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## Attorney-Client Privilege - Alabama

**State the general circumstances under which the jurisdiction will treat a communication as attorney-client privileged, including identification of all required elements/circumstances.**

Absent a recognized exception, “[t]he contents of a confidential communication between an attorney and his client are privileged and, thus, are not discoverable from either the attorney or his client unless the privilege is waived by the client.” *Ex parte Alfa Ins. Corp.*, 284 So. 3d 891, 904 (Ala. 2019). Though previously existing in Alabama common law and codified in the Alabama Code, the attorney-client privilege is now governed by Rule 502 of the Alabama Rules of Evidence (effective 1996). The general rule states that “[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client.” Ala. R. Evid. 502(b). To assert the privilege, a person must show the following: (1) the presence of an attorney-client relationship; (2) the facts demonstrating that the communications were within the privilege, and (3) the prejudice the purported client would suffer from any disclosure of the information claimed to be privileged.” *Ex parte Apolinar*, 686 So. 2d 207, 208 (Ala. 1996).

### *Attorney-client relationship*

The attorney-client relationship arises when a client is rendered professional legal services by an attorney. Practitioners should be careful to note, however, that the attorney-client privilege extends to “communications made by a person to an attorney with a view to retaining him even though it turns out that such person does not retain the attorney or the attorney declines the offered retainer.” Ala. R. Evid. 502(a)(1) (defining “client” to include a person who consults an attorney “with a view to obtaining professional legal services”); see also *Grimsley v. State*, 632 So. 2d 547, 551 (Ala. Crim. App. 1993) (quoting C. Gamble, McElroy’s Alabama Evidence § 390.03 (4th ed. 1991)).

The privilege protects communications between an attorney and client, but not necessarily all information or documents transmitted by or accompanying those communications. *Ex parte Willimon*, 299 So. 3d 934, 944 (Ala. 2020) (internal quotations omitted). The protected communications include not only direct communications between a client and the client’s attorney, Rule 502(b)(1), but also communications:

- between the attorney and the attorney’s representative, Rule 502(b)(2);
- by the client or the client’s attorney to an attorney representing another party concerning a matter of common interest, 502(b)(3);
- between the client and the client’s representative if the communication

results from the specific request of, or at the express direction of, an attorney, 502(b)(4); and

- among attorneys representing the same client, 502(b)(5).

For example, the privilege extends to communications made to the attorney's clerk or others acting as conduits or agents for the attorney. *Richards v. Lennox Indus., Inc.*, 574 So. 2d 736, 739 (Ala. 1990); see also *Grimsley*, 678 So. 2d 1197, 1202-03 (Ala. Crim. App. 1996) (holding that where investigator was agent of paralegal, and attorney had no knowledge paralegal used investigator to contact client, privilege did not apply).

### ***Confidential Communications***

Statements made by a client to an attorney are privileged only if there is an expectation that they be kept confidential. *Bassett v. Newton*, 658 So. 2d 398, 401-02 (Ala. 1995). A communication is confidential if it is "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those to whom disclosure is reasonably necessary for the transmission of the communication." Ala. R. Evid. 502(a)(5); see also *Goins v. Advanced Disposal Servs. Gulf Coast, LLC*, 333 So. 3d 644, 653 (Ala. 2021).

Communications include not only words, but also information conveyed in other ways, such as by actions. *Richards v. Linnox Indus., Inc.*, 574 So. 2d 736 (Ala. 1990) (law clerk's action in removing valve assembly from gas furnace and seeing no broken parts was protected by attorney-client privilege because the action was a communication by the homeowner clients). The Alabama Supreme Court points to the advisory committee's notes to Rule 502(b), which state the following:

[t]he drafters intend that the same expansive interpretation that has been applied under prior Alabama case law be given to the term 'communication,' so as to include within that term any knowledge that the attorney acquires from the client and any advice or counsel given to the client. See *Cooper v. Mann*, 273 Ala. 620, 143 So.2d 637 (1962) (privilege held to apply to all knowledge acquired by an attorney even if acquired through sight alone); Ala. Code 1975, § 12-21-161 (attorney-client privilege includes 'any matter or thing, knowledge of which may have been acquired from the client, or as to advice or counsel to the client').

*Ex parte Alfa*, 284 So. 3d at 904 (quoting Ala. R. Evid. 502(b) advisory committee's notes; underlining in original).

The privilege applies only to the communication, not the underlying facts. *Id.* at 905. Thus, while a client cannot be compelled to answer what the client communicated to the attorney, the client cannot refuse to disclose relevant facts simply because the client communicated those facts to the attorney. *Id.*

Generally, Alabama's attorney-client privilege does not preclude an attorney from disclosing the fact of the attorney's employment, the name of a client, or the fee arrangement. *Ex parte Tucker*, 66 So. 3d 750, 753 (Ala. 2011). However, in some circumstances, the client's identity itself is privileged because disclosing the client's identity might reveal that he committed a crime or was engaged in other activities. *Ex parte Enzor*, 117 So. 2d 361, 362-66 (Ala. 1960) (attorney learned election official was offered bribe when official told him as a client seeking legal advice, so that to divulge name of client would be to divulge possible criminal behavior of his client).

### ***Purpose of promotion rendition of professional services***

To be protected by the privilege, the communication must have been for the purpose of promoting the rendition of professional legal services. Ala. R. Evid. 502(b). Therefore, if an attorney is acting in a nonlegal capacity – for example as an investigator or business advisor – the privilege does not attach. *Grimsley*, 678 So. 2d at 1202-03; see also *Brannon v. BankTrust, Inc.*, 50 So. 3d 397, 407 (Ala. 2010) (when attorney acts as client's agent with regard to

a transaction, privilege does not apply to information about transaction); *Nyhoff v. Palmer*, 116 So. 520, 524 (Ala. 1928) (attorney hired in capacity of agent for transaction, not as attorney).

### ***Who may assert the privilege***

While the privilege belongs to the client, it may be asserted by both the client and the attorney, though the attorney may only claim it on behalf of the client. Ala. R. Evid. 502(c); *Lynch v. Hamrick*, 968 So. 2d 11, 14–15 (Ala. 2007). The Rule creates a presumption that the attorney or the representative has authority to claim the privilege on behalf of the client, in the absence of contradictory evidence. Ala. R. Evid. 502(c).

For corporate clients, a corporate representative may claim the privilege on behalf of the corporation. Ala. R. Evid. 502(c); *Exxon Corp. v. Dep't of Conservation & Natural Resources*, 859 So. 2d 1096, 1103 (Ala. 2002). A corporate officer cannot assert an individual attorney-client privilege for communications concerning the corporation's rights and duties, but the officer can assert the privilege for communications between the officer and corporate counsel that were "specifically focuse[d] on the individual officer's personal rights and liabilities," even if the general conversation had to do mainly with the affairs of the company. *Ex parte Smith*, 942 So. 2d 356, 360 (Ala. 2006).

### ***Proving that the privilege applies***

In practice, the party asserting the attorney-client privilege bears the burden to establish the privilege applies, and it is in the court's discretion to determine its application from the facts presented. *Lynch v. Hamrick*, 968 So. 2d 11, 14 (Ala. 2007) (whether the privilege applies is a question of fact for trial court). The party claiming the privilege must establish the relationship of the attorney and client and other facts demonstrating the privilege. *Id.* However, "[t]he parameters of an evidentiary privilege and, in particular, whether the law recognizes contended-for exceptions to that privilege" are questions of law, and, as such, are subject to de novo review." *Ex parte Alfa*, 284 So. 3d at 902.

### ***Duration of privilege***

Communications made during the attorney-client relationship continue to be protected by the privilege after the relationship ends. *Bassett v. Newton*, 658 So. 2d 398, 401 (Ala. 1995) (attorney-client privilege "permanently protect[s]" communications from disclosure, unless waived); *Hannon v. State*, 266 So. 2d 825, 829 (Crim. App. 1972) (attorney "may not at any time use against his former client knowledge or information acquired by virtue of the previous relationship").

## **Does the jurisdiction recognize/preserve the attorney-privilege for communications among co-defendants in joint-defense or common-interest situations? If so, what are the requirements for establishing two or more co-defendants' communications qualify?**

Alabama recognizes the attorney-client privilege for communications in joint defense and common interest situations. The Alabama Rules of Evidence state that the attorney-client privilege applies to any confidential communication made "by the client or a representative of the client or the client's attorney or a representative of the attorney to an attorney or a representative of an attorney representing another party concerning a matter of common interest . . ." Ala. R. Evid. 502(b)(3) (emphasis added).

However, in joint-defense situations, there is no privilege for communications "relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to an attorney retained or consulted in common, when offered in an action between or among any of the clients." Ala. R. Evid. 502(d)(5) (emphasis added); see, e.g., *Parish v. Gates*, 29 Ala. 254 (1856); *Nationwide Mut. Ins. Co. v. Smith*, 194 So. 2d 505, 508-09 (Ala. 1966). In other words, when two or more clients jointly retain an attorney for a common interest, they cannot claim privilege against each other, "[e]ach of them, however, has the attorney-client privilege

against outsiders.” Ala. R. Evid. 502(d)(5) advisory committee’s notes (quoting C. Gamble, McElroy’s Alabama Evidence § 392.03 at 935 (4th ed. 1991)).

One of the leading Alabama cases on the joint-defense and common interest doctrines is *International Bhd. Of Teamsters, Chauffeurs, Warehousemen & Helpers v. Hatas*, 252 So. 2d 7, 27 (Ala. 1971), where the Alabama Supreme Court held that the traditional attorney-client privilege would still protect communications made in the presence of a third person during a conference between an attorney and client, if the third person “is also a client as to the subject matter discussed [o]r has a common interest in the matters discussed.” In *Hatas*, the Alabama Supreme Court reasoned:

The rationale behind [the traditional rule that statements between a client and attorney made in the presence of a third party constitute a waiver of the attorney-client privilege] is that since the third party is not involved in the relationship between the attorney and the client, the presence of such third party defeats the confidential nature of the conference and thereby the privilege . . . [but that] [n]either that rationale nor the rule which it supports applies when the third person is also a client as to the subject matter discussed in the conference or has a common interest in the matters discussed. *Id.* at 367 (internal citations omitted).

Therefore, communications made in the presence of a third party who does not have a common interest in the subject matter, or who is otherwise “not necessary for the successful communication between the attorney and the client” will not be privileged. *Crenshaw v. Crenshaw*, 646 So. 2d 661, 662 (Ala. 1994) (quoting *Branch v. Greene County Bd. of Educ.*, 553 So. 2d 248, 255 (Ala. Civ. App. 1988)); see also *Lynch v. Hamrick*, 968 So. 2d 11, 16 (Ala. 2007) (holding that daughter’s presence at mother’s meeting with attorney was not necessary and destroyed the attorney-client privilege despite the fact that the mother was old and that the daughter set up the meeting and drove the mother to the meeting).

The most critical task in establishing the attorney-client privilege under the joint-defense or common interest doctrines is proving that the parties did in fact have a common interest in the subject matter being discussed. See, e.g., *Lynch*, 968 So. 2d at 16; *Crenshaw*, 646 So. 2d at 663; *Hatas*, 252 So. 2d at 28. To that end, the burden is on the party asserting the privilege to show that the presence of the third party did not destroy the privilege. See *Lynch*, 968 So. 2d at 16. One Alabama federal court has held that “[t]he common interest privilege applies when persons share a common legal interest, not when the primary common interest is a joint business strategy that happens to include a concern about litigation . . . The interest must, therefore, relate to litigation for this privilege to apply.” *Two Pines Coal Co., Inc. v. Colonial Pipeline Co.*, No. 2:09-CV-1403-SLB, 2011 WL 13234102, at \*4 (N.D. Ala. Jun. 10, 2011) (quoting *Infinite Energy, Inc. v. Econnergy Energy Co.*, No. 1:06CV124, 2008 WL 2856719, at \*2 (N.D. Fla. Jul. 23, 2008)). It is also important to remember that the third party’s interest in the litigation must be “sufficiently aligned” with the party claiming the privilege, and it cannot be adverse in any way. See *Lynch*, 968 So. 2d at 16 (holding that in action to set aside a deed conveying property from mother to daughter the common-interest doctrine did not apply to communications made between a mother and her attorney in the presence of the daughter, because the daughter’s “interests were not sufficiently aligned” with the mother given the daughter’s “interests in having her mother transfer the property were adverse to her mother’s interest in retaining it.”).

An example of a common interest can be found in *Hatas*, where the court held that a defendant and a third party were “both interested in a legal sense in the subject matter discussed at [a] conference with [defendant’s attorney]” because the third party had been contacted by the FBI about the whereabouts of the defendant. *Hatas*, 252 So. 2d at 27-28; see also *Bertarelli v. State*, 585 So. 2d 212, 217 (Ala. Crim. App. 1991) (holding that four police officers, all represented by one attorney at the time, had a sufficient common legal interest in the litigation given that they were all involved in an operation to bust fellow officers who were stealing money).

Identify key pitfalls/situations likely to result in the loss of the ability to claim the protections of the privilege – e.g. failure to assert, waiver, crime-fraud exception, assertion of advice of counsel, transmittal to additional non-qualifying recipients, etc.

### *Exceptions*

There are several exceptions to the attorney-client privilege, which are listed in Rule 502(d). Communications with attorneys are excepted from the privilege:

- where the attorney's services were sought to aid in the commission of a crime or fraud, Rule 502(d)(1);
- where the communication is relevant to an issue between parties who claim through the same deceased client, Rule 502(d)(2);
- where the communication is relevant to an issue of the breach of duty between the client and attorney (such as ineffective assistance of counsel claims in criminal cases), Rule 502(d)(3);
- where the communication is relevant to an issue concerning the intention or competence of a client executing an attested document to which the attorney is an attesting witness, or concerning the execution of attestation of such a document, Rule 502(d)(4); see also *Lynch*, 968 So. 2d at 16–17 (Ala. 2007) (attorney was attesting witness to deed and could testify regarding intentions and information gained in that capacity); and
- where the communication is relevant to a matter of common interest between two or more clients if it was made by any of them to an attorney retained in common, when offered in an action between any of the clients, Rule 502(d)(5).

Consistent with these exceptions, Rule 1.6 of the Alabama Rules of Professional Conduct requires attorneys to assert the privilege on their client's behalf, except in the following circumstances:

(1) when the client gives his or her consent to the disclosure; (2) to prevent the client from committing a criminal act the attorney believes will likely result in imminent death or substantial bodily harm; or (3) to establish a claim or defense on behalf of the attorney in certain circumstances.

*Lynch*, 968 So. 2d at 14–15.

### *Waiver*

Rule 510 of the Alabama Rules of Evidence states that a client may waive the attorney-client privilege through voluntary disclosure or consent to disclosure. Ala. R. Evid. 510(a) ("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."); see also *Lynch*, 968 So. 2d at 14–15. While an attorney can claim the privilege on the client's behalf, the attorney cannot waive it for the client. *Bassett*, 685 So. 2d at 402.

Communications are not confidential and, therefore, not protected by the privilege if they:

- will or necessarily must be made public, *Hughes v. Wallace*, 429 So. 2d 981, 983 (Ala. 1983);
- indicate an intent to be communicated to a third person, *White v. State*, 5 So. 674, 677 (Ala. 1889);

## Alabama

- are made in court, *Tate v. State*, 456 So. 2d 838, 840 (Ala. Crim App. 1984); *Griffin v. State*, 790 So. 2d 267 (Ala. Crim. App. 1999) (client made a comment in open court to his attorney that was loud enough that it could easily be heard by others in the courtroom, the client waived the privilege and testimony concerning the comment was permitted); or
- are made in the presence of a third party, unless the third party is a client or has a common interest in the subject of the communication, *Lynch*, 968 So. 2d at 15-16 (presence of children waived attorney-client privilege). The burden is on the party asserting the attorney-client privilege to show that the presence of a third party did not destroy the privilege. *Id.*

A party may waive the privilege if:

- he puts an attorney-client communication at issue in the case, *Lynch v. Hamrick*, 968 So. 2d 11, 17 (Ala. 2007); *Ex parte Nationwide Mut. Ins. Co.*, 990 So. 2d 355, 363 (Ala. 2008) (“The question whether a party has implicitly waived the attorney-client privilege ‘turns on whether the actual content of the attorney-client communication has been placed in issue [in such a way] that the information is actually required for the truthful resolution of the issues raised in the controversy.’”);
- inquires into the substance of his own otherwise privileged communication at trial, *Id.*;
- expressly waives it, *Id.*;
- relies on the advice of counsel as a defense, *Ex parte Nationwide*, 990 So. 2d at 355;
- fails to invoke the privilege when questioned, *Swain v. Terry*, 454 So. 2d 948, 954 (Ala. 1984) (client’s failure to invoke attorney-client privilege when his guardian ad litem was questioned regarding confidential communications waived privilege not only as to guardian but also as to other members of guardian’s firm).

### *Pitfalls*

Perhaps the most serious pitfall relates to communications with expert witnesses. The attorney-client privilege does not extend to communications between attorneys and employed expert witnesses. *State v. Chicago Bridge & Iron Co.*, 261 So. 2d 882, 885 (Ala. 1972). Attorneys should, therefore, give careful consideration to communications with experts, particularly written communications. Moreover, documents otherwise protected by the attorney-client privilege may become discoverable if turned over to an expert. See *Ex parte Head*, 958 So. 2d 860, 869 (Ala. 2006). While the work-product doctrine provides some protection for certain expert materials, it is not an absolute privilege like the attorney-client privilege.

**Identify any recent trends or limitations imposed by the jurisdiction on the scope of the attorney-client privilege.**

### *Ex parte Alfa Insurance Corporation*, 284 So. 3d 891 (Ala. 2019).

The Alabama Supreme Court recently made a couple of noteworthy findings on a petition for writ of mandamus in the case of *Ex parte Alfa*, 284 So. 3d at 893. In *Alfa*, the petitioner challenged the trial court’s order requiring it to produce a coverage opinion letter for in camera review. *Id.* at 905. The court held that when a party asserting the attorney-client privilege has established a basis for the privilege and “the party seeking discovery has not established (1) that some evidence or testimony supports the assertion that the materials may not [be] privileged . . . (2) that the materials fall within an exception . . . or (3) that the . . . privilege has been waived,” the “trial court exceeds its discretion in ordering production of [the] materials, even for . . . an in camera inspection.” *Id.* at 911.



Moreover, the court suggested that the rules regarding the applicability of and exceptions to the attorney-client privilege were not to be altered by judicial decision. *Id.* 910 (“[E]ven if we were to agree with the view that an exception to the attorney-client privilege should exist as to the communications at issue, we question whether it would be prudent to adopt such an exception via judicial decision, which arises from a happenstance of facts and arguments necessarily limited by the immediate parties’ objectives, rather than through the deliberative process of amending Rule 502(d), Ala. R. Evid.”).

### ***Rule 510 of the Alabama Rules of Evidence***

In 2013, Rule 510(b) was added to the Alabama Rules of Evidence, which aligned Alabama’s privilege law with Federal Rule of Evidence 502. C. Gamble, *Gamble’s Alabama Rules of Evidence* § 502 at 222 (3rd ed. 2014). Rule 510(b) places limitations on the waiver of the attorney-client privilege during court proceedings. *Id.* When a disclosure of otherwise privileged information is made during an Alabama proceeding, the waiver extends to undisclosed privileged information 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.” Ala. R. Evid. 510(b)(1). However, if the disclosure made in the proceeding was inadvertent, the disclosure does not operate as a waiver if: (1) “the holder of the privilege or protection took reasonable steps to prevent disclosure,” and (2) “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).” Ala. R. Evid. 510(b)(2). Similarly, absent a court order holding otherwise, a disclosure in a federal court or other state court proceeding does not operate as a waiver unless it would constitute a waiver under Alabama’s privilege rules or that jurisdiction’s privilege rules. See Ala. R. Evid. 510(b)(3). All of the rules discussed above are rendered inapplicable if the controlling court issues an order holding that the disclosure was not a waiver. Ala. R. Evid. 510(b)(4).

### ***Third-party billing auditors***

Over the past decade, concerns have been raised about the attorney-client privilege in regard to disclosure of confidential information to third-party billing auditors hired by insurance carriers. J. McClain, *Third-Party Auditing of Lawyer’s Billings – Confidentiality Problems and Interference with Representation*, 71 Ala. Law. 79, 79 (2010). The concern is that some billing information obviously contains descriptions of work for the insured, which could include information that is protected by the attorney-client privilege. *Id.* The Disciplinary Commission of the Alabama State Bar has warned “that a lawyer should not permit the disclosure of information relating to the representation of a third party, such as a billing auditor, if there is a possibility that waiver of . . . the attorney-client privilege . . . would occur. *Id.* at 80. The Commission cited *U.S. v. Mass. Inst. of Tech.*, 129 F.3d 681 (1st Cir. 1997), as an example of a how disclosure of certain documents to an auditor could constitute a waiver of the attorney-client privilege. *Id.* at 81-82. While there are no reported Alabama state or federal cases directly addressing this issue, it is one that practitioners and clients should consider when third-party auditors are involved in a case.

### Endnotes

[1] Ala. Code § 12-21-161 (1975).

[2] Rule 502 supersedes the statute, but is intended to perpetuate the law developed under it. Ala. R. Evid. 502 advisory committee's notes; *Ex parte City of Leeds*, 677 So. 2d 1171, 1173 (Ala. 1996) (holding that Rule 502 "expresses Alabama case law and the historic common law embodied in § 12-21-161"). Therefore, case law developed prior to 1996 still generally applies.

[3] The Rule includes communications made by or between representatives of the client and attorney, such as employees. Ala. R. Evid. 502(a) & (b).

[4] The Rule includes communications made by or between representatives of the client and attorney, such as employees. Ala. R. Evid. 502(a) & (b).

[5] The Alabama Supreme Court has expressed a reluctance to judicially create additional exceptions outside of Rule 502. See *Ex parte Alfa*, 284 So. 3d at 911.

[6] Note: This Rule contains certain limitations to waiver specific to the attorney-client privilege. Ala. R. Evid. 510(b). It was added to align Alabama law with Federal Rule 502. Rule 510(b)(2), for instance, adopts a three-part test to determine whether inadvertent disclosure of information subject to work product or attorney-client privilege results in waiver. If the disclosure was inadvertent, the holder of the privilege took reasonable steps to prevent disclosure, and the holder promptly took reasonable steps to rectify the error, disclosure will not result in waiver. *Id.*