) "Victim counseling center" means a private organization or unit of a government agency which has as one of its primary purposes the treatment of victims for any emotional or psychological condition resulting from a sexual assault or family violence.

(b) *General rule of privilege.* A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made for the purpose of facilitating the rendition of counseling services to the client.

(c) *Who may claim the privilege.* The privilege may be claimed by the client, the client's guardian or conservator, or the personal representative of a deceased client. The person who was the licensed counselor, counselor associate, or victim counselor at the time of the communication is presumed to have authority to claim the privilege, but only on behalf of the client.

(d) *Exceptions.*

(1) PROCEEDINGS FOR HOSPITALIZATION. In proceedings to hospitalize the client for mental illness, there is no privilege under this rule for communications relevant to an issue in those proceedings if the counselor or counselor associate has determined, in the course of counseling, that the client is in need of hospitalization.

(2) EXAMINATION BY ORDER OF COURT. If the court orders an examination of the mental or emotional condition of a client, whether a party or a witness, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered, unless the court orders otherwise.

(3) WHEN THE CLIENT'S CONDITION IS AN ELEMENT OF A CLAIM OR A DEFENSE. There is no privilege under this rule as to a communication relevant to an issue regarding the mental or emotional condition of the client, in any proceeding in which the client relies upon the condition as an element of the client's claim or defense, or, after the client's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

(4) BREACH OF DUTY ARISING OUT OF THE COUNSELOR-CLIENT RELATIONSHIP. There is no privilege under this rule as to an issue of breach of duty by the counselor, counselor associate, or victim counselor to the client or by the client to the counselor, counselor associate, or victim counselor.

(5) VICTIM COUNSELING IN CIVIL CASES. There is no privilege under this rule in civil cases as to a communication made to facilitate victim counseling when the person conducting the counseling is neither a licensed professional counselor nor a counselor associate, except that under no circumstances may a victim counselor or a victim be compelled to provide testimony in any proceeding that would identify the name, address, location, or telephone number of a “safe house,” abuse shelter, or other facility that provided temporary emergency shelter to the victim of the offense or transaction that is the subject of the proceeding, unless the facility is a party to the proceeding.

Advisory Committee’s Notes

While the psychotherapist-patient privilege of Rule 503 is based generally upon a preexisting Alabama statute, it nevertheless represents a nationally recognized privilege principle. Such a privilege is expressed in the evidence rules of virtually every state that has adopted rules of evidence based upon either the Federal Rules of Evidence or the Uniform Rules of Evidence. In contrast, however, the Rule 503A counselor-client privilege, created largely by combining two preexisting Alabama statutes, is generally not found in the primary body of evidence law nationally. The committee takes no position as to the merits of those statutes. Rather, their provisions are incorporated into the Alabama Rules of Evidence based upon a continuing philosophy that greater trial competency will result if, wherever feasible, external statutory rules of evidence are merged into these rules.

Rule 503A may be interpreted to include all licensed counselors who provide counseling services; however, its foundation lies in two separate statutes of a more specific applicability. The first is that statute creating, at least in criminal proceedings, a privilege for communications between the victim of sexual assault or family violence and a victim counselor. Ala. Code 1975, §§ 15-23-40 to -46. The second, and the one of broader application, is that statute creating a privilege for communications, in all types of cases, between a licensed counselor or counselor associate and a client. Ala. Code 1975, §§ 34-8A-1 to -21. Rule 503A is intended to supersede these preexisting statutes, except as might otherwise be expressly provided.

It should be noted that there basically are two types of persons whose counseling may be brought within the present privilege. First, there is the licensed professional counselor or the counselor associate, both of whom are either licensed or certified by the Alabama Board of Examiners in Counseling and who provide a broad range of counseling services. Second, there is the employee or supervised volunteer who provides counseling for any emotional or psychological condition resulting from a sexual assault or family violence. The field of operation for this privilege is broader for the first of these two groups. For example, the privilege arising in regard to communications with a victim counselor can generally be asserted only in a criminal case. If the victim counselor happens also to qualify as a licensed professional counselor or as a counselor associate, however, then the privilege could be asserted even in a civil case.

Subsection (a)(1). Definition of “client.” A client is anyone who consults either a licensed professional counselor or a certified counselor associate for the rendition of

professional counseling services. See Ala. Code 1975, § 34-8A-21. Additionally, the term “client” includes a person who consults a victim counselor for assistance in overcoming adverse emotional or psychological effects of a sexual assault or family violence. See Ala. Code 1975, § 15-23-41(2).

Subsection (a)(2). Definition of “licensed professional counselor.” The definition of “licensed professional counselor” is taken from the statute upon which the privilege is based. See Ala. Code 1975, § 34-8A-2(1). See also Ala. Code 1975, § 34-8A-7 (containing the statutory requirements for obtaining a professional counselor’s license). The statutory language limiting this privilege to those who render professional counseling services in private practice “for a fee” is abandoned.

Subsection (a)(3). Definition of “confidential.” The major variation in language made during the conversion of this privilege from statutory to rule form is in the definition of “confidential” as applied to communications. This is a change in form, rather than substance, and is intended to make the language in Rule 503A conform to the language found in other rules creating privileges, particularly the rule dealing with the psychotherapist-patient privilege. Compare Ala.R.Evid. 503(a)(3). Whether a communication is confidential largely constitutes a question of intent, to be measured by the objective facts. If it is intended that the communication be disclosed to third parties, then generally there is no privilege. Communication in the presence of a known third party, for example, generally destroys the privilege, because in that situation it is generally apparent that no confidentiality was intended. Rule 503A provides, however, that the presence of a third party does not destroy the privilege if disclosure to that person is necessary to the client-counselor communication.

As it is in regard to other privileges, the term “communication” is to be broadly interpreted. Consistent with the preexisting statute applicable to the victim-counselor privilege, the Rule 503A privilege extends to preclude the production of records when they concern confidential communications. See Ala. Code 1975, § 15-23-42(a).

Subsection (a)(4). Definition of “counselor associate.” The counselor associate is included, along with the licensed professional counselor, within the purview of the present privilege. The definition is taken from the preexisting statute. Ala. Code 1975, § 34-8A-2(2). In addition to being appropriately certified by the Board of Examiners in Counseling, the counselor associate must be acting under the supervision of a licensed professional counselor.

Subsection (a)(5). Definition of “counseling services.” The privilege arises when the client consults with the counselor for the delivery of counseling services as part of the practice of counseling. See Ala. Code 1975, § 34-8A-2(4).

Subsection (a)(6). Definition of “practice of counseling.” The “practice of counseling” includes, but is not limited to, those methods and procedures of counseling listed in the rule. This list of illustrations is taken directly from the statute upon which the privilege is based. Ala. Code 1975, § 34-8A-2(5). Included within the term is counseling victims “for any emotional or psychological condition resulting from a sexual assault or family violence.” Compare Ala. Code 1975, § 15-23-41(8).

Under the original statute upon which Rule 503A is based, the privilege applicable to licensed professional counselors and counselor associates was limited to those in the private

practice of counseling, i.e., those rendering counseling services in private practice, for a fee, monetary or otherwise. Ala. Code 1975, § 34-8A-2(5). Rule 503A discontinues that limitation.

Subsection (a)(7). Definition of “victim counselor.” This definition is taken from the statute upon which those provisions of Rule 503A relating to victim counselors are based. Ala. Code 1975, § 15-23-41(8). This particular capacity arises only as to counseling for an emotional or psychological condition resulting from sexual assault or family violence.

Subsection (a)(8). Definition of “sexual assault.” This definition conforms completely to that found in the predecessor statute that originally created the victim-counselor privilege. See Ala. Code 1975, § 15-23-41(3).

Subsection (a)(9). Definition of “family violence.” This definition is taken from the statutory language upon which the present privilege is based. See Ala. Code 1975, § 15-23-41(4).

Subsection (a)(10). Definition of “family or household members.” This term, which limits those against whom family violence may be committed, retains its preexisting statutory definition. See Ala. Code 1975, § 15-23-41(5).

Subsection (a)(11). Definition of “victim counseling center.” This definition, taken from statutory language, serves to modify the victim-counselor segment of the Rule 503A privilege. See Ala. Code 1975, § 14-23-41(7).

Section (b). General rule of privilege. The language used to state the counselor-client privilege is similar to that used to state other privileges. Compare Ala.R.Evid. 503. This is consistent with the legislative mandate that the counselor-client privilege is to be placed upon the same basis as the attorney-client privilege. See Ala. Code 1975, § 34-8A-21. No privilege arises, of course, unless the counselor is consulted in his or her capacity as a provider of counseling services. Additionally, the privilege applies only to communications that are confidential.

Like other rules dealing with privileges, Rule 503A is written so as to preclude any assertion of the third-party eavesdropper rule, created at common law, under which a third-party eavesdropper generally could relate any privileged conversation the eavesdropper had overheard. Compare Ala.R.Evid. 503(b). This result is accomplished by use of the words “to prevent any other person from disclosing.”

Section (c). Who may claim the privilege. This privilege belongs to the person who sought the counseling. This means that it may be asserted by the client (or victim) or the client’s legal representative. Additionally, the counselor may assert the privilege on behalf of the client or victim.

As a general rule, the privilege does not belong to the counselor. There is no question that this is true with regard to licensed professional counselors and counselor associates, because they are treated, for purposes of privilege, as attorneys are treated. Ala. Code 1975, § 34-8A-21. Compare Ala.R.Evid. 502(c). The preexisting statute regarding victim counselors, however, contained language indicating that the counselor held an independent right to assert the privilege. See Ala. Code 1975, § 15-23-42(a). Rule 503A does not incorporate that

language, in order to be consistent with all other rules setting out privileges; however, it makes one exception. That exception is that in no case may the victim counselor be required to provide testimony that would disclose the name, address, location, or telephone number of a safe house, abuse shelter, or other facility, providing temporary emergency shelter to the victim of the offense or transaction that is the subject of the civil or criminal proceeding, unless the facility is a party to the proceeding. See Ala.R.Evid. 503A(d)(5).

Section (d). Exceptions.

Subsection (1). Proceedings for hospitalization. Communications relevant to an issue in commitment proceedings do not fall within the protection of the present privilege if the licensed professional counselor or counselor associate has determined that hospitalization is needed. Compare Ala.R.Evid. 503(d)(1). This exception would be unnecessary with regard to victim counselors, because no privilege regarding them may be asserted in civil cases. See Ala.R.Evid. 503A(d)(5). Compare Ala. Code 1975, § 15-23-42.

Subsection (2). Examination by order of court. No privilege attaches to communications made during a court-ordered examination of a client's mental or emotional condition. The scope of the exception, however, is limited generally to communications relevant to the particular purpose for which the judge ordered the examination. This exception is consistent with a similar exception to the psychotherapist-patient privilege. See Ala.R.Evid. 503(d)(2). It is envisioned, of course, that this exception rarely would be needed in the context of the victim counselor who is a nonprofessional employee or volunteer; this is because the court customarily would not order an examination by such a person. Additionally, one should remember that this Rule 503A privilege, as it relates to victim counselors, generally has no application in civil cases.

Subsection (3). When the client's condition is an element of a claim or a defense. In any proceeding in which the client relies upon his or her mental or emotional condition, as an element of either a claim or a defense, the privilege does not protect communications that are relevant to that condition. This exception is identical to an exception to the psychotherapist-patient privilege. See Ala.R.Evid. § 503(d)(3). Compare *Harbin v. Harbin*, 495 So.2d 72 (Ala.Civ.App.1986) (holding that the psychologist-patient privilege is not applicable to protect communications that are relevant to show a party's mental state in a custody case).

No need for this exception will arise in civil cases, in regard to victim counselors who do not qualify as either licensed professional counselors or certified counselor associates. This is because the privilege applies to communications made to such persons only when the communications are offered in a criminal case. See Ala.R.Evid. 503A(d)(4). Compare Ala. Code 1975, § 15-23-42.

Subsection (4). Breach of duty arising out of the counselor-client relationship. No privilege arises as to communications relevant to litigation in which the client sues the counselor for breach of duty or in which the counselor sues the client. This exception is similar to that found in the rule setting out the psychotherapist-patient privilege. See Ala.R.Evid. 503(d)(4). No such exception is expressly set out in the statute originally creating the counselor-client privilege; however, that statute does provide that the privilege is to be treated on a par with the attorney-client privilege and this latter privilege contains such an exception. See Ala.R.Evid. 502(d)(3). The victim counselor statute, which is the basis for recognizing the

present privilege regarding victim counseling, in criminal cases, does contain an exception of this nature. The statute provides:

“[I]f a victim brings suit against a victim counselor or the agency, business, or organization in which the victim counselor was employed or served as a volunteer at the time of the counseling relationship and the suit alleges malpractice during the counseling relationship, the victim counselor may testify or produce records regarding confidential communications with the victim and is not liable for doing so.” Ala. Code 1975, § 15-23-43(b).

Subsection (5). Victim counseling in civil cases. This exception carries forward the preexisting statutory provision that the victim-counselor privilege does not apply in civil cases except as it might preclude the victim or counselor from divulging information as to the location of an emergency victim-services facility. See Ala. Code 1975, § 15-23-42. If the victim counselor qualifies as either a licensed professional counselor or a certified counselor associate, then this exception would not apply; accordingly, the confidential communications with the client/victim would be privileged in both civil and criminal cases.