

Alabama Rules of Evidence

Article V. Privileges

Rule 512A.

Comment upon or inference from claim of privilege in civil cases.

(a) *Comment or inference permitted.* In a civil action or proceeding, a party's claim of a privilege, whether in the present action or proceeding or upon a prior occasion, is a proper subject of comment by judge or counsel. An appropriate inference may be drawn from the claim.

(b) *Claim of privilege by nonparty witness.* The claim of a privilege by a nonparty witness in a civil action or proceeding is governed by the same principles that are applicable to criminal cases by virtue of Rule 512.

Advisory Committee's Note

Section (a). Comment or inference permitted. This rule continues Alabama's historic principle that a civil party's assertion of a privilege, such as that against self-incrimination, may be commented upon by the opponent and that the trier of fact may consider the assertion of the privilege and draw from it inferences against the party asserting it. *Cokely v. Cokely*, 469 So.2d 635 (Ala.Civ.App.1985) (divorce action in which spouse asserts privilege against self-incrimination when asked questions aimed at disclosing acts of adultery). A comment on the assertion of the privilege likewise is permissible when a party in a civil action or proceeding fails to take the witness stand altogether. *Trahan v. Cook*, 288 Ala. 704, 265 So.2d 125 (1972). See also *Morris v. McClellan*, 154 Ala. 639, 45 So. 641 (1908) (containing basic rationale for allowing such a comment).

The committee recognizes that a number of states have adopted rules of evidence that preclude such comment. See, e.g., Ark.R.Evid. 512; Idaho R.Evid. 512; Neb. Rev. Stat. § 27-513; Vt.R.Evid. 512. At the same time, however, such comment has been held constitutional and is regularly permitted in federal courts. See, e.g., *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977); *Baxter v. Palmigiano*, 425 U.S. 308 (1976). Compare Me.R.Evid. 513.

If in a civil action or proceeding comment is permissible as to the assertion of the privilege against self-incrimination, a constitutionally based privilege, then it seems reasonable to allow like comment when a party in a civil proceeding asserts any other evidentiary privilege.

Section (b). Claim of privilege by nonparty witness. If a nonparty witness takes the stand and asserts a privilege, then comment or inference against a party is not permitted. This appears consistent with preexisting Alabama authority. See *Breedwell v. State*, 38 Ala.App. 620, 90 So.2d 845 (1956); C. Gamble, McElroy's Alabama Evidence § 377.04 (4th ed. 1991).