

A defendant has been charged with making a false statement to a federally insured financial institution to secure a loan. At trial, the prosecutor calls the defendant's wife as a willing witness to testify that the defendant told her in confidence that he had misrepresented his assets on the loan application.

The defendant objects to his wife's testimony. Should the testimony be admitted?

- A. No, because even though the wife is a willing witness, the defendant has the right to exclude confidential marital communications in federal court.
- B. No, but only if the law of the state where the defendant and his wife reside recognizes a privilege for confidential marital communications.
- C. Yes, because in federal court the right not to testify belongs to the testifying spouse, and she is a willing witness.
- D. Yes, because while the adverse testimonial privilege is recognized in federal court, the marital communications privilege is not.

Explanation:

Spousal privileges

	Purpose	Privilege holder	Duration
Spousal-immunity	Shields witness-spouse from testifying against spouse in criminal case about matters that occurred before or during marriage	Witness-spouse	Only during active marriage
Marital-communications	Protects against disclosure of confidential spousal communications made during marriage in criminal & civil cases	Both spouses	Continues after divorce

In federal court, claims of privilege are generally governed by the common law. Two common law privileges apply to **spousal testimony**:

Spousal-immunity (ie, adverse-testimony) privilege – allows a person to refuse to testify against his/her spouse in a criminal case about any matter that occurred before or during marriage

Marital-communications privilege – protects confidential communications between spouses during the marriage from disclosure, discovery, or admission in criminal and civil cases **(Choice D)**

The **spousal-immunity privilege** belongs only to the **witness-spouse**, who can **choose to waive** the privilege **and testify** against the defendant-spouse (as seen here). But the **marital-communications privilege** belongs to **both spouses**, so one spouse can **prevent the other from disclosing** a confidential communication. Therefore, the wife's testimony about confidential marital communications should be excluded on this basis **(Choice C)**.

(Choice B) Federal common law privileges apply in federal cases except (1) when the Constitution, a federal statute, or a Supreme Court rule provides otherwise or (2) in diversity cases, where the rules of the state where the court (not the parties) sits will apply. Neither exception applies to this federal criminal case.

Educational objective:

Under the spousal-immunity (ie, adverse-testimony) privilege, a witness-spouse can refuse to testify against his/her spouse in a criminal case about any matter. Under the marital-communications privilege, both spouses can protect confidential communications during marriage from disclosure, discovery, or admission in all cases.

References

Fed. R. Evid. 501 (privilege in general).

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