

## Alabama Rules of Evidence

### Article V. Privileges

#### Rule 510.

##### **Waiver of privilege by voluntary disclosure.**

(a) *Generally.* A person upon whom these rules confer a privilege against disclosure waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.

(b) *Attorney-Client Privilege and Work Product; Limitations on Waiver.* Notwithstanding section (a) of this rule, the following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(1) **DISCLOSURE MADE IN AN ALABAMA PROCEEDING; SCOPE OF WAIVER.** When the disclosure is made in an Alabama proceeding and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in an Alabama proceeding only if:

(A) the waiver is intentional;

(B) the disclosed and undisclosed communications or information concern the same subject matter; and

(C) the disclosed and undisclosed communications or information should, in fairness, be considered together.

(2) **INADVERTENT DISCLOSURE.** When made in an Alabama proceeding, the disclosure does not operate as a waiver in an Alabama proceeding if:

(A) the disclosure is inadvertent;

(B) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(C) the holder promptly took reasonable steps to rectify the error, including (if applicable) following the procedure set out in Alabama Rule of Civil Procedure 26(b)(6)(B).

(3) **DISCLOSURE MADE IN A PROCEEDING IN FEDERAL COURT OR IN ANOTHER STATE.** When the disclosure is made in a proceeding in federal court or in another state and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in an Alabama proceeding if the disclosure:

(A) would not be a waiver under this rule if it had been made in an Alabama proceeding; or

(B) is not a waiver under the law governing the federal or state proceeding in which the disclosure occurred.

(4) CONTROLLING EFFECT OF A COURT ORDER. An Alabama court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Alabama proceeding.

(5) CONTROLLING EFFECT OF A PARTY AGREEMENT. An agreement on the effect of disclosure in an Alabama proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(6) DEFINITIONS. In this rule:

(A) "Attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(B) "Work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

[Amended 8-15-2013, eff. 10-1-2013.]

### **Advisory Committee's Notes**

This rule, stated substantially in the language of the corresponding Uniform Rule of Evidence, sets forth in express terms what is to be implied from the statement of all privileges – i.e., the privilege falls when that which is protected by the privilege is voluntarily disclosed by the holder. See Unif.R.Evid. 510. Such a waiver may occur, for example, when the holder allows an unnecessary third party to be privy to an otherwise privileged communication. Additionally, it may arise when the holder tells a third party about the privileged matter. See, e.g., *Perry v. State*, 280 Ark. 36, 655 S.W.2d 380 (1983) (clergyman privilege waived by disclosure of inculpatory statements to others); *State v. Jackson*, 97 N.M. 467, 641 P.2d 498 (1982). This waiver doctrine is consistent with preexisting Alabama law. See *Ex parte Great Am. Surplus Lines Ins. Co.*, 540 So.2d 1357 (Ala.1989) (attorney-client privilege); *Swoope v. State*, 115 Ala. 40, 22 So. 479 (1897) (husband-wife privilege); C. Gamble, *McElroy's Alabama Evidence* §§ 394.01 (waiver of attorney-client privilege), and 103.01(4) (husband-wife privilege) (4th ed. 1991).

The waiver doctrine has two significant limitations. First, waiver arises only when the holder has disclosed, or allowed disclosure of, the "privileged matter." The client does not waive the attorney-client privilege, for example, by disclosing the subject discussed without revealing the substance of the discussion itself. See Fed.R.Evid. 511 (not enacted) advisory committee's note; E. Cleary, *McCormick on Evidence* § 93 (3d ed. 1984). Even if the holder

discloses a portion of the privileged matter, however, the second limitation is that the disclosure must be of a “significant part” of it. Disclosure of an insignificant part of the privileged matter does not waive the privilege. Whether a significant part of the privileged matter has been disclosed is a common sense question for the judge. See N.D.R.Evid. 510 explanatory note. It should be observed, of course, that the holder need not disclose every detail of the privileged matter in order to waive the privilege. See Or.R.Evid. 511 legislative commentary. No waiver occurs if the disclosure, even of a significant part of the privileged matter, is made in the course of another privileged communication. *Perry v. State*, 280 Ark. 36, 655 S.W.2d 380 (1983).

The concept of fairness underlies the waiver doctrine. It has been held unfair to permit offensive assertion of a privilege. When a party, for example, offers a portion of the privileged matter in proof of his or her case, fairness dictates that the opponent be allowed to offer or discover the remainder. *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105 (Tex. 1985). This is consistent with preexisting Alabama law under which the attorney-client privilege falls when a plaintiff client puts the attorney-client communications at issue or charges the attorney with misconduct. *Ex parte Malone Freight Lines, Inc.*, 492 So.2d 1301 (Ala.1986); *Dewberry v. Bank of Standing Rock*, 227 Ala. 484, 150 So. 463 (1933).

### **Advisory Committee's Notes to Amendment to Rule 510 Effective October 1, 2013**

Rule 510 has been amended to establish a standard for determining whether inadvertent disclosure in an Alabama proceeding of matter otherwise protected by the attorney-client privilege or the work-product doctrine results in waiver of the privilege or protection. This amendment is to be read consistent with revisions made to the Alabama Rules of Civil Procedure in 2010 to accommodate the discovery of electronically stored information (ESI).

The amendment is also intended to align Alabama law with Federal Rule of Evidence 502 and to provide predictable, uniform standards whereby parties can protect against waiver of the privilege or protection in an Alabama proceeding. All substantive changes to Rule 510 are found in a new section (b), which is modeled on Federal Rule 502.

Section (a). Generally. No changes have been made to the original paragraph of Rule 510, which is now designated as Rule 510(a). Rule 510(a) governs the consequences of voluntary disclosure of privileged matter generally, in circumstances not covered by Rule 510(b).

Section (b). Attorney-Client Privilege and Work Product; Limitations on Waiver. Rule 510(b) addresses only the effect of disclosure, in an Alabama proceeding, of information otherwise protected by the attorney-client privilege or the work-product doctrine and whether the disclosure itself operates as a waiver of the privilege or protection for purposes of admissibility. The failure to address in Rule 510(b) other waiver issues or other privileges or protections is not intended to affect the law regarding those other waiver issues, privileges, or protections. The amendment does not alter existing Alabama law for determining whether a communication or information qualifies for protection under the attorney-client privilege or the work-product doctrine in the first instance.

Subsection (b)(1). Disclosure Made in an Alabama Proceeding; Scope of Waiver. Rule 510(b)(1) adopts the standard set forth in Federal Rule 502(a). The advisory committee's notes accompanying Federal Rule 502(a) provide a clear description of this standard.

"[A] subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. See, e.g., *In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994) (waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver."

Fed. R. Evid. 502(a) (Advisory Committee's Notes).

Subsection (b)(2). Inadvertent Disclosure. Subsection (b)(2) fills a gap in Alabama law regarding the proper standard for determining whether an inadvertent disclosure of matter protected by the attorney-client privilege or work-product doctrine during discovery results in waiver of the privilege or protection. See *Koch Foods of Alabama LLC v. Gen. Elec. Capital Corp.*, 531 F. Supp. 2d 1318, 1320-21 (M.D. Ala. 2008) (observing that courts have used three standards for determining whether an inadvertent waiver has occurred but that "Alabama law does not fall neatly into any of these categories"). See also Ala. R. Civ. P. 26(b)(6)(B) (Committee Comments to 2010 Amendment) (2010 amendment "provides a procedure to assert a claim of attorney-client privilege or work-product protection after production [that is] applicable to both non-ESI and ESI data, but [the change] is procedural and does not address substantive waiver law").

The substantive standard set forth in this subsection is intended to apply in the absence of a court order or a party agreement regarding the effect of disclosure. In determining whether waiver has occurred, court orders and party agreements should ordinarily control. Cf. Ala. R. Civ. P. 16(b)(6) (Committee Comments to 2010 Amendment) ("subdivision (b)(6) allows the parties to agree (and the court to adopt their agreement as its order) concerning nonwaiver of any claim of privilege or work-product protection in the event such materials are inadvertently produced").

Alabama Rule 510(b)(2) adopts verbatim the three-part standard set out in Federal Rule 502(b). Under this standard, disclosure does not operate as a waiver if: (1) the disclosure was inadvertent, (2) the holder took reasonable steps to prevent disclosure, and (3) the holder took prompt and reasonable steps to rectify the error including (if applicable) providing the notice and following the other steps set forth in Rule 26(b)(6)(B) of the Alabama Rules of Civil Procedure.

The standard adopted is intended to be flexible. Accordingly, no attempt is made to define "reasonable steps" or to list factors that must be considered in every case. Guidance for

applying this standard can be found in the advisory committee's notes accompanying Federal Rule 502(b), which provide:

"Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985), set out a multifactor test for determining whether inadvertent disclosure is a waiver. The stated factors (none of which is dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. The rule does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors. Other considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken 'reasonable steps' to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.

"The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently."

Fed. R. Evid. 502(b) (Advisory Committee's Notes).

Subsection (b)(3). Disclosure Made in a Proceeding in Federal Court or in Another State. Alabama Rule 510(b)(3) corresponds to Federal Rule 502(c) and addresses the situation where the initial disclosure occurred in a proceeding in federal court or in another state's court and the disclosed matter is subsequently offered in an Alabama proceeding. Rule 510(b)(3) provides that, in the absence of a court order, the disclosure will not operate as a waiver in an Alabama proceeding if: (1) the disclosure would not have resulted in a waiver in an Alabama proceeding by application of Ala. R. Evid. 510(b), or (2) if the disclosure would not have resulted in waiver under the law applicable to the federal or state proceeding in which it occurred. Stated differently, the law that is the most protective of privilege and work-product should be applied.

Subsection (b)(4). Controlling Effect of a Court Order. Alabama Rule 510(b)(4) corresponds to Federal Rule 502(d). Under Rule 510(b)(4), a confidentiality order governing the consequences of disclosure entered in an Alabama proceeding is enforceable against nonparties in a subsequent Alabama proceeding. Rule 510(b)(4), like its federal counterpart, is intended to provide predictability and reduce discovery costs. See Fed. R. Evid. 502(d) (Advisory Committee's Notes) ("[T]he utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the communications or information could be used by non-parties to the litigation."). Cf. Ala. R. Civ.

P. 16(b)(6) (party agreements for asserting claims of privilege or work-product protection after production may be included in court's scheduling order); Ala. R. Civ. P. 26(f) (party agreements for asserting claims of privilege or work-product protection after production may be included in court's discovery-conference order).

Subsection (b)(5). Controlling Effect of a Party Agreement. Alabama Rule 510(b)(5) corresponds to Federal Rule 502(e) and recognizes that parties may enter into agreements concerning the effect of disclosure of privileged or protected materials in an Alabama proceeding. However, such an agreement is binding only on the parties unless it is incorporated into a court order as provided in Rule 510(b)(4).

Subsection (b)(6). Definitions. Alabama Rule 510(b)(6) adopts verbatim the definitions for "attorney-client privilege" and "work-product protection" contained in Federal Rule 502(g). The definitions are general. No substantive change in existing Alabama law is intended. Cf. Ala. R. Evid. 502(a) (attorney-client privilege); Ala. R. Civ. P. 26(b)(4) (trial-preparation materials).

**Note from reporter of decisions:** The order amending Rule 404(a), Rule 405(a), Rule 407, Rule 408, Rule 412, Rule 510, Rule 608(b), Rule 703, Rule 801(d), Rule 803(6), Rule 804(b), and Rule 1103, Ala. R. Evid., and adopting Rule 902(11) and (12), Ala. R. Evid., and the Advisory Committee's Notes to the amendment or adoption of these rules, effective October 1, 2013, is published in that volume of *Alabama Reporter* that contains Alabama cases from \_\_\_ So. 3d.