Alabama Rules of Evidence

Article V. Privileges

Rule 502.

Attorney-client privilege.

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

(1) “Client” is a person, public officer, or corporation, association, or other organization or entity, either public or private, that is rendered professional legal services by an attorney, or that consults an attorney with a view to obtaining professional legal services from the attorney.

(2) “Representative of the client” is: (i) a person having authority to obtain professional legal services or to act on legal advice rendered on behalf of the client or (ii) any other person who, for the purpose of effecting legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.

(3) “Attorney” is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

(4) “Representative of the attorney” is a person employed by the attorney to assist the attorney in rendering professional legal services.

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

(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 professional legal services to the client, (1) between the client or a representative of the client and the client’s attorney or a representative of the attorney, or (2) between the attorney and a representative of the attorney, (3) by the client or a representative of the client or the client’s attorney or a representative of the attorney to an attorney or a representative of an attorney representing another party concerning a matter of common interest, (4) between representatives of the client and between the client and a representative of the client resulting from the specific request of, or at the express direction of, an attorney, or (5) among attorneys and their representatives representing the same client.

(c) *Who may claim the privilege.* The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the attorney, or the attorney's representative, at the time of the communication may claim the privilege, but only on behalf of the client. The attorney's or the representative's authority to do so is presumed in the absence of evidence to the contrary.

(d) *Exceptions.* There is no privilege under this rule:

(1) FURTHERANCE OF CRIME OR FRAUD. If the services of the attorney were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) CLAIMANTS THROUGH THE SAME DECEASED CLIENT. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) BREACH OF DUTY BY AN ATTORNEY OR CLIENT. As to a communication relevant to an issue of breach of duty by an attorney to the client or by a client to the client's attorney;

(4) DOCUMENT ATTESTED BY AN ATTORNEY. As to a communication relevant to an issue concerning the intention or competence of a client executing an attested document to which the attorney is an attesting witness, or concerning the execution or attestation of such a document;

(5) JOINT CLIENTS. As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to an attorney retained or consulted in common, when offered in an action between or among any of the clients.

Advisory Committee's Notes

Alabama's preexisting attorney-client privilege is a creature of the common law. See *Ex parte Enzor*, 270 Ala. 254, 117 So.2d 361 (1960). That common law privilege, however, has been embodied in a statute. Ala. Code 1975, § 12-21-161. See C. Gamble, McElroy's Alabama Evidence § 388.02 (4th ed. 1991). Except as otherwise may be specifically indicated, Rule 502 is intended to embody the same privilege as set out in this former case law and statutory law. This rule, consequently, supersedes the preexisting statute. While generally carrying forward the former Alabama law concerning the attorney-client privilege, the language of Rule 502 is based largely upon the corresponding principle as expressed under the Uniform Rules of

Evidence. See Unif.R.Evid. 502.

Rule 502 is not intended to describe or in any way limit the attorney work-product doctrine. See Ala.R.Civ.P. 26(b)(3); *Hickman v. Taylo*r, 329 U.S. 495 (1947); *Ex parte May*, 393 So.2d 1006 (Ala.1981).

Subsection (a)(1). Definition of "client." This subsection defines "client" to include those nonindividual entities that communicate with an attorney in the course of securing, or while seeking, legal services. The term includes, among others, corporations, governmental bodies, and nonincorporated associations and organizations. While antecedent Alabama law has not extended the client status to all these entities, including them is within the spirit of those cases in which the issue has been considered. Historic Alabama law, for example, has recognized that a corporation may be a client. *Ex parte Great Am. Surplus Lines Ins. Co*., 540 So.2d 1357 (Ala.1989); *Jay v. Sears, Roebuck & Co*., 340 So.2d 456 (Ala. Civ. App. 1976); *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971). The term "legal services" is to be defined broadly to include, among other things, the providing of mere legal advice.

As under prior Alabama law, the privilege provided by Rule 502 is available to one who consults an attorney for the purpose of retaining the attorney. It is available even if the attorney is never actually employed. Rule 502, like former Alabama law, requires, in a case in which the attorney is not employed, that the communication be made "with a view to" employing the attorney. See *State v. Tally*, 102 Ala. 25, 15 So. 722 (1894); C. Gamble, McElroy's Alabama Evidence § 390.03 (4th ed. 1991). The preexisting statute expresses the same requirement – that the communications be given by reason of "anticipated employment as attorney." Ala. Code 1975, § 12-21-161.

The employment of the attorney does not have to relate to litigation. To give rise to the privilege, however, the client must be consulting an attorney who is acting in the capacity of providing legal advice and counsel. Seeking an attorney's advice as to purely business or personal matters does not activate the privilege. See, e.g., *State v. Marshall*, 8 Ala. 240 (1845); *Modern Woodmen of Am. v. Watkins*, 132 F.2d 352 (5th Cir. 1942). See also C. Gamble, McElroy's Alabama Evidence § 389.01 (4th ed. 1991).

Subsection (a)(2). Definition of "representative of the client." Alabama has long recognized a principle, carried forward in Rule 502, that the attorney-client privilege applies to communications made by the client's servant or agent to the attorney. *Vacalis v. State,* 204 Ala. 345, 86 So. 92 (1920). See C. Gamble, McElroy's Alabama Evidence § 393.03 (4th ed. 1991). The privilege also applies to vicarious communications made in behalf of a corporate client. *Jay v. Sears, Roebuck & Co*., 340 So.2d 456 (Ala. Civ. App. 1976). While Alabama has had few appellate cases dealing with corporations claiming the privilege, Rule 502 was drafted in light of significant federal case law in this area. Historically, the federal position was that the privilege applied only to corporate employees who possessed authority to obtain professional legal services or to act on advice given by the attorney. This so-called "control group test" was rejected in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Rule 502 follows this decision in expanding the scope of the corporate attorney-client privilege beyond those employees within the control group, to include anyone who "for the purpose of effecting legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client."

Subsection (a)(3). Definition of "attorney." Rule 502 uses the term "attorney," instead of "lawyer," because that is the term used in both the Alabama privilege statute and the Alabama case law. See Ala. Code 1975, § 12-21-161. As under the Alabama case law, this privilege generally attaches only to advice sought from, and communications made to, one authorized to practice law. See *Frederick v. State*, 39 So. 915 (Ala.1905). The authorization to practice may be in any state or nation. This rule is different from preexisting Alabama practice, however, in that under this rule the privilege attaches even if the one consulted is not authorized to practice law, so long as the would-be client reasonably believes the one consulted possesses such authority. *Hawes v. State*, 88 Ala. 37, 7 So. 302 (1890).

The drafters anticipate that Rule 502 will apply to the situation where an attorney, authorized to practice law in one jurisdiction, is consulted by a client in another jurisdiction in which the attorney is not authorized to practice. The privilege has been held to apply, for example, to a patent attorney who was licensed in Ohio but was giving advice in California. *Paper Converting Mach. Co. v. FMC Corp*., 215 F.Supp. 249 (E.D.Wis.1963). See also *Georgia-Pacific Plywood Co. v. United States Plywood Corp*., 18 F.R.D. 463 (S.D.N.Y.1956).

Subsection (a)(4). Definition of "representative of the attorney." Under preexisting Alabama case law and statutory law, the only representative held within the scope of the privilege was the attorney's clerk. See *Richards v. Lennox Indus., Inc.*, 574 So.2d 736 (Ala.1990); *Hawes v. State*, 88 Ala. 37, 68, 7 So. 302, 313 (1890); Ala. Code 1975, § 12-21-161; C. Gamble, McElroy's Alabama Evidence § 390.02 (4th ed. 1991). Rule 502 applies the privilege to any person employed by the attorney to assist in rendering professional legal services. See *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961) (accountant); W. Schroeder, J. Hoffman, & R. Thigpen, Alabama Evidence § 5-2 (1987).

The phrase "employed by the attorney" is not intended to require that the "representative of the attorney" be on the attorney's standing payroll. Rather, the term includes any person engaged by the attorney to assist in rendering professional legal services. See *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961) (accountant qualifying as one employed by the attorney).

Subsection (a)(5). Definition of "confidential." This rule, like the preexisting law, defines "confidential" in terms of intent. The attorney-client privilege applies only to those communications that are confidential in the sense that the person or persons making them did not intend that they be disclosed to third persons other than representatives of the client or the lawyer. See *Hughes v. Wallace*, 429 So.2d 981 (Ala.1983).

Under Rule 502, communications one knowingly makes in the presence of a third person generally are not privileged. Exceptions to this arise, of course, if the third person is a representative of either the client or the lawyer or is otherwise necessary for the communication. Alabama case law has held that the presence of a necessary third person will not preclude the communication from being "confidential" for purposes of the privilege. *Branch v. Greene County Bd. of Educ*., 553 So.2d 248 (Ala.Civ.App.1988). See C. Gamble, McElroy's Alabama Evidence § 392.01 (4th ed. 1991).

Section (b). General rule of privilege. Preexisting Alabama law has long affirmed the principle that the privilege covers confidential communications made by the client's

representative to the attorney. It likewise protects such communications when procured by the client from the representative for transmission to the client's attorney for the purpose of seeking legal advice or legal services. *Vacalis v. State*, 204 Ala. 345, 86 So. 92 (1920). See *Ex parte Great Am. Surplus Lines Ins. Co*., 540 So.2d 1357 (Ala.1989).

The breadth of the privilege provided by Rule 502 is expanded significantly as to the persons within its scope. As to subject matter scope, however, the drafters intend that the same expansive interpretation that has been applied under prior Alabama case law be given to the term "communication," so as to include within that term any knowledge that the attorney acquires from the client and any advice or counsel given to the client. See *Cooper v. Mann*, 273 Ala. 620, 143 So.2d 637 (1962) (privilege held to apply to all knowledge acquired by an attorney even if acquired through sight alone); Ala. Code 1975, § 12-21-161 (including within the attorney-client privilege testimony as to "any matter or thing, knowledge of which may have been acquired from the client, or as to advice or counsel to the client"). Compare Alabama Rules of Professional Conduct, Rule 1.6(a) (expansively prohibiting a lawyer from revealing "information relating to representation of a client").

Subsection (b)(3) should be broadly applied to cover any mutual interest that may promote the trial strategies of the parties. See *United States v. McPartlin*, 595 F.2d 1321 (7th Cir.), cert. denied, 444 U.S. 833 (1979).

Historically, a decreasing majority of courts has applied the attorney-client privilege to statements made by an insured to the insurer, particularly where an attorney has been hired and the statement is made in anticipation of litigation. Some courts have explained this result upon the theory that the insurer is the agent of the insured, while others have theorized that the insurer is the agent of the attorney. An ever-growing minority of courts, however, has concluded that insured-insurer communications are not protected generally by the attorney-client privilege. See *Langdon v. Champion*, 752 P.2d 999 (Alaska 1988); J. Ludington, Annotation, *Insured-Insurer Communications as Privileged*, 55 A.L.R.4th 336 (1987). Rule 502 adopts this minority position that the insured's communications to the insurer are not privileged under Rule 502(b)(4). Communications from the insured fall within the attorney-client privilege only if made directly to the attorney for the insured or the attorney's representative. This, of course, has no impact upon whether such communication falls within the separate work product privilege.

Because an overbroad application of subsection (b)(4) could lead to abuse in a corporate or business setting, the committee feels it necessary to restate the following safeguards: the burden is upon the party asserting the privilege to prove it; the privilege is to be strictly applied, because it is in derogation of the search for truth; the judge has the responsibility for determining if the privilege applies and should not normally decide the question based solely upon the fact that the client asserts it; the communication may be made only between representatives of the client who are within the "control group" or whose duties are closely related to the matter about which the communication is made; the claimant must prove that the communication was treated within the corporation as confidential; and the person claiming the privilege must show that the communication was made "for the purpose of effecting legal representation for the client." See subsection (a)(2).

Section (c). Who may claim the privilege. As under traditional Alabama practice, the client is the one entitled to assert the privilege. *Mallory v. State*, 283 Ala. 636, 219 So.2d 888

(1969). See C. Gamble, McElroy's Alabama Evidence § 394.01 (4th ed. 1991). While the privilege remains that of the client, it may be asserted by others who represent the client. A guardian or conservator of the client, for example, may claim the privilege. It likewise may be asserted by a deceased client's personal representative. The privilege, when held by a corporation, association, or organization, may be claimed by the representative, successor, or trustee of the entity holding the privilege. Additionally, the attorney to whom the communication is made is presumed to possess the authority to claim the privilege on behalf of the client.

The attorney's assertion of the privilege, on behalf of the client, would appear consistent with the Alabama privilege statute, which proclaims the attorney to be incompetent and noncompellable as a witness to relate privileged matters. See Ala. Code 1975, § 12-21-161. It has long been the federal rule, of course, that the privilege may be asserted by the client's attorney. See *Fisher v. United States*, 425 U.S. 391 (1976).

The attorney, or the attorney's representative, may not claim the privilege except in behalf of the client. The committee assumes that the ethics of the profession require the attorney to assert the privilege. See Alabama Rules of Professional Conduct, Rule 1.6. See also *Klitzman, Klitzman & Gallagher v. Krut*, 744 F.2d 955 (3d Cir.1984). Compare Fed.R.Evid. 503(c) (rejected) advisory committee's note (containing this same observation as to the ethical obligation to assert the privilege). The committee would likewise assume that the privilege is to be asserted by the attorney's representative, particularly in light of the fact that Rule 5.3, Alabama Rules of Professional Conduct, makes the attorney responsible for ensuring that nonlawyer employees of the attorney or the attorney's firm comply with rules governing the attorney's professional conduct.

Section (d). Exceptions. There is no privilege under this rule in certain situations.

(1) Furtherance of crime or fraud. Preexisting Alabama law recognizes that the attorney-client privilege does not apply to confidential communications when the client's purpose is to secure legal advice regarding the commission of a crime or a fraud. See *Ex parte Griffith*, 278 Ala. 344, 178 So.2d 169 (1965), cert. denied, 382 U.S. 988 (1966) ("quickie divorce" case in which court observes that the perpetration of fraud is outside the scope of the privilege); *Ex parte Enzor*, 270 Ala. 254, 117 So.2d 361 (1960) (holding that the attorney-client privilege does not apply to communications in which advice is sought to cover future or contemplated crimes); C. Gamble, McElroy's Alabama Evidence § 389.02 (4th ed. 1991); J. Colquitt, Alabama Law of Evidence § 5.2 (1990). The party asserting fraud has the burden of satisfying the court that the client knew or reasonably should have known that what the client planned to commit was fraud. The client clearly may consult the attorney about conduct, the legality of which is debatable, and still be protected if it later proves to be criminal or fraudulent. While those charging the furtherance of a crime or a fraud have the burden of proving the charge, the purpose of the consultation may appear clear from the content of statements made to the attorney by the client. See *Sawyer v. Stanley*, 241 Ala. 39, 1 So.2d 21 (1941).

Under this rule, the question whether the attorney's services are sought for the purpose of aiding the client or someone else in committing or planning to commit a crime or a fraud is to be answered by a "reasonable person" standard – i.e., whether the client knew or reasonably should have known that the contemplated conduct was a crime or a fraud.

(2) Claimants through the same deceased client. When parties claim through the

same deceased client, a relevant communication between the client and the client's attorney cannot be asserted as privileged. Alabama historically has limited this exception to instances when the two parties claim under a will. *Stappas v. Stappas*, 271 Ala. 33, 122 So.2d 393 (1960). Subsection (d)(2), however, expands the preclusion to apply whether the parties claim through intestate succession or through inter vivos transactions.

(3) Breach of duty by an attorney or client. Subsection (d)(3) excludes from the privilege communications that are relevant to charges regarding an attorney's breach of duty to the client or a client's breach of duty to the attorney. While no prior Alabama cases specifically state this exclusion, it is consistent with those cases holding that the client may waive the privilege. *Dewberry v. Bank of Standing Rock*, 227 Ala. 484, 494, 150 So. 463, 471 (1933). Consistent with those cases, the client may be viewed as waiving the privilege either by breach of duty to the attorney or by charging that the attorney breached the duty owed to the client.

The privilege falls when the client sues the attorney on an allegation of breach of duty. The drafters intend the same result when the client sues a representative of the attorney, such as an accountant or a clerk.

(4) Document attested by an attorney. Subsection (d)(4) exempts an attesting attorney-witness from the privilege, in regard to certain testimony as to the attested document. This principle is consistent with prior Alabama law. See *White v. State*, 86 Ala. 69, 5 So. 674 (1889). This principle is likewise consistent with Alabama cases holding that the privilege does not attach to communications that the attorney, in the discharge of the attorney's duty, is of necessity obliged to make public. *Ex parte Griffith*, 278 Ala. 344, 351, 178 So.2d 169, 176 (1965), cert. denied, 382 U.S. 988 (1966). See also Ala. Code 1975, § 34-3-20.

The attesting-witness exception has been interpreted by some courts as setting aside the attorney-client privilege as to all matters relevant to the validity of the attested document. The language of subsection (d)(4) is intended to reject this view and to embrace what the committee feels to be the preferable rule, that the attorney who acts as an attesting witness can divulge only information received in the attorney's capacity as an attesting witness and cannot divulge information received in the attorney's capacity as a lawyer. See *Estate of Kime*, 144 Cal. App. 3d 246, 193 Cal. Rptr. 718 (1983). Subsection (d)(4) is based upon a similar provision in a corresponding California statute. See Cal. Evid. Code § 959. The committee agrees with the following sentiments of the California Law Revision Commission, appearing in the comments to that California statute:

> "This exception relates to the type of communication about which an attesting witness would testify. The mere fact that an attorney acts as an attesting witness should not destroy the lawyer-client privilege as to all statements made concerning the document attested; but the privilege should not prohibit the lawyer from performing the duties expected of an attesting witness."

(5) Joint clients. The joint client exception provided by subsection (d)(5) has been long recognized by Alabama cases. See, e.g., *Parish v. Gates*, 29 Ala. 254 (1856); *Nationwide Mut. Ins. Co. v. Smith*, 280 Ala. 343, 194 So.2d 505 (1966). This exception has been described thusly:

> "When two or more persons acting together become clients of the same

lawyer as to a matter of common interest, none of them has, as against another of them, the attorney-client privilege with respect to the matter. Each of them, however, has the attorney-client privilege as against outsiders." C. Gamble, McElroy's Alabama Evidence § 392.03 at 935 (4th ed. 1991).