Marital Privileges

CAROLINE RULE

The author is a partner with Koselanetz & Find, LLP, New York City.

Marriage is perplexing, and the marital privileges even more so. Contradictory views determine when they apply and what they protect. In many states, statutes, rather than case law, govern, but federal law leaves it to the courts, which sometimes results in conflicting decisions among the circuits.

There are two quite different and separate safeguards for spouses. One is the confidential marital communications privilege, which, with some exceptions, allows a spouse to refuse to testify about, or produce documents evidencing, any confidential communication made during a marriage *and* allows the other spouse to prevent that testimony or document production.

As the U.S. Supreme Court explained in the seminal case *Trammel v. United States*, 445 U.S. 40 (1980), referencing an early saccharine view of marriage, this privilege protects "information privately disclosed between husband and wife in the confidence of the marital relationship—once described by this Court as 'the best solace of human existence.'" *Id.* at 51 (quotation omitted).

The confidential marital communications privilege aims to nurture the marital relationship and foster the ability of spouses to speak freely with each other, without concern that their private communications will come back to haunt them. It survives dissolution of a marriage, continuing to protect communications that were made during the marriage.

The other privilege is the adverse spousal witness privilege, which applies in criminal proceedings and allows one spouse to refuse to testify against the other spouse. This privilege belongs *only* to the non-defendant spouse, however. Unless the defendant can invoke the confidential marital communications privilege, she cannot prevent her spouse from testifying against her if he decides to do so. This form of the privilege applies only while the marriage exists. And numerous states have repealed the adverse spousal witness privilege entirely.

Paradoxically, in the antiquated common law, the adverse spousal witness privilege belonged only to the defendant, who could use it to prevent his spouse from testifying against him. That obverse of current law grew out of two precepts of medieval jurisprudence—that a defendant could not testify on his own behalf and that, because husband and wife were one and the wife had no separate legal existence, the wife was disqualified from testifying on the husband's behalf.

In 1980, in *Trammel*, the Supreme Court reversed the course of this privilege and held that "the existing rule should be modified so that the witness-spouse alone has a privilege to refuse to testify; the witness can be neither compelled to testify nor foreclosed from testifying." *Id.* at 53.

Even though courts have described both spousal privileges as advancing marital harmony, the Court distinguished the adverse

Published in *Litigation,* Volume 45, Number 4, Summer 2019.

spousal witness privilege from the confidential marital communications privilege:

> When one spouse is willing to testify against the other in a criminal proceeding—whatever the motivation—their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve. In these circumstances, a rule of evidence that permits an accused to prevent adverse spousal testimony seems far more likely to frustrate justice than to foster family peace.

Id. at 52.

Thus, the adverse spousal witness privilege "is invoked, not to exclude private marital communications, but rather to exclude evidence of criminal acts and of communications made in the presence of third parties." *Id.* at 51.

Federal vs. State Law

As with other privileges in federal court, both marital privileges are governed by Federal Rule of Evidence 501, which does nothing to clarify their substance. Under Rule 501, in criminal cases and in civil cases based on federal law, federal common law applies; and in civil cases based on state law, any of 50 different states' laws govern.

The latter rule respecting state law accords with the rationale that when a case is not grounded in a federal question, federal law should not supersede state law in substantive areas like privileges. H. Comm. on the Judiciary, Federal Rules of Evidence, H.R. Rep. No. 93-650 (1974). This issue is complex, however; it has been held that when a federal court's jurisdiction in a civil case is based on a federal question, the federal law of privilege will apply, even if the spousal testimony at issue is also relevant to a pendent state law claim that might otherwise be controlled by contrary state law. *Hancock v. Hobbs*, 967 F.2d 462, 467 (11th Cir. 1992) ("it would be impractical to apply two different rules of privilege to the same evidence before a single jury").

The Supreme Court and other federal courts have interpreted Congress's failure to adopt a rule of evidence specifically governing the marital privileges as rendering the privileges pliable and as sanctioning their judicial development as courts see fit. In *Trammel*, for example, the Supreme Court explained: "In rejecting the proposed [privilege] Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to 'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis[.]'" 445 U.S. at 51 (citation omitted).

While the pliable nature of court-made marital privileges stems from a reasonable policy of allowing courts to stay abreast of changes in societal norms, it also leads to a federal

Illustration by Jon Krause

common law that varies dramatically among the circuits. Courts also sometimes conflate or confuse the two forms of the privilege.

Nevertheless, "[a]lthough judicial confusion about the two privileges is indeed prevalent, they are distinct." *United States v. Fulk*, 816 F.2d 1202, 1205 (7th Cir. 1987).

> The two privileges have related but distinct purposes. The adverse testimony privilege embodies society's desire to protect viable marriages from the potentially irreparable rifts that may result from compelled disclosure or commentary before a tribunal. The confidential communications privilege, by contrast, provides assurance that all private statements between spouses . . . will be forever free from public exposure.

In re Witness Before Grand Jury, 791 F.2d 234, 237 (2d Cir. 1986).

A proposed Rule of Evidence 505 specifically governing the marital privileges was first suggested in 1969. Even though the proposed rule was revised in 1971, debated by Congress in 1973, revised in 1974, debated by the Judicial Conference in 1977, and significantly revised in 1986, it never has been adopted.

An example of how the marital privileges have changed over the years is found in the first version of Rule 505, proposed in 1969, which recognized only one privilege—the right of a criminal defendant to *prevent* his spouse from testifying against him—the polar opposite of the current adverse spousal witness privilege adopted in *Trammel*, which belongs only to the non-defendant spouse. Similarly, the 1971 version of the proposed rule included the 1969 version of the adverse spousal witness privilege and did not recognize the confidential marital communications privilege.

These proposed rules and the reactions to them illustrate conflicting ideas about what the marital privileges should protect and why. The first proposed rules were roundly criticized as endorsing the least defensible privilege—that is, allowing a criminal defendant to prevent his spouse from testifying against him—while doing away with the more rational common-law confidential marital communications privilege.

For example, the Justice Department objected to the 1971 proposed rule, under which the adverse spousal witness privilege belonged to the defendant spouse, on the following grounds:

> The approach taken in the draft is essentially to make a spouse incompetent as a witness in a criminal case at the option of the defendant. This approach does not withstand analysis. . . . It is patent . . . that if a spouse is willing to testify for the Government in a criminal case, there is no marital harmony to preserve. And to recognize a privilege even when a spouse is willing to testify is to pay a price in competent evidence for no redeeming purpose.

117 Cong. Rec. 33,651 (1971) (Justice Department remarks).

The Justice Department recommended an amendment so that "[t]he privilege may be claimed only by the person who is sought to be compelled to testify *against* his spouse." *Id.* (emphasis added). Despite the Justice Department's objections, a 1973 version of the proposed rule that the Supreme Court sent to Congress maintained that it was a defendant spouse who could invoke the adverse spousal witness privilege.

During subsequent congressional hearings, interested parties, including bar associations, sought to have the adverse spousal witness privilege confined to the non-defendant spouse, and others objected to the proposed rule's abolition of the common-law confidential marital communications privilege. *See* 1-2 House Hearings (1973).

The objections were heeded and the proposed changes were incorporated into the 1974 proposed Rule 505. Yet Congress, perhaps faintheartedly, refrained from resolving the differing views, failed to adopt any rule, and instead left the issues to be decided by the federal courts applying their own perspectives of the common law, as provided by Rule 501.

The Second Circuit's view is that "[w]hile the [confidential marital communications privilege] is venerated, the [adverse spousal witness privilege] has been the subject of harsh, and often justifiable, criticism." *Matter of Grand Jury Subpoena of Ford v. United States*, 756 F.2d 249, 252 (2d Cir. 1985).

The confidential marital communications privilege has been recognized by all U.S. jurisdictions, sometimes by judicial decision but often by state statute, and was first recognized by the Supreme Court in *Wolfle v. United States*, 291 U.S. 7, 16 (1934), a criminal case in which the adverse spousal witness privilege did not play a role:

> The basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails. . . . Communications between the spouses, privately made, are generally assumed to have been intended to be confidential[.]

Id. at 15.

Confidential Marital Communications Privilege

There are four basic elements to the confidential marital communications privilege: There must have been a communication, there must have been a valid marriage at the time of the communication, the communication must have been made in confidence, and the privilege must not have been waived. *Sec. & Exch. Comm'n v. Lavin*, 111 F.3d 921, 925 (D.C. Cir. 1997).

But there is little federal case law that defines what a "confidential marital communication" actually means, and most earlier cases applied state common law or state statutes. The American

Law Institute's 1942 Model Evidence Rule 214(d) provides a workable definition—"information transmitted by the voluntary act of disclosure by one spouse to the other without the intention that it be disclosed to a third party and by a means which, so far as the communicating spouse is aware, does not disclose it to a third person"—though some courts refer instead to Federal Rule of Evidence 801(a), which defines a statement as "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion."

The privilege outlasts the death of a spouse and can be invoked by the decedent spouse's personal representative.

Generally, if a communication is made between spouses and not also made to a third person or intended to be passed on to a third person, it is presumed to be confidential. *United States v. Hamilton*, 701 F.3d 404, 407 (4th Cir. 2013). *See also* 3 Weinstein's Federal Evidence § 505.10[3] (2d ed. 2008) ("The federal courts apply a presumption that communications between spouses are intended to be confidential.").

While the jurisprudence of the attorney-client privilege, for example, has long recognized that certain third persons, necessary for an attorney properly to represent a client, may have access to communications without the privilege being waived, that reasoning has, strangely, not been applied to the confidential marital communications privilege. Most courts simply cite *Wolfle v. United States*, 291 U.S. at 16, from 1934, which held that a stenographer who had transcribed a letter dictated by a husband to his wife could testify as to the letter's contents:

> Normally husband and wife may conveniently communicate without stenographic aid, and the privilege of holding their confidences immune from proof in court may be reasonably enjoyed and preserved without embracing within it the testimony of third persons to whom such communications have been voluntarily revealed.

The fact that, less than a decade after *Wolfle*, hundreds of thousands of American service-people dictated telegrams to their spouses did not change this view. And, somewhat inexplicably, it has not evolved since, despite how society has changed, with both spouses now often working and necessarily using the help of assistants. *See* Wright & Miller, 25 Federal Practice and Procedure, Evid., § 5578, *Elements of the Privileges—"Communicative Revelations"* (1st ed., 2018 update).

Despite the general rule that the confidential marital communications privilege is waived if the communication is disclosed to a third party, there are isolated cases that have held that a spousal communication remains confidential when shared with a third party to whom a separate privilege applies, such as an attorney. *United States v. Howton*, 260 F. App'x 813, 819 (6th Cir. 2008); *United States v. Rakes*, 136 F.3d 1, 5–6 (1st Cir. 1998); *Westmoreland v. Wells Fargo Bank Nw., N.A.*, 2016 U.S. Dist. LEXIS 151444, at *5 (D. Idaho Oct. 31, 2016).

As Rule 801(a)'s definition of a "statement" provides, nonverbal conduct can be a communication, and courts have held that it can be confidential. In *United States v. Bahe*, 128 F.3d 1440, 1441, 1443–44 (10th Cir. 1997), for example, the court held that, through an idiosyncratic act of foreplay, a husband communicated to his wife that he wanted to engage in sex and that this act was therefore communicative and presumptively confidential. The court also noted that "physical acts that are entirely communicative, such as sign language," fall within the confidential marital communications privilege. *Id.* at 1443 (citation omitted).

The confidential marital communications privilege also applies to documents and other recordings of communications between spouses. *See, e.g., Sec. & Exch. Comm'n v. Lavin*, 111 F.3d 921, 928–29 (D.C. Cir. 1997) (the privilege could provide grounds to quash a subpoena issued to a third party who possessed recordings of two spouses speaking with each other, when the spouses were unaware that they had been taped and therefore did not waive the privilege). It does not apply, however, to email communications to a spouse from the other spouse's work computer if, as is now common, the employer notifies its employees that that they have no legitimate expectation of privacy in their work computers. *See, e.g., United States v. Hamilton*, 701 F.3d 404, 408 (4th Cir. 2012).

As noted, the confidential marital communications privilege survives dissolution of the marriage, continuing to protect communications made during the marriage after the marriage has ended. The privilege even outlasts the death of a spouse and can be invoked by the decedent spouse's personal representative. *United States v. Burks*, 470 F.2d 432, 436 (D.C. Cir. 1972). Moreover, the privilege can be invoked in any proceeding and regardless of whether the invoking spouse is a party, a witness, or merely a potential witness.

By contrast, the adverse spousal witness privilege requires that there be a valid marriage in place at the time the privilege is invoked, and this form of the privilege survives even if the marital communication is disclosed to third parties. As the Supreme

> The first was that the goal intended to be served by the privilege, *i.e.*, preventing either spouse from committing the "unforgivable act" of testifying against the other in a criminal case, did not justify assuring a criminal that he or she could enlist the aid of a spouse in a criminal enterprise without fear that by recruiting an accomplice the criminal was creating another potential witness. . . . The second reason was that the rehabilitative effect of a marriage, which in part justifies the privilege, is diminished when both spouses are participants in the crime.

United States v. Clark, 712 F.2d 299, 301 (7th Cir. 1983) (quoting *United States v. Van Drunen*, 501 F.2d at 1397). *But see Appeal of Malfitano*, 633 F.2d 276, 278–89 (3d Cir. 1980) ("There is nothing in the record or otherwise to indicate that marriages with criminal overtones disintegrate and dissolve. The spouses in fact may be very happy. . . . [And] the marriage may well serve as a restraining influence on couples against future antisocial acts and may tend to help future integration of the spouses back into society.")

The joint-participants exception applies to both marital privileges and requires that both spouses be involved in a crime or its cover-up. The confidential marital communications privilege will continue to apply when a spouse is no more than aware of her spouse's criminal activity but will fall away if that spouse assists the other spouse in the criminal activity or helps to cover it up afterwards. *See, e.g.*, *United States v. Neal*, 743 F.2d 1441, 1446 (10th Cir. 1984) (marital communications privilege would apply "to prevent the testimony of one spouse against the other if the sole knowledge and information and/or participation involves a conversation wherein the spouse who committed the crime discloses that fact to the other spouse" but not if the other spouse later discusses covering up evidence, and so participates "as an accessory after the fact").

In addition to the joint-participants exception that applies to both marital privileges—and which requires that both spouses engage in a crime or its cover-up—there is an additional "crime or fraud exception" to the confidential marital communications privilege, and it is analogous to the crime or fraud exception to the attorney-client privilege. The exception requires only that one spouse be aware that the communication in question was made for an iniquitous purpose. But the case law is muddled in this area, with courts often describing both the confidential marital communications privilege and the crime-fraud exception interchangeably, as is vividly described by Wright and Miller:

> The two exceptions are so hopelessly confused in the literature and the caselaw that it is doubtful that federal courts will ever get them straight[.] Nevertheless, in connection with the crime or fraud exception, a court must determine whether each individual communication claimed to fall within the exception had a purpose of aiding in a criminal endeavor.

25 Federal Practice and Procedure, Evid., § 5594, *Exceptions—Crime or Fraud* (1st ed., 2018 update).

There is an exception to both forms of the marital privilege for communications demonstrating that one spouse committed a crime against the other or against their child. The exception applies similarly in both instances. *United States v. Allery*, 526 F.2d 1362, 1367 (8th Cir. 1975).

Although *Trammel* held clearly that a defendant spouse cannot prevent the witness spouse from testifying about crimes that the defendant committed, courts have reinforced this rule by recognizing, for example, an exception to the confidential marital communications privilege when the victim of a spouse's offense is a child within the household. *See, e.g.*, *United States v. Bahe*, 128 F.3d 1440, 1446 (10th Cir. 1997); *United States v. White*, 974 F.2d 1135, 1137–38 (9th Cir. 1992).

While confusing and contradictory, the marital privileges are here to stay, at least in federal law.

In addition, courts have gone further than *Trammel* and forced a spouse who is a victim of marital abuse to testify against her abuser, recognizing that the victim spouse may be reluctant to testify and, instead, may be likely to invoke a marital privilege in a manner that goes against societal interests. Thus, despite *Trammel*'s confirmation that "the witness may [not] be . . . compelled to testify," 445 U.S. at 53, some courts have adopted a so-called "necessity exception," under which a court may compel the victim to testify against an abusive spouse. *See, e.g.*, *United States v. Seminole*, 865 F.3d 1150, 1154 (9th Cir. 2017) (the defendant "has not identified any cases that hold that *Trammel* somehow eliminated a court's ability to compel a witness to testify against her spouse when she is the victim of the spouse's crime").

While confusing and contradictory, the marital privileges are here to stay, at least in federal law. Bear them in mind when handling a civil or criminal case that involves spouses. Understand the differences between the confidential marital communications privilege and the adverse spousal testimony privilege; and be sure to research closely the law of the particular federal jurisdiction in which the case arises. ■

Court wrote in *Trammel*, the adverse spousal witness privilege specifically "exclude[s] evidence of criminal acts and of communications made in the presence of third persons." 445 U.S. at 51 (unless both spouses were involved in the criminal acts).

Some jurisdictions recognize common-law marriages or informal marriage relationships, but most federal courts require that a legally valid marriage have existed for the confidential marital communications privilege to apply or that a legally valid marriage currently exist for the adverse spousal witness privilege to apply. *See, e.g.*, *United States v. Rivera*, 527 F.3d 891, 906 n.4 (9th Cir. 2008). *But see Holton v. Newsome*, 750 F.2d 1513, 1514 (11th Cir. 1985) (recognizing state common-law marriage).

Adverse Spousal Witness Privilege

The elements of the adverse spousal witness privilege are that there is a valid marriage at the time the privilege is asserted, that one spouse is a defendant, that the other spouse is called to testify against the defendant, and that there is a valid claim of privilege by the spouse called to testify. *See, e.g.*, Wright & Miller, 25 Federal Practice and Procedure, Evid., § 5577, *Privilege—"Witness"* (1st ed., 2018 update).

The 1986 version of proposed Rule 505 provided that the adverse spousal witness privilege governed spousal testimony only in criminal proceedings. With little success, litigants have urged that this privilege should apply in civil cases as well. Federal courts consistently have held that the privilege applies only in a criminal case or—at most—also in a civil case when the testifying spouse would, by testifying, reveal a crime committed by the other spouse. *See, e.g.*, *Nordetek Envtl., Inc. v. RDP Techs., Inc.*, 2011 WL 13227709, at *7 (E.D. Pa. Nov. 28, 2011); 1-501 Bender's Federal Evidence § 501.6 (2010).

Today, the adverse spousal testimony privilege has nothing to do with a perceived incompetence of a spouse to testify against another. After *Trammel*, the term "incompetent" is no longer germane because, regardless of gender, a spouse whose testimony is sought against a defendant spouse may *choose* whether to testify.

Just as the Fifth Amendment generally does not protect a defendant from producing physical evidence, the adverse spousal witness privilege does not prevent the government from obtaining physical evidence from the non-defendant spouse who invokes the privilege. *See, e.g.*, *United States v. McKeon*, 558 F. Supp. 1243, 1247 (E.D.N.Y. 1983) (handwriting exemplars); *In re Grand Jury 85-1*, 666 F. Supp. 196, 299 (D. Colo. 1987) (fingerprint exemplars).

Some courts have refused to apply the adverse spousal witness privilege if the marriage is in disrepair—*see In re Witness Before Grand Jury*, 791 F.2d at 237–38, and cases cited—while other courts have relied solely on whether the marriage is formally in existence when the privilege is invoked—s*ee, e.g.*, *In re Grand Jury Investigation of Hugle*, 754 F.2d 863, 865 (9th Cir. 1985) (privilege applied despite "disharmonious" marriage); *United States v. Clark*, 712 F.2d 299, 303 (7th Cir. 1983) (courts should avoid "subjective determinations" about whether testimony would disrupt "marital harmony").

Commentators have agreed that the better rule with respect to the adverse spousal witness privilege is to apply a bright-line test of whether the couple is currently married:

> Even pending divorce proceedings do not necessarily mean that a marriage is over, and in any event forcing testimony by one spouse against another in such proceedings is likely to complicate the process of dissolution itself, and the social interest in enabling even previously married spouses to maintain reasonably cordial relations suffice to justify continued protection. Beyond these points is the complication of inquiring into the health of a marriage, which courts are and should be reluctant to do.

C. Mueller & L. Kirkpatrick, 2 Federal Evidence § 5:39 (4th ed., July 2018 update).

Not surprisingly, however, a defendant cannot prevent a witness from testifying against him by marrying the witness in a "collusive marriage":

> [W]e conclude that since defendant's wife's testimony concerned matters prior to the marriage, the privilege against the testimony of a spouse is inapplicable . . . [so as] to eliminate the possibility of suppressing testimony by marrying a witness. Here, as the Government has noted, the marriage took place one month after defendant's indictment. As the Advisory Committee [to proposed Rule 505] concluded, the prevention of collusive marriages justifies such an exception[.]

United States v. Van Drunen, 501 F.2d 1393, 1397 (7th Cir. 1974). *But see In re Grand Jury Proceedings (86-2)*, 640 F. Supp. 988 (E.D. Mich. 1988) (both marital privileges applied even though couple married after husband was under criminal investigation, because there was persuasive evidence that the couple would have married anyway).

Joint-Participants Exception

The version of Rule 505 proposed in 1986 provided that no marital privilege would apply "in any criminal proceeding in which an unrefuted showing is made that the spouses acted jointly in the commission of the crime charged." Federal case law largely follows that proposed rule, with some additional subtleties.

With respect to the adverse spousal witness privilege, the exception that applies when spouses work together to commit a crime is grounded in two reasons: