



2018

§5.32 Marital Confidences Privilege

Christopher B. Mueller
University of Colorado Law School

Laird Kirkpatrick
George Washington University Law School, lkirkpatrick@law.gwu.edu

Liesa Richter
University of Oklahoma College of Law

Follow this and additional works at: https://scholarship.law.gwu.edu/faculty_publications

 Part of the [Law Commons](#)

Recommended Citation

Mueller, Christopher B. and Kirkpatrick, Laird C. and Richter, Liesa, §5.32 Marital Confidences Privilege (2018). C. Mueller, L. Kirkpatrick, & L. Richter, Evidence §5.32 (6th ed. Wolters Kluwer 2018); GWU Law School Public Law Research Paper No. 2018-67; GWU Legal Studies Research Paper No. 2018-67. Available at SSRN: <https://ssrn.com/abstract=3277044>

This Chapter is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in GW Law Faculty Publications & Other Works by an authorized administrator of Scholarly Commons. For more information, please contact spagel@law.gwu.edu.

§5.32 Marital Confidences Privilege

The marital confidences privilege prevents compelled disclosure of confidential communications made between spouses during the course of their marriage. The marital confidences privilege is narrower than the spousal testimonial privilege in that it applies only to confidential communications, while the testimonial privilege bars all testimony.¹ The confidences privilege is broader than the testimonial privilege, however, in that it applies in civil as well as criminal proceedings and can be asserted after the termination of the marriage.

The rationale of the privilege is to protect the privacy and trust of the marital relationship, and to enable spouses freely to communicate and confide in one another.² The privilege is intended to preserve and strengthen the institution of marriage.³ Without the privilege, a witness could be compelled by the state to breach the bonds of trust between husband and wife and reveal the intimacies and secrets of their relationship.⁴

The marital confidences privilege is well established as a matter of federal common law⁵ and is recognized by virtually all states.⁶ The proposed Federal Rules would have codified only a spousal

§5.32 1. *See* *United States v. Davis*, 714 F. Supp. 853, 870 (S.D. Ohio 1988) (communications privilege cannot be used to preclude all testimony by former wife out of concern that she might “blurt out” privileged communications; defendant must object at trial to any testimony about confidential marital communications). The spousal testimonial privilege is discussed in §5.31, *supra*.

2. *United States v. Brock*, 724 F.3d 817, 820-821 (7th Cir. 2013) (marital communications privilege exists “to ensure that spouses . . . feel free to communicate their deepest feelings to each other without fear of eventual exposure in a court of law”).

3. *Wolfe v. United States*, 291 U.S. 7, 14 (1934) (marital confidences are 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”); *Stein v. Bowman*, 38 U.S. 209, 223 (1839) (privilege “is founded upon the deepest and soundest principles of our nature” and helps preserve the marriage relationship, which Court described as “the best solace of human existence”).

4. *See* Note, *Pillow Talk, Grimribbers and Connubial Bliss: The Marital Communication Privilege*, 56 *Ind. L.J.* 121, 139-142 (1980) (suggesting privilege may have constitutional underpinning stemming from right of privacy). *Cf. In re Grand Jury Investigation (Hipes) v. United States*, 603 F.2d 786, 788-789 (9th Cir. 1979) (privilege protects privacy of communications, not merely their incriminatory use; privilege can be asserted even where other spouse has been granted immunity so that there is no risk of criminal liability).

5. *See Trammel v. United States*, 445 U.S. 40, 45 n.5 (1980); *Blau v. United States*, 340 U.S. 332 (1951); *Wolfe v. United States*, 291 U.S. 7 (1934).

6. 8 *Wigmore*, *Evidence* §2336 at 250 n.1 (McNaughton rev. 1961).

testimonial privilege, omitting a spousal confidences privilege.⁷ The Advisory Committee viewed the privilege as ineffectual because married persons are generally unaware of it.⁸ The decision of the drafters to abrogate the marital confidences privilege prompted public outcry and contributed to the ultimate defeat of the proposed privilege rules.⁹

Under the prevailing view, both spouses hold the confidences privilege—that is to say, both the spouse who says something and the spouse who listens to what is being said—and either can refuse to disclose and prevent the other from disclosing confidential marital communications.¹⁰ Some authorities favor a narrower approach, vesting each spouse with a privilege covering only what he or she has said to the other, and not extending the privilege to statements by the other spouse.¹¹ Such a limitation appears in URE 504,¹² but it seems a wholly artificial distinction that invites attempts to prove circumstantially the statements of one spouse by proof of what the other says, which should no more be allowed in this context than it would be in the context of attorney and client.¹³

If one spouse discloses confidential marital communications of the other without consent, the

7. *See* proposed-but-rejected FRE 505.

8. *See* ACN, proposed-but-rejected FRE 505 (unlikely that “marital conduct will be affected by a privilege for confidential communications of whose existence the parties in all likelihood are unaware” whereas “other communications privileges, by way of contrast, have as one party a professional person who can be expected to inform the other of the existence of the privilege”).

9. *See, e.g.*, Black, Marital and Physician Privileges—A Reprint of a Letter to a Congressman, 1975 Duke L.J. 45, 48 (by failing to include communications privilege, proposed-but-rejected FRE 505 means “that, however intimate, however private, however embarrassing may be a disclosure by one spouse to another, or some fact discovered, within the privacies of marriage, by one spouse about another, that disclosure or fact can be wrung from the spouse under penalty of being held in contempt of court, if it is thought barely relevant to the issues in anybody’s lawsuit for breach of a contract to sell a carload of apples. It ought to be enough to say of such a rule that it could easily—even often—force any decent person—anybody any of us would want to associate with—either to lie or to go to jail. No rule can be good that has that consequence—that compels the decent and honorable to evade or to disobey it.”).

10. *See, e.g.*, United States v. Montgomery, 384 F.3d 1050 (9th Cir. 2004) (adopting position of majority of states that either spouse may invoke marital confidence privilege; restricting privilege to communicating spouse “invites attempts to prove circumstantially the statements of one spouse by proof of what the other has said”) (quoting authors of this Treatise).

11. United States v. Figueroa-Paz, 468 F.2d 1055, 1057 (9th Cir. 1972); United States v. Neal, 532 F. Supp. 942, 944-947 (D. Colo. 1982).

12. *See* URE 504(a) (1999) (individual has a privilege “to refuse to testify or to prevent his or her spouse or former spouse from testifying as to any confidential communications made by the individual to the spouse during their marriage”).

13. *See* §5.12, *supra*.

privilege can still be asserted by the nondisclosing spouse to block their subsequent use in a legal proceeding.¹⁴ Thus the privilege can be asserted to prevent introduction of an incriminating letter from a husband to his wife where the wife had turned the letter over to the prosecutor.¹⁵

A number of jurisdictions provide by statute that in criminal cases the privilege belongs to the defendant spouse, thereby allowing the defendant spouse to introduce confidential marital communications that are exculpatory.¹⁶ A similar result has been reached by some court decisions.¹⁷

The privilege generally applies only to parties who are legally married,¹⁸ which includes same sex marriages,¹⁹ although a number of states now also extend the privilege to partners in civil unions or domestic partnerships.²⁰ The privilege covers common law marriages to the extent they are recognized by the law of the state where the couple resides.²¹ The privilege has been held

14. *See, e.g.*, *State v. Compton*, 104 N.M. 683, 726 P.2d 837, 841 (1986) (wife disclosed confidential marital communication to police; defendant allowed to assert privilege to prevent introduction of communication at trial), *cert. denied*, 479 U.S. 890.

15. *United States v. Wood*, 924 F.2d 399, 401-402 (1st Cir. 1991) (wife could not waive husband's marital communications privilege with respect to an incriminating letter sent from husband to wife while both were in jail). *Cf. Annot.*, *Applicability of Marital Privilege to Written Communications Between Spouses Inadvertently Obtained by Third Person*, 32 A.L.R.4th 1177, 1180-1184 (1984).

16. *See, e.g.*, Ark. Stat. Ann. §16-41-101, R. Evid. 504(b) (1987); Okla. Stat. Ann. tit. 12, §2504(B) (West 1983); S.D. Codified Laws Ann. §19-13-13 (1987).

17. *See, e.g.*, *United States v. Ammar*, 714 F.2d 238, 257 (3d Cir. 1983) (testimony essential to spouse's defense admissible even if it requires revelation of marital confidences), *cert. denied*, 464 U.S. 936. *See generally* 8 Wigmore §2338(4) (McNaughton rev. 1961) (where an accused spouse needs evidence of marital communications, "the privilege should cease or a cruel injustice may be done").

18. *United States v. Rivera*, 527 F.3d 891, 906 n.4 (9th Cir. 2008) (marital communications privilege recognized by federal common law does not cover conversations between unmarried individuals even though they have children in common); *United States v. Knox*, 124 F.3d 1360, 1365 (10th Cir. 1997) (federal courts routinely apply state law to determine whether couples are spouses for purposes of privilege).

19. *See, e.g.*, Vt. Stat. Ann. tit. 15, §1204(e)(15) (2008); N.H. Rev. Stat. Ann. §457-A:6 (2008). *See also Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (extending the right to marry to same-sex couples in all 50 states).

20. *See, e.g.*, N.J. Stat. Ann. §37:1-32(o) (2008) (civil union); Or. Rev. Stat. §106.340(1) (2007) (domestic partnership). For a discussion of the future of civil unions and domestic partnerships in the wake of *Obergefell*, *see* §5.31, note 25.

21. *United States v. Lustig*, 555 F.2d 737, 747 (9th Cir. 1977) (privilege inapplicable because Alaska recognizes no common law marriage), *cert. denied*, 434 U.S. 926.

inapplicable to spouses who are permanently separated²² or to moribund marriages²³ although other courts properly refuse to condition the privilege on the health of the marriage.²⁴

Communications during course of marriage

The privilege applies only to communications made during the course of the marriage. Premarital or postmarital communications are excluded.²⁵ However, if the confidential communication was made while the parties were married, the privilege may be asserted even after the marriage is terminated.²⁶ The privilege survives the death of a spouse and may be asserted by the spouse's personal representative.²⁷

Protects communications only

Most modern authorities and particularly federal decisions limit the privilege to confidential spousal communications.²⁸ Assertive or expressive conduct that is intended to convey a meaning

22. *United States v. Singleton*, 260 F.3d 1295 (11th Cir. 2001) (wife's taped inculpatory statements to husband whom she was in process of divorcing admissible; court rejects claim of marital communications privilege because spouses were permanently separated with no prospect of reconciliation); *United States v. Porter*, 986 F.2d 1014, 1019 (6th Cir. 1993) (marital communications privilege inapplicable to communications made when spouses were permanently separated).

23. *United States v. Roberson*, 859 F.2d 1376, 1380-1382 (9th Cir. 1988) (husband's admission to estranged wife that he had raped someone was admissible; trial court finding that marriage was "defunct" was not clearly erroneous); *United States v. Nash*, 910 F. Supp. 2d 1133, 1145 (S.D. Ill. 2012) (marital communications privilege inapplicable, in part, because marriage was moribund; spouses intended to separate and wife was recording conversations with husband to provide to authorities).

24. *See, e.g., In re Grand Jury Investigation of Huggle*, 754 F.2d 863, 865 (9th Cir. 1985) (privilege available "to a partner in an existing, albeit disharmonious, marriage").

25. *United States v. Termini*, 267 F.2d 18, 19-20 (2d Cir. 1959), *cert. denied*, 361 U.S. 822 (postmarital communication excluded); *State v. Dikstaal*, 320 N.W.2d 164, 166 (S.D. 1982) (premarital communication excluded).

26. *Pereira v. United States*, 347 U.S. 1, 5 (1954) (divorce does not terminate privilege for confidential marital communications made during marriage).

27. *United States v. Burks*, 470 F.2d 432, 436 (D.C. Cir. 1972) (privilege survives death of spouse).

28. *United States v. Bolzer*, 556 F.2d 948, 951 (9th Cir. 1977) (marital communications privilege did not bar testimony of a former wife of the defendant identifying pants as belonging to the defendant because this testimony pertained to an observation, not a communication).

or message to another is within the privilege,²⁹ but not mere observations of a spouse's noncommunicative behavior, appearance, physical or emotional condition, and similar facts,³⁰ even where such observations might not have occurred but for the marital relationship.³¹ Thus the definition of privileged marital conduct parallels the definition of nonverbal conduct qualifying as a "statement" for purposes of the hearsay doctrine.³² A minority of courts take a broader view and extend the privilege to confidential disclosures and observations that occurred only because of the privacy and trust of the marriage relationship.³³ But even under the broader view a spouse's conduct should not be privileged where the spouse was unaware that he was being observed or was attempting to hide or conceal his conduct from the witness spouse.³⁴ Draft communications addressed to, but never sent to a spouse, are not within the privilege, at least in the absence of sufficient evidence that the drafter intended to send the communication to his spouse.³⁵

Information known to a spouse that is derived from confidential spousal communications is privileged.³⁶ Even verbal expressions by a spouse, however, are sometimes outside the privilege

29. *United States v. Bahe*, 128 F.3d 1440, 1441-1443 (10th Cir. 1997) (physical manner in which husband initiated sex with wife was confidential marital communication, because it was way of signaling his desire); *United States v. Estes*, 793 F.2d 465, 467 (2d Cir. 1986) (testimony concerning a spouse's conduct is precluded "only in the rare instances where the conduct was intended to convey a confidential message from the actor to the observer").

30. *United States v. Brock*, 724 F.3d 817, 821 (7th Cir. 2013) (wife's observations of husband using firearms not within marital communications privilege); *United States v. Miller*, 588 F.3d 897, 904-905 (5th Cir. 2009) (ex-wife's testimony describing defendant processing business payments was not within marital communications privilege).

31. *United States v. Espino*, 317 F.3d 788, 795-796 (8th Cir. 2003) (wife's testimony describing defendant's drug trading activities before and during marriage was not protected by confidential communications privilege; testimony did not describe communicative gesture); *United States v. Estes*, 793 F.2d 465, 467 (2d Cir. 1986) (acts do not become privileged "simply because they are performed in the presence of the actor's spouse").

32. *See* FRE 801(a) (a statement is "nonverbal conduct of a person, if it is intended by the person as an assertion").

33. *People v. Daghita*, 299 N.Y. 194, 86 N.E.2d 172, 174 (1949) (privilege applies to "knowledge derived from the observance of disclosive acts done in the presence of view of one spouse by the other because of the confidence existing between them by reason of the marital relation and which would not have been performed except for the confidence so existing").

34. *United States v. Lewis*, 433 F.2d 1146, 1151 (D.C. Cir. 1970) (clandestine conduct by husband is not privileged).

35. *See United States v. Mohsen*, 587 F.3d 1028 (9th Cir. 2009) (note found in defendant's jail cell with his wife's name on it not privileged; defendant presented no evidence that he intended to deliver the message to his wife); *United States v. Pugh*, 162 F. Supp. 3d 97, 107 (E.D.N.Y. 2016) (draft letter to wife conveying defendant's intent to join ISIL not privileged absent evidence that defendant intended to convey it to wife).

36. *See Blau v. United States*, 340 U.S. 332 (1951) (testimony by husband about whereabouts of wife is presumptively within confidential communications privilege, unless it can be shown such knowledge was not based

when they amount to verbal acts, such as threats of bodily harm, rather than communications of the more usual sort.³⁷

Confidentiality requirement

The privilege applies only to communications that are confidential. Communications made in the presence of third persons,³⁸ or intended to be disclosed to others,³⁹ are outside the privilege. The presence of children of tender years does not destroy the privilege.⁴⁰ The presence of living-at-home children under the age of adulthood during -otherwise-confidential conversations between spouses should not destroy the privilege even though there is no broader privilege covering familial conversations. To say, as some courts do, that the presence of children of the age of 10 or 11 destroys the privilege ignores the reality that their presence is something to be expected and does not usually persuade spouses to avoid saying things that are intended as confidential.⁴¹ To force spouses in such situations to resort to the bedroom or some other truly closed space is to make it hard to claim the benefits of the privilege and to lessen its salutary effect in recognizing the essentially private relationship that constitutes marriage. Courts generally recognize a presumption that communications between a husband and wife are confidential, and the party seeking disclosure has the burden of overcoming the presumption.⁴²

The privilege does not apply where a third person assists in preparing the communication, as

upon a communication); *Hipes v. United States*, 603 F.2d 786, 788 n.1 (9th Cir. 1979) (wife could not testify about nature of husband's job responsibilities because presumably her knowledge came from privileged communications).

37. *Chaney v. State*, 42 Md. App. 563, 402 A.2d 86, 93 (1979) (wife testified she did not report husband to police because he had threatened her; privilege held not to apply because husband's words was verbal act and not substantive communication).

38. *See, e.g., United States v. Marashi*, 913 F.2d 724, 730 (9th Cir. 1990) (presence of a third person destroyed privilege).

39. *United States v. Strobehn*, 421 F.3d 1017, 1021 (9th Cir. 2005) (in bank robbery trial, defendant's letter to wife and 24 others was not shielded by marital communications privilege regardless whether defendant assumed wife would not pass message to others if he survived robbery; letter indicated communication was intended for others besides wife).

40. *Hicks v. Hicks*, 271 N.C. 204, 155 S.E.2d 799, 802 (1967) (presence of eight-year-old child did not destroy confidentiality).

41. *See State v. Muenick*, 26 Ohio App. 3d 3, 498 N.E.2d 171, 173 (1985) (marital communications privilege inapplicable to communications made in presence of two sons who were 10 and 11 at the time).

42. *Pereira v. United States*, 347 U.S. 1, 6 (1954); *United States v. Taylor*, 92 F.3d 1313, 1332 (2d Cir. 1996) (marital communications are "presumptively confidential" and opponent has burden of demonstrating they are not).

happened in one case in which a husband dictated a letter to his wife using a stenographer.⁴³ Nor does the privilege apply to communications that are relayed to the recipient spouse through third persons.⁴⁴

A marital confidence is outside the privilege if the communicating party did not take reasonable precautions to keep it from being heard by outsiders or intercepted by a third party.⁴⁵ Marital communications by email are generally considered to be confidential, but modern cases hold that spousal email communications on work computers or employer email servers, where the employer has the right to monitor communications, lack confidentiality and are not privileged.⁴⁶ A spouse cannot, however, destroy the privilege through connivance by arranging to have a third person overhear the communication without the knowledge of the communicating spouse.⁴⁷ There is a well-recognized exception to the privilege in proceedings in which one spouse is charged with a crime or tort against the person or property of the other spouse or a child of either.⁴⁸ Similarly, an exception is traditionally recognized in any civil action, such as a divorce proceeding, where the

43. *Wolfe v. United States*, 291 U.S. 7, 15-17 (1934) (communications made in presence of third party “usually regarded as not privileged”).

44. *Gutridge v. State*, 236 Md. 514, 204 A.2d 557, 559 (1964) (husband’s message conveyed by third party telling wife to retrieve contents from a locker held not privileged). *See also* *United States v. Pugh*, 162 F. Supp. 3d 97, 113 (E.D.N.Y. 2016) (defendant’s draft letter to wife not intended to be confidential where couple routinely employed *ad hoc* network of interpreters to translate their communications from English to Arabic).

45. *United States v. Dunbar*, 553 F.3d 48 (1st Cir. 2009) (conversation in back of police car not confidential); *United States v. Madoch*, 149 F.3d 596, 602 (7th Cir. 1998) (spousal communications over prison phone lines when one is incarcerated not confidential and not protected). *But see* *United States v. Montgomery*, 384 F.3d 1050 (9th Cir. 2004) (note left by wife for husband in kitchen of home confidential where no showing that note was likely to have been seen by the couple’s children).

46. *See, e.g., United States v. Hamilton*, 701 F.3d 404, 408 (4th Cir. 2012) (just as spouses can “conveniently communicate without use of a stenographer, they can also conveniently communicate without using a work email account on an office computer”).

47. *United States v. Neal*, 532 F. Supp. 942, 947 (D. Colo. 1982), *aff’d*, 743 F.2d 1441 (10th Cir. 1984) (privilege claim upheld where wife allowed federal agents to eavesdrop on telephone conversation without husband’s knowledge), *cert. denied*, 470 U.S. 1086. *See also* Annot., *Spouse’s Betrayal or Connivances as Extending Marital Communications Privilege to Testimony of Third Person*, 3 A.L.R.4th 1104 (1981).

48. *United States v. Breton*, 740 F.3d 1, 12 (1st Cir. 2014) (exception to marital communications privilege covers offenses against a child of either spouse; defendant’s statements to wife after she turned laptop computer over to authorities that “she had screwed up” and that he “was going to jail and lose his job” admissible). *Compare* *United States v. Banks*, 556 F.3d 967 (9th Cir. 2009) (exception limited to birth children, step-children, or their “functional equivalent”; exception found not to extend to grandchild) *with* *United States v. Bahe*, 128 F.3d 1440, 1446 (10th Cir. 1997) (exception covers child relative visiting home) *and* *United States v. Underwood*, 859 F.3d 386, 392 (6th Cir. 2017) (exceptions applied to communications relating to offense against spouse’s granddaughter).

spouses are adverse parties.⁴⁹

Virtually all circuits recognize an exception for marital confidences that relate to ongoing or future crimes in which the spouses were joint participants at the time of the communication,⁵⁰ although some courts limit the exception to communications “in furtherance” of such activity⁵¹ and some limit the exception to “patently illegal activity.”⁵² The exception is justified on the theory that the need for effective law enforcement must prevail when two spouses engage in joint criminal activity, and the interest in protecting marital privacy is diminished in this setting.⁵³

The joint participants exception applies even where only one of the spouses is prosecuted for their joint crimes.⁵⁴ The exception does not apply to communications made before both spouses have become involved in the criminal activity⁵⁵ or after the conspiracy has been terminated by arrest or otherwise.⁵⁶

49. *See* URE 504(d)(1)(1999).

50. *See, e.g.*, *United States v. Darif*, 446 F.3d 701, 706 (7th Cir. 2006) (husband and putative wife were indicted as conspirators in marriage fraud; his letter urging her to change testimony to avoid charge if marriage fraud charge was admissible against husband under joint crime exception to communications privilege even if they were married; they were participants in underlying offense); *United States v. Westmoreland*, 312 F.3d 302, 309 (7th Cir. 2002) (initial disclosure of crime to spouse is covered by marital communications privilege; if the spouse later joins in conspiracy, communications from that point are not protected).

51. *See, e.g.*, *United States v. Picciandra*, 788 F.2d 39 (1st Cir. 1986).

52. *United States v. Evans*, 966 F.2d 398, 401 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 502.

53. *United States v. Marashi*, 913 F.2d 724, 731 (9th Cir. 1990) (policies underlying marital communications privilege “pale in the face of public concerns about bringing criminals to justice”).

54. *United States v. Marashi*, 913 F.2d 724, 731 (9th Cir. 1990) (exception applies even where government decides “to forego prosecution of one spouse in order to secure her testimony against the other”).

55. *United States v. Estes*, 793 F.2d 465, 467-468 (2d Cir. 1986) (privilege applies to incriminating communications of husband made to wife before she became involved in crime but not to those made subsequently).

56. *United States v. Wood*, 924 F.2d 399, 401-402 (1st Cir. 1991) (privilege applies to incriminating letter sent by husband to wife after both had been arrested and were in jail; court finds letter was written “after the conclusion of the alleged conspiracy between them”).