

**Module X: Marital Privilege and Confidentiality of Victim Records****Table of Contents and Learning Objectives**

(10 Pages)

**Learning Objectives:**

This module will enable judges to:

- Determine whether an intimate partner sexual assault offender may invoke the doctrines of spousal immunity and marital communication privilege.
- Determine whether, and if so, how, an intimate partner sexual abuse victim's confidential records may be disclosed.

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## Module X: Marital Privilege and Confidentiality of Victim Records

### Marital Privilege: Introduction

#### Marital Privilege: Spousal Immunity and Marital Communications

"If the promotion of marital peace, and the apprehension of marital dissension, are the ultimate ground of the privilege, it is an overgenerous assumption that the wife who has been beaten, poisoned, or deserted is still on such terms of delicate good feeling with her spouse that her testimony must not be enforced lest the iridescent halo of peace be dispelled by the breath of disparaging testimony."

— JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §2239 (1961) at 234.

Two distinct doctrines historically prevented compelled testimony of one spouse against the other: spousal immunity and the marital communication privilege.

## Resources

### *Nonperiodical Literature*

- John Henry Wigmore, VOL. JOHN T. McNAUGHTON ED. EVIDENCE IN TRIALS AT COMMON LAW (1961)

## Resources

## Cases

- Trammel v. United States, *Trammel v. United States*, 445 U.S. 40 (1980)
- State v. Taylor, *State v. Taylor*, 642 So. 2d 160, 1994 LA. LEXIS 1936 (1994)

## Module X: Marital Privilege and Confidentiality of Victim Records

## Spousal Immunity

**Spousal immunity** barred one spouse from testifying against the other. In most jurisdictions it applied only in criminal matters. The rule stemmed from the historical presumption that a defendant could not testify in his own behalf because of interest in the proceeding, and that because husband and wife were legally the same person, one spouse was incompetent to testify against the other.

It is now recognized that the accused has an unequivocal right to testify on his own behalf. Spousal immunity was therefore eliminated in *Trammel v. United States*, 445 U.S. 40 (1980) in those instances where the witness-spouse voluntarily waives immunity, although a reluctant spouse may not be compelled to testify. Thus in most jurisdictions nothing prevents a spouse from testifying voluntarily about circumstances concerning marital rape, but the spouse-witness-victim cannot generally be compelled to do so. However, courts have found exceptions to spousal immunity rules where the spouse is a victim of abuse and refuses to testify for fear of retribution or because the abuser coerces the victim.

In *State v. Taylor*, 642 So. 2d 160, 1994 La. LEXIS 1936 (1994) the court declined to recognize a severely battered victim's invocation of spousal immunity. The court wrote:

"[T]he dynamics of spousal abuse and domestic violence cannot be ignored. Fear, self-blame, and other emotional factors often leave a battered spouse unable to make a sound judgment as to whether to testify against an abusive spouse. Exercise of the spousal witness privilege may be the result of coercion, fear, subjugation, or undue influence, perhaps not even recognized by the abused spouse in some circumstances....

"[W]e...feel justified and even compelled to limit exercise of the privilege where facts and circumstances established by proper evidence indicate the privilege is being exercised because of fear, threats, or coercion...We do not believe it was the legislative intent to make the privilege available under circumstances such as these where sanctity of the marriage and marital harmony are hardly served."

— *Id.* at 166.

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### Marital Communication Privilege

The marital communication privilege is still in effect and protects against disclosure of any confidential communication made during marriage.

Even if a spouse-witness elects to waive spousal immunity and testify as to events that occurred during the marriage, the other spouse can still refuse to waive the marital communication privilege and thus block disclosure of any confidential communications.

However, a communication between husband and wife is not automatically deemed confidential but rather depends on the context and the purpose for which it was made. In *Commonwealth v. Spetzer*, 572 Pa. 17, 813 A. 2d 707 (2002), the defendant, who had repeatedly raped his wife, was on trial for raping his stepdaughter. The Pennsylvania Supreme Court rejected his claim of marital communication privilege respecting his communications to his wife about his plans to rape her daughters. The court wrote:



"It is safe to say that the communications appellee made to his wife here—concerning appellee's past (e.g., rape), continuing (e.g., witness intimidation), and future-intended (e.g., attempted sexual assaults) crimes against his wife and her minor children—are not the sensitive, marital harmony-inspiring communications contemplated by the common law authorities, or the Pennsylvania General Assembly in erecting this privilege. To the contrary, these communications were intended to further marital disharmony."

— *Id.* at 39.

Some states continue to vest the privilege in the defendant-spouse rather than the witness-spouse. In those circumstances, however, most states have recognized an exception when one spouse has committed a crime of violence against the other. However, four states still have confidential communications privileges with no spousal crimes exception, and even in those states that do, the spousal exception may not go far enough. In *Reconsidering Spousal Privilege After Crawford*, 2006, Professor R. Michael Cassidy argues:

"Many jurisdictions exclude oral threats made by one spouse against another from the confidential communications privilege, treating such threats essentially as verbal acts rather than private conversations. But such a judicial narrowing of the confidential communications privilege does not assure that non-threatening statements made by the defendant during or after an incident of domestic violence will be admitted in those states that have not enacted a spousal crimes exception. For example, statements by the defendant after his arrest begging his spouse for forgiveness, seeking reconciliation, or encouraging her not to press criminal charges are uniquely probative of guilt and helpful to the jury in understanding a cycle of abuse; however, they may not be admissible in states that have not enacted an express exception to the confidential communication privilege for cases alleging inter-spousal crime."

— *Id.* at 369-370 (citations omitted).

### Resources

#### Cases

- Commonwealth v. Spetzer, *Commonwealth v. Spetzer*, 572 Pa. 17, 813 A.2d 707 (2002)

#### Articles

- R. Michael Cassidy, *Reconsidering Spousal Privileges after Crawford*, VOL. 33 AMERICAN JOURNAL OF CRIMINAL LAW 339 (2006)

**Resources****Cases**

- Jaffee v. Redmond, *Jaffee v. Redmond*, 518 U.S. 1 (1996)

**Module X: Marital Privilege and Confidentiality of Victim Records****Confidentiality of Victim Records**

Defendants frequently seek information from third parties concerning treatment of a victim of sexual assault or domestic violence. Laws governing such disclosure vary from state to state; those laws may or may not be consistent with federal law on the subject.



In general, evidence of this kind that is not in the possession of a prosecutor may be privileged. Evidentiary privileges, which arose through common law and statute, protect certain relationships by prohibiting testimony concerning confidential communications that take place between persons in these protected relationships. Attorney-client, priest-penitent and physician-patient are all relationships that society values. Without a guarantee of confidentiality, the vitality and worth of these associations will weaken. Such

communications are therefore deemed "privileged" in every jurisdiction and are protected through evidentiary rules upholding their confidential nature.

In cases involving sexual assault and domestic violence, a defendant may argue that the Sixth Amendment right to confrontation allows discovery of medical and counseling records concerning the treatment or support of the victim. The person maintaining the record may not be able to claim a privilege. For example, a sexual assault counselor may not have the credentials necessary to qualify as a psychotherapist pursuant to a psychotherapist-patient privilege. Yet forced disclosure of such records can lead a victim to avoid prosecution rather than submit to such an invasion of privacy.

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### Absolute Privilege

In *Jaffee v. Redmond*, 518 U.S. 1 (1996), the administrator of a decedent's estate filed an action alleging that the decedent's constitutional rights had been violated when he was shot and killed by the respondent, an on-duty police officer. The petitioner sought notes made by a clinical social worker during counseling sessions with the respondent after the shooting. The U.S. Supreme Court found that Rule 501 of the Federal Rules of Evidence authorized federal courts to define new privileges, and that the psychotherapist-patient privilege, like the spousal and attorney-client privileges, is "rooted in the imperative need for confidence and trust," *Id.* at 10. The Court recognized for the first time a psychotherapist-patient privilege protecting communications made to a psychotherapist in the course of treatment.

Finding that the "reasons for recognizing privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a clinical social worker," the Court next held that the privilege should be extended to conversations with clinical social workers in the course of psychotherapy. *Id.* at 15. Finally, the Court also explicitly rejected an evidentiary interest vs. privacy interest balancing test on the privilege, stating that "an uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Id.* at 18.

### Resources

#### Cases

- *Jaffee v. Redmond*, *Jaffee v. Redmond*, 518 U.S. 1 (1996)
- *Pennsylvania v. Ritchie*, *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987)

**Resources****Cases**

- Pennsylvania v. Ritchie, *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987)

**Module X: Marital Privilege and Confidentiality of Victim Records****Qualified Privilege**

In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the U.S. Supreme Court considered the balance a court must strike between rights of defendants and privacy interests of victims in determining admissibility of a child abuse counseling center's records. A plurality of the Court found a qualified privilege only, directing that a trial court must conduct an *in camera* review of privileged records to determine whether the contents were "material."

So, while an absolute privilege provides complete protection against disclosure of records, precluding introduction for any purpose, a qualified privilege confers a general right of confidentiality, but enables the court to authorize disclosure when defendant's rights outweigh the victim's interests. States vary widely, however, on how that determination is reached, including:

- whether the court must weigh the matter *in camera*
- whether all records are turned over to the defense directly, or
- some intermediate measure is taken.

## Module X: Marital Privilege and Confidentiality of Victim Records

### Compelling Disclosure: Best Practices

Where not clearly guided by statute, it is best practice for a court considering an application to compel disclosure of information relating to treatment or services emanating from intimate partner sexual abuse to try to protect the important confidentiality considerations that are unique to domestic violence and sexual assault. Where disclosure may be indicated, documents should always first be reviewed *in camera*, and never turned over directly to the defense or respondent. Any information that could compromise the safety of the victim must be redacted.

Confidentiality is particularly important in the context of domestic violence. Since their inception, organizations serving battered women have gone to great lengths to preserve confidentiality because the safety of their clients and staff depend on it. Shelter locations may be secret. Shelter and counseling programs take care in telephone practices, correspondence and court papers not to disclose information such as clients' addresses after they leave the shelter. Without such precautions, a battered woman would most often be reluctant to seek help at all.

When sexual assault is added, few women would disclose the extent of the abuse they have experienced without some sense that the information they are imparting will remain private.

In the case of *People v. Turner*, 109 P. 3d 639 (2005), therefore, the Colorado Supreme Court overturned a trial court order directing domestic violence advocates to disclose to the criminal defendant the whereabouts of their client, the alleged victim in the domestic violence prosecution. The shelter counselors were prepared to be held in contempt of court rather than disclose information they believed might endanger their client.

## Resources

### Cases

- *People v. Turner*, *People v. Turner*, 109 P. 3d 639 (2005)

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### Federal and State Confidentiality Legislation

Federal and state legislatures have also taken steps to ensure the privacy of battered women and confidentiality in their interactions with support services. The Family Violence Prevention and Services Act requires any program seeking a grant to provide documentation that "procedures have been developed...to assure the confidentiality of records pertaining to any individual provided family violence prevention or treatment services." (42 U.S.C. 10402(a)(2)(E), 1994). The Victims of Crime Act contains a similar provision (42 U.S.C. 10604(a), 1994).

Importantly, many states have enacted a counselor-battered woman privilege. See Michael B. Bressman & Fernando R. Laguarda, *Annual Survey of the United States Supreme Court and Federal Law*, Article: *Jaffee v. Redmond: Towards Recognition of a Federal Counselor-Battered Woman Privilege*, 30 CREIGHTON L. REV., 319 (1997), citing DEPARTMENT OF JUSTICE, REPORT TO CONGRESS ON THE CONFIDENTIALITY OF COMMUNICATIONS BETWEEN SEXUAL ASSAULT OR DOMESTIC VIOLENCE VICTIMS AND THEIR COUNSELORS, FINDINGS AND MODEL LEGISLATION 3 (1995).

For a current description of laws concerning communications between a sexual assault victim and a counselor, see: U.S. Dept. of Justice, LEGAL SERIES BULLETIN No. 8: PRIVACY OF VICTIM'S COUNSELING COMMUNICATIONS, NCJ-192264, available online [here](#).

See also American Bar Association Commission on Domestic Violence, Summary of Domestic Violence/Sexual Assault Advocate Confidentiality Laws (January 2007), available online [here](#).

### Resources

#### Articles

- Michael B. Bressman, Fernando R. Laguarda, *Annual Survey of the United States Supreme Court and Federal Law: Article: Jaffee v. Redmond: Towards*, VOL. 30 CREIGHTON L. REV. 319 (1997)

#### Online

- [Summary of Domestic Violence/Sexual Assault Advocate Confidentiality Laws](#)

#### Nonperiodical Literature

- U.S. Dept. of Justice, [LEGAL SERIES NO. 8: PRIVACY OF VICTIM'S COUNSELING COMMUNICATIONS](#) (2002)

#### Statutes

- VOL. 42 THE FAMILY VIOLENCE PREVENTION AND SERVICES ACT 10402(a)(2)(E) (1994)
- VOL. 42 THE VICTIMS OF CRIME ACT 10604(a) (1994)

**Module X: Marital Privilege and Confidentiality of Victim Records****Key Points: Marital Privilege and Confidentiality of Victim Records**

- Spousal immunity no longer prevents a victim-spouse from testifying against her spouse if she so chooses; she cannot, however, be compelled to do so.
- Although marital privilege operates to block disclosure of confidential communications made during the marriage, the majority of states have a statutory or caselaw exception where the communication concerns a crime committed by one spouse against the other.
- In cases of extreme violence and "confidential communications" respecting future crimes against other family members, courts have compelled unwilling spouse-victims to testify and rejected a husband's claim of marital privilege to silence his wife.
- Confidentiality of communications between victims of intimate partner sexual abuse and those who assist them—counselors, advocates, medical personnel—is of fundamental importance. Without assurances of confidentiality, a victim may find her safety compromised even further when she tries to obtain help.
- Laws governing confidentiality are both legislatively and judicially created. They vary significantly from jurisdiction to jurisdiction. Whenever possible, a court should construe the laws of its jurisdiction to support confidentiality of communications for victims of intimate partner sexual abuse who have sought assistance and safety.
- If disclosure is nevertheless required, the court should take every possible measure to ensure that the safety of the victim is protected, as well as the safety of those who have assisted her.
- Documents should be reviewed *in camera* prior to disclosure to the defense. Any identifying information that could compromise the victim's safety, such as her address, phone number or the location of a secret domestic violence shelter, should be redacted.