

IN THE SUPREME COURT OF ALABAMA
February 9, 2015

ORDER

WHEREAS, the Alabama Legislature enacted the Alabama Uniform Collaborative Law Act, Act No. 2013-355, codified at § 6-6-26 et seq., Ala. Code 1975 ("the Act"), which Act, modeled on the Uniform Collaborative Law Act/Rules, sets out collaborative law rules for disputes or claims arising out of the family or domestic-relations law of this State and was effective January 1, 2014; and

WHEREAS, the Act omitted the sections/rules on privileges, the legislature deciding, as indicated in the Alabama Comment to §§ 6-6-26.16, -26.17, and -26.18, that those provisions "would best be governed by the Rules of Court";

IT IS THEREFORE ORDERED that the Alabama Rules of Privilege in Collaborative Law Practice, including the Alabama Committee Comments, be adopted to read in accordance with the appendix to this order;

IT IS FURTHER ORDERED that the adoption of these Rules is effective immediately;

IT IS FURTHER ORDERED that the following note from the reporter of decisions be added to follow these Rules:

"Note from the reporter of decisions: The order adopting the Alabama Rules of Privilege in Collaborative Law Practice, including the Alabama Committee Comments, effective February 9, 2015, is published in that volume of Alabama Reporter that contains Alabama cases from ___ So. 3d."

Moore, C.J., and Stuart, Bolin, Parker, Murdock, Shaw, Main, Wise, and Bryan, JJ., concur.

I, Julia Jordan Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 9th day of February, 2015

Julia Jordan Weller
Clerk, Supreme Court of Alabama

APPENDIX

ALABAMA RULES OF PRIVILEGE IN COLLABORATIVE LAW PRACTICE

RULE 1. DEFINITIONS.

The Alabama Legislature adopted the Alabama Uniform Collaborative Law Act, § 6-6-26 et seq., Ala. Code 1975 ("the Act"), effective January 1, 2014. The Act and these Rules apply to "collaborative matters," as that term is defined in § 6-6-26.01(5), Ala. Code 1975. "Collaborative matters" include disputes, claims, and issues arising "under the family or domestic-relations law of this state." § 6-6-26.01(5). The Act does not address the sections/rules regarding privilege that are included in the Uniform Collaborative Law Act/Rules. These Rules adopt, with some changes, Sections/Rules 17, 18, and 19 of the Uniform Collaborative Law Act/Rules regarding privilege in collaborative matters. The definitions in the Act, currently in § 6-6-26.01, Ala. Code 1975, and as may be amended, are hereby incorporated by reference into these Rules. The first time a term defined in § 6-6-26.01 is used in these Rules, it will be designated by quotation marks.

Alabama Committee Comment

When the Alabama Legislature adopted the Act, it intentionally omitted from the Act those sections/rules in the Uniform Collaborative Law Act/Rules dealing with privilege in collaborative law matters. The Alabama Comment to §§ 6-6-26.16, -26.17, and -26.18, states: "Alabama chose to omit th[ese] section[s], deciding that the subject matter could best be governed by the Rules of Court." These Rules implement those omitted sections.

The incorporation by reference of the definitions from the Act into these Rules obviates the need for repeating them in the Rules. Moreover, the incorporation will ensure that any future changes in the statutory definitions will have the effect of simultaneously changing the definition in the Rules. This will avoid the potential for a gap period in which any change in a statutory definition might create an unintended conflict with a definition in the Rules if the Rules were not simultaneously amended to reflect the statutory change.

RULE 2. PRIVILEGE AGAINST DISCLOSURE FOR "COLLABORATIVE LAW COMMUNICATION"; ADMISSIBILITY; DISCOVERY.

(a) Subject to Rules 3 and 4, a collaborative law communication is privileged under subsection (b), is not subject to discovery, and is not admissible in evidence.

(b) In a proceeding, the following privileges apply:

(1) A "party" may refuse to disclose, and may prevent any other person from disclosing, a collaborative law communication.

(2) A "nonparty participant" may refuse to disclose and may prevent any other person from disclosing a collaborative law communication of the nonparty participant.

(c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely because of its disclosure or use in a "collaborative law process."

Alabama Committee Comment

This rule is identical to Section/Rule 17 of the Uniform Collaborative Law Act/Rules. The rule provides the general structure for creating a privilege that prohibits the disclosure of collaborative law communications in legal proceedings. It is based on similar provisions in the Uniform Mediation Act.

The parties are holders of the collaborative-law-communications privilege. The rule includes a privilege for a nonparty participant, though limited to the communications by that individual in the collaborative law process. The retention of mental-health and/or financial experts by one or both parties, common in many collaborative law cases, is provided for under this rule. This provision would also cover statements prepared by such persons for the collaborative law process and submitted as part of it, such as experts' reports. Thus, any party who wants to later use an expert report prepared during the collaborative law process in a legal proceeding would have to secure permission of all parties and the expert in order to do so.

"Collaborative lawyers" are not nonparty participants under these Rules. They maintain the traditional attorney-client relationship with parties, which allocates to clients the right to waive the attorney-client privilege, even over their lawyer's objection.

Subsection (c) clarifies that relevant evidence otherwise discoverable and admissible may not be shielded from discovery or admission at trial merely because it is communicated in a collaborative law process.

RULE 3. WAIVER AND PRECLUSION OF PRIVILEGE.

(a) A privilege under Rule 2 may be waived in a "record" or orally during a proceeding if it is expressly waived by all parties and, in the case of the privilege of a nonparty participant, it is also expressly waived by the nonparty participant.

(b) A person who makes a disclosure or representation about a collaborative law communication that prejudices another person in a proceeding may not assert a privilege under Rule 2, but this preclusion applies only to the extent necessary for the person prejudiced to respond to the disclosure or representation.

Alabama Committee Comment

This rule is substantively identical to Section/Rule 18 of the Uniform Collaborative Law Act/Rules. This rule establishes the requirements that must be met for a waiver of a privilege under Rule 2 of the Alabama Rules of Privilege in Collaborative Law Practice.

RULE 4. LIMITS OF PRIVILEGE.

(a) There is no privilege under Rule 2 for a collaborative law communication that is:

(1) a threat or statement of a plan to inflict bodily injury or to commit a crime of violence;

(2) intentionally used to plan a crime, to commit or attempt to commit a crime, or to conceal an ongoing crime or ongoing criminal activity; or

(3) in an agreement resulting from the collaborative law process, evidenced by a record signed by all parties to the "collaborative law participation agreement."

(b) The privileges under Rule 2 for a collaborative law communication do not apply to the extent that a communication is:

(1) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice arising from or related to a collaborative law process; or

(2) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult.

(c) There is no privilege under Rule 2 if a tribunal finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that the need for the evidence substantially outweighs the interest in protecting confidentiality, and that the collaborative law communication is sought or offered in:

(1) a court proceeding involving a felony or misdemeanor; or

(2) a proceeding seeking rescission or reformation of a contract arising out of the collaborative law process or in which a defense to avoid liability on the contract is asserted.

(d) If a collaborative law communication is subject to an exception under subsection (b) or (c) of this rule, only the part of the communication necessary for the application of the exception may be disclosed or admitted.

(e) Disclosure or admission of evidence excepted from the privilege under subsection (b) or (c) of this rule does not make the evidence or any other collaborative law communication discoverable or admissible for any other purpose.

(f) The privileges under Rule 2 do not apply if the parties agree in advance in a signed record, or if a record of

a proceeding reflects agreement by the parties, that all or part of a collaborative law process is not privileged. This subsection does not apply to a collaborative law communication made by a person who did not receive actual notice of the agreement before the communication was made.

Alabama Committee Comment

This rule is similar to Section/Rule 19 of the Uniform Collaborative Law Act/Rules and delineates specific and exclusive exceptions to the broad grant of privilege provided to collaborative law communications under Rule 2 of these Rules. The exceptions are similar to those contained in the Uniform Mediation Act.

Subsection (a) (1) of Uniform Section/Rule 19 was deleted as being unnecessary because the Act is limited to family-law matters. Subsection (b) (2) of this rule omitted the exception relating to a governmental agency's participation contemplated in subsection (b) (2) of Uniform Section/Rule 19.

Consistent with the direction of the other states adopting collaborative law statutes or rules, both felonies and misdemeanors are included in subsection (c) (1).