

A defendant has pleaded not guilty to a federal bank robbery charge.

The principal issue at trial is the identity of the robber. The prosecutor has called the defendant's wife to testify to the clothing that the defendant wore as he left their house on the day the bank was robbed, expecting her description to match that of eyewitnesses to the robbery. Both the defendant and his wife have objected to her testifying against the defendant.

Should the wife be required to testify?

- A. No, because the defendant has a privilege to prevent his wife from testifying against him in a criminal case.
- B. No, because the wife has a privilege not to testify against her husband in a criminal case.
- C. Yes, because the spousal testimonial privilege does not apply in criminal cases.
- D. Yes, because the wife's viewing of the defendant's clothing was not a confidential communication.

Explanation:

Two common law privileges apply to **spousal testimony** when in federal court:

Spousal-communications privilege – protects confidential communications between spouses during the marriage from disclosure in a civil or criminal case, even after the marriage has ended

Spousal-immunity (ie, spousal-testimonial) privilege – protects persons in an active marriage from **testifying against** their **spouse** in a **criminal case** about any matters that occurred before or during the marriage **(Choice C)**

The **witness-spouse** holds the spousal-immunity privilege and therefore has the **unilateral right** to either (1) **refuse to testify** against the other spouse or (2) waive the privilege and testify.

Here, the wife holds the spousal-immunity privilege because she is the testifying spouse. Therefore, the defendant cannot prevent her from testifying against him in his criminal prosecution for bank robbery **(Choice A)**. Nor can the prosecution require her to do so.

(Choice D) The spousal-communications privilege allows either spouse to refuse to disclose or prevent the other from disclosing confidential communications—not mere observations (eg, noticing a spouse's clothing). But the wife need not testify if she asserts the spousal-immunity privilege.

Educational objective:

The spousal-*communications* privilege protects confidential communications during the marriage from disclosure in a civil or criminal case. In contrast, the spousal-*immunity* privilege protects persons from being required to testify against their spouse in a criminal case about events that occurred before or during the marriage.

References

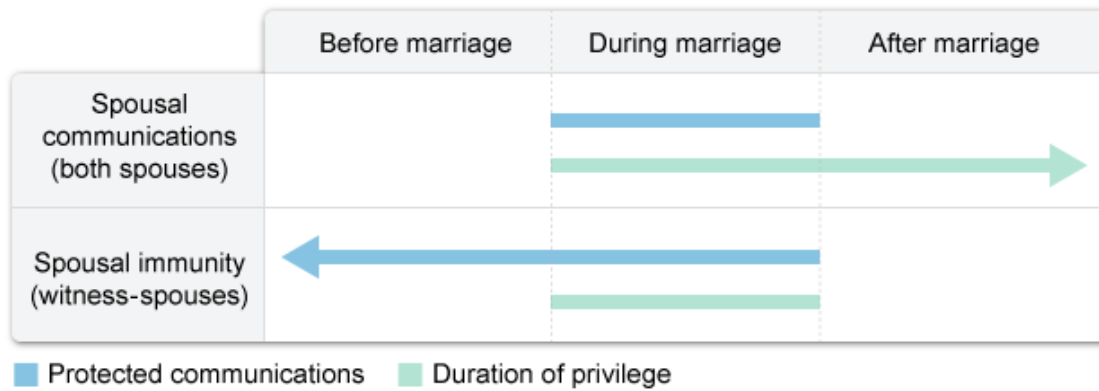
Trammel v. United States, 445 U.S. 40, 53 (1980) (vesting spousal-immunity privilege in the witness-spouse).

Fed. R. Evid. 501 (privileges).

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Spousal communications v. Spousal immunity



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