

NY CLS CPLR § 4502

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New York

Consolidated Laws Service >
Civil Practice Law And Rules (Arts. 1 — 100) >
Article 45 Evidence (§§ 4501 — 4551)

§ 4502. Spouse

(a) Incompetency Where Issue Adultery. A husband or wife is not competent to testify against the other in an action founded upon adultery, except to prove the marriage, disprove the adultery, or disprove a defense after evidence has been introduced tending to prove such defense.

(b) Confidential Communication Privileged. A husband or wife shall not be required, or, without consent of the other if living, allowed, to disclose a confidential communication made by one to the other during marriage.

History

Add, L 1962, ch 308, eff Sept 1, 1963.

Annotations

Notes

Prior Law:

Earlier statutes: CPA § 349; CCP § 831.

Advisory Committee Notes:

This section is substantively the same as former § 349. The title has been changed from “Testimony of husband and wife in action and proceeding,” the section has been split into two subdivisions, catchlines have been added, and there has been some simplification of the language of subd (a).

Subd (a) deals with competency. Its prohibition of testimony on adultery may not be waived. See *Taylor v Taylor*, 123 App Div 220, 108 NY Supp 428 (4th Dept 1908); *Bolognino v Bolognino*, 136 Misc 656, 241 NY Supp 445 (Sup Ct), *affd without opinion*, 231 App Div 817, 246 NY Supp 883 (1st Dept 1930). On the other hand, subd (b) deals with a privilege for confidential communication which may be waived. See *People v Wood*, 126 NY 249, 271, 27 NE 362, 368 (1891); *Parkhurst v Berdell*, 110 NY 386, 393, 18 NE 123, 127 (1888). The two subdivisions raise distinctly different problems and separation will facilitate their analysis and use. Cf. *Poppe v Poppe*, 3 NY2d 312, 314–315, 144 NE2d 72, 73–74 (1957).

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I. Under CPLR

1. In general

At common law, person was incompetent to testify if interested in event, on supposed ground that he or she was unworthy of belief, but for most part and under statute, interest disqualification has been abolished. *Coleman v New York City Transit Authority*, 37 N.Y.2d 137, 371 N.Y.S.2d 663, 332 N.E.2d 850, 1975 N.Y. LEXIS 1938 (N.Y. 1975).

In a wrongful death action wherein it was alleged that plaintiff's deceased husband was killed when he fell from a 36th floor window, statements made by the deceased's psychiatrist to a medical examiner and to plaintiff after her husband's death do not constitute a waiver of the spousal or physician-patient privilege, making otherwise privileged statements admissible, since a recipient of confidential information may not destroy the privilege; however, such statements are admissible since a wrongful death action is authorized only if it could have been maintained by the decedent had he survived (EPTL 5-4.1) and if decedent had survived and brought the action he could not have successfully resisted defendants' demand, in their effort to establish

that his injuries resulted from attempted suicide rather than defendants' negligence because the privilege against self incrimination does not permit a plaintiff to claim affirmative relief and at the same time refuse to disclose information bearing upon his right to maintain his action and for essentially the same reason, the decedent as plaintiff could assert neither the physician-patient privilege nor the conjugal privilege to foreclose inquiry concerning whether his injury was the result of an attempt at suicide. By bringing a personal injury action in which mental or physical condition is affirmatively put in issue, privilege is waived, and it is judicially noticed that many apparently accidental deaths are in fact suicides and that a wrongful death complaint predicated upon an alleged accidental fall from a 36th story window is sufficiently equivocal in that respect to put in issue, by plaintiff's affirmative act in bringing the action, decedent's mental condition. The spousal privilege (CPLR 4502, subd [b]) is not terminated by death alone, and applies unless waived in some manner; the privilege belongs not to the witness but to the spouse against whom the testimony is offered. *Prink v Rockefeller Center, Inc.*, 48 N.Y.2d 309, 422 N.Y.S.2d 911, 398 N.E.2d 517, 1979 N.Y. LEXIS 2401 (N.Y. 1979).

Where defendant's wife exhibited to police certain drug equipment and marijuana assertedly belonging to defendant, such tangible property did not constitute a "confidential communication" between the spouses within the scope of the marital privilege, but was in the nature of "real evidence." Fact that police had learned of the presence of drug equipment and marijuana in defendant's apartment from defendant's wife who took police into the apartment and exhibited the drug equipment and marijuana to them did not require that the tangible evidence be suppressed on the ground that the wife's knowledge was based on confidential and thus privileged communication; rather, State should have had an opportunity to demonstrate defendant's ownership of the drug equipment and marijuana by proof independent of his wife's testimony. *People v Kemp*, 59 A.D.2d 414, 399 N.Y.S.2d 879, 1977 N.Y. App. Div. LEXIS 13940 (N.Y. App. Div. 1st Dep't 1977), app. denied, 43 N.Y.2d 929, 1978 N.Y. LEXIS 2785 (N.Y. 1978).

A communication made in confidence by a child to his parents does not fall within the marital privilege. *In re Application of A. In re A. & M.*, 61 A.D.2d 426, 403 N.Y.S.2d 375, 1978 N.Y. App. Div. LEXIS 9756 (N.Y. App. Div. 4th Dep't 1978).

The marital privilege (CPLR 4502, subd [b]) is inapplicable except to those statements which would not have been made but for the absolute confidence in, and induced by, the marital relationship. *People v Scalise*, 70 A.D.2d 346, 421 N.Y.S.2d 637, 1979 N.Y. App. Div. LEXIS 12719 (N.Y. App. Div. 3d Dep't 1979).

In a divorce action, one spouse is incompetent to testify on the issue of the other spouse's adultery. *Hendery v Hendery*, 101 A.D.2d 624, 474 N.Y.S.2d 991, 1984 N.Y. App. Div. LEXIS 18164 (N.Y. App. Div. 3d Dep't 1984).

In wrongful death action by deceased's husband against doctors and hospital who had treated deceased for psychiatric problems 2 months prior to her suicide, defendants were entitled to discovery of name and address of attorney representing husband as plaintiff in divorce action pending at time of suicide as well as index number of divorce case and copies of all pleadings filed therein; husband had waived all normal privileges between spouses, attorneys and clients and those granted by CLS Dom Rel § 235 by bringing his tort action and thus putting into issue "whether and to what extent plaintiff's actions aggravated and caused a resurgence of deceased's condition . . . the manner in which plaintiff pursued his divorce proceeding, the grounds he alleged, the claims he made . . . the actions he took . . . the defenses she claimed, and the counterclaims." *Janecka v Casey*, 121 A.D.2d 28, 508 N.Y.S.2d 451, 1986 N.Y. App. Div. LEXIS 60634 (N.Y. App. Div. 1st Dep't 1986).

In prosecution for murder of defendant's first wife, defendant's second wife was properly permitted to testify that defendant had told her that he killed his first wife, notwithstanding claim of marital privilege under CLS CPLR § 4502(b), since (1) first wife's father testified that defendant and first wife were living apart, but not divorced, at time of defendant's marriage to second wife, and therefore second marriage was void, and (2) there was no indication that defendant was not aware of invalidity of his second marriage. *People v Mulgrave*, 163 A.D.2d

538, 558 N.Y.S.2d 607, 1990 N.Y. App. Div. LEXIS 8750 (N.Y. App. Div. 2d Dep't 1990), app. denied, 76 N.Y.2d 989, 563 N.Y.S.2d 777, 565 N.E.2d 526, 1990 N.Y. LEXIS 4671 (N.Y. 1990), app. denied, 78 N.Y.2d 1129, 578 N.Y.S.2d 886, 586 N.E.2d 69, 1991 N.Y. LEXIS 5528 (N.Y. 1991).

In prosecution for sexual abuse of 3 young boys, court properly allowed defendant's wife to testify that he slept with boys, notwithstanding claim of marital privilege, since acts testified to occurred in presence of third persons (boys) and were not intended to be confidential; moreover, court properly allowed wife to testify to communications made by her to defendant regarding her objections to his sleeping with boys since that testimony did not implicate confidential communications made by defendant to her. *People v Rossi*, 185 A.D.2d 401, 585 N.Y.S.2d 816, 1992 N.Y. App. Div. LEXIS 8834 (N.Y. App. Div. 3d Dep't), app. denied, 80 N.Y.2d 909, 588 N.Y.S.2d 834, 602 N.E.2d 242, 1992 N.Y. LEXIS 3717 (N.Y. 1992).

Court properly permitted defendant's wife to testify concerning time defendant arrived at home on particular day, and as to her discovery of duffel bag and its contents later that day; such observations were not "communications" protected by marital privilege. *People v LaPlanche*, 193 A.D.2d 1062, 598 N.Y.S.2d 877, 1993 N.Y. App. Div. LEXIS 5679 (N.Y. App. Div. 4th Dep't), app. dismissed, 82 N.Y.2d 756, 603 N.Y.S.2d 998, 624 N.E.2d 184, 1993 N.Y. LEXIS 4084 (N.Y. 1993).

Court properly permitted witness to read to jury from letter from murder defendant to his wife that was intercepted by wife's cellmate and turned over to prosecution where letter was sufficiently related to conspiracy to cover up murder that it could be said to have been made in pursuit of criminal enterprise. *People v Smythe*, 210 A.D.2d 887, 620 N.Y.S.2d 647, 1994 N.Y. App. Div. LEXIS 13339 (N.Y. App. Div. 4th Dep't 1994), app. denied, 85 N.Y.2d 943, 627 N.Y.S.2d 1005, 651 N.E.2d 930, 1995 N.Y. LEXIS 2012 (N.Y. 1995).

Decedent's widow ordered to produce the original copy of her will to the representatives of the decedent's estate, to determine whether certain personal property belonged to her, under evidence that the decedent and his wife both submitted information to the attorney to prepare

wills for each of them; that the husband supplied some of the information to the attorney on behalf of his wife and there were some mutual provisions under the widow's will and the will simultaneously executed by the decedent. *In re Newton's Will*, 62 Misc. 2d 553, 309 N.Y.S.2d 284, 1970 N.Y. Misc. LEXIS 1724 (N.Y. Sur. Ct. 1970).

Subpoena of deputy Attorney General directing petitioners to produce books and records relating to their nursing home was not violative of petitioners' marital privilege against self-incrimination as husband and wife, where privilege was no greater than right against self-incrimination, and no such right existed in case because records were those of a separate business entity. *Lewis v Hynes*, 82 Misc. 2d 256, 368 N.Y.S.2d 738, 1975 N.Y. Misc. LEXIS 2615 (N.Y. Sup. Ct. 1975), *aff'd*, 51 A.D.2d 550, 379 N.Y.S.2d 374, 1976 N.Y. App. Div. LEXIS 10799 (N.Y. App. Div. 2d Dep't 1976).

Information concerning conversations with or instructions given wife by her husband in connection with his business and business records was privileged and could not be disclosed by wife to grand jury, but only those communications and acts which were confidential in character were deemed protected by the privilege. *In re Doe*, 90 Misc. 2d 812, 396 N.Y.S.2d 145, 1977 N.Y. Misc. LEXIS 2161 (N.Y. County Ct. 1977).

In a judgment enforcement proceeding, where the defendant's wife is subpoenaed to testify as a witness with respect to a judgment entered against her husband and testifies freely as to all matters except as to her husband's present whereabouts and the amount of support she receives from him, she is entitled to invoke the privilege accorded of a spouse (CPLR 4502, subd [b]), since there is no showing of any fraud or attempt to conceal fraud by the witness, and need not disclose his whereabouts or information regarding support. The disclosure of confidential communications between a husband and wife is prohibited, as a matter of public policy, in order that the parties to a marriage may speak freely to each other of intimate confidences without the fear of thereafter being confronted in litigious matters with confessions even at the cost of frustrating the fact-finding process; the statutory privilege does not protect all the daily and ordinary exchanges between the spouses, but merely those which would not have

been made but for the absolute confidence in, and induced by, the marital relationship. *Federated Dep't Stores, Inc. v Esser*, 96 Misc. 2d 567, 409 N.Y.S.2d 353, 1978 N.Y. Misc. LEXIS 2642 (N.Y. Sup. Ct. 1978).

CPLR § 4502(b), in recognizing the special relationship enjoyed by a man and wife, provides a husband and wife with a special privilege of confidential communication existing between them that is not found to exist between a parent and child; the policy behind this privilege is to protect and strengthen the marital bond. *Siveke v Keena*, 110 Misc. 2d 4, 441 N.Y.S.2d 631, 1981 N.Y. Misc. LEXIS 3033 (N.Y. Sup. Ct. 1981).

In a medical malpractice action by an infant child of divorced parents in which the child's (and therefore the mother's) medical history was placed in issue, the husband-wife privilege would not apply, during examination of the mother, to any observations or knowledge that the mother had as to the father's medical history; because the privilege asserted was that of husband and wife, and not the husband's medical privilege, only knowledge arising from marital communications—not facts plain to observation—were privileged. *Rubino v Albany Medical Center Hospital*, 126 Misc. 2d 204, 481 N.Y.S.2d 622, 1984 N.Y. Misc. LEXIS 3579 (N.Y. Sup. Ct. 1984).

Marital communication privilege of CLS CPL § 60.10 and CLS CPLR § 4502(b) would not be extended to cover nonformalized relationship between couple who had lived together for 6 years and had 2 children. *People v Suarez*, 148 Misc. 2d 95, 560 N.Y.S.2d 68, 1990 N.Y. Misc. LEXIS 409 (N.Y. Sup. Ct. 1990).

Alleged use of confidential communication obtained by police from interview with defendant's estranged wife in furtherance of investigation into disappearance of 2 women, leading to search of defendant's premises, did not violate defendant's constitutional right to be free from unreasonable searches and seizures since (1) there is no Fourth Amendment prohibition against using privileged communication as basis for finding of probable cause to conduct search, (2) statements of spouse which would be privileged under CLS CPLR § 4502(b) can nevertheless be used to establish probable cause to obtain search warrant or investigate suspect, since

spousal privilege is applicable only at trial, and (3) spousal privilege does not implicate constitutionally protected right. *People v Lifrieri*, 157 Misc. 2d 598, 597 N.Y.S.2d 580, 1993 N.Y. Misc. LEXIS 151 (N.Y. Sup. Ct. 1993).

2. Criteria for confidentiality

A tape recorded message prepared by petitioner prior to a suicide attempt which he addressed to his wife and left at their home was protected from disclosure by the marital privilege contained in CPLR § 4502, where it was a communication by petitioner to his wife made in confidence and induced by the marital relationship; the fact that the tape passed through the hands of two third-parties and that petitioner's wife disclosed the existence of the tape to police did not destroy the privilege, as none of the other parties listened to the tapes and the privilege falls only when the substance of the communication and not the mere fact of its occurrence is revealed to third parties. *In re Vanderbilt*, 57 N.Y.2d 66, 453 N.Y.S.2d 662, 439 N.E.2d 378, 1982 N.Y. LEXIS 3577 (N.Y. 1982).

Statement by husband regarding killing of wife's lover, made during course of telephone conversation initiated by husband immediately after arrest for killing of lover, is subject to marital privilege. *People v Fediuk*, 66 N.Y.2d 881, 498 N.Y.S.2d 763, 489 N.E.2d 732, 1985 N.Y. LEXIS 17982 (N.Y. 1985).

The marital privilege does not extend to all the ordinary daily exchanges between spouses, but merely those which would not have been made except for the absolute confidence of the marriage relationship. *People v O'Dell*, 36 A.D.2d 774, 318 N.Y.S.2d 908, 1971 N.Y. App. Div. LEXIS 4575 (N.Y. App. Div. 3d Dep't), cert. denied, 404 U.S. 860, 92 S. Ct. 160, 30 L. Ed. 2d 103, 1971 U.S. LEXIS 1339 (U.S. 1971).

Where defendant's wife brought out drug equipment and marijuana and displayed them to the police wholly on her own initiative and without any coercion, domination or direction by the police, defendant was not entitled to suppression of articles of contraband thus voluntarily exhibited by his wife. *People v Kemp*, 59 A.D.2d 414, 399 N.Y.S.2d 879, 1977 N.Y. App. Div.

LEXIS 13940 (N.Y. App. Div. 1st Dep't 1977), app. denied, 43 N.Y.2d 929, 1978 N.Y. LEXIS 2785 (N.Y. 1978).

The marital privilege (CPLR 4502, subd [b]), which generally precludes disclosure of a confidential communication made by one spouse to another during marriage, does not encompass statements made by a married couple in the presence of a third party, such as offspring old enough to comprehend what is being said, or statements made by a third party in the presence of a married couple. *In re Application of A. In re A. & M.*, 61 A.D.2d 426, 403 N.Y.S.2d 375, 1978 N.Y. App. Div. LEXIS 9756 (N.Y. App. Div. 4th Dep't 1978).

The marital privilege cannot be asserted as a bar to all inquiry in a post-judgment examination regarding the extent and whereabouts of the assets of the examinee's spouse, since the privilege is concerned only with specific matters and may be asserted only in response to questions on those matters. *Roberts v Pollack*, 92 A.D.2d 440, 461 N.Y.S.2d 272, 1983 N.Y. App. Div. LEXIS 17085 (N.Y. App. Div. 1st Dep't 1983).

There is no privilege against testimony of confidential communications between husband and wife in prosecutions arising out of charges of child abuse; accordingly, defendant's statements to his wife concerning rape of niece are properly admitted. *People v Gomez*, 112 A.D.2d 445, 492 N.Y.S.2d 415, 1985 N.Y. App. Div. LEXIS 56193 (N.Y. App. Div. 2d Dep't 1985).

In action to recover proceeds of stolen securities, defendant wife of principal (who had been convicted of transporting stolen securities in prior criminal action) was not entitled to have subpoena duces tecum served in aid of supplementary proceedings quashed, since (1) her motion to quash was untimely, in that it was made 3 weeks after subpoena was served and only 3 days before requested appearance for deposition, (2) her application lacked any prior request to withdraw process as required by CLS CPLR § 2304, and (3) application required denial on merits, inasmuch as no marital privilege attached to ordinary business records sought by plaintiffs or to testimony as to ordinary business matters of spouse. *Securities Settlement Corp. v Johnpoll*, 128 A.D.2d 429, 512 N.Y.S.2d 814, 1987 N.Y. App. Div. LEXIS 44136 (N.Y. App.

Div. 1st Dep't), app. dismissed, 70 N.Y.2d 693, 518 N.Y.S.2d 1028, 512 N.E.2d 554, 1987 N.Y. LEXIS 17955 (N.Y. 1987).

Spousal privilege was violated where court permitted criminal defendant's wife to testify as to certain statements made to her by defendant, and allowed letters written to her by defendant to be introduced in evidence, since defendant's communications did not constitute admissions of guilt. *People v Knights*, 131 A.D.2d 924, 516 N.Y.S.2d 969, 1987 N.Y. App. Div. LEXIS 48352 (N.Y. App. Div. 3d Dep't 1987).

Marital privilege of CLS CPLR § 4502 did not attach to defendant's communications made to his girlfriend prior to their marriage, and thus statements did not require suppression in murder prosecution. *People v Chirse*, 132 A.D.2d 615, 517 N.Y.S.2d 772, 1987 N.Y. App. Div. LEXIS 49155 (N.Y. App. Div. 2d Dep't 1987).

Defendant's statement to his wife was not subject to marital privilege where it was overheard by third person, since it was not confidential. *People v Felton*, 145 A.D.2d 969, 536 N.Y.S.2d 340, 1988 N.Y. App. Div. LEXIS 14057 (N.Y. App. Div. 4th Dep't 1988), app. denied, 73 N.Y.2d 1014, 541 N.Y.S.2d 769, 539 N.E.2d 597, 1989 N.Y. LEXIS 1836 (N.Y. 1989).

Portions of conversation between defendant and his wife were admissible against defendant since they were made in presence of 2 police officers and thus were not made in reliance on marital relationship. *People v Gorman*, 150 A.D.2d 797, 542 N.Y.S.2d 225, 1989 N.Y. App. Div. LEXIS 7202 (N.Y. App. Div. 2d Dep't), app. denied, 74 N.Y.2d 847, 546 N.Y.S.2d 1012, 546 N.E.2d 195, 1989 N.Y. LEXIS 3864 (N.Y. 1989), app. denied, 75 N.Y.2d 770, 551 N.Y.S.2d 913, 551 N.E.2d 114, 1989 N.Y. LEXIS 4721 (N.Y. 1989).

Second degree murder defendant's wife was properly allowed to testify at trial that he had arrived home wet on morning that victim's body was discovered in wooded area since act of coming home wet was not confidential communication which would not have been made but for marriage relationship; in any event, defendant appeared in public wet, and thus act could not be characterized as confidence. *People v Dawson*, 166 A.D.2d 808, 562 N.Y.S.2d 813, 1990 N.Y.

App. Div. LEXIS 12770 (N.Y. App. Div. 3d Dep't 1990), app. denied, 77 N.Y.2d 876, 568 N.Y.S.2d 919, 571 N.E.2d 89, 1991 N.Y. LEXIS 1070 (N.Y. 1991).

Defendant was not entitled to invoke marital privilege to preclude testimony of witness where she denied that she was married to defendant and he presented no proof that they were married. *People v Miller*, 212 A.D.2d 966, 623 N.Y.S.2d 672, 1995 N.Y. App. Div. LEXIS 1817 (N.Y. App. Div. 4th Dep't 1995).

Presumption of confidentiality as to communications between spouses during marriage was not overcome by showing that wife had assault charges pending against husband at time of communication, especially considering that it was wife who sought to assert privilege. *People v Starr*, 213 A.D.2d 758, 622 N.Y.S.2d 1010, 1995 N.Y. App. Div. LEXIS 2374 (N.Y. App. Div. 3d Dep't), app. denied, 85 N.Y.2d 980, 629 N.Y.S.2d 741, 653 N.E.2d 637, 1995 N.Y. LEXIS 2538 (N.Y. 1995).

Court properly allowed defendant's wife to testify that he admitted setting fire at issue where it was clearly shown that arson was directed against wife. *People v Capobianco*, 218 A.D.2d 707, 630 N.Y.S.2d 386, 1995 N.Y. App. Div. LEXIS 8683 (N.Y. App. Div. 2d Dep't), app. denied, 86 N.Y.2d 841, 634 N.Y.S.2d 450, 658 N.E.2d 228, 1995 N.Y. LEXIS 4548 (N.Y. 1995).

Court properly allowed defendant's wife to testify to statements defendant made to her prior to crimes where those statements conveyed threats and were not prompted by affection, confidence, and loyalty engendered by marital relationship. *People v Branch*, 224 A.D.2d 926, 637 N.Y.S.2d 892, 1996 N.Y. App. Div. LEXIS 1557 (N.Y. App. Div. 4th Dep't), app. denied, 87 N.Y.2d 1017, 644 N.Y.S.2d 150, 666 N.E.2d 1064, 1996 N.Y. LEXIS 1206 (N.Y. 1996).

Spousal privilege of CLS CPLR § 4502(b) does not apply to "homosexuals in a spousal relationship." *Greenwald v H & P 29th St. Assocs.*, 241 A.D.2d 307, 659 N.Y.S.2d 473, 1997 N.Y. App. Div. LEXIS 7024 (N.Y. App. Div. 1st Dep't 1997).

No testimony of defendant's wife at defendant's murder trial violated the marital privilege under circumstances in which statements made by defendant to his wife concerning his plans and

activities on the evening of the murders were nothing more than daily and ordinary exchanges between the spouses unprotected by the marital privilege, and were, in any event, essentially repeated to the police lieutenant who interviewed defendant; moreover, defendant's conduct in pulling out a gun and simultaneously directing his wife "to get down" when she otherwise wanted to open the door to the police when they first knocked on the door of their home within hours of the murders were properly found to constitute threats and, therefore, also unprotected by the marital privilege. *People v Parker*, 49 A.D.3d 974, 854 N.Y.S.2d 233, 2008 N.Y. App. Div. LEXIS 2048 (N.Y. App. Div. 3d Dep't 2008), app. denied, 10 N.Y.3d 868, 860 N.Y.S.2d 494, 890 N.E.2d 257, 2008 N.Y. LEXIS 2006 (N.Y. 2008).

Admission of the testimony of the declarant's ex-wife that he admitted murdering two persons and threatened to kill her if she told anyone about it did not violate the declarant's spousal privilege because the threat he made against her indicated that he was not then relying upon any confidential relationship to preserve the secrecy of his acts and words, and was sufficient to remove the communications from the protection of the privilege. *People v Pierre*, 129 A.D.3d 1490, 11 N.Y.S.3d 389, 2015 N.Y. App. Div. LEXIS 4968 (N.Y. App. Div. 4th Dep't 2015).

Trial court properly determined that the wife of a county employee's supervisor, who provided the special education for the employee's son that the employee was dissatisfied with, could not be questioned about the substance of her conversations with her husband, the supervisor, in the employee's unlawful retaliation action, as the spousal privilege applied. *Calhoun v County of Herkimer*, 169 A.D.3d 1495, 92 N.Y.S.3d 838, 2019 N.Y. App. Div. LEXIS 1031 (N.Y. App. Div. 4th Dep't 2019).

Marital privilege against self-incrimination, an extension of Fifth Amendment right, is grounded upon theory that, just as one may not be convicted by his own compelled testimony, he may not be convicted by testimony of his spouse as to a communication uttered in reliance upon sanctity of a marital relationship. *Lewis v Hynes*, 82 Misc. 2d 256, 368 N.Y.S.2d 738, 1975 N.Y. Misc. LEXIS 2615 (N.Y. Sup. Ct. 1975), aff'd, 51 A.D.2d 550, 379 N.Y.S.2d 374, 1976 N.Y. App. Div. LEXIS 10799 (N.Y. App. Div. 2d Dep't 1976).

Husband-wife privilege extends to more than mere oral communications; it includes knowledge derived from observations of disclosive acts done in the presence of one by the other because of the marital relation which would not have been performed in the presence of the other except for the confidence existing between the two. *People v Watkins*, 89 Misc. 2d 870, 393 N.Y.S.2d 283, 1977 N.Y. Misc. LEXIS 1958 (N.Y. Sup. Ct. 1977), *aff'd*, 63 A.D.2d 1033, 406 N.Y.S.2d 343, 1978 N.Y. App. Div. LEXIS 12130 (N.Y. App. Div. 2d Dep't 1978).

Even if marital privilege were applicable in absence of a valid marriage, fact that statements had been made in presence of detective would have vitiated the privilege in any event. Marital privilege could not apply so as to preclude testimony of witness in the absence of a valid marriage, notwithstanding that witness and defendant had resided together in both New York and Puerto Rico and that witness considered herself to be the defendant's wife and had borne a child by him. *People v Torres*, 90 Misc. 2d 358, 394 N.Y.S.2d 546, 1977 N.Y. Misc. LEXIS 2064 (N.Y. Sup. Ct. 1977).

The confidential communications privilege accorded a husband and wife (CPLR 4502, subd [b]) extends to more than mere oral communications or conversations between husband and wife; it includes knowledge derived from observance of disclosive acts done in the presence or view of one spouse by the other because of the confidence existing between them by reason of the marital relation and which would not have been performed except for the confidence so existing. *Federated Dep't Stores, Inc. v Esser*, 96 Misc. 2d 567, 409 N.Y.S.2d 353, 1978 N.Y. Misc. LEXIS 2642 (N.Y. Sup. Ct. 1978).

Letters from defendant to his wife would be admissible in evidence at defendant's homicide trial to show consciousness of guilt where they revealed an attempt by defendant to obtain false testimony from his wife in support of a fabricated alibi and threats of physical harm should the wife not comply with the request, since such a communication is not within the marital privilege under CPLR § 4502(b) in view of the fact that the threats indicate that the communication is not being made in reliance on the marital relationship; further, the letters are evidence of subornation of perjury and thus constitute a criminal offense in themselves, which would not be

included within the privilege, and since the marital relationship had deteriorated to the point of nonexistence at the time of the communication, no public policy interest would be served in preserving the harmony of the relationship. *People v Mohammed*, 122 Misc. 2d 504, 470 N.Y.S.2d 997, 1984 N.Y. Misc. LEXIS 2862 (N.Y. Sup. Ct. 1984).

Spousal privilege fell and the testimony of defendant's wife was admissible because the substance of the communication between defendant and his wife was revealed to his wife's sister by both defendant and his wife. *People v Weeks*, 15 A.D.3d 845, 789 N.Y.S.2d 373, 2005 N.Y. App. Div. LEXIS 1234 (N.Y. App. Div. 4th Dep't), app. denied, 4 N.Y.3d 892, 798 N.Y.S.2d 737, 831 N.E.2d 982, 2005 N.Y. LEXIS 1813 (N.Y. 2005).

In a criminal prosecution, defendant's text messages to his wife in which he confessed that he had sexually assaulted his 11-year-old nephew were made in confidence and induced by the marriage, and were thereby protected by the spousal privilege. The text exchanges occurred solely between defendant and his wife on their personal cell phones, and nothing suggested that any other party was monitoring the conversation. The wife never hinted that defendant's discourse with her lacked privacy, and while she subsequently gave the messages to the police, the disclosure was immaterial to defendant's reasonable expectation of privacy at the time of the text exchange. *People v Lucas*, 80 Misc. 3d 574, 194 N.Y.S.3d 913, 2023 N.Y. Misc. LEXIS 3980 (N.Y. Sup. Ct. 2023).

In a criminal prosecution in which defendant confessed in text messages to his wife that he had sexually assaulted his 11-year-old nephew, the spousal privilege was extinguished by defendant's criminal activity against his wife in the form of adultery. When he sexually assaulted his nephew, defendant also committed the crime of adultery against his wife, so defendant's confession of the sexual molestation to his wife was the same as telling her that he had committed the crime of adultery against her. As a victim of the crime, the wife did not have to remain silent about it, and because defendant's text messages announced criminal activity aimed at the other spouse, the spousal privilege was extinguished. *People v Lucas*, 80 Misc. 3d 574, 194 N.Y.S.3d 913, 2023 N.Y. Misc. LEXIS 3980 (N.Y. Sup. Ct. 2023).

3. —Grand jury proceeding

Testimony by the defendant's wife before the Grand Jury, the defendant having been charged with arson and conspiracy, as to certain inculpatory remarks made by defendant to her in the presence of other people and that defendant gave her \$500 and instructed her to give it to another person, was admissible before the Grand Jury, and was not privileged communication under CPLR 4502 (subd [b]), since defendant's statements made to his wife were made in the presence of others, and the money was given to a third party and there was no statement by the defendant to his wife as to what the money was for. *People v Scalise*, 70 A.D.2d 346, 421 N.Y.S.2d 637, 1979 N.Y. App. Div. LEXIS 12719 (N.Y. App. Div. 3d Dep't 1979).

Wife's testimony before grand jury, which was investigating possibility that defendant had beaten his three-month-old child, that she was home on the day in question with the defendant and their child but had no knowledge of how or when he was injured or who, if anyone, injured him, did not relate to any confidential communications and was thus properly admitted before the grand jury. *People v Easter*, 90 Misc. 2d 748, 395 N.Y.S.2d 926, 1977 N.Y. Misc. LEXIS 2145 (N.Y. County Ct. 1977).

Inasmuch as the delivery of tangible property to an attorney by his client may constitute a communication subject to the attorney-client privilege, the delivery of an ammunition clip and ammunition believed to have been used in the shooting of a police officer, to an attorney by the defendant client fell within the ambit of such privilege; defendant's attorney, however, would not be permitted to withhold such property from the Grand Jury on the ground of privilege since public policy demands that where reasonable grounds exist to believe that certain tangible property may have been used in the commission of a crime, such property should be made available to the Grand Jury for its investigation. Furthermore the presence of a third party during a communication between an attorney and his client vitiates the attorney-client privilege that would otherwise attach to the communication; thus, the attorney-client privilege was contravened where the defendant client's live-in girlfriend was present during the transfer of the

ammunition clip and ammunition. *People v Investigation into a Certain Weapon*, 113 Misc. 2d 348, 448 N.Y.S.2d 950, 1982 N.Y. Misc. LEXIS 3301 (N.Y. Sup. Ct. 1982).

4. —Professional misconduct hearing

In professional misconduct hearing, negative inferences could properly be drawn from patient's assertion of marital and doctor-patient privileges, despite patient's status as both patient and spouse of psychiatrist charged with misconduct, where material that was sought dealt with matters prior to marriage and generally did not deal with information obtained through confidential communications within privileged relationships; since privileges were improperly invoked, negative inferences could properly be drawn. *Damino v Board of Regents*, 124 A.D.2d 271, 508 N.Y.S.2d 618, 1986 N.Y. App. Div. LEXIS 61318 (N.Y. App. Div. 3d Dep't 1986), app. denied, 70 N.Y.2d 613, 524 N.Y.S.2d 431, 519 N.E.2d 342, 1987 N.Y. LEXIS 19897 (N.Y. 1987).

5. Consent for divulging information

Defendant in a divorce action could not urge upon appeal that her testimony in support of her defense of condonation was incompetent under this section, where that testimony had been admitted over plaintiff's objection and upon defendant's insistence that it was competent. *Prytherch v Prytherch*, 23 A.D.2d 871, 259 N.Y.S.2d 304, 1965 N.Y. App. Div. LEXIS 4241 (N.Y. App. Div. 2d Dep't), aff'd, 16 N.Y.2d 997, 265 N.Y.S.2d 660, 212 N.E.2d 896, 1965 N.Y. LEXIS 999 (N.Y. 1965).

Consent once given in a judicial proceeding operates as a waiver of the privilege and the privileged communication so divulged can be used or elicited upon another judicial proceeding. Consent to divulging privileged matters can either be actual or implied. It is actual when one party to the marriage is called upon to give testimony to such privileged knowledge, at the behest of the other. It is implied when one spouse testifies to such matters without seasonable objection by the other. Objection must be made before the confidential matter is disclosed.

People v Santiago, 68 Misc. 2d 85, 326 N.Y.S.2d 332, 1971 N.Y. Misc. LEXIS 1118 (N.Y. City Crim. Ct. 1971).

A motion to dismiss an indictment on the grounds that the Grand Jury received incompetent and inadmissible evidence contrary to CPLR 4502 (subd [b]) so as to impair the integrity of the Grand Jury is denied, since the uncontradicted sworn allegations of fact contained in the People's answering papers show that the defendant, with the advice of counsel, knowingly and intelligently waived the privilege which may have existed under the statute. People v Ellwanger, 99 Misc. 2d 807, 417 N.Y.S.2d 402, 1979 N.Y. Misc. LEXIS 2340 (N.Y. County Ct. 1979).

6. Effect of living apart

There are three recognized grounds for the destruction of the protection afforded by CPLR 4502(b): (1) where the criminal activity is aimed against the other spouse; (2) where the communication is made in the presence of third parties; (3) where the defendant in communicating relied on other grounds specifically enjoining silence or fear; but a fourth exception will not be added where the parties are not living together in the milieu of the normal marriage relationship. In an assault prosecution, testimony of the wife that the defendant-husband had telephoned her and told her of the shootings, and that she had seen a revolver in his possession shortly prior to the shootings, was inadmissible by virtue of CPLR 4502(b) even though the parties were living apart at the time and even though she thought her life was in danger when the defendant visited her following the shootings and told her that he had come to kill her. People v Fields, 38 A.D.2d 231, 328 N.Y.S.2d 542, 1972 N.Y. App. Div. LEXIS 5423 (N.Y. App. Div. 1st Dep't), aff'd, 31 N.Y.2d 713, 337 N.Y.S.2d 517, 289 N.E.2d 557, 1972 N.Y. LEXIS 1041 (N.Y. 1972).

Fact that the parties were separated does not destroy the privilege where that party obviously clings to the illusion that reconciliation is possible. People v Fediuk, 104 A.D.2d 1003, 480 N.Y.S.2d 913, 1984 N.Y. App. Div. LEXIS 20438 (N.Y. App. Div. 2d Dep't 1984), aff'd, 66 N.Y.2d 881, 498 N.Y.S.2d 763, 489 N.E.2d 732, 1985 N.Y. LEXIS 17982 (N.Y. 1985).

7. Personal wrongs

Where immediately after shooting, defendant charged with murder attempted to strangle his wife and after releasing his grip on her, ordered her about with a rifle still clutched in his hands, defendant was not then relying upon any confidential relationship to preserve secrecy of his acts and words and wife was properly permitted to testify as to facts of shooting and conversation with defendant during ride from scene of crime. *People v Patterson*, 39 N.Y.2d 288, 383 N.Y.S.2d 573, 347 N.E.2d 898, 1976 N.Y. LEXIS 2409 (N.Y. 1976), *aff'd*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281, 1977 U.S. LEXIS 120 (U.S. 1977).

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Wife's testimony against husband in prosecution of latter for child-beating death of his daughter would have been admissible, even if husband-wife privilege (CPLR § 4502, subd b) had not been removed in such cases by Social Services L § 383-a, under exception that injuries to one spouse by the other are outside the privilege. *People v Allman*, 41 A.D.2d 325, 342 N.Y.S.2d 896, 1973 N.Y. App. Div. LEXIS 4642 (N.Y. App. Div. 2d Dep't 1973).

Marital privilege of confidential communication does not preclude wife from testifying regarding conversations had with husband in which husband, by threats of force, attempts to enlist her support in criminal scheme resulting in assault. *People v Naylor*, 120 A.D.2d 940, 502 N.Y.S.2d 856, 1986 N.Y. App. Div. LEXIS 57027 (N.Y. App. Div. 4th Dep't 1986).

In burglary prosecution, court properly admitted testimony by defendant's wife as to threats and physical abuse by defendant forcing her to participate in burglaries, notwithstanding claim by defendant that statements made to wife were protected by marital privilege, since communications that include threats are not protected by marital privilege because they indicate that communication was not being made in reliance on marital relationship. *People v Edwards*, 151 A.D.2d 987, 542 N.Y.S.2d 425, 1989 N.Y. App. Div. LEXIS 8306 (N.Y. App. Div. 4th Dep't), app. denied, 74 N.Y.2d 808, 546 N.Y.S.2d 566, 545 N.E.2d 880, 1989 N.Y. LEXIS 3459 (N.Y. 1989).

In trial of defendant for second degree kidnapping of his wife, spousal privilege under CLS CPLR § 4502 was extinguished because criminal activity was aimed at spouse. *People v Govan*, 268 A.D.2d 689, 701 N.Y.S.2d 474, 2000 N.Y. App. Div. LEXIS 259 (N.Y. App. Div. 3d Dep't), app. denied, 94 N.Y.2d 920, 708 N.Y.S.2d 359, 729 N.E.2d 1158, 2000 N.Y. LEXIS 1177 (N.Y. 2000).

Where the defendant was charged with the murder of his infant child and argued that the testimony of his wife before the Grand Jury, relating to certain acts committed in her presence, was inadmissible as the disclosure of a "confidential communication", it was held the statute was never intended to encompass an inquiry into personal wrongs committed by one spouse against the other, and was never intended to label confidential a communication aimed at destroying the marital relation. *People v Allman*, 59 Misc. 2d 209, 298 N.Y.S.2d 363, 1969 N.Y. Misc. LEXIS 1678 (N.Y. Sup. Ct. 1969).

In a criminal action against the defendant-husband, charged with false imprisonment on the complaint of his wife, and with the possession of various guns, drugs and other contraband all in violation of the Penal Law, in which the wife was called as a witness and the defendant-husband

objected, such testimony was permissible where the husband had twice consented to the divulgence of communications privy to the marital relationship under evidence that he called his wife as his witness on a hearing upon a motion to suppress and permitted her to testify in extenso as to privileged information, and, on a preliminary hearing, the wife was called as the complaining witness and was permitted to give testimony without objection by the husband. *People v Santiago*, 68 Misc. 2d 85, 326 N.Y.S.2d 332, 1971 N.Y. Misc. LEXIS 1118 (N.Y. City Crim. Ct. 1971).

In action by entertainer against his former manager for declaration of validity of entertainer's termination of management agreement based on manager's fraud and breach of his fiduciary duty, manager could not maintain third party claim against wife for tortious interference with management contract since crucial testimony would be inadmissible as confidential communications under CLS CPLR § 4502(b) given that management agreement pertained in part to handling of household account under ante-nuptial agreement, and income and assets of "marital partnership"; under circumstances, relevant communications between entertainer and wife did not fall within statutory exception for ordinary business conversation. *Joel v Weber*, 153 Misc. 2d 549, 581 N.Y.S.2d 579, 1992 N.Y. Misc. LEXIS 84 (N.Y. Sup. Ct. 1992).

Admission, in defendant's sodomy trial, of a recording of a telephone conversation between defendant and his estranged wife in which he admitted having oral sex with the child victim was not improper because the communication involved an admission of guilt to an act of sexual abuse on his spouse's child, and so the communication was not protected by the marital privilege. *People v Powers*, 42 A.D.3d 816, 839 N.Y.S.2d 865, 2007 N.Y. App. Div. LEXIS 8722 (N.Y. App. Div. 3d Dep't), app. denied, 9 N.Y.3d 1008, 850 N.Y.S.2d 396, 880 N.E.2d 882, 2007 N.Y. LEXIS 4000 (N.Y. 2007).

8. Matrimonial actions

Wife is incompetent to testify either orally or by affidavit as to alleged condonation. *Tallent v Tallent*, 22 A.D.2d 988, 254 N.Y.S.2d 722, 1964 N.Y. App. Div. LEXIS 2507 (N.Y. App. Div. 3d Dep't 1964).

Since statute requires matrimonial actions to go forward only after submission to conciliation, the restricted use of disclosure is substantially diminished and an order properly permitted disclosure of all relevant facts and circumstances in connection with divorce action, but disclosure by husband on issue of adultery alleged in his counterclaim should not be required because he is not competent to testify on that issue. *Dunlap v Dunlap*, 34 A.D.2d 889, 312 N.Y.S.2d 441, 1970 N.Y. App. Div. LEXIS 4792 (N.Y. App. Div. 4th Dep't 1970).

Notwithstanding statute prohibiting husband or wife from testifying against the other in an action for adultery or from divulging confidential communications of the other, a spouse may give testimony of commission of adultery by other spouse in a matrimonial suit based upon cruel and inhuman treatment. *Lee v Lee*, 51 A.D.2d 576, 378 N.Y.S.2d 459, 1976 N.Y. App. Div. LEXIS 10861 (N.Y. App. Div. 2d Dep't 1976).

In a divorce action, the wife was not competent to testify on the issue of the husband's adultery, and thus the wife's motion for a protective order, prohibiting the husband from taking her deposition on that issue, was properly granted. *Eades v Eades*, 83 A.D.2d 972, 442 N.Y.S.2d 815, 1981 N.Y. App. Div. LEXIS 15433 (N.Y. App. Div. 3d Dep't), app. dismissed, 55 N.Y.2d 800, 447 N.Y.S.2d 435, 432 N.E.2d 137, 1981 N.Y. LEXIS 3317 (N.Y. 1981).

Supreme Court erred in dismissing wife's complaint for divorce at conclusion of her case where court apparently believed that husband had established defense of recrimination under CLS Dom Rel § 171 and thus did not pass upon sufficiency of wife's proof in that regard, since such finding was based primarily upon husband's testimony which should have been disregarded pursuant to CLS CPLR § 4502; wife's denial of many of allegations testified to by husband raised issues of fact that could only be determined at close of all proof. Supreme Court should have disregarded testimony of husband as to wife's alleged adultery that came out as defense of recrimination during wife's case in chief, even though wife's counsel objected only belatedly to

its introduction, where testimony was incompetent pursuant to CLS CPLR § 4502. *Marrow v Marrow*, 124 A.D.2d 1000, 508 N.Y.S.2d 789, 1986 N.Y. App. Div. LEXIS 62326 (N.Y. App. Div. 4th Dep't 1986).

In a divorce action where the wife raised a counterclaim of adultery, the wife's affidavit in opposition to the husband's motion for summary judgment dismissing the counterclaim could be properly considered, as it was submitted to oppose the husband's own evidence that the claimed adultery with the family babysitter had never occurred. *Agulnick v Agulnick*, 191 A.D.3d 12, 136 N.Y.S.3d 462, 2020 N.Y. App. Div. LEXIS 7613 (N.Y. App. Div. 2d Dep't 2020).

9. Child custody proceedings

The testimony of a husband in a divorce action, admitted and considered solely on the question of the custody of the children of the parties, was not incompetent under CPLR 4502(a). *Johnson v Johnson*, 25 A.D.2d 672, 268 N.Y.S.2d 403, 1966 N.Y. App. Div. LEXIS 4732 (N.Y. App. Div. 2d Dep't 1966).

10. Examinations before trial

Where an unexplained accident causing the death of a third party had occurred, defendant's wife could be examined before trial as to her husband's prior physical condition. *Wood v Lawrence*, 59 Misc. 2d 333, 299 N.Y.S.2d 72, 1969 N.Y. Misc. LEXIS 1617 (N.Y. Sup. Ct. 1969).

Spousal confidentiality did not preclude admission of wife's testimony that husband told her he had killed a boy many years earlier, because at the time of the admission, the husband was choking the wife and threatening to kill her; this was not a confidential communication for purposes of the privilege. *People v Mills*, 1 N.Y.3d 269, 772 N.Y.S.2d 228, 804 N.E.2d 392, 2003 N.Y. LEXIS 3369 (N.Y. 2003).

Wife was not entitled to refuse to answer certain written interrogatories regarding her husband's assets sought by judgment creditor where information sought dealt with business matters that

either were not confidential or, if deliberate efforts were made to conceal them to prevent execution of judgment, were not entitled to marital privilege even if parties intended them to be confidential. *G--Fours, Inc. v Miele*, 496 F.2d 809, 1974 U.S. App. LEXIS 9005 (2d Cir. N.Y. 1974).

II. Under Former Civil Practice Laws

A. In General

11. Generally

The rule does not extend to the case of a woman cohabiting with a person as his wife, but not married to him. *Dennis v Crittenden*, 42 N.Y. 542, 42 N.Y. (N.Y.S.) 542, 1870 N.Y. LEXIS 77 (N.Y. 1870).

In an action between husband and wife either was a witness against the other save in the cases excepted in CPA § 349. *Southwick v Southwick*, 49 N.Y. 510, 49 N.Y. (N.Y.S.) 510, 1872 N.Y. LEXIS 199 (N.Y. 1872).

This provision of CPA § 349 related only to such communications as were expressly made in confidence or from their nature and the circumstances of disclosure appeared to be so made, or such as sprang out of and were induced by the marital relation and were, therefore, confidential in character. *Symington v Symington*, 215 A.D. 553, 214 N.Y.S. 307, 1926 N.Y. App. Div. LEXIS 11007 (N.Y. App. Div. 1926).

CPA § 349 was to be strictly limited to the particular situation covered by its language. In *re Callahan's Estate*, 254 N.Y.S. 46, 142 Misc. 28, 1931 N.Y. Misc. LEXIS 1558 (N.Y. Sur. Ct. 1931), *aff'd*, 236 A.D. 814, 259 N.Y.S. 987, 1932 N.Y. App. Div. LEXIS 7199 (N.Y. App. Div. 1932).

One spouse is not incompetent to identify the other even in a divorce action. *Walsh v Walsh*, 25 Misc. 2d 441, 208 N.Y.S.2d 380, 1960 N.Y. Misc. LEXIS 2439 (N.Y. Sup. Ct. 1960).

Service upon husband in divorce action was not rendered insufficient because process server, who had not previously known or seen husband, identified him from a photograph given to him by wife and by wife's pointing husband out to him at time of service where both wife and process server testified and server identified husband who was in court. *Walsh v Walsh*, 25 Misc. 2d 441, 208 N.Y.S.2d 380, 1960 N.Y. Misc. LEXIS 2439 (N.Y. Sup. Ct. 1960).

An order of publication of summons, in an action for divorce, cannot be made merely upon the affidavit of the plaintiff. *Perweiler v Perweiler*, 160 N.Y.S. 785 (N.Y. Sup. Ct. 1916).

12. Burden of proof

Where complaint was verified, the averments set forth in RCP 275 (Now Rel. Law 144) were prima facie evidence and burden of proof was shifted upon defendant who had to controvert same as matter of affirmative defense. *Farace v Farace*, 61 How. Pr. 61, 1881 N.Y. Misc. LEXIS 132 (N.Y. Sup. Ct. May 1, 1881).

13. Waiver

Provisions prohibiting either spouse from testifying express a principle of public policy, binding alike upon the parties and the court, and cannot be waived, even though done in good faith. *Bolognino v Bolognino*, 241 N.Y.S. 445, 136 Misc. 656, 1930 N.Y. Misc. LEXIS 1202 (N.Y. Sup. Ct.), *aff'd*, 231 A.D. 817, 246 N.Y.S. 883, 1930 N.Y. App. Div. LEXIS 8054 (N.Y. App. Div. 1930).

Where testimony fell within scope of CPA § 349, incompetency of witness could not be waived, and his testimony did not become admissible by failure to object to it. *Admire v Admire*, 42 N.Y.S.2d 755, 180 Misc. 68, 1943 N.Y. Misc. LEXIS 2065 (N.Y. Sup. Ct. 1943).

B. Adultery And Defenses Thereto

14. Generally

The husband was forbidden by the provisions of CPA § 349 to testify to material facts tending to establish the misconduct of his wife, alleged by him in his complaint. *Colwell v Colwell*, 14 A.D. 80, 43 N.Y.S. 439, 1897 N.Y. App. Div. LEXIS 214 (N.Y. App. Div. 1897).

Voluntary testimony by wife to her own adultery was competent, and if sufficiently corroborated by other testimony, was sufficient to support divorce decree. *Rivett v Rivett*, 270 A.D. 878, 61 N.Y.S.2d 7, 1946 N.Y. App. Div. LEXIS 4415 (N.Y. App. Div. 1946).

In action for divorce, husband was incompetent to testify and detail physical description of apartment where adultery allegedly occurred, and to identify handwriting of paramour, as effect was to offer husband as witness indirectly to facts of adultery. *Weil v Weil*, 283 A.D. 33, 125 N.Y.S.2d 368, 1953 N.Y. App. Div. LEXIS 2974 (N.Y. App. Div. 1953).

In proceeding by second husband and wife to adopt her child by first husband objecting to proceeding, her voluntary testimony of her adultery with petitioner was competent. In re Anonymous Minor Child's Adoption, 77 N.Y.S.2d 121, 192 Misc. 359, 1948 N.Y. Misc. LEXIS 2133 (N.Y. Sur. Ct. 1948).

Confessions of adultery made by a defendant and proved on the trial, and which are not denied by him, will warrant a decree of divorce. *Sigel v Sigel*, 20 N.Y.S. 377 (N.Y. Super. Ct. 1892).

Where plaintiff brings an action for divorce a vinculo and the answer puts in issue the residence of plaintiff at the time of the commission of the adultery and the commencement of the action, the plaintiff is incompetent to testify as to such facts. *Dickinson v Dickinson*, 18 N.Y.S. 485, 63 Hun 516 (1892).

15. One spouse as witness for the other

By the act of 1860, husband and wife were competent witnesses the one for the other in all cases where they were parties to the action. *Birdsall v Patterson*, 51 N.Y. 43, 51 N.Y. (N.Y.S.) 43, 1872 N.Y. LEXIS 535 (N.Y. 1872).

In action by husband for divorce for wife's adultery, she is competent witness to testify for him and against herself on issue of adultery. *Abramowitz v Abramowitz*, 137 N.Y.S.2d 442, 1954 N.Y. Misc. LEXIS 2556 (N.Y. Sup. Ct. 1954).

The husband or wife was still a competent witness in an action for divorce, for adultery, in favor of the other in spite of CPA § 349. *Bailey v Bailey*, 41 Hun 424, 3 N.Y. St. 132 (N.Y.).

C. Confidential Communications

16. Generally

The communications which a husband or wife are prohibited to disclose are such as are expressly made confidential, or are of that nature, or induced by the marital relation; they do not refer to ordinary conversation relating to matters of business. *Parkhurst v Berdell*, 110 N.Y. 386, 18 N.E. 123, 110 N.Y. (N.Y.S.) 386, 18 N.Y. St. 193, 1888 N.Y. LEXIS 888 (N.Y. 1888).

In an action for libel, a husband could not testify as to conversations had with his wife, where such conversation might tend to show that an unlawful intimacy existed between the wife and a third party; a communication was confidential within the meaning of CPA § 349 when it was of a character that it could not be supposed that both husband and wife would have been willing to discuss the subject in the presence of others. *Warner v Press Pub. Co.*, 132 N.Y. 181, 30 N.E. 393, 132 N.Y. (N.Y.S.) 181, 1892 N.Y. LEXIS 1174 (N.Y. 1892).

In an action for separation, statements made by the husband to his wife whereby she was induced to believe that it would be dangerous for her to give birth to children are not privileged communications between husband and wife. *Sheldon v Sheldon*, 146 A.D. 430, 131 N.Y.S. 291, 1911 N.Y. App. Div. LEXIS 1906 (N.Y. App. Div. 1911).

Testimony of divorced husband relative to an alleged confession of adultery by the wife before divorce, properly excluded. *Yax v Yax*, 213 N.Y.S. 4, 125 Misc. 851, 1925 N.Y. Misc. LEXIS 1162 (N.Y. Sup. Ct. 1925), *aff'd*, 217 A.D. 714, 215 N.Y.S. 941, 1926 N.Y. App. Div. LEXIS 8034 (N.Y. App. Div. 1926).

The words “except to prove the fact of marriage,” refer to the marriage which took place between the parties, and it is not competent thereunder for a party to testify to a previous marriage, for the purpose of showing that her subsequent marriage to his adversary in the action was void. *Finn v Finn*, 12 Hun 339 (N.Y.); see *Southwick v Southwick*, 49 N.Y. 510, 49 N.Y. (N.Y.S.) 510, 1872 N.Y. LEXIS 199 (N.Y. 1872).

17. Letters between husband and wife

Not prejudicial error to admit in evidence in action for separation, letter from husband to wife containing statement characterizing her act as abandonment, offered merely to contradict her testimony. *Bohmert v Bohmert*, 241 N.Y. 446, 150 N.E. 511, 241 N.Y. (N.Y.S.) 446, 1926 N.Y. LEXIS 585 (N.Y. 1926).

A letter by a husband addressed to his wife is competent evidence and is not a confidential communication between the husband and the wife, though written in the former's presence. *Weston v Weston*, 86 A.D. 159, 83 N.Y.S. 528, 1903 N.Y. App. Div. LEXIS 2322 (N.Y. App. Div. 1903).

In an action on a note made by a husband and wife, a letter written by the husband chronicling his daily doings, and stating matter material to the action, should not be excluded as a confidential communication. *Norris v Lee*, 136 A.D. 685, 121 N.Y.S. 512, 1910 N.Y. App. Div. LEXIS 116 (N.Y. App. Div. 1910).

In divorce action on ground of the defendant's adultery, held that letters written to the plaintiff by the defendant after the parties had separated, one written five days before and the other nine days after the commencement of the action, were not such confidential communications

between husband and wife as to preclude their admission in evidence. *Symington v Symington*, 215 A.D. 553, 214 N.Y.S. 307, 1926 N.Y. App. Div. LEXIS 11007 (N.Y. App. Div. 1926).

Letters between husband and wife were within the protection of CPA § 349. *Stillman v Stillman*, 187 N.Y.S. 383, 115 Misc. 106, 1921 N.Y. Misc. LEXIS 1222 (N.Y. Sup. Ct. 1921).

After separation a letter written by husband to wife, confessing adultery, was admissible in her divorce action where third person identified his handwriting. *Grobin v Grobin*, 55 N.Y.S.2d 32, 184 Misc. 996, 1945 N.Y. Misc. LEXIS 1797 (N.Y. Sup. Ct. 1945).

Letter written by plaintiff and delivered to defendant shortly before leaving him, giving her reasons for leaving, is competent as a declaration made to defendant himself of facts which he had an opportunity to deny or excuse. *Fowler v Fowler*, 11 N.Y.S. 419, 58 Hun 601, 1890 N.Y. Misc. LEXIS 778 (N.Y. Sup. Ct. 1890).

A declaration made by defendant the second night after marriage that he did not love plaintiff and had made a mistake in marrying her is not a privileged communication. Nor is a pretended confession of adultery by the husband made with the hope of rendering a similar confession by the wife. *Fowler v Fowler*, 11 N.Y.S. 419, 58 Hun 601, 1890 N.Y. Misc. LEXIS 778 (N.Y. Sup. Ct. 1890).

On wife's motion for alimony pending divorce, husband's letter to wife, admitting adultery, and letters received by him from correspondent, were inadmissible. *Lake v Lake*, 60 N.Y.S.2d 105, 1946 N.Y. Misc. LEXIS 1827 (N.Y. Sup. Ct. 1946).

18. Communications regarding illness or physical ailment

Heart ailments were deemed not confidential communication within this section. *Schneider v Van Wyckhouse*, 54 N.Y.S.2d 446, 1945 N.Y. Misc. LEXIS 1707 (N.Y. Sup. Ct. 1945).

Conversations between decedent and wife, as to chest pains or his visits to doctor, are confidential communications induced by marital relationship. *Salamon v Indemnity Ins. Co.*, 10 F.R.D. 232, 1950 U.S. Dist. LEXIS 3610 (D.N.Y. 1950).

Fact that cloak of privilege is thrown over conversations with one's doctor is of probative value to show that such conversations are in most cases of highly confidential nature, and are usually disclosed only to one's spouse. *Salamon v Indemnity Ins. Co.*, 10 F.R.D. 232, 1950 U.S. Dist. LEXIS 3610 (D.N.Y. 1950).

19. Presence of third party

Presence of daughter when conversation took place between husband and wife destroyed "confidential" character of such conversation. *In re Bourne's Estate*, 133 N.Y.S.2d 192, 206 Misc. 378, 1954 N.Y. Misc. LEXIS 2147 (N.Y. Sur. Ct. 1954).

20. Abusive language or cruel or inhuman conduct

CPA § 349 was not designed to forbid inquiry into the personal wrongs committed by one spouse against the other. A husband could prove his wife's cruel treatment of him by his testimony that she had admitted to him that she had committed adultery. *Poppe v Poppe*, 3 N.Y.2d 312, 165 N.Y.S.2d 99, 144 N.E.2d 72, 1957 N.Y. LEXIS 891 (N.Y.), reh'g denied, 3 N.Y.2d 941, 1957 N.Y. LEXIS 1523 (N.Y. 1957).

In an action to recover damages for the intentional alienation of the affections of the plaintiff's wife, evidence of abusive language, unfounded charges of adultery and unreasonable reprimand are not confidential communications. *Millspaugh v Potter*, 62 A.D. 521, 71 N.Y.S. 134, 1901 N.Y. App. Div. LEXIS 1289 (N.Y. App. Div. 1901).

In action for alienation of wife's affection, proof of ill-treatment of wife by husband is competent, and profane and abusive language used by him to her is not a confidential communication.

Stillman v Stillman, 187 N.Y.S. 383, 115 Misc. 106, 1921 N.Y. Misc. LEXIS 1222 (N.Y. Sup. Ct. 1921).

21. Illegitimacy of child; non-access

In husband's action for divorce, he could not testify as to wife's adultery or illegitimacy of child born during marriage. Punzi v Punzi, 79 N.Y.S.2d 620, 191 Misc. 36, 1948 N.Y. Misc. LEXIS 2443 (N.Y. Sup. Ct. 1948), aff'd, 275 A.D. 766, 88 N.Y.S.2d 905, 1949 N.Y. App. Div. LEXIS 4375 (N.Y. App. Div. 1949).

CPA § 349 did not apply where child was born over three years after divorce of mother and reputed father. Urquhart v Urquhart, 92 N.Y.S.2d 484, 196 Misc. 664, 1949 N.Y. Misc. LEXIS 2844 (N.Y. Sup. Ct. 1949), aff'd, 277 A.D. 752, 97 N.Y.S.2d 200, 1950 N.Y. App. Div. LEXIS 3128 (N.Y. App. Div. 1950).

Plaintiff husband cannot testify that he did not have access to wife during time allegedly adulterous child was conceived. Schacht v Schacht, 53 N.Y.S.2d 636, 1945 N.Y. Misc. LEXIS 1560 (N.Y. Sup. Ct. 1945). See Benti v Benti, 62 N.Y.S.2d 239, 1946 N.Y. Misc. LEXIS 2213 (N.Y. Sup. Ct. 1946).

Defendant wife, in divorce action, incompetent to testify to non-access to plaintiff husband. Benti v Benti, 62 N.Y.S.2d 239, 1946 N.Y. Misc. LEXIS 2213 (N.Y. Sup. Ct. 1946).

In husband's action for divorce for wife's adultery, he is incompetent to testify to nonaccess to her during their separation for seven years preceding birth of her child. Abramowitz v Abramowitz, 137 N.Y.S.2d 442, 1954 N.Y. Misc. LEXIS 2556 (N.Y. Sup. Ct. 1954).

22. Disproving adultery

Where plaintiff in an action for separation alleges that defendant had refused to permit her to return home, had slandered her, accusing her of unchastity, etc., and defendant alleges adultery on part of plaintiff with a person named, at a specified place, which plaintiff denies, plaintiff may

testify that there has been no impropriety between herself and the alleged paramour. *De Meli v De Meli*, 120 N.Y. 485, 24 N.E. 996, 120 N.Y. (N.Y.S.) 485, 1890 N.Y. LEXIS 1284 (N.Y. 1890).

In an action for a separation on the ground of cruel and inhuman treatment, where the defense sets up a counterclaim for adultery, the defendant may testify in detail as to a conversation had with the plaintiff, his wife, where it is competent on the issue of cruel and inhuman treatment; where the issues in such a case are tried together, this difficulty seems inherent. Testimony competent on either issue must be admitted. *Woodrick v Woodrick*, 141 N.Y. 457, 36 N.E. 395, 141 N.Y. (N.Y.S.) 457, 1894 N.Y. LEXIS 1150 (N.Y. 1894).

In an action for absolute divorce, in which counter charges of adultery are made in the answer, testimony of the plaintiff which is competent upon the issues presented by the answer is admissible, although incompetent upon the charges made by the complaint. *McCarthy v McCarthy*, 143 N.Y. 235, 38 N.E. 288, 143 N.Y. (N.Y.S.) 235, 1894 N.Y. LEXIS 941 (N.Y. 1894).

A wife sued for divorce is not confined to a mere denial of adultery, but may testify the facts and circumstances tending to explain her situation and show a conspiracy against her. *O'Hara v O'Hara*, 136 A.D. 378, 120 N.Y.S. 982, 1910 N.Y. App. Div. LEXIS 32 (N.Y. App. Div. 1910).

In a husband's action for an absolute divorce, he was not only disqualified under CPA § 349 from testifying to the alleged acts of adultery by defendant, but he might not as a witness deny an alleged admission that he had condoned such adultery. *Biers v Biers*, 156 A.D. 409, 142 N.Y.S. 128, 1913 N.Y. App. Div. LEXIS 6529 (N.Y. App. Div. 1913).

In action for divorce on ground of adultery, defendant had right to call wife as witness and prove any fact by her in support of his defense of collusion. *Rosenwasser v Rosenwasser*, 179 N.Y.S. 617, 110 Misc. 38, 1920 N.Y. Misc. LEXIS 1021 (N.Y. Sup. Ct.), rev'd, 191 A.D. 715, 182 N.Y.S. 27, 1920 N.Y. App. Div. LEXIS 4794 (N.Y. App. Div. 1920).

In action for divorce a party is not confined to denials, but may testify to affirmative facts to disprove the allegation of adultery. *Stevens v Stevens* (1889) 54 Hun 490, 8 NYS 47; *Irsch v*

Irsch, 12 Civ Proc 181; or to avoid the inferences to be drawn therefrom. *Steffens v Steffens*, 11 N.Y.S. 424, 1890 N.Y. Misc. LEXIS 783 (N.Y.C.P. 1890).

After the amendment of § 831 of the Code of Civ Proc (CPA § 349), permitting either the husband or the wife to become a witness in an action brought by the other to procure a divorce on the ground of adultery, for the purpose of disproving the charge of adultery, the force of the reason requiring corroboration of the alleged paramour's testimony was considerably weakened and the sufficiency of the alleged paramour's testimony must not have depended mainly upon the degree of credibility a judge or jury saw fit to attach to it; and, since such amendment, the refusal of the person charged with adultery to deny as a witness on his or her own behalf the truth of the alleged paramour's testimony could of itself, be considered corroboration of that testimony. *Steffens v Steffens*, 11 N.Y.S. 424, 1890 N.Y. Misc. LEXIS 783 (N.Y.C.P. 1890).

A defendant might disprove the allegations of adultery made by his wife and CPA § 349 did not limit the evidence to a simple denial. The husband or wife could testify to any fact or circumstance within his or her knowledge, competent and material on the question as to whether the act, as charged, was committed. *Huntley v Huntley*, 26 N.Y.S. 266, 73 Hun 261 (1893).

Amendment made in 1879 to the predecessor of CPA § 349 did not remove the restriction as to parties to an action for divorce testifying in their own behalf. *Hennessey v Hennessey*, 58 How. Pr. 304, 1877 N.Y. Misc. LEXIS 317 (N.Y. Sup. Ct. 1877).

D. Admission Of Improper Evidence

23. Necessity for specific objection

Under a general objection to a witness giving the conversation between J, his client, H, the assignee, and himself, such witness would be allowed to testify what his client told him in the presence of H to draw an assignment to H, which H might assign to Mrs. J. H. if he wished. If the objection had been to what J said, a different question might have arisen. *Brennan v Hall*, 14

N.Y.S. 864, 60 Hun 583, 1891 N.Y. Misc. LEXIS 2535 (N.Y. Sup. Ct. 1891), aff'd, 131 N.Y. 160, 29 N.E. 1009, 131 N.Y. (N.Y.S.) 160, 1892 N.Y. LEXIS 1008 (N.Y. 1892).

In action by husband for divorce for wife's adultery, where she objected to testifying against herself on issue of adultery but did not base objection on her constitutional privilege, she waived her privilege. *Abramowitz v Abramowitz*, 137 N.Y.S.2d 442, 1954 N.Y. Misc. LEXIS 2556 (N.Y. Sup. Ct. 1954).

24. —Objection that evidence immaterial

Where a letter from the wife to the husband was received in evidence and spread on the record, under objection that it was immaterial, a subsequent motion to strike out because it was a confidential communication will be denied. *Lunham v Lunham*, 133 A.D. 215, 117 N.Y.S. 396, 1909 N.Y. App. Div. LEXIS 2139 (N.Y. App. Div. 1909).

25. Exclusion on court's own motion

Objection to prohibited testimony must be made by the party against whom it is given, but court may exclude it. *Rosenwasser v Rosenwasser*, 179 N.Y.S. 617, 110 Misc. 38, 1920 N.Y. Misc. LEXIS 1021 (N.Y. Sup. Ct.), rev'd, 191 A.D. 715, 182 N.Y.S. 27, 1920 N.Y. App. Div. LEXIS 4794 (N.Y. App. Div. 1920).

26. Consideration of incompetent evidence admitted without objection

An order denying plaintiff's motion to set aside a verdict, and for a new trial was affirmed, on appeal, notwithstanding testimony of the defendant was received in violation of the provisions of CPA § 349, where plaintiff failed to object to the admission thereof at the trial, and plaintiff herself testified as to the same subject-matter on her direct examination and such testimony was not necessary to prove the charges made. *Gunsberg v Gunsberg*, 202 A.D. 757, 195 N.Y.S. 29, 1922 N.Y. App. Div. LEXIS 5340 (N.Y. App. Div. 1922).

Admission of spouse's testimony, other than proof of marriage, held erroneous and highly prejudicial to defendant, and judgment reversed on facts as well as law because no exception was taken to the admission of most of such evidence. *Bevelaqua v Bevelaqua*, 202 A.D. 841, 194 N.Y.S. 918, 1922 N.Y. App. Div. LEXIS 6095 (N.Y. App. Div. 1922).

The testimony of the wife as to the fact of adultery will not be considered even when no objection was taken by the defendant. *Fanning v Fanning*, 20 N.Y.S. 849, 2 Misc. 90, 1892 N.Y. Misc. LEXIS 213 (N.Y.C.P. 1892).

Evidence incompetent under CPA § 349 might have been considered by the court where not objected to. *Rosenwasser v Rosenwasser*, 179 N.Y.S. 617, 110 Misc. 38, 1920 N.Y. Misc. LEXIS 1021 (N.Y. Sup. Ct.), rev'd, 191 A.D. 715, 182 N.Y.S. 27, 1920 N.Y. App. Div. LEXIS 4794 (N.Y. App. Div. 1920).

27. —On appeal

In an action for an absolute divorce it is error to permit the wife to testify concerning her husband's property and income, but the error is not available for the first time on appeal; it seems that the wife can only testify to such matters as are specifically mentioned. *Valentine v Valentine*, 87 A.D. 156, 84 N.Y.S. 37, 1903 N.Y. App. Div. LEXIS 2607 (N.Y. App. Div. 1903).

E. Particular Applications

28. Examination before trial

CPA § 349 did not of itself justify vacatur of a notice as to examination before trial relating to the marital and domestic relations between a plaintiff executrix and her husband, an insured. Only those communications between husband and wife which were of a strictly confidential nature or were induced by the marital relation were privileged. *Pardee v Mutual Ben. Life Ins. Co.*, 265

N.Y.S. 833, 148 Misc. 860, 1932 N.Y. Misc. LEXIS 1318 (N.Y. Sup. Ct. 1932), modified, 238 A.D. 294, 265 N.Y.S. 837, 1933 N.Y. App. Div. LEXIS 9491 (N.Y. App. Div. 1933).

Examination before trial of husband or wife is not barred, since appropriate protection may be afforded by rulings during examination. *Erdenbrecher v Erdenbrecher*, 67 N.Y.S.2d 132, 188 Misc. 94, 1946 N.Y. Misc. LEXIS 3193 (N.Y. Sup. Ct. 1946).

29. Proceedings for alimony and counsel fees

On motion by defendant wife for alimony and counsel fee, plaintiff cannot make affidavit as to matters on which he would not be permitted to testify. *Stillman v Stillman*, 187 N.Y.S. 383, 115 Misc. 106, 1921 N.Y. Misc. LEXIS 1222 (N.Y. Sup. Ct. 1921).

On motion for temporary alimony and counsel fees in wife's action for divorce for husband's adultery, wife's statements in her affidavit, corroborated by photographs of husband and corespondent, may be considered by court in determining probability of wife's success. *Hershey v Hershey*, 29 N.Y.S.2d 397, 1941 N.Y. Misc. LEXIS 2086 (N.Y. Sup. Ct. 1941).

30. Filiation or support proceedings

It is the law in New York that neither spouse may testify that there was no access to the other, nor may a mother testify that her offspring is not legitimate, but such testimony is permitted under Domestic Relations Law Section 126 in a filiation proceeding brought to enforce support of an infant. *A. C. v B. C.*, 12 Misc. 2d 1, 176 N.Y.S.2d 794, 1958 N.Y. Misc. LEXIS 2933 (N.Y. Sup. Ct. 1958).

Dom Rel Ct A § 131, provides that in family court support proceeding husbands and wives shall be competent witnesses against each other. *Tell v Tell*, 53 N.Y.S.2d 94, 1944 N.Y. Misc. LEXIS 2803 (N.Y. Dom. Rel. Ct. 1944).

In proceedings under the Revised Statutes against a husband for neglect to support his family, although the warrant was issued upon the application of the wife, verified by her oath, she was

not a competent witness to sustain the complaint, because CPA § 349 was applicable only to civil proceedings. *People v Crandon*, 17 Hun 490 (N.Y.).

31. Miscellaneous applications

A husband is not competent to testify in an action brought by his wife for a separation, as to the presence at certain times in his house of a person who his wife denies was there. *Budd v Budd*, 55 A.D. 113, 67 N.Y.S. 43, 1900 N.Y. App. Div. LEXIS 2568 (N.Y. App. Div. 1900).

In wife's action for divorce, she was not competent to testify that she resided in New York. *Jennings v Jennings*, 84 N.Y.S.2d 511, 193 Misc. 805, 1948 N.Y. Misc. LEXIS 3614 (N.Y. Sup. Ct. 1948).

In an action for divorce an order discontinuing the alimony unless defendant attend upon the trial, for the purpose of identification, is a just and proper one. *Jacobson v Jacobson*, 8 N.Y. St. 383 (N.Y.C.P. June 6, 1887).

Research References & Practice Aids

Cross References:

Evidence, CLS Fam Ct Act § 1046.

Communication between alleged narcotic addict and spouse not confidential, CLS Men Hyg § 81.13.

This section referred to in CLS Soc Ser § 384-b.; CLS Fam Ct Act § 1046.

Guardianship and custody of destitute or dependent children; commitment by court order, CLS Soc Ser § 384-b.

Federal Aspects:

General rule for privileges in United States courts, USCS Court Rules, Federal Rules of Evidence, Rule 501.

Jurisprudences:

46 NY Jur 2d Domestic Relations § 822. .

47A NY Jur 2d Domestic Relations §§ 1732., 1978. .

48 NY Jur 2d Domestic Relations §§ 2081., 2127., 2129., 2192.– 2197. .

57 NY Jur 2d Evidence and Witnesses § 3. .

58 NY Jur 2d Evidence and Witnesses § 456. .

58A NY Jur 2d Evidence and Witnesses §§ 833., 841., 856., 858., 860. .

2 Am Jur 2d, Adultery and Fornication § 22.

81 Am Jur 2d, Witnesses §§ 296 et seq.

1 Am Jur Proof of Facts 237., Adultery.

Law Reviews:

Toward a New York evidence code: some notes on the privileges. 19 N.Y.L. Sch. L. Rev. 791.

Treatises

Matthew Bender's New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 4502, Spouse.

1 Carrieri, Lansner, New York Civil Practice: Family Court Proceedings § 3.06; 2 Carrieri, Lansner, New York Civil Practice: Family Court Proceedings §§ 31.10, 38A.06.

1 Lansner, Reichler, New York Civil Practice: Matrimonial Actions §§ 1.04, 13.01, 15.06, 16.08, 18.03— 18.05.

2 Lansner, Reichler, New York Civil Practice: Matrimonial Actions §§ 35.04, 35A.05, 37.02—37.04.

4 Lansner, Reichler, New York Civil Practice: Matrimonial Actions § 66.09.

3 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶1404.11.

Matthew Bender's New York CPLR Manual:

CPLR Manual § 20.02. Scope of disclosure.

Matthew Bender's New York Practice Guides:

1 New York Practice Guide: Domestic Relations §§ 2.05, 4.09, 12.06.

LexisNexis Practice Guide New York e-Discovery and Evidence § 9.05. Objecting Based on Privilege.

Matthew Bender's New York AnswerGuides:

Lexis Nexis AnswerGuide New York Civil Disclosure § 8.14. Asserting Spousal Privilege.

LexisNexis AnswerGuide New York Civil Litigation § 6.13. Applying Statutory Privileges.

LexisNexis AnswerGuide New York Civil Litigation § 10.04. Protecting Privileged Communications.

Warren's Weed New York Real Property:

Warren's Weed: New York Real Property § 50.13.

Matthew Bender's New York Evidence:

8 Bender's New York Evidence § 29.02. Presumptions.

8 Bender's New York Evidence § 29.03 The spouse as a witness.

8 Bender's New York Evidence § 29.04. Proof of marriage.

1 Bender's New York Evidence § 101.09. Privileges.

2 Bender's New York Evidence § 127.07. Specific Presumptions.

4 Bender's New York Evidence § 160.04. Familial Privileges.

Annotations:

Right to show in civil case that party or witness refused to testify on same matter under claim of privilege in previous criminal proceeding. 2 ALR2d 1297.

Conversations between husband and wife relating to property or business as within rule excluding private communications between them. 4 ALR2d 835.

“Communications” within testimonial privilege of confidential communications between husband and wife as including knowledge derived from observation by one spouse of acts of other spouse. 10 ALR2d 1389.

Crimes against spouse within exception permitting testimony by one spouse against other in criminal prosecution. 11 ALR2d 646.

Competency of one spouse to testify against other in prosecution for offense against third party as affected by fact that offense against spouse was involved in same transaction. 36 ALR3d 820.

Rule as regards competency of husband or wife to testify as to nonaccess. 49 ALR3d 212.

Effect, on competency to testify against spouse or on marital communication privilege, of separation or other marital instability short of absolute divorce. 98 ALR3d 1285.

Spouse's betrayal or connivance as extending marital communications privilege to testimony of third person. 3 ALR4th 1104.

Communication between unmarried couple living together as privileged. 4 ALR4th 422.

§ 4502. Spouse

Existence of spousal privilege where marriage was entered into for purpose of barring testimony. 13 ALR4th 1305.

Presence of child at communication between husband and wife as destroying confidentiality of otherwise privileged communication between them. 39 ALR4th 480.

Insured-insurer communications as privileged. 55 A.L.R.4th 336.

Communications between spouses as to joint participation in crime as within privilege of interspousal communications. 62 ALR4th 1134.

Crimes against spouse within exception permitting testimony by one spouse against other in criminal prosecution—modern state cases. 74 ALR4th 223.

Competency of one spouse to testify against other in prosecution for offense against third party as affected by fact that offense against spouse was involved in same transaction. 74 ALR4th 277.

Testimonial privilege for confidential communications between relatives other than husband and wife—state cases. 62 ALR5th 629.

Competency of one spouse to testify against other in prosecution for offense against child of both or either or neither. 119 ALR5th 275.

Marital privilege under Rule 501 of Federal Rules of Evidence. 46 ALR Fed 735.

Situations in which federal courts are governed by state law of privilege under Rule 501 of the Federal Rules of Evidence. 48 ALR Fed 259.

Immunity's sufficiency to meet federal grand jury witness's claim of privilege against adverse spousal testimony. 82 ALR Fed 600.

Competency of one spouse to testify in federal criminal prosecution of other. 3 L Ed 2d 1607.

Matthew Bender's New York Checklists:

Checklist for Evaluating Limitations on Disclosure LexisNexis AnswerGuide New York Civil Litigation § 6.12.

Checklist for Protecting Privileged Communications LexisNexis AnswerGuide New York Civil Litigation § 10.02.

Forms:

Bender's Forms for the Civil Practice Form No. CPLR 4502:1.

LexisNexis Forms FORM 75-CPLR 4502:1.—Waiver of Privileged Communication Made to Spouse.

Texts:

New York Criminal Practice Ch 34.

Jonakait, Baer, Jones, & Imwinkelried, New York Evidentiary Foundations (Michie), Ch 3 .The Competency of Witnesses; Ch 7 Privileges and Similar Doctrines.

NY Pattern Jury Instructions 3d, PJI 1:76., 5:2.

1 New York Trial Guide (Matthew Bender) §§ 7.23, 7.51; 2 New York Trial Guide (Matthew Bender) §§ 22.01, 22.02, 22.12, 22.13; 3 New York Trial Guide (Matthew Bender) §§ 51.01, 51.13, 51.30.

Hierarchy Notes:

NY CLS CPLR, Art. 45

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