Alabama Rules of Evidence

Article V. Privileges

Rule 504.

Husband-wife privilege.

(a) *Definition of "confidential" communication.* A communication is "confidential" if it is made during marriage privately by any person to that person's spouse and is not intended for disclosure to any other person.

(b) *General rule of privilege.* In any civil or criminal proceeding, a person has a privilege to refuse to testify, or to prevent any person from testifying, as to any confidential communication made by one spouse to the other during the marriage.

(c) *Who may claim the privilege.* The privilege may be claimed by either spouse, the lawyer for either spouse in that spouse's behalf, the guardian or conservator of either spouse, or the personal representative of a deceased spouse. The authority of those named to claim the privilege in the spouse's behalf is presumed in the absence of evidence to the contrary.

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

(1) PARTIES TO A CIVIL ACTION. In any civil proceeding in which the spouses are adverse parties.

(2) FURTHERANCE OF CRIME. In any criminal proceeding in which the spouses are alleged to have acted jointly in the commission of the crime charged.

(3) CRIMINAL ACTION. In a criminal action or proceeding in which one spouse is charged with a crime against the person or property of (A) the other spouse, (B) a minor child of either, (C) a person residing in the household of either, or (D) a third person if the crime is committed in the course of committing a crime against any of the persons previously named in this sentence.

Advisory Committee's Notes

For historical perspective, it is useful to note that spouses were once incompetent to testify for or against each other in civil or criminal cases. The only remaining vestige of this marital disqualification or incompetency is found in a statute that provides: "The husband and wife may testify either for or against each other in criminal cases, but shall not be compelled so to do." Ala. Code 1975, § 12-21-227. This statute is interpreted to mean that a spouse may

take the witness stand against an accused spouse if he or she decides to do so. Such a witness may be characterized as competent, but not compellable. This principle is sometimes described as providing the witness spouse a privilege to testify or not. Such a privilege, however, is not to be confused with the privilege set forth in Rule 504. Even if a witness spouse decides to take the stand against an accused spouse, such a witness yet remains precluded generally from divulging confidential, inter-spousal communications of the accused spouse. The preexisting statutory and case law dealing with the marital disqualification or competency question stands unaffected by the adoption of Rule 504. See *Arnold v. State*, 353 So.2d 524 (Ala.1977); C. Gamble, McElroy's Alabama Evidence § 103.01 (4th ed. 1991).

Section (a). Definition of "confidential" communication. Consistent with the language setting out other evidentiary privileges, the language of Rule 504 defines confidentiality in terms of the communicating spouse's intent. No privilege arises unless the communicating spouse intends the communication to be confidential. This is fully consistent with preexisting Alabama law, which will continue to evolve the corresponding rules with regard to when the objective facts show intended confidentiality. See, e.g., *Owen v. State*, 78 Ala. 425 (1885); *Harris v. State*, 395 So.2d 1063 (Ala.Crim.App.1980), cert. denied, 395 So.2d 1069 (Ala.1981); C. Gamble, McElroy's Alabama Evidence § 103.01(4) (4th ed. 1991).

Section (b). General rule of privilege. This section perpetuates Alabama's preexisting husband-wife privilege for confidential communications. It should be noted that Alabama is among those states whose courts interpret the term "communication" as including acts and transactions that are both communicative and noncommunicative. Indeed, any act performed with the confidence of the marriage in mind has been held to be privileged. This rule is not intended to abrogate this expansive interpretation of the term "communication" to include any act that one spouse would not have committed in the presence of the other but for the confidential, husband-wife relationship. See *Arnold v. State*, 353 So.2d 524 (Ala.1977) (wife precluded from testifying in arson prosecution to her ride with accused husband around his burned building immediately after the fire); *Cooper v. Mann*, 273 Ala. 620, 143 So.2d 637 (1962). Several other states include noncommunicative acts, facts, conditions, and transactions within the protection of the privilege. See *Smith v. State*, 344 So.2d 915 (Fla.Dist.Ct.App.), cert. denied, 353 So.2d 679 (Fla.1977); *State v. Robbins*, 35 Wash. 2d 389, 213 P.2d 310 (1950); *Menefee v. Commonwealth*, 189 Va. 900, 55 S.E.2d 9 (1949). Other jurisdictions have limited the interpretation of "communication" to include only expressions – i.e., statements and acts that are communicative in nature. See, e.g., *Pereira v. United States*, 347 U.S. 1 (1954); *People v. Krankel*, 131 Ill.App.3d 887, 87 Ill. Dec. 75, 476 N.E.2d 777 (1985); *State v. Smith*, 384 A.2d 687 (Me.1978).

It is not required that the parties be married at the time the communication is offered as evidence. Rather, they must have been married at the time the communication occurred. See *Long v. State*, 86 Ala. 36, 5 So. 443 (1889).

Section (c). Who may claim the privilege. The inter-spousal privilege is recognized as belonging to both spouses rather than solely to the communicating spouse. While preexisting Alabama law on this point is not a model of clarity, there is preexisting case law suggesting that both the speaking and the receiving spouse may assert the privilege. See *Cooper v. Mann*, 273 Ala. 620, 143 So.2d 637 (1962) (both husband and wife, parties in the action, were permitted to raise the communication privilege as against discovery even though the wife received the requested information from her husband). Nothing in Rule 504 requires that the

spouse asserting the privilege be a party to the proceedings in question. Compare *Swoope v. State*, 115 Ala. 40, 22 So. 479 (1897) (wife called by the prosecution, and state's privilege objection sustained when accused husband asked about wife's statements to the husband).

The privilege may be asserted in a spouse's behalf by that spouse's lawyer, guardian, or conservator, or by a deceased spouse's personal representative. While there exists no preexisting Alabama authority on this point, it is consistent with at least one criminal appellate decision in which the prosecution was allowed to lodge a privilege objection in behalf of the state's spouse-witness when she was asked about privileged matters by the husband's defense counsel on cross-examination. See *Swoope v. State*, 115 Ala. 40, 22 So. 479 (1897).

A spouse may assert the privilege to prevent any person's divulging the confidential communication. A third-party is thus precluded from relating a husband-wife communication that has been overheard by accident or by eavesdropping. This principle is inconsistent with historic Alabama practice, at least as evidenced by decisions from appellate courts other than the Alabama Supreme Court. See *Howton v. State*, 391 So.2d 147 (Ala.Crim.App.1980); *Phillips v. State*, 11 Ala.App. 168, 65 So. 673 (1914).

Section (d). Exceptions.

(1) Parties to a civil action. If the spouses are adverse parties in a civil proceeding, it would appear unnecessary to protect their marital relationship from the disclosure of confidential communications between them. See E. Cleary, McCormick on Evidence § 84 (3d ed. 1984). An analogous exception is recognized within the attorney-client privilege for instances where clients jointly consult with the same attorney and then initiate legal action among themselves. See Ala.R.Evid. 502(d)(5). A similar exception is likewise common among the forms of the husband-wife privilege as adopted by the various states. Compare Alaska R.Evid. 505(a)(2)(A), Fla. Stat. Ann. § 90-504(3)(a), Idaho R.Evid. 504(d)(4), Me.R.Evid. 504(d)(4), Neb. Rev. Stat. § 27-505(3)(c) (limiting the exception to civil actions relating to divorce, annulment, or support), Nev. Rev. Stat. § 49.295(2)(a), N.M.R.Evid. 505(d)(3), Or.R.Evid. 505(4)(c), Wis. Stat. Ann. § 905.05(3)(a).

A similar but more limited exception is recognized, albeit almost by implication, under preexisting Alabama law. In divorce actions, one spouse historically has been permitted to relate statements of the other spouse, particularly when those statements go to prove adultery. See *Lyall v. Lyall*, 250 Ala. 635, 35 So.2d 550 (1948). Compare *Hubbard v. Hubbard*, 55 Ala.App. 521, 317 So.2d 489, cert. denied, 294 Ala. 759, 317 So.2d 492 (1975) (confessions of adultery from one spouse to the other admitted).

(2) Furtherance of crime. Any inter-spousal communication falls outside the privilege if it is made in furtherance of a crime in which both spouses are engaged. As under the attorney-client privilege, communications in furtherance of criminal activity are not immune from disclosure. Compare Ala.R.Evid. 502(d)(1).

This rule is consistent with preexisting case law adopting an exception to the husband-wife privilege for communications between spouses relating to crimes in which they are jointly participating when the communications occur. *State v. Browder*, 486 So.2d 504 (Ala. Crim. App. 1986). This exception applies only to communications that are in furtherance of, or pertain to, the crime charged. The communications are nonprivileged, even if the testifying

spouse's only involvement in the crime charged is as an accessory after the fact. See *United States v. Mendoza*, 574 F.2d 1373 (5th Cir.), cert. denied, 439 U.S. 988 (1978).

(3) Criminal action. Commentators have long suggested that grave injustice is avoided by precluding an assertion of the marital incompetency privilege – which may keep a witness spouse off the stand completely – in cases where the charged offense is committed against the witness spouse. 8 J. Wigmore, Wigmore on Evidence § 2239 (McNaughton rev. 1961). This position has been embraced by the Supreme Court of the United States. *Wyatt v. United States*, 362 U.S. 525 (1960) (denying accused's motion to exclude wife's testimony in Mann Act prosecution where she was the woman who was transported for immoral purposes). Such an exception to the marital incompetency or disqualification privilege was recognized in early Alabama decisions holding that the spouse's testimony was compellable by the state in a case where the crime was committed against the spouse. See, e.g., *State v. Neill*, 6 Ala. 685 (1844); *Clarke v. State*, 117 Ala. 1, 23 So. 671 (1898). It would be reasonable to conclude that such compellability of the victim spouse would hold today in Alabama even after enactment of the competency statute, which provides that the privilege of testifying or not is solely that of the witness spouse (contrasted with the ability to divulge a confidential communication). See *McCoy v. State*, 221 Ala. 466, 129 So. 21 (1930).

Based upon this exception to the spousal incompetency rule, subsection (d)(3) accomplishes two things. First, it establishes the same exception in the area of husband-wife confidential communications – meaning that an accused spouse may not object to the witness spouse's divulging confidential inter-spousal communications when they are offered in a criminal prosecution in which the witness spouse is the victim. Second, it expands the exception beyond crimes committed against the spouse, to include those committed against a minor child of either spouse and crimes committed against certain others. This exception is identical to an exception found in most jurisdictions that have conducted modern codification of their evidence rules. See Ark.R.Evid. 504(d), N.D.R.Evid. 504(d), Fla. Stat. Ann. § 90.504(3)(b), Haw. R. Evid. 505(c)(1), Idaho R. Evid. 504(d)(2), Miss.R.Evid. 504(d), Okla. Stat. tit. 12, § 2504(D), S.D. Codified Laws Ann. § 19-13-15, Vt.R.Evid. 504(d). See also Unif.R.Evid. 504(c). The term "child," as used in subsection (d)(3), is not limited to a natural child. See *Daniels v. State*, 681 P.2d 341 (Alaska App.1984).

The committee envisions that this exception set out in subsection (d)(3) will continue to apply, as provided under the preexisting statute, in criminal desertion and nonsupport proceedings. See Ala. Code 1975, § 30-4-57.