

Alabama Rules of Evidence

Article V. Privileges

Rule 503.

Psychotherapist-patient privilege.

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

(1) A “patient” is a person who consults or is examined or interviewed by a psychotherapist.

(2) A “psychotherapist” is (A) a person licensed to practice medicine in any state or nation, or reasonably believed by the patient so to be, while regularly engaged in the diagnosis or treatment of mental or emotional conditions, including alcohol or drug addiction or (B) a person licensed as a psychologist under the laws of any state or nation, while similarly engaged.

(3) A communication is “confidential” if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient’s family.

(b) *General rule of privilege.* A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of the patient’s mental or emotional condition, including alcohol or drug addiction, among the patient, the patient’s psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient’s family.

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

(d) *Exceptions.*

(1) PROCEEDINGS FOR HOSPITALIZATION. There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist has determined, in the course of diagnosis or treatment, that the patient 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 patient, 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) ACCUSED IN CRIMINAL CASE. There is no privilege under this rule as to an accused in a criminal case who raises the defense of insanity.

(4) BREACH OF DUTY ARISING OUT OF PSYCHOTHERAPIST-PATIENT RELATIONSHIP. There is no privilege under this rule as to an issue of breach of duty by the psychotherapist to the patient or by the patient to the psychotherapist.

(5) Child custody cases. There is no privilege under this rule for relevant communications offered in a child custody case in which the mental state of a party is clearly an issue and a proper resolution of the custody question requires disclosure.

Advisory Committee's Notes

Alabama statutory law has long recognized a psychologist-client privilege. Ala. Code 1975, § 34-26-2. This particular statutory privilege was amended in 1979 to include psychiatrists within its coverage. The legislative act creating the privilege stipulates that it is to be placed upon the same basis as the privilege that arises by law between an attorney and a client; consequently, Rule 503 is modeled after the rule providing for the corresponding attorney-client privilege. See C. Gamble, McElroy's Alabama Evidence § 414.01 (4th ed. 1991). The language of Rule 503 is taken largely from the Uniform Rules of Evidence. See Unif.R.Evid. 503.

It should be noted that the Alabama Rules of Evidence contain no general physician-patient privilege. Such a privilege has never been recognized in Alabama, either by the legislature or by the courts. See *Duncan v. State*, 473 So.2d 1203 (Ala.Crim.App.1985). See also C. Gamble, McElroy's Alabama Evidence § 413.01 (4th ed. 1991); J. Colquitt, Alabama Law of Evidence § 5.10 (1990). Communications with a physician may fall within the Rule 503 psychotherapist privilege if the physician is a licensed psychologist or is a practicing psychiatrist. See *Ex parte Rudder*, 507 So.2d 411 (Ala.1987).

Subsection (a)(1). Definition of "patient." The preexisting Alabama statutory privilege concerning psychologists used the term "client," rather than "patient," to refer to the holder of the privilege. Rule 503 uses the term "patient," because that word more clearly reflects the fact that the preexisting statute was amended to apply to psychiatrists. Additionally, however, the term "patient" is used in virtually all other state versions of the present privilege. See, e.g., Fla. Stat. Ann. § 90.503; Miss.R.Evid. 503; Wis. Stat. Ann. § 905.04. See also B.W. Best, Annotation, *Privilege, in Judicial or Quasi-Judicial Proceedings, Arising from Relationship Between Psychiatrist or Psychologist and Patient*, 44 A.L.R.3d 24 (1972).

Subsection (a)(2). Definition of “psychotherapist.” This term includes licensed psychologists and psychiatrists. This composite description is used to embrace both of those professional groups that were included under the preexisting statute to which Rule 503 is the successor. Additionally, the term “psychotherapist” is the most common term used in stating this privilege as it exists in other states. See, e.g., Haw.R.Evid. 504.1; N.M.R.Evid. 504; Or.R.Evid. 504.

The Rule 503 privilege applies so long as the patient reasonably believes the person to be licensed to practice medicine. That principle is similar to a principle applicable to the attorney-client privilege. See Rule 502(a)(3). No such principle, however, applies to persons not psychologists but reasonably believed to be psychologists; persons acting as, or believed to be, psychologists must be in fact licensed for the privilege to apply. This distinction, made also both in the Uniform Rules of Evidence and in the corresponding provision deleted from the Federal Rules of Evidence, is said to be “justified by the number of persons, other than psychiatrists, purporting to render psychotherapeutic aid and the variety of their theories.” Fed.R.Evid. 504 (deleted) (advisory committee note).

Subsection (a)(3). Definition of “confidential.” The predecessor statute, establishing the privileges applicable to both psychologists and psychiatrists, provided that these were to be placed upon the same basis as the attorney-client privilege. Ala. Code 1975, § 34-26-2. Accordingly, to define “confidential communication,” Rule 503(a)(3) uses language similar to that found in the corresponding rule setting forth the attorney-client privilege. See Rule 502(a)(5). This then means that the question of confidentiality is largely one of intent as judged by the facts; consequently, communications made in the known presence of third parties are not privileged unless those third parties are necessary to either the rendition of the services or the transmission of the communication. The term “communication” is given a broad interpretation so as to include the medical records created during the psychotherapist-patient relationship. See *Ex parte Rudder*, 507 So.2d 411 (Ala.1987).

Section (b). General rule of privilege. As recognized in the comments to section (a), the psychotherapist-patient privilege is to be applied on largely the same basis as the attorney-client privilege. Compare Ala.R.Evid. 502(b). This necessarily means that the breadth of the privilege extends well beyond the psychotherapist and the patient themselves to encompass others who are necessary to the communication or delivery of the psychological services.

Section (c). Who may claim the privilege. As under Rule 502, where the privilege belongs to the client, so here it belongs to the patient. While the privilege remains that of the patient, it may be asserted by others who represent the patient. A guardian or conservator of the patient, for example, may claim the privilege. It likewise may be asserted by a deceased patient’s personal representative. The psychotherapist to whom the communication is made is presumed to have the authority, in the absence of evidence to the contrary, to claim the privilege in behalf of the patient. Compare Ala.R.Evid. 502(c).

Section (d). Exceptions.

(1) Proceedings for hospitalization. Communications relevant to an issue in commitment proceedings do not fall within the protection of the Rule 503 privilege if the psychotherapist involved has determined that hospitalization is necessary.

(2) Examination by order of court. No privilege attaches to communications made during a court-ordered examination of a patient'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 several corresponding principles applicable in the area of criminal law and criminal procedure. The preexisting statutory psychiatrist-patient or psychologist-patient privilege is not applicable to reports serving as the basis for the court-authorized release of a person from a state mental hospital after having been found not guilty by reason of insanity, mental disease, or defect. Ala. Code 1975, § 15-16-69.

The Alabama Rules of Criminal Procedure authorize a court-ordered examination into a defendant's competency to stand trial. Ala.R.Crim.P. 11.2(a)(1). The results of such an examination are admissible on the issue of such competency but are not admissible during the ultimate trial for the charged offense. Ala.R.Crim.P. 11.2(b)(1).

Examinations to determine the defendant's mental condition at the time of the offense may likewise be ordered by the court. Ala.R.Crim.P. 11.2(b)(2). The results of such examinations are admissible so long as the defendant has not subsequently withdrawn his or her plea of not guilty by reason of mental disease or defect. Ala.R.Crim.P. 11.2(b)(2). Even if there remains a plea of not guilty by reason of insanity, statements by the defendant during such an examination – as well as testimony or evidence based upon or derived from such statements – are admissible only as to the issue of the defendant's mental condition at the time of the offense and only if the defendant has introduced testimony as to such mental condition. Ala.R.Crim.P. 11.2(b)(2).

(3) Accused in criminal case. This rule continues Alabama's judicially created exception to the statutory psychotherapist-patient privilege. The privilege is unavailable in a criminal trial where the defendant raises the defense of insanity. See *Free v. State*, 455 So.2d 137 (Ala.Crim.App.1984); *Magwood v. State*, 426 So.2d 918 (Ala.Crim.App.1982), *aff'd*, 426 So.2d 929 (Ala.), *cert. denied*, 462 U.S. 1124 (1983).

In many respects, this exception is based upon the concept of waiver and has been long recognized in the American legal system. See *United States v. Meagher*, 531 F.2d 752, *cert. denied*, 429 U.S. 853 (1976) (holding that insanity plea opens the door to correspondence between the defendant and his or her treating psychiatrist). Additionally, this exception is consistent with several provisions found in the Alabama Rules of Criminal Procedure. An accused's offering proof as to his or her mental condition at the time of the offense, for example, opens the door to statements made to a psychiatrist or psychologist during a court-ordered examination. Ala.R.Crim.P. 11.2(b)(2). Reports of court-appointed psychiatrists or psychologists are to be made available to both the defense attorney and the district attorney. Ala.R.Crim.P. 11.5(a). Both the defense and the prosecution are to be given access to the names and addresses of all psychiatrists or psychologists who have examined either the defendant or evidence in the case, along with the results of mental examinations, scientific tests, experiments, or comparisons. This latter disclosure includes access to written reports or statements. Ala.R.Crim.P. 11.4(b). Compare Ark.R.Evid. 503(d)(3); N.D.R.Evid. 503(d)(3); Alaska R.Evid. 504(d)(1); Del.R.Evid. 503(d)(3); Fla.Stat. Ann. § 0.503(4)(c); Haw.R.Evid. 504.1(d)(3); Idaho R.Evid. 503(d)(3); Me.R.Evid. 503(e)(3); Miss.R.Evid. 503(f); Neb.Rev.Stat.

§ 27-504(4)(c); Nev.Rev.Stat. § 49.245(3); N.M.R.Evid. 504(d)(3); Okla. Stat. tit. 12, § 2503(D)(3); Or.R.Evid. 504(4)(b); Vt.R.Evid. 503(d)(3); Wis.Stat. Ann. § 905.04(4)(c).

(4) Breach of duty arising out of psychotherapist-patient relationship. The Alabama statute upon which Rule 503 is based calls for the psychotherapist-patient privilege to be applied as the attorney-client privilege is applied. Ala. Code 1975, § 34-26-2. Accordingly, a “breach of duty” exception is included here, just as such an exception is included in regard to the attorney-client privilege. See Ala.R.Evid. 502(d)(4). Cf. Fed.R.Evid. 503(d)(3).

(5) Child custody cases. It is arguable that any person seeking custody has thereby placed his or her mental or emotional condition at issue. Accordingly, this rule continues Alabama’s preexisting, judicially created, exception to the psychotherapist-patient privilege. See *Harbin v. Harbin*, 495 So.2d 72 (Ala.Civ.App.1986) (holding that the psychologist-patient privilege yields when the mental state of a party to a custody case is clearly in controversy); *Matter of Von Goyt*, 461 So.2d 821 (Ala.Civ.App.1984) (psychologist-patient privilege inapplicable to protect medical records of litigant in child custody case).