

RULE 504. HUSBAND-WIFE PRIVILEGES
(this the current rule)

(a) Confidential Communication Privilege.

(1) *Definition.* A communication is confidential if it is made privately by any person to the person's spouse and it is not intended for disclosure to any other person.

(2) *Rule of privilege.* A person, whether or not a party, or the guardian or representative of an incompetent or deceased person, has a privilege during marriage and afterwards to refuse to disclose and to prevent another from disclosing a confidential communication made to the person's spouse while they were married.

(3) *Who may claim the privilege.* The confidential communication privilege may be claimed by the person or the person's guardian or representative, or by the spouse on the person's behalf. The authority of the spouse to do so is presumed.

(4) *Exceptions.* There is no confidential communication privilege:

(A) *Furtherance of crime or fraud.* If the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or fraud.

(B) *Proceeding between spouses in civil cases.* In (A) a proceeding brought by or on behalf of one spouse against the other spouse, or (B) a proceeding between a surviving spouse and a person who claims through the deceased spouse, regardless of whether the claim is by testate or intestate succession or by *inter vivos* transaction.

(C) *Crime against spouse or minor child.* In a proceeding in which the party is accused of conduct which, if proved, is a crime against the person of the spouse, any minor child, or any member of the household of either spouse, or, in a criminal proceeding, when the offense charged is under Section 25.01 Penal Code (Bigamy).

(D) *Commitment or similar proceeding.* In a proceeding to commit either spouse or otherwise to place that person or that person's property, or both, under the control of another because of an alleged mental or physical condition.

(E) *Proceeding to establish competence.* In a proceeding brought by or on behalf of either spouse to establish competence.

(b) Privilege not to Testify in Criminal Case.

(1) *Rule of privilege.* In a criminal case, the spouse of the accused has a privilege not to be called as a witness for the state. This rule does not prohibit the spouse from testifying voluntarily for the state, even over objection by the accused. A spouse who testifies on behalf of an accused is subject to cross-examination as provided in rule 611(b).

(2) *Failure to call as witness.* Failure by an accused to call the accused's spouse as a witness, where other evidence indicates that the spouse could testify to relevant matters, is a proper subject of comment by counsel.

(3) *Who may claim the privilege.* The privilege not to testify may be claimed by the person or the person's guardian or representative but not by that person's spouse.

(4) *Exceptions.* The privilege of a person's spouse not to be called as a witness for the state does not apply:

(A) *Certain criminal proceedings.* In any proceeding in which the person is charged with a crime against the person's spouse, a member of the household of either spouse, or any minor, or in an offense charged under Section 25.01, Penal Code (Bigamy).

(B) *Matters occurring prior to marriage.* As to matters occurring prior to the marriage.

Notes and Comments

Comment to 1997 change: The rule eliminates the spousal testimonial privilege for prosecutions in which the testifying spouse is the alleged victim of a crime by the accused. This is intended to be consistent with Code of Criminal Procedure article 38.10, effective September 1, 1995.

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