1 **Evidence Code**
Legal Privileges

"There are particular relations in which
it is the policy of the law to encourage confidence
and to preserve it inviolate" UCA 78B-1-137

2

Donna Kelly
Sexual Assault and Domestic Violence Resource Prosecutor
Utah Prosecution Council, Office of the Attorney General

Preparation and printing of this document financed by Grant number 11 VAWA 40 awarded by the Office on Violence Against Women, U.S. Department of Justice, to the Utah Commission on Criminal and Juvenile Justice. The opinions, findings, conclusions, and recommendations expressed in this presentation are those of the author and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.

•

3 **Black Letter Law. . . Or is it?**

- Utah Rule of Evidence 501:
- A claim of *privilege to withhold evidence* is governed by:
  - (a) The Constitution of the United States;
  - (b) The Constitution of the State of Utah;
  - (c) These rules of evidence;
  - (d) Other rules adopted by the Supreme Court;
  - (e) Decisions of the Utah courts; and
  - (f) Existing statutory provisions not in conflict with the above.

What is NOT included as a source of privileges:
Common Law

- Recommendation of the Advisory Committee that was NOT adopted by the Supreme Court:
  "Privileges are governed by common law, except as modified by statute or court rule."

4 **Privilege Law Caveat!**

2 This is a confusing and complicated area of the law because:

1) Court decisions often confuse common law and rules and statutes;

2) Privileges are often articulated in court decisions, statutes, rules and the constitution in inconsistent and overlapping ways;

3) Lack of appellate decisions concerning privileges; and

4) Privileges have been addressed by the legislature in piecemeal – rather than a comprehensive - fashion.

5) A privilege found in the evidence code is to be "strictly construed in accordance with its object," *Jackson v. Kennecott Copper Corp.,* 27 Utah 2d 310, 495 P.2d 1254, 1257 (1972).

5 **Waiver of Privileges URE 510**

1 • Privilege is waived if

- Holder of the privilege discloses or consents to disclosure of any significant part of the matter; or
- Holder of the privilege fails to take reasonable precautions against inadvertent disclosure.
- No comment may be made by judge or counsel on invocation of a privilege
- As far as possible, claim of privilege shall be made without the knowledge of the jury
- If requested by any party, a jury instruction shall be given

-

2

"Since the purpose of evidentiary privileges is the protection of some societal interest or confidential relationship, the privilege should end when that purpose is no longer served because the holder of the privilege has made or allowed disclosure." URE 510 Advisory Committee Note

6 **Accidental Waiver of Privilege**

- Disclosed material is not admissible against the holder of the privilege if
  - Disclosure was compelled erroneously; or
  - Disclosure was made without an opportunity to claim the privilege.

"Once disclosure has occurred, although confidentiality cannot be restored, the purpose of the privilege may still be served in some instances by preventing the use of the disclosed material against the holder of the privilege." URE 510, Advisory Committee Note

Example: Defense attorney mistakenly faxed notes from investigator interview of Defendant in a murder case.

7

Privileges apply universally
In any setting
Even in A Galaxy Far, Far Away
Including for discovery purposes URCP 26(b) (1)

8 **What we WON'T Cover**

1 Confidential ("Privileged") Records
There are 75+ Different Statutes

9 **General Witness Privileges**

2
- "Felony Acts" UCA 78B-1-134 (2)
  - A witness need not give an answer which will subject him to punishment for a felony
- "Self Infamy" UCA 78B-1-134 (3)
  - A witness need not give an answer which will degrade his character, unless it is relevant to the very fact in issue

- "Harassment" UCA 78B-1-136
  - A witness has a "right" to be protected from irrelevant, improper or insulting questions, and from harsh or insulting demeanor (by lawyers?)
-

10 **Husband - Wife Testimonial Privilege**

1 Attention Shoppers: "Wedding party on Aisle 3."

2
- Article I, Section 12, Utah Constitution
- "A wife shall not be compelled to testify against her husband, nor a husband against his wife. . ."
- (also appears *ver batim* in UCA 77-36-6 (2)(d))
- Applies in all court proceedings except child support proceedings
- The purpose of the spousal testimonial privilege is to foster "the harmony and sanctity of the marriage relationship."

11 **Husband – Wife Testimonial Privilege**

1 *State vs. Timmerman, 218 P3d 590 (2009)*

Criticism of the spousal testimonial privilege further bolsters this narrow interpretation. The privilege enables "abusers to silence their victims" and makes the testifying spouse "vulnerable to coercion from the defendant-spouse and his lawyer." Amanda H. Frost, *Updating the Marital Privileges: A Witness–Centered Rationale,* 14 Wis. Women's L.J. 1, 34 (1999).

Similarly, the Advisory Committee of the Utah Rules of Evidence is convinced that the justifications for the spousal testimonial privilege are insufficient: "[The privilege] does not promote marital felicity, is based on the outmoded concept that the husband and wife are one, and causes suppression of relevant evidence." Utah R. Evid. 502 advisory comm. note.

The Advisory Committee recommends that only the spousal communications privilege be preserved and the spousal testimonial privilege be repealed. However, such a change is dependent on a constitutional amendment to article I, section 12 that would remove the spousal testimonial privilege

2 'Til death do us part.

12 **Criminal Defense Attorney**
Explains Privilege to The World

13 **Husband – Wife Testimonial Privilege**

1 Hypothetical:
Police obtain statement from a wife who tells them she does not want to testify in court. Have they violated the law?

Answer:
No.

The privilege applies only in the courtroom – it does not prohibit the state or its agents from taking a statement from a spouse, even if it involves a marital communication. *State vs. Carter, 888 P2d 629 (1995)*; citing *Trammel vs. US, 445 US 40 (1980).*

2 "I now pronounce you Cousin and Cousin."

14 **Husband – Wife Testimonial Privilege**

1 The New Guy is dumb.

2 Hypothetical:
If spouse appears and invokes the testimonial privilege, can her out-of-court statements be used if otherwise admissible?

Answer:
Yes.

The privilege only excludes testimony. *State vs. Timmerman, 218 P3d 590 (2009)*

We also note that barring the statements would not comport with the justifications for the privilege. Whatever degree of marital harmony that previously existed between the Timmermans was most likely absent when Mrs. Timmerman voluntarily gave her statements to the police and to the sexual assault nurse. Blocking her statements from admission into evidence at the preliminary hearing would promote excluding relevant evidence more than it would promote marital harmony.

15 **Husband – Wife Testimonial Privilege**

1 Hypothetical:
Can a former spouse invoke spousal testimonial privilege?

Answer:
No.

Only a person who is legally married to the accused at the time of the court hearing may invoke the privilege. *State vs. Robertson, 932 P2d 1219 (1997)*

2 His two favorite days in one: Opening Day of Hunting Season AND Wedding Day.

16 **Marital Communications Privilege**

1 This is what happens when you fail to RSVP.

2
- Generally:
- Applies to spouse or former spouse
- Can be invoked by either spouse
- URE 502: Applies to "confidential communication"
  Defined as made privately between spouses and not intended to be disclosed to any other person
- UCA: 78B-1-137: Applies to "any communication"
- Communication must have been made during the marriage
-

17 **Marital Communications Privilege**

1 What if the Hokey Pokey is truly what it's all about?

2 Does NOT apply to:
-- A civil action by one spouse against another;
-- A criminal action for a crime or tort committed by one spouse against the other;
-- A civil or criminal proceeding for abuse or neglect committed against a child of either spouse;
-- If the court finds that the interest of a minor child of either spouse may be adversely

affected;
-- Any communication made in whole or part to aid, plan or conceal a crime.

18 **When Privilege is Invoked**

1 • A wedding night that shant be forgotten.
2 • When the privilege is invoked, the victim shall be considered unavailable under the evidence code. UCA 77-36-2.7
• All hearsay exceptions in URE 803 and 804 apply
•

19 **Pushing the Envelope**

Gray areas for prosecution advocacy:

-- Where marriage was entered into for the purpose of invoking the spousal privilege
-- If parties are no longer married, no privilege should apply
-- Presence of child during the communication
-- Adverse presumption if the party claiming the privilege does not produce the other spouse to testify re: communication and invocation
-- Prosecution of a child of either spouse

20 **Communications to Clergy URE 503**

• A person has a privilege to refuse to disclose and to prevent others from disclosing any confidential communication:
  • 1) Made to a cleric in the cleric's "religious" (as opposed to "professional")** capacity; and
  • 2) Necessary to enable the cleric to discharge the office according to the usual course of practice or discipline.
  • 3) Statements made in the course of discipline by church to which they belong. UCA 78B-1-137 (3)

*** NOTE: Includes lay clergy!*

21 **Communications to Clergy URE 503**

• Who may claim the privilege:
  • The person who made the confidential communication; or
  • The guardian or personal representative of the communicant; or
  • The cleric who heard the communication on behalf of the communicant.

22 **Communications to Clergy URE 503**

• "Confidential Communication" is
• (A) made privately; and (B) not intended for further disclosure except to other persons in furtherance of the purpose of the communication." *State vs. Patterson, 294 P3d 662 (2013).*
• Extends beyond "doctrinally required confessions" and is "broadly applicable to all confidential communications with a cleric." URE 503 Advisory Committee Note.
• *Scott vs. Hammock, 870 P2d 947 (1994)*- privilege extends to spiritual or religious counseling type sessions with Bishop. Prior common law held only "pentitential communications" were privileged.

23 **The Clergy Privilege in Real Life**

24 **Communications to Clergy URE 503**

- If a Defendant is unwise and allows a partial disclosure of a confidential communication to a cleric, privilege is waived.

In *State vs. Patterson*, Defendant requested that his Bishop speak to the presentence writer in his criminal case. The Bishop wrote a letter explaining that "he told me how sorry he was for what he has done."

Held: *Privilege Waived.*

25 **Lawyer-Client Privilege URE 504**

- A client has a privilege to refuse to disclose and to prevent another from disclosing confidential communications:
  - 1) made for the purpose of facilitating rendition of legal services to the client; and
  - 2) the communications were between client and client's representatives and lawyer and lawyer's representatives.

"The privilege belongs to the client and he [or she] may waive it or enforce it as to him [or her] may seem proper.... The sole purpose of the privilege was [and is] to protect the client's interest." *In Re Young's Estate,* 33 Utah 382, 387, 94 P. 731 (1908).

26 **Waiver of Lawyer-Client Privilege**

In addition to Rule 510 waivers, these waivers apply:

- Services of the lawyer were sought to enable or aid anyone to commit a crime or fraud.
- Issue is a breach of duty by the lawyer.
- Information relevant to a lawyer witnessing the signing of a document.
- An action between clients represented by the same lawyer.

27 **Lawyer Client Privilege in Real Life**

Letter in possession of Defendant's Attorney

-

28 **Government Informer URE 505**

1 - Only privilege held by the government (NOT informant)
- Can whithhold identity of informer
- Except when there is a showing by Defendant that "an informer may be able to give testimony necessary to a determination of the issue of guilt," and

- Court so finds, then
- Government must disclose or dismiss case
-
  -
-

29 **Physician and MH Privilege URE 506**

1 - Patient holds privilege during lifetime
- To refuse to disclose and prevent others from disclosing
- Information obtained by
- A physician or mental health therapist for the purpose of
- Diagnosis or treatment
-

30 **Physician and MH Privilege URE 506**

1 - In addition to waivers under URE 510, Privilege does not apply:
  - After death of patient;
  - If patient is in need of MH hospitalization; or
  - Court ordered evaluations; or
  - If condition is relevant to an element of a claim or defense;

2 *State vs. Worthen, 177 P3d 664 (2008)*

Defendant obtained MH records of victim because he made a showing with "reasonable certainty" that her records contained material that was "exculpatory material evidence" concerning an element of his defense.

Query: Why wouldn't this same exception apply for the benefit of the State?

-

31 **Physician and MH Privilege URE 506**

1 - URE 506 does NOT override the reporting requirements for
  - Child Abuse UCA 62a-4-501
  - Elder Abuse UCA 76-5-111.1
  - Injury resulting from a crime

32 **Miscellaneous Privileges**

1 - Sexual Assault Counselor Privilege UCA 78B-1-137 (6)
  - Confidential communications cannot be disclosed (some exceptions for minor victims)
- Public Officer Privilege UCA 78B-1-137 (5)
  - Applies to communications made in official confidence when the public interest would suffer
  - Example: Executive session of a legislative body

2 - News Reporters URE 509
  - Privilege belongs to news reporter
  - Right to refuse to disclose "confidential source information"
  - Exception: information is "necessary to prevent substantial injury or death."