

Alabama Rules of Evidence

Article V. Privileges

Rule 511.

Privileged matter disclosed under compulsion or without opportunity to claim privilege.

A claim of privilege is not defeated by a disclosure which was (a) compelled erroneously or (b) made without opportunity to claim the privilege.

Advisory Committee's Notes

Rule 510 provides that a disclosure ordinarily waives a privilege. However, Rule 511 establishes a corollary, that not every disclosure constitutes a waiver. The language of Rule 511 is taken from Unif.R.Evid. 511.

Part (a). Erroneously compelled disclosure. A disclosure that is compelled erroneously does not prevent the holder from subsequently asserting the privilege. The remedy for an erroneously compelled disclosure is for the court to exclude from the evidence the information erroneously compelled. There is no requirement, as a condition precedent to reasserting the privilege, that the holder have exhausted all remedies with regard to the erroneously compelled disclosure. The omission of such a requirement is perhaps best expressed by the drafters of the identical, but not enacted, federal rule:

“With respect to erroneously compelled disclosure, the argument may be made that the holder should be required in the first instance to assert the privilege, stand his ground, refuse to answer, perhaps incur a judgment of contempt, and exhaust all legal recourse, in order to sustain his privilege. However, this exacts of the holder greater fortitude in the face of authority than ordinary individuals are likely to possess, and assumes unrealistically that a judicial remedy is always available.” Fed.R.Evid. 512 (not enacted) advisory committee's note (citation omitted).

Part (b). Disclosure without opportunity to claim the privilege. A second basis for an exception to the waiver concept arises when disclosure is made under circumstances in which the holder has no opportunity to assert the privilege. Such circumstances would be present, for example, if an employee of an attorney (expressly included within the attorney-client privilege as a third party whose presence does not destroy confidentiality) discloses the privileged matter in a setting where neither the attorney nor the client is present. See Ala.R.Evid. 502(4). Such disclosure could arise when a member of a patient's family, who participated in the consultation, divulges, out of the presence of the patient or the patient's attorney, confidential communications between the patient and a psychotherapist. See Ala.R.Evid. 503. Additionally, circumstances justifying exclusion would exist where a question calling for privileged information is asked and is answered in such rapid succession that the holder has an inadequate opportunity to object.