

MARITAL DISCOVERY PRIVILEGE

Last revised: 7/11/2008

TABLE OF CONTENTS

1	Introduction	5
2	Background on the Marital Discovery Privilege	5
3	Validity of Marriage	6
3.1	Statutory Requirements for a Valid Marriage.....	6
3.1.1	No “common law marriage”	7
3.1.2	Capacity to marry	7
3.1.2.1	Age of lawful consent and “not otherwise disqualified”	7
3.1.2.2	Minors	7
3.1.2.3	Opposite-sex parties only	7
3.1.3	Confidential marriage	8
3.1.4	Solemnization	9
3.1.4.1	Exception for marriages under canon law	9
3.2	Validity of Foreign Marriages	9
3.2.1	Deference to law of contracting jurisdiction.....	9
3.2.1.1	Out-of-state “common law marriage”	9
3.2.1.2	Incestuous marriage.....	9
3.2.1.3	Out-of-state marriage to evade local law	10
3.2.2	Special rule where no applicable law in contracting jurisdiction	10
3.2.2.1	Public policy exception to choice of law rule.....	10
3.2.2.2	Exception re out-of-state same-sex marriages	10
3.3	Common Law Marriage.....	11
3.3.1	In General	11
3.3.1.1	Generally	11
3.3.1.2	Necessity of Consummation	11
3.3.1.3	View that Agreement Alone is Sufficient.....	12
3.3.1.4	History	12
3.3.1.5	Public Policy as to Common Law Marriage.....	13
3.3.2	Basic elements	14
3.3.2.1	Capacity to marry	14
3.3.2.2	Present agreement to be husband and wife.....	14
3.3.2.3	Agreement to be husband and wife in future	15
3.3.2.4	Cohabitation	16
3.3.2.5	Holding out to public as husband and wife.....	17
3.3.2.6	Reputation as husband and wife	17
3.3.3	Validity	18
3.3.3.1	Generally	18
3.3.3.2	Effect of Statutes Governing Ceremonial Marriages.....	19
3.3.3.3	Statutes Imposing Penalty for Noncompliance.....	20
3.3.3.4	Effect of Misunderstanding as to validity of common-law marriage	20
3.3.3.5	Effect of subsequent ceremonial marriage, or intent to have such marriage	21
3.3.3.6	Removal of impediment to marriage as creating valid common law marriage	21
3.3.3.7	Necessity of good faith	22
3.3.3.8	Proxy marriage as common law marriage	23
3.3.3.9	Secret common law marriage	23
3.4	Ecclesiastical Only Marriage	23
4	Responding to Discovery Against a Spouse	25
4.1	Federal Litigation Discovery	25
4.2	IRS Administrative Summons	26

Constitutional Provisions

U.S. Constitution	8
-------------------------	---

Statutes

18 U.S.C. §1512	6
26 U.S.C. §7210	26
26 U.S.C. §7402	26
26 U.S.C. §7602	26
26 U.S.C. §7603	26
26 U.S.C. §7604	26
26 U.S.C. §7605	26
26 U.S.C. §7605(a).....	26
26 U.S.C. §7609	26
26 U.S.C. §7609(a)(1)	26
26 U.S.C. §7610	26
26 U.S.C. §7611	26
26 U.S.C. §7612	26
28 U.S.C. §1738C	10
CC ¶1556.....	7
Fam.C. §§300, 306	7
Fam.C. §§422-424.....	9
Fam.C. §§422-425.....	7
Fam.C. §300.....	7
Fam.C. §301	7
Fam.C. §302.....	7
Fam.C. §303.....	7
Fam.C. §306.....	7
Fam.C. §307	9
Fam.C. §308.....	7, 9, 10
Fam.C. §308.5	7, 10
Fam.C. §350	7
Fam.C. §359 & 360.....	7
Fam.C. §400	7, 9
Fam.C. §420(a) & (b).....	9
Fam.C. §500.....	8
Fam.C. §511(a).....	8
Fam.C. §511(c).....	8
Fam.C. ¶300	7
Health & Saf.C. §103180	9

Rules

Fed.R.Civ.P. 26	25
Fed.R.Civ.P.27	25
Fed.R.Civ.P.28	25
Fed.R.Civ.P.29	25
Fed.R.Civ.P.30	25
Fed.R.Civ.P.31	25

Fed.R.Civ.P.32	25
Fed.R.Civ.P.33	25
Fed.R.Civ.P.34	25
Fed.R.Civ.P.35	25
Fed.R.Civ.P.36	25
Fed.R.Civ.P.37	25
Federal Rule of Evidence 104(a).....	5

Cases

Centinela Hosp. Med Center v. Super.Ct. (Willis) (1989) 215 CA3d 971, 975, 263 CR 672, 674.....	7
Estate of Levie (1975) 50 CA3d 572, 576, 123 CR 445, 447.....	9, 10
Estate of Sanders (1957) 147 CA2d 450, 454-455, 305 P2d 655, 658-659.....	10
Etienne v. DKM Enterprises, Inc. (1982) 136 CA3d 487, 492, 186 CR 321, 324	9
In re Dalip Singh Bir's Estate (1948) 83 CA2d 256, 188 P2d 499.....	10
Marriage of Smyklo	9
Marriage of Smyklo (1986) 180 CA3d 1095, 1099, 226 CR 174, 176.....	9
McDonald v. McDonald (1936) 6 C2d 457, 459, 58 P2d 163, 164.....	10
Norman v. Norman (1898) 121 C 620, 54 P 143	10
Norman v. Norman (1898) 121 C 620, 628, 54 P 143, 145-146.....	7
Pereira v. United States, 347 U.S. 1, 6, 74 S.Ct. 358, 361 (1954).....	6
Tatum v. Tatum (9th Cir. 1957) 241 F2d 401, 407	9
Trammel v. United States, 445 U.S. 40, 44, 100 S.Ct. 906, 909 (1980).....	5
Trammel v. United States, 445 U.S. at 51, 100 S.Ct. at 913 (1980).....	5
United States v. Burks, 470 F2d 432, 436 (DC Cir. 1972).....	6
United States v. Espino, 317 F3d 788, 796 (8th Cir. 2003).....	6
United States v. Hill, 967 F2d 902, 911, fn 12 (3rd Cir. 1992)	6
United States v. Lofton, 957 F.2d 476, 477 (1992).....	5
United States v. Marashi, 913 F2d 724, 729 (9th Cir. 1990).....	6
United States v. Montgomery, 384 F3d 1050, 1056 (9th Cir. 2004)	5
United States v. Murphy, 65 F3d 758, 761 (9th Cir. 1995).....	5
United States v. Porter, 986 F2d 1014, 1018 (6th Cir. 1993).....	5
United States v. Porter, 986 F2d 1014, 1018 (6th Cir. 1993).....	6
United States v. Roberson , 859 F2d 1376, 1378 (9th Cir, 1988).....	5
United States v. Termini , 267 F2d 18, 19-20 (2nd Cir. 1959).....	6
United States v. Westmoreland, 312 F3d 302, 307 (7th Cir. 2002), fn 3	5
United States v. Westmoreland, supra, 312 F3d at 307, fn. 3.....	5
Welch v. State of Calif., supra, 83 CA4th at 1378, 100 CR2d at 432	7

Other Authorities

Deposition Handout, Form #03.018	26
Internal Revenue Manual 5.17.6	26
IRS Form 2039 Administrative Summons	6
Petition to Quash IRS Summons, Litigation Tool #05.002	26
Rest.2d Conflict of Laws §283	9, 10
Rest.2d Conflict of Laws §284.....	10
Sovereign Christian Marriage, Form #06.009	6

Scriptures

1 Cor. 13.....	24
1 Cor. 7:2.....	24
1 Cor. 7:3-5	24
1 Cor. 7:8-9	25

Marital Discovery Privilege

1 Timothy 5:3-16..... 24
Eph. 5:18-21 24
Gal. 5: 22-23..... 25
Gen. 1:28 24
Gen. 2:18 24
Gen. 2:24 24
Heb. 13:4 24
Heb. 13:5 24
Matt. 7:24-27 24

1 **1 Introduction**

2 When the government has trouble instituting legal discovery against a particular person because that person has done a
3 good job protecting their privacy, they may try to:

- 4 1. Contact your spouse and depose him or her.
5 2. Pressure the other spouse and use that pressure to influence you indirectly.

6 For instance, if the government wants you to testify as a witness in an ongoing lawsuit or enforcement action and you
7 refuse, they may administratively summons or legally depose your spouse, who often times is a loyal “taxpayer” that will
8 cave in to their every demand. This tactic destroys families and causes divorce if it is not handled properly and discretely.

9 The law recognizes what is called the “spousal testimony privilege”, which prohibits the government from compelling
10 spouses to testify against each other. This memorandum will describe:

- 11 1. The prerequisites for asserting the spousal testimony privilege.
12 2. What constitutes a valid marriage for the purposes of asserting the spousal testimony privilege.
13 3. Techniques useful to married people for preventing one spouse from being compelled to testify against the other
14 spouse.
15 4. How to handle a deposition or summons against a spouse by the government.
16 5. Prevent conflict within the family caused by spouses testifying against each other.

17 **2 Background on the Marital Discovery Privilege**

18 Let us begin this section by listing all the things the IRS and the DOJ MAY NOT lawfully do in the context of your spouse:

- 19 1. **Two Distinct Marital Privileges:** There are two distinct “marital privileges” which restrict courts and the government
20 from compelling spouses to testify against each other and, by implication, responding to an administrative summons.

21 These are:

- 22 1.1. **Adverse Spousal Privilege:** The adverse spousal testimonial privilege applies to all adverse testimony against a
23 defendant spouse, including testimony on nonconfidential matters and matters that occurred prior to the marriage.
24 This broader privilege even excludes evidence of criminal acts and communications made in the presence of third
25 persons. [*Trammel v. United States*, 445 U.S. at 51, 100 S.Ct. at 913 (1980); *United States v. Lofton*, 957 F.2d
26 476, 477 (1992)]

- 27 1.2. **Confidential Marriage Communications Privilege:** In contrast, the marital communications privilege applies only
28 to confidential communications between the spouses during a valid marriage. [*United States v. Lofton*, 957 F.2d
29 476, 477 (1992); *United States v. Montgomery*, 384 F3d 1050, 1056 (9th Cir. 2004)]

- 30 2. **Purposes:** While the underlying reason for both privileges is to preserve the family, there are differences in the
31 purposes of the two privileges [*United States v. Westmoreland*, 312 F3d 302, 307 (7th Cir. 2002), fn 3]

- 32 2.1. The testimonial privilege is meant to protect against the impact of the testimony on the marriage [*United States v.*
33 *Westmoreland*, 312 F3d 302, 307 (7th Cir. 2002), fn 3]

- 34 2.2. The marital communications privilege exists to ensure that spouses generally feel free to communicate their
35 deepest feelings to each other without fear of eventual exposure in a court of law [*United States v. Westmoreland*,
36 *supra*, 312 F3d at 307, fn. 3]

- 37 3. **Valid Marriage Required:** A valid marriage under state law is a necessary prerequisite for either privilege. [*United*
38 *States v. Porter*, 986 F2d 1014, 1018 (6th Cir. 1993) -adverse spousal testimony privilege; *United States v. Roberson* ,
39 859 F2d 1376, 1378 (9th Cir, 1988) -marital communications privilege.

- 40 3.1. Preliminary fact determinations: If disputed, the validity/existence of the marriage raises a preliminary fact issue
41 that must be resolved by the court under Federal Rule of Evidence 104(a). [*United States v. Murphy*, 65 F3d 758,
42 761 (9th Cir. 1995)]

- 43 3.2. **When tested—distinction:** The time at which a valid marriage must exist depends on which privilege is at issue:

- 44 3.2.1. Testimonial privilege: A spouse’s testimonial privilege attaches only if there is a valid marriage at the time
45 the witness is called to testify. [*Trammel v. United States*, 445 U.S. 40, 44, 100 S.Ct. 906, 909 (1980)]

- 46 3.2.2. Confidential communications privilege: The privilege for confidential communications between spouses
47 attaches at the time the communication was made. [*United States v. Termini* , 267 F2d 18, 19-20 (2nd Cir.

1 1959) —postmarital communications excluded]

2
3 Consequently, a spouse’s privilege against compelled disclosure of confidential marriage communications
4 survives termination of the marriage [*Pereira v. United States*, 347 U.S. 1, 6, 74 S.Ct. 358, 361 (1954) —
5 divorce does not terminate privilege for confidential marriage communications made during marriage;
6 *United States v. Burks*, 470 F2d 432, 436 (DC Cir. 1972) —privilege survives spouse’s death]

7 3.3. **Strictly construed:** Because privileges are in “derogation of the truth,” the “valid marriage” requirement is
8 strictly construed. [*United States v. Hamilton* (7th Cir. 1994) 19 F3d 350, 354—court refused to extend marital
9 communications privilege to defendant who held good faith belief that marriage was valid (defendant unaware of
10 spouse’s bigamy)]

11 4. **Privilege Against Adverse Spousal Testimony (“Anti-Marital Facts”):** The privilege against adverse spousal
12 testimony (sometimes called the “anti-marital facts” privilege) protects one spouse from being compelled to testify
13 against the other. [*United States v. Porter*, 986 F2d 1014, 1018 (6th Cir. 1993); *United States v. Marashi*, 913 F2d
14 724, 729 (9th Cir. 1990)]

15 5. **Waiver by testifying:** The witness spouse may waive this privilege by voluntarily testifying. [*United States v. Hill*,
16 967 F2d 902, 911, fn 12 (3rd Cir. 1992); *United States v. Espino*, 317 F3d 788, 796 (8th Cir. 2003)]

17 6. **The implication of the above are that:**

18 6.1. The IRS may not lawfully contact your spouse and obtain any information about you. This includes IRS Form
19 2039 Administrative Summons. They surely know this limitation upon their authority but chronically and
20 illegally disregard it anyway. They have been known to blatantly violate this restriction by personally serving
21 spouses of those they are inquiring about at their residence. This is an illegal intimidation mechanism
22 deliberately designed to cause strife and distress in your family so that you will cave in and give them what they
23 seek. It essentially amounts to stalking, terrorism, and tampering with a witness, which is you. in violation of [18](#)
24 [U.S.C. §1512](#). When it happens, you should send a criminal complaint to the Dept. of Justice complaining that
25 they are tampering with

26 6.2. No government legal representative, including the United States Department of Justice, may contact you as part
27 of a legal proceeding and subpoena you to testify against your spouse, and especially not in a criminal
28 proceeding.

29 6.3. You need to be very careful to encourage and inform your spouse if they have been contacted by the government
30 to testify. Show them the law and prove to them that they have no obligation to respond. This will give them the
31 courage to resist. Also warn them that they may voluntarily waive the privilege not to testify simply by caving in
32 to the government and turning against you. Also warn them that the IRS may try to lie to them by saying that
33 they MUST testify, but that they have no authority to say this and actually are deceiving the public to do so.

34 **3 Validity of Marriage**

35 The following subsections discuss what constitutes a valid marriage under California law. The laws in your state may be
36 different but more likely are similar. Mentions of “Fam.C.” refer to the California Family Code.

37 Many of our readers may have chosen to pursue an ecclesiastical marriage not under state law using the following
38 document on our website:

[Sovereign Christian Marriage, Form #06.009
http://sedm.org/Forms/FormIndex.htm](http://sedm.org/Forms/FormIndex.htm)

39 For readers who have pursued an unlicensed ecclesiastical marriage, the following constraints apply:

- 40 1. The validity of the marriage is determined by the place of domicile of those being married.
41 2. The marriage is regarded in law as a “foreign marriage” because consummated outside the civil jurisdiction of the
42 government in question. See section 3.2 later for details.
43 3. Whether the foreign marriage is recognized within a particular state is determined under the laws of that state.

44 **3.1 Statutory Requirements for a Valid Marriage**