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He Loves Me? He Loves Me Not? He Wants To Keep Me from Testifying?

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He loves me? He loves me not? He wants to keep me from testifying?

By Cynthia Ford

Valentine's Day having just passed, I thought I would devote this month to the Spousal Privilege as it exists in Montana. They don't show this on any of the jewelry store ads in early February, but under some circumstances, buying a wedding ring might also buy you freedom. You don't have to return the ring, but you should at least be aware of the legal implications of the nuptials.

PRIVILEGES IN GENERAL

A privilege protects a confidential communication between two qualifying persons from disclosure in discovery¹ and at trial, even if the communication is both relevant and extremely important to the determination of a fact at issue in the litigation. Every privilege necessarily impedes the search for truth, and consequently, justice. I think of privilege as a gag in the mouth of someone who KNOWS, having gotten the information from "the horse's mouth," but who is prevented from saying what he was told, even though in some circumstances he affirmatively may want to disclose the contents of the communication.

The justification for the privileges which are recognized by the law is uniform: the relationship between the persons to the communication itself serves the public good, and the ability of the parties to speak freely and without fear of later disclosure is essential to that beneficial relationship. Thus, if the communication is made in confidence and kept in confidence, the law will honor that confidence. The relationship in effect trumps the interest in the complete truth. M.C.A. 26-1-801 expresses this:

26-1-801. Policy to protect confidentiality in certain relations. There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the cases enumerated in this part.

THE MONTANA V. FEDERAL APPROACHES TO PRIVILEGE

The state and federal privilege regimes are very different

¹ Both the state and federal versions of Civil Procedure Rule 26 state that a party may discover any matter which is relevant (and this term is construed more broadly than at trial) AND "non-privileged."

procedurally. Under the FRE, in non-diversity cases², federal evidentiary privileges are expressly judge-made. FRE 501 states:

The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.³

FRE 501 is a Congressional revision to the version of FRE Article V submitted by the Supreme Court, which actually contained several specific rules, each setting forth the terms of a particular privilege. Congress morphed these into a single rule, 501, conferring the development of federal evidentiary privilege law on the federal courts, case-by-case. For more explanation of this remarkable sleight-of-hand, see *Trammel v. U.S.* Montana's privilege law is exactly the opposite. Montana's privileges are found solely in legislation. MRE 501 provides:

Rule 501. Privileges recognized only as provided. Except as otherwise provided by constitution, statute, these rules, or other rules applicable in the courts of this state, no person has a privilege to:

- (1) refuse to be a witness;
 - (2) refuse to disclose any matter;
 - (3) refuse to produce any object or writing;
- or
- (4) prevent another from being a witness or disclosing any matter or producing any object or writing.

In addition to MRE 501, Article V contains one specific

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² FRE 501's last sentence provides that in diversity cases, privilege is to be determined by state law. This clear statement obviates the need for that sticky *Erie* determination of whether evidentiary privileges are substantive (state law) or procedural (federal).

³ The Constitutional reference is to the privilege against self-incrimination. Congress has not enacted any privilege statutes itself, and the only other "rule prescribed by the Supreme Court" is FRE 502 (effective 12/1/2011), which deals not with a privilege per se but treatment of disclosures of attorney-client and work-product material.

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privilege (Rule 502, privilege of government to refuse to disclose the identity of a confidential informant, which became effective in 1990). The rest of Montana's privileges are located primarily in Title 26, Chapter 1, Part 8 of the MCA, entitled "Privileges." The Commission Comment to MRE 501 makes it very clear that Montana intends its privilege law to come from the legislature, rather than the judicial approach adopted by the FRE:

The rule provides that only the privileges incorporated by reference shall be recognized and so has the effect of cutting off any further case law recognition of privileges. The final four clauses in this rule represent a delineation of the elements of a testimonial privilege and are intended to clarify privileges generally. This rule represents a new approach to the use of privileges in Montana courts.

Notwithstanding the procedural differences in the creation of privileges, both the Montana and the U.S. Supreme Courts hold that privileges are and to be narrowly construed precisely because they abrogate the search for truth.

Testimonial exclusionary rules and privileges contravene the fundamental principle that "the public ... has a right to every man's evidence." As such, they must be strictly construed and accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel v. United States* (1980), 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186, 195 (citations omitted).

State v. MacKinnon, 1998 MT 78, 288 Mont. 329, 336, 957 P.2d 23, 27. See also, *State v. Gooding*, 1999 MT 249, 296 Mont. 234, 238, 989 P.2d 304, 307.

SPOUSAL TESTIMONIAL V. COMMUNICATIONS PRIVILEGES

States and the federal government differ about which relationships to privilege, but some sort of spousal privilege (communication, testimonial, or both: see below) is common. The marital privileges all stem from the public policy in favor of marriage. "[T]he purpose behind spousal privilege is to preserve the sanctity of the marriage and home." *In re Marriage of Sarsfield*, 206 Mont. 397, 406, 671 P.2d 595 (1983).

There are two types of spousal privilege, each aimed at the public policy in favor of marriage but differing in terms of the way in which the privilege protects marriage. Jurisdictions recognize one or both. The spousal testimonial privilege prevents a person married at the time of trial from testifying, in order to preserve the then-existing marriage. My visual is the witness

4 Primarily is not the same as exclusively. As always, a wise practitioner should search the rest of the M.C.A. for scattered exceptions. Spousal privilege is a good example: there are applicable statutes in both Title 26 and Title 46.

and defendant leaving the courtroom hand-in-hand, which would presumably not occur if she just testified against him. (Some of my students report that their marriages are strong enough that he would forgive her for her adverse testimony, but I have lived longer). The spousal communications privilege, on the other hand, depends on the marital status of the parties at the time the communication between the spouses occurred, even if they are no longer married at the time of the testimony. The theory is that free communication without fear of compelled disclosure is good for marriage, and marriage is good for society. My nickname for this privilege is "the pillow talk privilege," but I wouldn't use that in court and of course it covers all confidential communications between spouses, whether in the bedroom, kitchen, car, or chairlift.

The spousal testimonial privilege operates to keep a spouse off the stand altogether in a case involving the other spouse. In its most traditional, Olde Englande, form, this privilege was a logical extension of the privilege against self-incrimination. The wife was seen as the property of the husband, so if she testified against her husband, it was as if he was testifying against himself. Although this property view of marriage no longer exists, the privilege is extant in many jurisdictions. In fact, the U.S. Supreme Court recently acknowledged the privilege even as it narrowed it in *Trammel v. U.S.*, 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186 (holding that the privilege belongs solely to the witness-spouse, who is the best judge of whether there is a marriage worth preserving⁵):

[The testimonial] privilege is invoked, not to exclude private marital communications, but rather to exclude evidence of criminal acts and of communications made in the presence of third persons.

Trammel v. United States, 445 U.S. 40, 51, 100 S. Ct. 906, 913, 63 L. Ed. 2d 186 (1980). The Supreme Court elected to maintain only a limited form of the privilege, vesting the decision about whether to testify in the witness-spouse whether than the defendant-spouse:

The contemporary justification for affording an accused such a privilege is also unpersuasive. When one spouse is willing to testify against the other in a criminal proceeding-whatever the motivation-their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve. In these circumstances, a rule of evidence that permits an accused to prevent adverse spousal testimony seems far more likely to frustrate justice than to foster family peace

445 U.S. at 52, 100 S. Ct. at 913, 63 L. Ed. 2d 186 (1980).

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5 Mrs. Trammel wanted to testify for the government in her husband's drug case. The defendant argued that her testimony was not truly voluntary, induced as it was by an offer of immunity from her own prosecution. The Supreme Court ruled in favor of the government, holding that the reason Mrs. Trammel agreed to take the stand was irrelevant:

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The federal system, then, recognizes both the spousal communications privilege and a limited form of the spousal testimonial privilege. These federal spousal privileges apply to cases in federal court arising from federal questions, but not to diversity cases (see F.R.E. 501). Montana's privilege law determines the extent of the spousal privilege in both Montana state courts and in diversity actions in federal court where Montana law is the rule of decision.

MONTANA'S SPOUSAL PRIVILEGE LAW: COMMUNICATIONS BUT NOT TESTIMONIAL MARITAL PRIVILEGE

Montana, like the federal courts, does include a privilege for spouses. In fact, it is the first of the twelve specific privileges established by the Montana legislature. In its current form, the spousal privilege statute reads:

26-1-802. Spousal privilege. Neither spouse may, without the consent of the other, testify during or after the marriage **concerning any communication made by one to the other during their marriage.** The privilege is restricted to communications made during the existence of the marriage relationship and does not extend to communications made prior to the marriage or to communications made after the marriage is dissolved. The privilege does not apply to a civil action or proceeding by one spouse against the other or to a criminal action or proceeding for a crime committed by one spouse against the other or against a child of either spouse. (Emphasis added)

Another, not inconsistent, statute appears in Title 46, Criminal Procedure:

46-16-212. Competency of spouses

(1) Neither spouse may testify to the communications or conversations between spouses that occur during their marriage unless:

(a) consent of the defendant-spouse is obtained;

(b) the defendant-spouse has been charged with an act of criminal violence against the other; or

(c) the defendant-spouse has been charged with abuse, abandonment, or neglect of the other spouse or either spouse's children.

(2) Except as provided in subsection (1), a spouse is a competent witness for or against the other spouse.

The Montana Supreme Court has characterized this statute

as dealing with the competency of a witness-spouse, while Title 26 provides the privilege for communications made during the marriage when a spouse is a witness: "both the heading and subsection (2) of § 46-16-212, MCA, are clear that the statute relates to the competency of spouses to testify, not spousal privilege." *State v. Baldwin*, 2003 MT 346, 318 Mont. 489, 495, 81 P.3d 488, 493.

In *State v. Moore*, 254 Mont. 241, 836 P.2d 604 (1992), the Court addressed MCA 46-16-212, making it clear that it destroys any argument based on the spousal testimonial privilege (which would make a spouse incompetent as a witness):

We conclude that testimony by the wife Michelle Moore, if it meets other rules of evidence, is not to be excluded on the grounds of her competency as a witness, unless it is testimony of communications and conversation between the spouses during their marriage.

254 Mont. at 247, 836 P.2d at 608.

Neither of the above statutes privileges spousal testimony in general. As *Baldwin* recognized, MCA 46-16-212(2) expressly disallows a "spousal testimonial privilege" in criminal cases, and the Commission Comment to its 1991 amendment explicitly states: "Subsection (2) emphasizes that the privilege applies only to communications or conversations." This conforms to the current language of MCA 26-1-802. The prior version of the same statute contained an additional provision: "A husband cannot be examined for or against his wife without her consent or a wife for or against her husband without his consent." The removal of this language in the 2005 legislative session effectively abolished the spousal testimonial privilege. Thus, in Montana civil and criminal cases since 2005, there is a spousal communication privilege but not a general spousal testimonial privilege.

The privilege applies to communications made between spouses during their marriage, made and kept in confidence, at least by the spouse asserting the privilege. The witness spouse can be compelled to testify as to what she observed, even during the marriage, but not as to what her husband told her during the marriage, if he didn't tell anyone else about their communication. Because this privilege, like all others, is construed narrowly, it does not protect communications between unmarried people, no matter how long or how committed their relationship.⁶ It does apply to couples who are married either through the statutory process or through common law.⁷ Any communication made after that date of the marriage, until the end of the marriage, is privileged. Communications made before or after the marriage are not privileged.

If a couple follows the statutory route to marriage, it is

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⁶ Because Montana explicitly forbids same-sex marriage, the privilege is unavailable to same-sex couples, even where they have participated in a "commitment" or other marriage-like ceremony, and even where they have registered with a city government (Missoula has such a registry) as life partners.

⁷ MCA 40-1-403 expressly provides: "**Validity of common-law marriage.** Common-law marriages are not invalidated by this chapter..." Montana is commonly viewed as having the most liberal common-law marriage law in the country.

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easy to tell when the marriage, and thus the communication privilege, begins and ends: the privilege covers all confidential communications after the date of the wedding, reflected by the state-issued marriage certificate. When does the marriage end, and thus the privilege for communications between the former spouses? That, too, is an easy question in most circumstances: the marital communications privilege does not cover any communications between the ex-spouses after the entry of the decree of dissolution of the marriage. This applies to both statutory and common-law marriages: the only ways out of either are death and formal dissolution. You can get married through common-law, but you can't get unmarried that way.

These limits make sense in view of the public policy in favor of marriage. One of the incentives to marry is the privilege, and if the State extended the reach of the privilege, that incentive is removed. On the other end of the timeline, the purpose of the privilege is to strengthen the marriage by encouraging full and frank conversation between spouses; if they have divorced, there is no marriage to strengthen and it is clear that the privilege was not sufficient incentive to keep them married. In both circumstances, the need for information to determine the facts and administer justice regains its supremacy and the spousal communications privilege disappears.

By its very nature, common law marriage is a much messier can of worms than a statutory marriage for purposes of assessing the privilege. Couples, or a member of a couple, usually assert that there was a common law marriage only in retrospect, when it has become clear that marital status confers some advantage. Most of those cases involve a claim to the dissolution procedure for ending the relationship, or an inheritance or governmental financial benefit such as Social Security. The spousal communications privilege is another such advantage. The Montana Supreme Court has decided a couple of relatively recent marital privilege cases where the defendant claimed he had married the witness at common law.

STATE V. NETTLETON (1988)

The Montana Supreme Court had the opportunity to elucidate both forms of spousal privilege in 1988, when it decided *State v. Nettleton*, 233 Mont. 308, 760 P.2d 733. Nettleton was convicted of deliberate homicide for a 1977 murder. Two important witnesses for the State were women who had lived with Nettleton, and who had information about both what he said to them and what they observed relevant to the murder. The defendant moved in limine to exclude their testimony, claiming that he had been married to each (in series) and that the spousal privilege prevented both from testifying.

The trial court held a pretrial hearing, taking evidence on the issue of whether defendant had been married to either witness. The judge found that one of the women, Candace Semenze, had been Nettleton's common law wife from 1975 to 1982 (and thus at the time of the crime), and that the other woman, Magdelina DuMontier, had been statutorily married to Nettleton from July 1983 until June 1986. Before the Supreme Court, the State argued that there had been no common law marriage, but the

Court affirmed the findings of the trial judge:

The State's argument to the District Court and its brief on appeal emphasize that Nettleton and Semenze were never married. According to the State, the alleged common-law marriage between the two did not have the four elements necessary under Montana common law: capability, agreement, cohabitation and reputation (citing *Matter of Estate of Murnion* (Mont.1984), 686 P.2d 893, 41 St.Rep. 1627, and other cases). Whether the relationship between Nettleton and Semenze fit the legal definition of common-law marriage was a question of fact for the District Court to decide. That decision must be upheld if there is substantial, credible evidence in the record to support it. *Griffel v. Cove Ditch Co.* (1984), 207 Mont. 348, 675 P.2d 90, 41 St.Rep. 1.

The record shows that while Semenze denied the existence of the marriage in her testimony, she and Nettleton lived together, had a child, opened and used a joint checking account, and filed joint income tax returns for two consecutive years. The record also shows the filing of a joint petition for divorce signed by Semenze and Nettleton. This evidence provides a sufficient basis for the District Court's decision that Nettleton and Semenze considered themselves married. *State v. Nettleton*, 233 Mont. 308, 311-12, 760 P.2d 733, 736 (1988).

The Court then went on to apply Montana's spousal privilege to the various pieces of testimony from the ex-wives. It held that the privilege did not apply to:

- Testimony by DuMontier concerning Nettleton's actions and statements after the two were divorced ... because those statements were not made during marriage.
- Testimony involving statements or actions by persons other than Nettleton ... because those were not communications by one spouse to the other.
- Testimony about observations of Nettleton's actions; physical evidence such as Brisson's body, her scarf or Nettleton's knife; and feelings such as the fear induced by Nettleton's threats and other behavior.
- Testimony about statements made during the marriage, but in the presence of third persons; "The presence of third parties indicates that Nettleton did not intend those statements to be confidential."
- Testimony about threats by Nettleton to induce the wife's cooperation and silence, "do not merit spousal privilege."

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The Court did find that one part of the testimony should have been protected by spousal privilege, so that the judge erred in admitting it, but held that the error was harmless:

The one clear instance of testimony that should have been protected by the privilege-Nettleton's admission to DuMontier in response to her question while they were married-simply restates the same information contained in the far greater number of non-privileged statements. The failure of the District Court to exclude this testimony was therefore harmless error.

State v. Nettleton, 233 Mont. 308, 317-18, 760 P.2d 733, 739 (1988).

STATE V. BALDWIN (2003)

In *State v. Baldwin*, 2003 MT 346, 318 Mont. 489, 495, 81 P.3d 488, 493, the defendant objected to testimony from Karin Baldwin, whom the government had called as a hostile witness. The defendant objected to her testimony at trial, claiming that Karin was his common-law spouse and that he was entitled to a spousal communications privilege. Karin and Baldwin solemnized their marriage on October 16, 2001, after Baldwin had been charged, but before his trial on December 3, 2001. (Baldwin also argued that he and Karin had been in a common-law marriage for six years prior to the ceremony, so that the privilege extended to the communications between them from 1995.) The trial court overruled the objection and allowed the testimony. The Supreme Court found error⁸:

We conclude that because Baldwin and Karin were married at the time of Baldwin's trial, Karin's testimony should have been excluded based upon spousal privilege, pursuant to § 26-1-802, MCA.

State v. Baldwin, 2003 MT 346, 318 Mont. 489, 495, 81 P.3d 488, 493.

The majority opinion went no further on its analysis of the application of the marital communications privilege, for which Justice Rice took them to task in his concurrence, joined by Justices Gray and Lephart. He correctly observed:

¶ 33 The Court concludes in ¶ 26 that because Baldwin and Karin were married *at the time of trial*, Karin's testimony in regard to a statement made *prior* to the solemnization of their marriage was inadmissible under the spousal privilege statute. However, this is an incorrect conclusion under Montana law. **The spousal privilege does not bar admission of a statement made between two persons who were not married at the time the statement was made.** (Emphasis added)

State v. Baldwin, 2003 MT 346, 318 Mont. 489,

497, 81 P.3d 488, 494.

Justice Rice did a more thorough analysis and concluded that:

¶ 36 Karin's testimony was not made inadmissible by virtue of the fact that she and Baldwin were married at the time of trial. To the contrary, the inquiry centers on **their status at the time the contested statement was made**. If they were not married at that time, then the statement could not "convey a message from one *spouse* to the other" and could not have been "conveyed *in reliance* on the confidence of the *marital relationship*." *Nettleton*, 233 Mont. at 317, 760 P.2d at 739 (original emphasis). Because the solemnization of the marriage had not occurred at the time the statement was made, Karin's testimony about the statement was not barred thereby.

318 Mont. at 497.

In support of his objection at trial, the defendant also claimed a pre-existing common-law marriage. The judge excused the jury and held a brief evidentiary hearing on the question of the common-law marriage:

The direct and cross-examination produced testimony that Baldwin and Karin had not shared finances or income tax returns during their relationship, had been separated for a year prior to the solemnization, that Baldwin had an intervening relationship with another woman, and that the parties decided to marry by solemnization because, according to Karin, "I wanted to get married. We've been wanting to get married a long time."

State v. Baldwin, 2003 MT 346, 318 Mont. 489, 498, 81 P.3d 488, 495.

Justice Rice concluded that the "District Court's evidentiary ruling that no common law marriage existed was founded upon substantial evidence, and therefore, Karin's testimony concerning the statement was not barred by the spousal privilege." *State v. Baldwin*, 2003 MT 346, 318 Mont. 489, 498, 81 P.3d 488, 495.

The proof of a common-law marriage is beyond the scope of this article, but I can suggest that this issue requires extensive fact-finding, and would be better dealt with in a motion and hearing in limine than by excusing the jury in the middle of a trial.

WAIVING THE PRIVILEGE

Clearly privileged confidential spousal communications may be admissible if the spouse who claims the privilege waives it. Waiver can occur by voluntary disclosure of the contents of the communication by the person who now claims the privilege or by failure of counsel to object in discovery or at trial. Additionally, some Montana cases have refused to allow the privilege when sexual abuse has occurred, reasoning that the

⁸ As with so many evidentiary error cases, the Court further found the error to be harmless, discussing the strength of other evidence on the same issue, and affirmed the conviction.

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“home” which the privilege is designed to support no longer exists.

Voluntary Disclosure Outside Judicial Proceedings

One way waiver can occur is if the spouse him/herself “shares” the communication with someone outside the marriage before trial. An essential element of a privileged communication is that it was made in confidence and afterwards kept confidential. Thus, a husband who tells his wife something during their marriage, but then describes that conversation to his hunting buddy⁹ has waived the privilege and should lose his objection at trial. M.R.E. 503 covers this:

(a) A person upon whom these rules confer a privilege against disclosure waives the privilege if the person or the person’s predecessor while the holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.

(b) Joint holders. Where two or more persons are joint holders of a privilege, a waiver of the right of a particular joint holder to claim the privilege does not affect the right of another joint holder to claim the privilege.

In re Marriage of Sarsfield seemed to use this waiver theory when it affirmed admission of an ex-wife’s testimony about things her husband told her while they were married. The Sarsfields were involved in a custody dispute which arose when the former Mrs. Sarsfield agreed to marry a man (“M.M.”) with a history of child sexual abuse. Mr. Sarsfield sought a change in custody for the Sarsfield children, and called the ex-wife of the prospective new husband to testify at trial.

M.M.’s former wife was called as a witness. She testified that her daughter had been removed from the family home because she had been sexually abused by M.M. She had never witnessed any incidents of abuse, but her husband had admitted the incidents to her. M.M. indicated to his wife that, for at least six years prior to his admission, he had “used various items, his hands, pokers, various instruments of that sort to induce her [the daughter] in various ways” on several occasions. No criminal charges were filed against M.M., but the daughter was removed by authorities and underwent treatment for emotional problems connected with the abuse.

After her return from therapy, M.M. admitted to his wife that he had sexually molested the girl again. The daughter was removed to a childrens’

[sic] home where she continues to undergo therapy. According to the former wife, M.M. is not allowed to see the girl without others present. He admitted his problem to counselors, but has apparently not committed any deviant acts since the last incident with his daughter.

In re Marriage of Sarsfield, 206 Mont. 397, 405, 671 P.2d 595, 600 (1983).

Although the ex-wife’s observations during the marriage to M.M. would not now be covered by a spousal testimonial privilege, it did exist back then, and her entire testimony should have been barred under it. Even under the more limited extant spousal communications privilege, the ex-wife’s testimony about what M.M. told her in confidence during their marriage should have been privileged and the objection sustained.

The custodial mother’s attorney did object at trial on the basis of the spousal privilege, to no avail. The trial judge allowed the testimony, and the Supreme Court affirmed that decision in a very murky paragraph:

Clearly, the subject of the supposedly privileged communications had been revealed to welfare authorities and, as it turned out later, to M.M.’s “counselor,” Paster [sic] Miller. We agree with the trial court that the testimony of M.M.’s wife was not protected by the spousal privilege under these facts.

In re Marriage of Sarsfield, 206 Mont. 397, 407, 671 P.2d 595, 601 (1983).

This reasoning is wrong, at least under the current version of M.R.E. 503. The discloser of the communication to welfare authorities was not M.M. himself, but his wife. She cannot waive the privilege unilaterally, per M.R.E. 503(b), or if he does not have an opportunity to invoke the privilege. M.R.E. 504 provides:

Rule 504. Privileged matter disclosed under compulsion or without opportunity to claim the privilege. A claim of privilege is not defeated by a disclosure which was (a) compelled erroneously or (b) made without opportunity to claim the privilege.

Thus, the then-wife’s revelation to “welfare authorities” should not operate as a waiver of the husband’s spousal privilege. Further, M.M.’s own disclosure to his “counselor” or “paster”¹⁰ might itself be privileged¹⁰, and thus fit M.R.E. 503’s clear provision that waiver by voluntary disclosure: “does not

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⁹ It is ok to disclose the communication to another person with whom the spouse has a privileged relationship, such as his attorney or minister. See the last sentence of Rule 503(a).

¹⁰ Montana recognizes privileges for communications with members of the clergy, M.C.A. 26-1-804, and psychologists, M.C.A. 26-1-807. The *Sarsfield* opinion does not discuss either of these in detail, but it does evince skepticism about the status of the “counselor.”

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apply if the disclosure itself is privileged.”¹¹

Child Abuse

Sarsfield did offer another basis for its refusal to apply the spousal privilege, which seems to have been the real reason M.M.’s ex-wife could testify:

This privilege, however, is subject to the maxim that, when the reason for a rule ceases to exist, so then should the rule. See Section 1-3-201, MCA. Thus, in *Matter of J.H.*, we held that once a family member has been sexually abused, the sanctity of the home and therefore the reason for the rule are simultaneously destroyed, 640 P.2d at 447, 39 St.Rep. at 269, and that a mother could testify about her husband’s sexual abuse of their son in a child neglect proceeding, where the father was a party to the action. In the immediate case, the sexual abuse of M.M.’s daughter decidedly contributed to the destruction of the family home and M.M.’s marriage. Under the circumstances, we believe the privilege concerning communications about this abuse died with the marriage, and we are disinclined to invoke the privilege even though M.M. and his former wife are not parties to this custody battle.

In re Marriage of Sarsfield, 206 Mont. 397, 406-07, 671 P.2d 595, 600-01 (1983).

Five years later, the Montana Supreme Court left the *Sarsfield* holding, and rationale in child abuse cases, standing, but acknowledged the difficulty it presents:

In this case, we are concerned only with spouses. Rather than muddying the waters by attempting to apply the rule from *Sarsfield* and *J.H.* to the present situation, we will evaluate the District Court’s ruling in light of the threshold characteristics outlined above.

State v. Nettleton, 233 Mont. 308, 315-16, 760 P.2d 733, 738 (1988).

This judge-made “child abuse” exception is a possible avenue to invading the marital privilege, and you might as well try it if it fits your situation, but I wouldn’t bet on it.

Failure to Object

The other avenue to waiver is failure to object in discovery or at trial. A recent example occurred in a poaching case, where the estranged wife went to Fish and Game and turned in her husband for several instances of hunting out of season and for

possession of illegal golden eagle feathers and parts. At trial, the then-divorced wife testified about a written communication from her husband during the marriage. On appeal, the husband claimed error. The Supreme Court held:

¶ 30 Torgerson contends on appeal that the District Court violated § 26-1-802, MCA, in admitting the above testimony by Doane. He claims the court had granted him a continuing objection on grounds of spousal immunity.

¶ 31 As indicated above, the record reflects that the court told defense counsel prior to trial “[i]f [spousal immunity] does come up, raise your objections, if you want a continuing objection to some of those things.” Torgerson did not follow the District Court’s directive; nor did he object to the testimony he now argues was improperly admitted. As a result, we conclude he may not now argue trial court error in this regard. See § 46-20-104(2), MCA; *State v. Clausell*, 2001 MT 62, ¶ 25, 305 Mont. 1, ¶ 25, 22 P.3d 1111, ¶ 25 (citation omitted).

State v. Torgerson, 2008 MT 303, 345 Mont. 532, 539, 192 P.3d 695, 700.

Ouch! Not only must you object, you must keep objecting. I myself am not a fan of the “continuing objection” precisely because it is unclear when you are objecting, what you are objecting to, and what the judge’s ruling is. If you are going to use that route (for the strategic purpose of not irritating the jury with a constant stream of objections), be sure to articulate exactly what your “continuing objection” covers. In the perfect world, try to get the court to state on the record both that you have constructively objected to all questions and answer about what one spouse told the other during the marriage, and that the judge has overruled your objection on each and every such piece of testimony.

PREVENTING WAIVER

Client Instruction

A sad fact of lawyering is that our clients do not check with us before they go for coffee with friends. The corollary is that we often come to the party too late, and the client may already have shared his conversation with his wife with an outsider, destroying the spousal communications privilege. However, once the client does cross your threshold, it is imperative to instruct her about privileges in general, and if she is or has been married, the spousal communications privilege in general. Tell her that she can tell you things you must and can keep confidential, and that the same is true of her conversations with her husband, but that if she tells anyone else (friend, mother, neighbor etc.) about the contents of those privileged conversations, she loses the privilege. She is the owner of the privilege, and only she can protect it.

¹¹ The spousal privilege statute now does address this issue, but its waiver is much narrower and would not have affected the privilege of M.M. in the *Sarsfield* situation: The privilege does not apply to a civil action or proceeding by one spouse against the other or to a criminal action or proceeding for a crime committed by one spouse against the other or against a child of either spouse. M.C.A. 26-1-802.

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Objection

Once you, the lawyer, have come on board in the case, you share the burden of maintaining the privilege during discovery and at trial. You can invoke the privilege, and you can lose it by failure to do so.

M.R.Civ.P. 26b specifically permits an objection to any discovery question calling for privileged information: "Parties may obtain discovery regarding any non-privileged matter..." The form of the objection itself is simple: "Objection, spousal privilege." However, Montana now echoes the F.R.Civ.P. and requires the objector to provide information to back up the claim of privilege:

(6) Claiming Privilege or Protecting Trial-Preparation Materials.

A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

- (i) expressly make the claim; and
- (ii) describe the nature of the documents, communications, or things not produced or disclosed -- and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

M.R.Civ.P. 26(b)(6). To fulfill this requirement, you should indicate that the information involves an oral or written communication between spouses during the marriage, being as specific as you can about the form and dates of the communications without divulging the contents of the communications.

This advice is fairly easy to follow during written discovery, when you have time to reflect and craft responses. It is more difficult, but equally important, to guard the privilege during oral testimony at deposition or in trial. You must object and instruct the witness not to answer (until a judge has ruled on the objection). In depositions, you don't have the luxury of a ruling in limine, and a waiver of the privilege there may lead to a ruling that the privilege has been waived at trial. I once had a case against a former student whom I liked very much (luckily, I had taught the student Civil Procedure but not Evidence; still...) In the defendant's deposition, I asked him: "Have you talked to anyone else about this?" He said: "Yes, my wife." There was no reaction from his lawyer, and so on I went for about 5 minutes, with no objection: "What did you tell her?" "What did she say?" The defendant eventually told me that his wife had objected strenuously to his plan, and had told him both that it was immoral, illegal, and stupid. (She wasn't wrong). I was conflicted the whole time this was going on, wanting my former student to jump up and stop me, but that never happened and of course my paramount duty was to my client. (The case settled, so we never got to the admissibility of those answers at trial.)

The obvious cue is a question like:

"What did your wife tell you about...?"

OBJECTION! PRIVILEGE!

It is much more likely that the question will be less obvious, or that the conversation will come out in response to another type of question altogether. The trick is to recognize and object as soon as the privilege becomes apparent:

"And then what happened?"

"Well, I was so shook up that I went straight home and told my wife ..."

OBJECTION! PRIVILEGE!

[... "that I had hit a bicyclist and left him on the side of the road"]

Remember that "communication" does not have to be verbal. Obviously, written communications like letters (remember those?), notes, and emails are all communications which are privileged if sent by one spouse to another during the marriage.

"I am handing you a document premarked as Exhibit A."

"Can you identify Exhibit A?"

"Yes."

"How can you identify Exhibit A?"

"It is in my ex-wife's handwriting"

OBJECTION! PRIVILEGE! MAY I VOIR DIRE outside the presence of the jury?

"Sir, is Exhibit A a letter sent by your ex-wife?"

"Yes."

"Was it sent to you?"

"Yes."

"At the time she sent you this letter, you were still married, weren't you?"

"Yes."

I RENEW MY OBJECTION. EXHIBIT A IS A PRIVILEGED SPOUSAL COMMUNICATION.

You should file a motion in limine to assert the privilege and get a pretrial ruling if you anticipate that a spouse will be called as a witness at trial. Even if you do this, remember *State v. Torgerson* (discussed above) and object to every piece of testimony at trial which invades the spousal privilege. Watch out for opponents who might try to sneak around a pretrial ruling by indirect language, and for witnesses who testify, wittingly or not, about what their spouses told them. You may have already won a ruling that spousal privilege applies, but it is up to you to get the benefit of the ruling.

Rescuing the Privilege

The recently-revised M.R.Civ.P provide a mechanism for

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“clawing back” privileged material produced during discovery:

(B) Information Produced. If information produced in discovery is subject to a claim of privilege, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

M.R.Civ.P. 26(b)(6)(B). I have not found any cases applying this provision to production of marital privileged information, but I would use this if I inadvertently sent in my discovery responses a letter or email between spouses. It might also be useful in the deposition scenario I described above, if the opposing lawyer had gone back to the office and realized that a breach of the privilege had just occurred. Note that this rule does not set any standard for when disclosure amounts to waiver, but it does freeze the use of the information once a notification and request is made and provides a process for a court determination of the effect of the disclosure.

DEVELOPING PROOF OF WAIVER

If the party-spouse objects to questions (in discovery or at trial) about conversations with spouse, the opponent should investigate (through discovery and otherwise) whether the objector discussed the spousal conversation with anyone else. Example:

Q. Did you talk to anyone else about this transaction?

A. Yes.

Q. With whom?

A. My wife.

Q. What did you say to her about the transaction?

Counsel: OBJECTION. PRIVILEGED. DO NOT ANSWER.

Q. Don't tell me what you said to your wife, or she to you. But I do want to know whether you have told anyone else about the conversation with your wife. Did you tell any other person about what you said to your wife, or what she said to you?

A. My lawyer.

Counsel: OBJECTION. PRIVILEGED. DO NOT ANSWER.

Q. Don't tell me what you told your lawyer, either. Was there anyone else besides your lawyer to whom you described your conversation with your wife?

A. Yes, I told my mother about that conversation. I told Mom what I told my wife, and what my wife said back to me.

Q. Aha! What did you tell your mother¹²?

Q. Now let's go back: what did you tell your wife about the transaction?

Because the party himself disclosed the content of the spousal communication, he waived the protection of the privilege and must divulge the communication with his wife.

CAVEAT: PRIVILEGE ONLY PROTECTS THE COMMUNICATION, NOT THE FACT

Obviously, a privilege does not prevent the discovery of the underlying fact itself. The prosecutor can still investigate and present evidence as to the identity of that guy who ran down Arthur Avenue in Missoula carrying a semi-automatic handgun and a paper bag (presumably containing the loot from his robbery of the Taco Bell at 9:30 a.m. on a recent snowy morning), resulting in a 3 hour extremely inconvenient (just sayin') lockdown of the University of Montana. The state just can't do it by putting a wife on the stand to say “my husband told me¹³ he was the masked man.”

MORAL OF THE STORY

One of the benefits of marriage is the ability to confide in your spouse without fear that she will be compelled to testify against you about what you told her. (You no longer get the ability to prevent her from being called to the stand to recount that she saw you with the bloody knife, burning your bloody clothes, on the night of the stabbing). Only the communications you make during the marriage are protected; it is your marital status at the time of the communication, not at the time of trial, which counts. Although it is possible to obtain the privilege by proving to the court at trial that you were married by common law at the time of the conversation, it is much easier and clearer to go to the courthouse, get a license, and go through a formal ceremony. You can freely divulge your most intimate secrets to your husband and know that he can't testify about them, even if you do end up getting divorced. So, put a ring on it!

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¹² Neither the FRE nor the MRE recognize any parent-child privilege, so disclosure to the mother amounts to disclosure of the contents of a privileged conversation just as if the husband described the privileged conversation to a bartender.

¹³ Of course, this would not be hearsay, per M.R.E. 801d2a: “A statement is not hearsay if... The statement is offered against a party and is (A) the party's own statement...”