

Alabama Rules of Evidence

Article V. Privileges

Rule 509.

Identity of informer.

(a) *Rule of privilege.* The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished to a law enforcement officer information relating to or assisting in an investigation of a possible violation of a law.

(b) *Who may claim.* The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished or the public entity bringing the prosecution.

(c) *Exceptions.*

(1) VOLUNTARY DISCLOSURE; INFORMER AS A WITNESS. No privilege exists under this rule if the identity of the informer or the informer's interest in the subject matter of the communication has been disclosed, by a holder of the privilege or by the informer's own action, to those who would have cause to resent the communication or if the informer appears as a witness for the prosecution.

(2) TESTIMONY ON RELEVANT ISSUE. If it appears in the case that an informer may be able to give testimony relevant to any issue in a criminal case or to a fair determination of a material issue on the merits in a civil case, and the privilege has been invoked, the court shall give the public entity an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavit. If the court finds there is a reasonable probability that the informer can give the testimony, and the public entity elects not to disclose the informer's identity, in criminal cases the court on motion of the defendant, or on its own motion shall grant appropriate relief, which may include one or more of the following: requiring the prosecuting attorney to comply with an order to disclose the informer's identity, granting the defendant additional time or a continuance, relieving the defendant from making disclosures otherwise required, prohibiting the prosecuting attorney from introducing specified evidence, or dismissing charges. In fashioning appropriate relief in civil cases, the court may make any order the interests of justice require. Evidence submitted to the court shall be sealed and preserved, to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the public entity asserting the privilege. During any in camera showing, for the purpose of determining the applicability of the present privilege, no party should be present but, in

its discretion, the court may allow counsel for any party and counsel for the public entity to be present.

Advisory Committee's Notes

Section (a). Rule of privilege. The language of this rule is substantially the same as that found in Unif.R.Evid. 509. It continues that historic governmental privilege protecting the identity of one who furnishes to the government information that is related to or that assists in investigations regarding violations of law. See E. Cleary, McCormick on Evidence § 111 (3d ed. 1984). Such a privilege has long existed under preexisting Alabama law. *Pugh v. State*, 493 So.2d 388 (Ala.Crim.App. 1985), aff'd, 493 So.2d 393 (Ala.1986); C. Gamble, McElroy's Alabama Evidence § 408.01 (4th ed. 1991). While customarily asserted in the context of a criminal proceeding, the Rule 509 privilege is not limited to criminal cases. It may be asserted in civil cases. This application of the privilege in civil cases goes beyond preexisting Alabama authority. Compare *White v. State*, 368 So.2d 332 (Ala.Crim.App.1979). Consistent with historic precedent, this privilege applies only to the identity of the informer. The communication does not fall within the privilege unless its disclosure would have the incidental effect of identifying the informer. See *Pugh v. State*, 493 So.2d 388 (Ala.Crim.App.1985), aff'd, 495 So.2d 393 (Ala.1986); 8 J. Wigmore, Wigmore on Evidence § 2374 (McNaughton rev. 1961).

The drafters thought it unnecessary to extend this privilege to legislative investigations; thus, in that regard this rule is different from Unif.R.Evid. 509.

Section (b). Who may claim. While this privilege is often referred to as the "informer's privilege," the holder of this privilege is either the governmental entity to which the informer furnished the information or the public entity bringing the prosecution. An appropriate representative of such an entity may claim the privilege in its behalf. Normally, the appropriate representative is counsel for the entity. See Fed.R.Evid. 501 (original proposal, not enacted) advisory committee's note. Others, however, may be deemed appropriate to assert the privilege, particularly in proceedings to which the governmental entity is not a party. See *Bocchicchio v. Curtis Publishing Co.*, 203 F.Supp. 403 (E.D.Pa.1962) (civil libel action in which the police officer, not represented by counsel, successfully claimed the privilege).

Section (c). Exceptions.

(1) Voluntary disclosure; informer as a witness. The informer's privilege falls where the informer's identity has been disclosed. Disclosure may be direct or may arise indirectly when the informer's interest in the subject matter of the information furnished to the law enforcement officer becomes known. See *Westinghouse Elec. Corp. v. City of Burlington*, 351 F.2d 762 (D.C.Cir.1965), on remand, 246 F.Supp. 839 (D.D.C.1965) (informer's privilege held inapplicable, with regard to complaints of criminal antitrust violations made to the attorney general, after plaintiff/informer filed civil antitrust action).

The informer's privilege falls, however, only if disclosure is made to "those who would have cause to resent the communication." The idea underlying this principle is that, if the informer's identity has already been disclosed to those who would resent the informer's action, there is no need for the privilege. The language "resent the communication" is taken from *Roviaro v. United States*, 353 U.S. 53 (1957), and has been quoted approvingly by the

Supreme Court of Alabama. *Pugh v. State*, 493 So.2d 388 (Ala.Crim.App.1985), aff'd, 493 So.2d 393, 395 (Ala.1986). Those as to whom a disclosure will abrogate the privilege may include the defense or persons in the community. See *United States v. Long*, 533 F.2d 505 (9th Cir.), cert. denied, 429 U.S. 829 (1976). Disclosure by one law enforcement agency to another does not abrogate the privilege. See E. Cleary, *McCormick on Evidence* § 111 (3d ed. 1984).

The privilege may be waived when the holder of it discloses the informer's identity, i.e., when an agent of the governmental entity holding the privilege discloses the informer's identity. Additionally, however, this rule recognizes a waiver when the informer discloses his or her own identity. Compare Fed.R.Evid. 510 (not enacted).

When the government calls the informer as a witness, the cross-examining party's right to show the informer's status, as indicating bias, outweighs the interest promoted by assertion of the privilege. See *Harris v. United States*, 371 F.2d 365 (9th Cir. 1967).

(2) Testimony on relevant issue. The Rule 509 privilege aims at promoting the free flow of information to governmental law enforcement officers. This policy, however, may be held to give way, under the present exception, to an overriding policy of fundamental fairness in allowing litigants to prove their cases via access to material and relevant information.

The privilege falls where the identity of the informer, or what was communicated by the informer, is relevant and helpful to the defense of the criminally accused. *Roviaro v. United States*, 353 U.S. 53 (1957). In this circumstance, the governmental interest in the free flow of information is deemed to be outweighed by the accused's right to prove innocence. This exception has received historic recognition in Alabama. *Pugh v. State*, 493 So.2d 388 (Ala.Crim.App.1985), aff'd, 493 So.2d 393 (Ala.1986). Rule 509 extends this balancing process to civil cases and directs the court's focus to whether there exists a reasonable probability that the informer may be able to give testimony necessary to a fair determination of a material issue on the merits in a civil case. In determining whether that probability exists, the court is to investigate the facts in camera. Should the privilege continue to be asserted, in face of the court's finding that the informer is able to give necessary testimony, the court is to afford appropriate relief. Subsection (c)(2) provides a list of possible measures, satisfying the requirement of "appropriate relief," for application in criminal cases. Possible relief in civil litigation is of such breadth that no specification is attempted.