

Alabama Rules of Evidence

Article V. Privileges

Rule 512.

Comment upon or inference from claim of privilege in criminal cases; instruction.

(a) *Comment or inference not permitted.* In a criminal case, the claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(b) *Claiming privilege without knowledge of jury.* In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) *Jury instruction.* Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

Advisory Committee's Notes

Section (a). Comment or inference not permitted. A long held constitutional principle has been that of the accused's right to prevent the prosecution from commenting upon the accused's failure to take the witness stand based on the assertion of the privilege against self-incrimination. See *Griffin v. California*, 380 U.S. 609 (1965); *Dobard v. State*, 435 So.2d 1338 (Ala.Crim.App. 1982), *aff'd*, 435 So.2d 1351 (Ala.1983), *cert. denied*, 464 U.S. 1063 (1984); C. Gamble, McElroy's Alabama Evidence § 377.01 (4th ed. 1991). Rule 512, containing language similar to that found in the corresponding Uniform Rule of Evidence, extends this no-comment principle to privileges that are not of constitutional origin. See Unif.R.Evid. 512. One should note, however, that Ala.R.Evid. 512A creates a special rule applicable to comment upon a civil party's assertion of a privilege.

Section (b). Claiming privilege without knowledge of jury. Often, a witness is called to the stand and asked a question, a privilege is asserted, and, after an exchange, is not required to answer – all within the hearing of the jury. Rule 512 calls upon the trial judge, insofar as is practicable, to avoid such a situation and to conduct proceedings so that privileges may be claimed without the knowledge of the jury. Many privilege questions will appear in advance, and the trial judge is encouraged to foresee these questions and to facilitate the assertion of the privilege by addressing the question outside the hearing of the jury. Obviously, not all privilege questions will be anticipated; consequently, much must be left to the discretion of the trial judge.

This rule is consistent with preexisting Alabama authority, which gives the trial judge discretion to require that offers of evidence and arguments as to admissibility be made outside the hearing of the jury. See *Shiflett v. State*, 38 Ala.App. 662, 93 So.2d 523 (1956), cert. denied, 265 Ala. 652, 93 So.2d 526 (1957). Additionally, Alabama motion in limine practice affords the privilege holder a pretrial tactic through which to avoid being forced to claim the privilege before the jury. See C. Gamble, *The Motion in Limine: A Pretrial Procedure That Has Come of Age*, 33 Ala.L.Rev. 1 (1981).

Section (c). Jury instruction. As a matter of right, the holder of the privilege may have the trial court instruct the jury against drawing any negative inference from the assertion of a privilege. See *Bruno v. United States*, 308 U.S. 287 (1939). Neither the rule nor these comments address the effectiveness of such an instruction. That issue, and whether to ask for the instruction, are tactical questions for the privilege holder. This rule is consistent with appellate decisions in Alabama that have increasingly extolled the virtues of instructing juries as to their role arising from certain evidentiary rulings. See *Cups Coal Co. v. Tennessee River Pulp & Paper Co.*, 519 So.2d 932 (Ala.1988).