GUIDE TO NY EVIDENCE

ARTICLE 5 PRIVILEGES

TABLE OF CONTENTS

5.01. Self-incrimination (CPLR 4501)

5.02. Spousal (CPLR 4502)

5.03. Attorney (CPLR 4503)

5.04. Physician (CPLR 4504)

5.05. Clergy (CPLR 4505)

5.07. Psychologist (CPLR 4507)

5.08. Social Worker (CPLR 4508)

5.09. Library (CPLR 4509)

5.10. Rape Crisis Counselor (CPLR 4510)

5.48. Privileged Communications; electronic communication (CPLR 4548)

5.50. Parent-Child Privilege

5.01. Self-Incrimination

(1) In a criminal proceeding:

(a) No person shall be compelled in any criminal case to be a witness against himself or herself.

(b) When the defendant does not testify on his or her own behalf, neither the court nor the prosecutor may comment adversely thereon.

(2) In a civil proceeding:

(a) A competent witness shall not be excused from answering a relevant question, on the ground only that the answer may tend to establish that he owes a debt or is otherwise subject to a civil suit.

(b) A competent witness may otherwise decline to give an answer which will tend to accuse himself or herself of a crime or to expose him or her to a penalty or forfeiture in response to a specific question.

(3) When during the giving of testimony, a witness invokes the privilege, the court must determine the degree of prejudice, if any, to the party whose right to examine the witness is impaired by the witness's invocation of the privilege and, upon that determination, take appropriate action to dissipate any prejudice.

Note

Subdivision (1) (a) restates both the Federal Constitution's Fifth Amendment and New York Constitution's (art I, § 6) prohibition on compelled self-incrimination. (*See generally* William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, CPL 50.10 [on the scope of the privilege in a criminal proceeding].)

Albeit the "general rule [is] that the witness is the judge of his right to invoke the privilege" (*People v Arroyo*, 46 NY2d 928, 930 [1979]), a witness may validly claim the privilege only where it is shown that the hazards of incrimination are "substantial and real, and not merely trifling or imaginary" (*Marchetti v United States*, 390 US 39, 53 [1968] [internal quotation marks and citation omitted]; *see Ohio v Reiner*, 532 US 17, 21 [2001]; *Zicarelli v New Jersey Comm'n of Investigation*, 406 US 472, 478 [1972]; *Carver Fed. Sav. Bank v Shaker Gardens, Inc.*, 167 AD3d 1337, 1340 [3d Dept 2018]).

Subdivision (1) (b) is derived from *Griffin v California* (380 US 609, 615 [1965] ["We . . . hold that the Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt"]).

CPL 300.10 (2) states: "Upon request of a defendant who did not testify in his own behalf, but not otherwise, the court must state that the fact that he did not testify is not a factor from which any inference unfavorable to the defendant may be drawn." The failure to give that instruction, "on [the] defendant's request," is reversible error. (*People v Britt*, 43 NY2d 111, 115 [1977]; *compare People v Vereen*, 45 NY2d 856, 857 [1978] [instructing the jury as provided by the statute, over the defendant's objection, may be harmless error].)

Subdivision (2) is derived from CPLR 4501. (*See generally* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR 4501.)

Subdivision (2) (a) states verbatim the first sentence of CPLR 4501. (*See McDermott v Manhattan Eye, Ear & Throat Hosp.*, 15 NY2d 20, 28 [1964] ["Unlike his counterpart in a criminal prosecution, the defendant in a civil suit has no inherent right to remain silent or, once on the stand, to answer only those inquiries which will have no adverse effect on his case. Rather, he must, if called as a witness, respond to virtually all questions aimed at eliciting information he may possess relevant to the issues, even though his testimony on such matters might further the plaintiff's case"].)

Subdivision (2) (b) is derived from the second sentence of CPLR 4501 which reads:

> "This section does not require a witness to give an answer which will tend to accuse himself of a crime or to expose him to a penalty or forfeiture, nor does it vary any other rule respecting the examination of a witness."

(*See Matter of Agnello v Corbisiero*, 177 AD2d 445, 446 [1st Dept 1991] ["While it is undeniably true that the privilege applies in both civil and criminal proceedings, petitioner here did not properly invoke the privilege. When he was called as a witness on respondent's case, he refused to answer any and all questions put to him,

and not just questions the answers to which he reasonably believed could incriminate him" (citation omitted)].)

Subdivision (3) is derived from the holding in *People v Siegel* (87 NY2d 536, 544 [1995]) that "the trial court has wide discretion in fashioning the appropriate corrective response, depending on the degree of prejudice that was incurred by the party whose right of cross-examination of the witness was impaired by the claim of the privilege." The *Siegel* Court highlighted three "corrective responses":

> (a) directing that the entire testimony of the witness be stricken when the questions the witness refused to answer were closely related to a principal element of the case, or
>
> (b) directing that a portion of the testimony be stricken when the questions the witness refused to answer were connected to a discrete phase of the case, or
>
> (c) permitting the jury to consider the refusal to answer questions in determining the believability and weight of the testimony when the questions the witness refused to answer involve collateral matters or cumulative testimony concerning credibility.

(*Id*. at 544; *see also* CJI2d[NY] Witness Refuses to Answer—Refusal Effect on Witness Credibility, available at http://www.nycourts.gov/judges/cji/1-General/CJI2d.Witness_Refusal_Credibility.pdf; CJI2d[NY] Witness Refuses to Answer—Refusal Requires Testimony Stricken, available at http://www.nycourts.gov/judges/cji/1-General/CJI2d.Witness_Testimony_Stricken.pdf).

In a civil proceeding, "[w]hile the Fifth Amendment accords an individual the privilege not to answer questions . . . if the answers might incriminate the person in future criminal proceedings (*see Baxter v Palmigiano*, 425 US 308, 316 [1976]), a witness who asserts this Fifth Amendment privilege in a civil trial is not necessarily protected from consequences in the same manner as in a criminal trial." (*Andrew Carothers, M.D., P.C. v Progressive Ins. Co.*, — NY3d —, — , 2019 NY Slip Op 04643, *4 [2019].)

Thus, the consequences that may attend the invocation of the privilege in a civil case include:

> (a) permitting the jury to consider the failure to answer questions by a witness who is a party " 'in assessing the strength of evidence offered by the opposite party on the issue which the witness was in a position to controvert' (*Marine Midland Bank v Russo Produce Co*., 50 NY2d 31, 42 [1980])." (*Andrew Carothers, M.D., P.C. v*

Progressive Ins. Co., — NY3d at — , 2019 NY Slip Op 04643, *4, *supra*.)

(b) " 'an unfavorable inference may be drawn against a party from the exercise of the privilege against self-incrimination' (Prince, Richardson on Evidence § 5-710)." (*Id.*; *see El-Dehdan v El-Dehdan*, 26 NY3d 19, 37-38 [2015] ["a negative inference may be drawn in the civil context when a party invokes the right against self-incrimination. Here, defendant could invoke the privilege, but that did not relieve him of his burden to present adequate evidence of his (defense) to avoid civil contempt liability"]; *see also* PJI 1:76 ["General Instruction—Evidence—Claim of Privilege"].)

In its decision in *Carothers*, the Appellate Division held that an adverse inference may not be drawn against a party in a civil action where the privilege is invoked by a nonparty witness (*Andrew Carothers, M.D., P.C. v Progressive Ins. Co*., 150 AD3d 192, 203-204 [1st Dept 2017]; *compare Searle v Cayuga Med. Ctr. at Ithaca*, 28 AD3d 834, 837–838 [3d Dept 2006] ["While no adverse inference typically arises from the invocation of the privilege by a nonparty witness, that rule is not inflexible. The inference may be appropriate where the witness is a former party who settled, the testimony in question is directly relevant to an issue before the jury and the party being burdened by the adverse inference may be held vicariously liable due to the witness's actions" (citations omitted)]). The Court of Appeals, in its *Carothers* opinion, noted that they had "not previously decided whether a *nonparty's* invocation of the Fifth Amendment may trigger an adverse inference instruction against a party in a civil case, and we have no occasion to do so here because any error by the trial court was harmless." (*Andrew Carothers, M.D., P.C. v Progressive Ins. Co*., — NY3d at — , 2019 NY Slip Op 04643, *4-5, *supra*.)

(c) dismissal of the complaint. (*Levine v Bornstein*, 13 Misc 2d 161, 165 [Sup Ct, Kings County 1958], *affd no op* 7 AD2d 995 [2d Dept 1959], *affd no op* 6 NY2d 892 [1959] [plaintiff's refusal to answer questions in an examination before trial required dismissal of the complaint].)

5.02. Spouse (CPLR 4502)

(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.

Note

Introduction. This rule is reproduced verbatim from CPLR 4502 (*see* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4502:1 *et seq.*).

The section is historically derived from the common-law rule that spouses were generally incompetent to testify against one another. Since 1867, the common-law rule has been statutorily abrogated (*People v Daghita*, 299 NY 194, 198 [1949]). CPLR 4512, the modern statutory abrogation of the common-law rule, provides that except as otherwise expressly proscribed, no person shall be excluded or excused from being a witness as the spouse of a party. CPLR 4502 is an express proscription on when a spouse may testify against the other. Subdivision (a), subject to certain exceptions, renders a spouse "incompetent" to testify that the other spouse committed adultery in an action founded on adultery (*Eades v Eades*, 83 AD2d 972 [3d Dept 1981], *lv dismissed* 55 NY2d 800 [1981]). Subdivision (b) provides for a spousal privilege to protect confidential communications between spouses.

CPLR 4502 (a). This subdivision generally prohibits a spouse from testifying that the other spouse has committed adultery. It is subject to three exceptions: (1) to prove the marriage; (2) to disprove the adultery; or (3) to disprove a defense to adultery after proof of a defense has been submitted. It mostly affects divorce actions based upon adultery (Domestic Relations Law § 170 [4]). It does not limit a spouse from testifying that the other spouse flaunted an adulterous relationship in support of a claim other than adultery, including a defense of cruelty in a legal separation action (*Poppe v Poppe*, 3 NY2d 312, 317 [1957]; Domestic Relations Law § 200) or a claim for divorce based on cruel and inhuman treatment

(*Fritz v Fritz*, 88 AD2d 778 [4th Dept 1982]; Domestic Relations Law § 170 [1]). With the repeal of adultery-only divorce laws in 1966, and the subsequent legislative enactment of irreconcilable differences as a ground for divorce in 2010, subdivision (a) has far less vitality (*see Fritz v Fritz* [wife testified to husband's admission of adultery to obtain divorce on cruel and inhuman treatment]; *Johnston v Johnston*, 156 AD3d 1181, 1182 [3d Dept 2017], *appeal dismissed upon the ground that no substantial constitutional question is directly involved* 31 NY3d 1126 [2018] [having determined that husband established an irretrievable breakdown of the marriage, the court was not bound to grant wife a judgment of divorce on the ground of adultery]).

CPLR 4502 (b). The spousal privilege protects confidential communications induced by the marital relationship. The privilege is "[d]esigned to protect and strengthen the marital bond" and will only encompass confidential statements "that are induced by the marital relation and prompted by the affection, confidence and loyalty engendered by such relationship" (*People v Mills*, 1 NY3d 269, 276 [2003] [citations omitted]; *see People v Fediuk*, 66 NY2d 881, 883 [1985]; *Matter of Vanderbilt [Rosner—Hickey]*, 57 NY2d 66, 73 [1982]; *People v Dudley*, 24 NY2d 410 [1969]). The key inquiry is whether the communication was induced by the marital relation itself; if so, the privilege will attach (*Poppe v Poppe*, 3 NY2d at 315), it being presumed that such communication was "conducted under the mantle of confidentiality" (*People v Fediuk*, 66 NY2d at 883, 884 [statements by husband to estranged wife after killing her lover were engendered by the marital relationship because husband "clung to the illusion that (the parties) could still reconcile"]).

For the privilege to apply, the parties must actually be legally married at the time the communication is made (*People v Mulgrave*, 163 AD2d 538 [2d Dept 1990] [no privilege for bigamous marriage]; *People v Chirse*, 132 AD2d 615, 616 [2d Dept 1987], *lv denied* 70 NY2d 749 [1987] [no privilege for statements made before marriage]). Separation of legally married parties will not necessarily preclude application of the privilege (*People v Fields*, 38 AD2d 231, 233 [1972], *affd on op below* 31 NY2d 713 [1972]). The operative consideration is whether the parties were legally married at the time the communication was made, not when it was received (*see Matter of Vanderbilt [Rosner—Hickey]*, 57 NY2d at 73 [note left before husband's death still subject to privilege, even though received after death]).

The privilege applies no matter the medium of communication (*People v Fediuk*, 66 NY2d 881 [1985] [telephone calls]; *Matter of Vanderbilt [Rosner—Hickey]*, 57 NY2d 66 [1982] [tapes]; *Poppe v Poppe*, 3 NY2d 312 [1957] [conversations]). The privilege may also apply to "disclosive" acts and actions, but only if induced by the marital relation and prompted by the affection, confidence, and loyalty engendered by such relationship (*People v Daghita*, 299 NY at 199 [observation by wife that husband was bringing home stolen property and storing it in house was privileged]; *but see People v Dudley*, 24 NY2d 410, 415 [1969] [defendant's acts and words to wife conveying where his victim was buried were

not privileged because they were not induced by his confidence in the marital relationship]; *People v Wilson*, 64 NY2d 634, 636 [1984] [testimony by wife of defendant husband's presence or absence from their apartment was not a communication that would not have been made but for the marital relationship; no privilege applied]).

Not every private communication between spouses is protected (*People v Dudley*, 24 NY2d at 413; *Poppe v Poppe*, 3 NY2d at 314). Communications that would have been made regardless of the marriage's existence are not protected (*Matter of Vanderbilt [Rosner—Hickey]*, 57 NY2d at 73). "[D]aily and ordinary exchanges" between spouses are not protected (*People v Dudley*, 24 NY2d at 413-414). Nor are communications about "ordinary business matters" (*People v Melski*, 10 NY2d 78, 80 [1961]). Although the privilege may apply to admissions or confessions of adultery, which are not intended to be disclosed to third parties, it does not apply to unfounded accusations of adultery or other abusive language (*Melski* at 81).

The privilege does not apply to communications between spouses or threats by one spouse against the other made during the course of physical abuse, because the declarant is not relying upon any confidential relationship to preserve secrecy (*People v Mills*, 1 NY3d at 276; *People v Dudley*, 24 NY2d at 413 [no privilege because no confidential relationship where marriage held together by fear and domination]). The privilege is not a shield "to forbid inquiry into the personal wrongs committed by one spouse against the other" (*People v Howard*, 134 AD3d 1153, 1154 [3d Dept 2015] [wife testified at husband's arson trial that he repeatedly threatened to burn the house down to prevent her from living there]). Nor may the privilege be used to protect criminal activity directed at the other spouse (*People v Fields*, 38 AD2d 231, 233 [1972], *affd on op below* 31 NY2d 713 [1972] [threats that husband would kill wife held not privileged]). Nor can it be invoked when the communication is a threat to silence the other spouse (*People v Fields*, 38 AD2d 231, 233 [1972], *affd on op below* 31 NY2d 713 [1972] [no privilege where husband threatened to kill wife if she disclosed her observations about his criminal conduct]).

The privilege does not apply to communications or statements made by spouses in the presence of others (*People v Melski*, 10 NY2d at 84 [wife of defendant charged with grand larceny was permitted to testify that members of the robbery gang met with her husband in her kitchen where stolen guns were laid out on a table]; *People v Howard*, 134 AD3d at 1153 [threats of arson made in the presence of mutual friends and the couple's children were not privileged]). Nor does the privilege apply where the spouse entitled to the privilege voluntarily discloses the communication to a third party (*People v Melski*, 10 NY2d at 79 [husband voluntarily disclosed his communications with wife to a state trooper]).

Whether a communication is confidential and, therefore, privileged is a preliminary question of fact to be determined by the trial judge (*People v Dudley*,

24 NY2d at 414; *People v Melski*, 10 NY2d at 79; *Matter of Vanderbilt [Rosner—Hickey]*, 57 NY2d at 73; *see also* Guide to NY Evid rule 1.11 [1]).

The privilege automatically attaches to a confidential communication (*Matter of Vanderbilt [Rosner—Hickey]*, 57 NY2d at 73). There is a rebuttable presumption that communications between spouses have been conducted under a mantle of confidentiality (*People v Fediuk*, 66 NY2d 881, 883 [1985]). The presumption is not rebutted merely by the fact that the parties are not living together at the time the communication is made, or that the marriage has deteriorated (*id.* at 883).

The privilege belongs to the spouse who made the confidential communication (*Prink v Rockefeller Ctr.*, 48 NY2d 309, 314 [1979]). While living, only the spouse against whom the testimony is offered can waive the privilege (*People v Fediuk*, 66 NY2d at 881). The privilege is not terminated by death (*Prink v Rockefeller Ctr.*, 48 NY2d at 314). After death, the privilege may still be waived by the decedent's representative (*id*. at 314 [privilege waived where husband's mental condition put in issue in a wrongful death action]).

5.03 Attorney (CPLR 4503)[1]

(a) 1. Confidential communication privileged.

Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof.

Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof.

The relationship of an attorney and client shall exist between a professional service corporation organized under article fifteen of the business corporation law to practice as an attorney and counselor-at-law and the clients to whom it renders legal services.

2. Personal representatives.

(A) For purposes of the attorney-client privilege, if the client is a personal representative and the attorney represents the personal representative in that capacity, in the absence of an agreement

between the attorney and the personal representative to the contrary:

> **(i) No beneficiary of the estate is, or shall be treated as, the client of the attorney solely by reason of his or her status as beneficiary; and**
>
> **(ii) The existence of a fiduciary relationship between the personal representative and a beneficiary of the estate does not by itself constitute or give rise to any waiver of the privilege for confidential communications made in the course of professional employment between the attorney or his or her employee and the personal representative who is the client; and**
>
> **(iii) The fiduciary's testimony that he or she has relied on the attorney's advice shall not by itself constitute such a waiver.**

(B) For purposes of this paragraph, "personal representative" shall mean (i) the administrator, administrator c.t.a., ancillary administrator, executor, preliminary executor, temporary administrator or trustee to whom letters have been issued within the meaning of subdivision thirty-four of section one hundred three of the surrogate's court procedure act, and (ii) the guardian of an incapacitated communicant if and to the extent that the order appointing such guardian under subdivision (c) of section 81.16 of the mental hygiene law or any subsequent order of any court expressly provides that the guardian is to be the personal representative of the incapacitated communicant for purposes of this section; "beneficiary" shall have the meaning set forth in subdivision eight of section

one hundred three of the surrogate's court procedure act and "estate" shall have the meaning set forth in subdivision nineteen of section one hundred three of the surrogate's court procedure act.

(b) Wills and revocable trusts. In any action involving the probate, validity or construction of a will or, after the grantor's death, a revocable trust, an attorney or his employee shall be required to disclose information as to the preparation, execution or revocation of any will, revocable trust, or other relevant instrument, but he [or she] shall not be allowed to disclose any communication privileged under subdivision (a) which would tend to disgrace the memory of the decedent.

(c) Corporations and governmental entities may avail themselves of the attorney-client privilege for confidential communications with their attorneys relating to their legal matters.

Note

Subdivisions (a) and (b) of this rule are reproduced verbatim from CPLR 4503 (*see generally* Vincent C. Alexander, Prac Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4503:1-C4503:7); subdivision (c) is derived from *Matter of Appellate Advocates v New York State Dept. of Corr. & Community Supervision* (40 NY3d 547 [2023]) and *Rossi v Blue Cross & Blue Shield of Greater N.Y.* (73 NY2d 588, 592 [1989]). *See generally* Michael J. Hutter, *'Appellate Advocates': Application of Attorney-Client Privilege to Government Communications and More,* NYLJ, February 14, 2024; Michael J. Hutter, *Attorney-Client Privilege and Dual-Purpose Communications*, NYLJ, April 3, 2024.

CPLR 4503 (a) (1) codifies the attorney-client privilege as recognized under the common law (*see Hurlburt v Hurlburt*, 128 NY 420, 424 [1891] [describing the predecessor statute as a "mere re-enactment of the common law"]).

CPLR 4503 (a) (2) abolishes the "fiduciary exception" to the privilege regarding communications between counsel and a personal representative of a decedent's estate.

CPLR 4503 (b) creates a statutory exception to the privilege where the confidential communication between a deceased client and the client's attorney involves the preparation, execution, or revocation of any will of that client or other relevant instrument.

The attorney-client privilege protects from disclosure certain confidential communications made between clients and their attorneys. The Court of Appeals has long viewed the privilege as premised on the rationale that "one seeking legal advice will be able to confide fully and freely in his [or her] attorney, secure in the knowledge that his [or her] confidences will not later be exposed to public view to his [or her] embarrassment or legal detriment" (*Matter of Priest v Hennessy*, 51 NY2d 62, 67-68 [1980]). Such disclosure enables the attorney to act more effectively and expeditiously, thereby "ultimately promoting the administration of justice" (*Rossi v Blue Cross & Blue Shield of Greater N.Y.*, 73 NY2d 588, 592 [1989]). Notwithstanding its desirable purpose, the Court of Appeals has cautioned that as the attorney-client privilege constitutes an "obstacle" to the truth-finding process, the privilege should be narrowly construed to ensure that its application is consistent with its purpose (*Ambac Assur. Corp. v Countrywide Home Loans, Inc*., 27 NY3d 616, 624 [2016]; *Matter of Jacqueline F*., 47 NY2d 215, 219 [1979]).

As stated in **subdivision (c)**, corporations and governmental entities may avail themselves of the attorney-client privilege for confidential communications with their attorneys relating to their legal matters.

With respect to corporations, the New York courts have drawn no distinction between corporate staff counsel and outside counsel in applying the privilege (*see Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 378 [1991]; *Rossi*, 73 NY2d at 592). A corporation's claim to the privilege is on par with the claim of an individual (*ibid*.).

An unsettled issue is whether confidential communications with the corporate attorney on behalf of the corporation fall within the privilege only when corporate officers or employees in the upper echelon of the corporation are involved or whether the privilege also extends to confidential communications of low- and mid-level corporate employees (*see* Barker & Alexander, Evidence in New York State and Federal Courts § 5:8 [2d ed]; Martin & Capra, New York Evidence Handbook § 5.2.5 [3d ed]). Barker and Alexander note that some courts have accepted a "subject matter test" which "extends the privilege to a confidential communication between the corporation's attorney and any employee, provided the

subject matter of the communication concerns the employee's corporate duties and the purpose of the communication involves the providing of legal advice to the corporation" (Evidence in New York State and Federal Courts § 5:8).

Governmental entities, like corporations, may also invoke the privilege to protect confidential communications between governmental entities and their attorneys relating to their legal matters (*Matter of Appellate Advocates v New York State Dept. of Corr. & Community Supervision*, 40 NY3d 547 [2023]). In *Appellate Advocates*, the Court recognized the vital role the privilege plays as the public is well served when the attorney "advises government clients on how to lawfully fulfill their public duties" based upon their "free and candid communication" protected by the privilege (40 NY3d at 555). Notably, the Court in *Appellate Advocates* rejected petitioner's argument that the "public policy in favor of transparency in [governmental] determinations trumps attorney-client privilege" (*ibid.* at 554-555).

For the privilege to apply, an attorney-client relationship must exist, and such relationship "arises only when one contacts an attorney in his capacity as such for the purpose of obtaining legal advice or services" (*Priest*, 51 NY2d at 68-69). Once such relationship is established, the privilege will encompass a confidential communication made between the client and attorney, which was made for the purpose of obtaining or providing legal assistance to the client (*see Ambac*, 27 NY3d at 624 [2016]; *Spectrum Sys.*, 78 NY2d at 377-378). Communications that relate solely to nonlegal personal or business matters fall outside the privilege (*Spectrum Sys.* at 378 ["The communication itself must be primarily or predominantly of a legal character"]). Thus, the applicability of the privilege to a corporate attorney's confidential communications will turn upon whether the attorney is acting as a legal advisor or business advisor (*compare Cooper-Rutter Assoc. v Anchor Natl. Life Ins. Co.*, 168 AD2d 663, 663 [2d Dept 1990] [privilege did not apply as the communications expressed "substantial nonlegal concerns" of business transaction], *with Quail Ridge Assoc. v Chemical Bank*, 174 AD2d 959, 962 [3d Dept 1991] [privilege applied as communications related to legal advice concerning a business transaction]). As to a government attorney's confidential communications, the privilege will apply so long as the communications involve the legal rights and obligations of the governmental entity or official and not policy advice (*compare Appellate Advocates*, *supra* [privilege applicable as communications reflected attorney's legal analysis of statutory, regulatory and decisional law and provide guidance for the officials to exercise their discretionary authority regarding parole decisions], *with Matter of Empire Ch. of the Associated Bldrs. & Contrs., Inc. v New York State Dept. of Transp.*, 211 AD3d 1155 [3d Dept

2022] [privilege not applicable as communications involved the feasibility of using a project labor agreement for a bridge project]).

Confidentiality of the communication is the pillar of the attorney-client privilege (*see United States v Tellier*, 255 F2d 441, 447 [2d Cir 1958] ["It is of the essence of the attorney-client privilege that it is limited to those communications which are intended to be confidential"]). This key element of the privilege requires that, at the time of the communication between the client and the attorney, it was made in confidence and with the intent and reasonable expectation that the communication would not be disclosed to persons outside the attorney-client relationship (*see People v Osorio*, 75 NY2d 80, 84 [1989]; *People v Harris*, 57 NY2d 335, 343 [1982] ["Generally, communications made in the presence of third parties, whose presence is known to the (client), are not privileged"]; *Baumann v Steingester*, 213 NY 328, 331-333 [1915]). The element of confidentiality also requires that confidentiality be maintained (*see Osorio*, 75 NY2d at 84).

An exception to the general rule that the presence of a third party precludes a finding of confidentiality is the judicially recognized "common interest exception" (*see generally Ambac*, 27 NY3d at 625-630). Under this exception, where two or more clients separately retain counsel to advise them on matters of common legal interest, confidential communications that are revealed to one another for the purpose of furthering a common legal interest retain their confidential status (*id*. at 625).

The privilege may extend to confidential communications between the agents of the client and agents of the attorney, provided they are assisting in the legal representation involved (*Rossi*, 73 NY2d at 592-593 [corporate staff attorney]; *Osorio*, 75 NY2d at 84 [an interpreter acting as "agent of either attorney or client to facilitate communication"]; *Matter of Putnam*, 257 NY 140, 143-144 [1931] [clerical staff]). Communications between the attorney and a consultant retained by the attorney to assist the attorney in providing legal services to the clients and not for testifying, e.g., an accountant, economist, or investment banker, may also be protected by the privilege (*see United States v Kovel*, 296 F2d 918, 921-922 [2d Cir 1961]; *compare Gottwald v Sebert*, 161 AD3d 679, 680 [1st Dept 2018] ["The communications between her counsel and press agents do not reflect a discussion of legal strategy relevant to the pending litigation but, rather, a discussion of a public relations strategy, and are not protected under the attorney-client privilege"]).

Certain details about the attorney-client relationship are not protected by the privilege. In *Matter of Priest v Hennessy*, the Court held that fee arrangements between attorney and client, including the amount of the retainer and the identity of a person paying the fee, do not ordinarily constitute a confidential communication and thus are not privileged in the usual case (51 NY2d at 69; *see also Eisic Trading Corp. v Somerset Mar.*, 212 AD2d 451 [1st Dept 1995] [time records and billing statements are not within attorney-client privilege if devoid of detailed information regarding the nature of services]). In *Matter of Jacqueline F.* (47 NY2d at 219-220), the Court explained that while it is "generally stated" that a client's identity (including the client's whereabouts) is not privileged, "the rule in New York is not so broad as to state categorically that the privilege never attaches to a client's identity." *Jacqueline F.* noted, for example, that a client's identity "must be disclosed where the question of identity arises during the course of litigation" and "absent other circumstances, an attorney cannot be compelled to reveal a client's identity where the latter is not a party to a pending litigation" (*id.* at 220; CPLR 3118). Other circumstances in which disclosure of the client's identity may be compelled include: "where an 'attorney's assertion of the privilege is a cover for co-operation in wrongdoing' " (47 NY2d at 220); where there exists a legitimate "fear of reprisal" should the whereabouts of the client be disclosed (*id.* at 222); and where the client, as in *Jacqueline F.*, leaves the jurisdiction in an attempt to thwart the mandate of a court ordering the client to return custody of a child to her parents.

CPLR 4503 (a) permits the privilege to be invoked in any judicial, administrative, or legislative proceeding. Unless the client has waived the privilege, the attorney, the attorney's employees, the client, the client's agents, and an eavesdropper cannot be compelled in any such proceeding to disclose a privileged communication.

In addition to the exception to the privilege set forth in CPLR 4503 (b), New York courts have created exceptions. They include:

- crime-fraud exception (*Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 1 AD3d 223, 224 [1st Dept 2003] [privilege "may not be invoked where it involves client communications that may have been in furtherance of a fraudulent scheme, an alleged breach of fiduciary duty or an accusation of some other wrongful conduct"]);

- fiduciary exception (*NAMA Holdings, LLC v Greenberg Traurig LLP*, 133 AD3d 46, 52 [1st Dept 2015] ["In the corporate context, where a

shareholder (or, as here, an investor in a company) brings suit against corporate management for breach of fiduciary duty or similar wrongdoing, courts have carved out a 'fiduciary exception' to the privilege that otherwise attaches to communications between management and corporate counsel"]);

- attorney-client dispute exception (*see Matter of Glines v Estate of Baird*, 16 AD2d 743, 743-744 [4th Dept 1962] ["(T)he rule as to privileged communications does not apply when litigation arises between an attorney and client to the extent that their communications are relevant to the issue"]; *People v Mendoza*, 240 AD2d 316, 316 [1st Dept 1997] [defendant waived the attorney-privilege "by volunteering his claim that counsel, among other things, had coerced him to testify falsely at the suppression hearing"]); and

- public policy exception (*Priest*, 51 NY2d at 69 ["(E)ven where the technical requirements of the privilege are satisfied, it may, nonetheless, yield in a proper case, where strong public policy requires disclosure"]).

As CPLR 4503 (a) recognizes, the client may waive the privilege (*see generally* Barker & Alexander, Evidence in New York State and Federal Courts § 5:10 [2d ed]). Waiver involves a loss of the privilege which occurs subsequent to the privilege having attached to the communication involved (*Harris*, 57 NY2d at 343 n 1). A waiver may occur in a myriad of situations. Waiver will be present, for example:

- when the client gives authority to an agent to waive the privilege (*People v Cassas*, 84 NY2d 718, 722 [1995]);

- when the client discloses the communication to another person (*People v Patrick*, 182 NY 131, 175 [1905]);

- when the client is a defendant in a criminal case and places his sanity in issue, the privilege is waived as to communications between the defendant and a psychiatrist retained by the attorney, and the psychiatrist may accordingly testify for the prosecution that he determined that the defendant was sane (*People v Edney*, 39 NY2d 620, 625 [1976]).

The Appellate Division Departments have uniformly held that an inadvertent disclosure does not automatically result in a waiver of the privilege. Rather, the party making the disclosure may avoid a finding of waiver by showing:

(1) the party had no intention to disclose the matter and took reasonable steps to prevent any disclosure;

(2) the party promptly took reasonable steps to rectify its mistake upon discovery of the disclosure; and

(3) the party in possession of the matter will not be prejudiced if it cannot use the matter (*see e.g. New York Times Newspaper Div. of N.Y. Times Co. v Lehrer McGovern Bovis*, 300 AD2d 169, 172 [1st Dept 2002]; *AFA Protective Sys., Inc. v City of New York*, 13 AD3d 564, 565 [2d Dept 2004]; *McGlynn v Grinberg*, 172 AD2d 960, 961 [3d Dept 1991]; *Manufacturers & Traders Trust Co. v Servotronics, Inc.*, 132 AD2d 392, 399-400 [4th Dept 1987]).

A corollary to the attorney-client privilege is an attorney's ethical obligation, in the absence of a client's consent or waiver or certain exceptions, to "not knowingly reveal confidential information" or "use such information to the disadvantage of a client or for the advantage of the lawyer or a third person" (Rules of Prof Conduct [22 NYCRR 1200.0] rule 1.6 [a]).

---

[1] In May 2024, subdivision (c) was added and the Note updated accordingly.

5.04. Physician, dentist, podiatrist, chiropractor and nurse (CPLR 4504)

(a) Confidential information privileged.

Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing, dentistry, podiatry or chiropractic shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity. The relationship of a physician and patient shall exist between a medical corporation, as defined in article forty-four of the public health law, a professional service corporation organized under article fifteen of the business corporation law to practice medicine, a university faculty practice corporation organized under section fourteen hundred twelve of the not-for-profit corporation law to practice medicine or dentistry, and the patients to whom they respectively render professional medical services.

A patient who, for the purpose of obtaining insurance benefits, authorizes the disclosure of any such privileged communication to any person shall not be deemed to have waived the privilege created by this subdivision. For purposes of this subdivision:

1. "person" shall mean any individual, insurer or agent thereof, peer review committee, public or private corporation, political subdivision, government agency, department or bureau of the state, municipality, industry, co-partnership, association, firm, trust, estate or any other legal entity whatsoever; and

2. "insurance benefits" shall include payments under a self-insured plan.

(b) Identification by dentist; crime committed against patient under sixteen. A dentist shall be required to disclose information necessary for identification of a patient. A

physician, dentist, podiatrist, chiropractor or nurse shall be required to disclose information indicating that a patient who is under the age of sixteen years has been the victim of a crime.

(c) Mental or physical condition of deceased patient. A physician or nurse shall be required to disclose any information as to the mental or physical condition of a deceased patient privileged under subdivision (a), except information which would tend to disgrace the memory of the decedent, either in the absence of an objection by a party to the litigation or when the privilege has been waived:

> **1. by the personal representative, or the surviving spouse, or the next of kin of the decedent; or**
>
> **2. in any litigation where the interests of the personal representative are deemed by the trial judge to be adverse to those of the estate of the decedent, by any party in interest; or**
>
> **3. if the validity of the will of the decedent is in question, by the executor named in the will, or the surviving spouse or any heir-at-law or any of the next kin or any other party in interest.**

(d) Proof of negligence; unauthorized practice of medicine. In any action for damages for personal injuries or death against a person not authorized to practice medicine under article 131 of the education law for any act or acts constituting the practice of medicine, when such act or acts were a competent producing proximate or contributing cause of such injuries or death, the fact that such person practiced medicine without being so authorized shall be deemed prima facie evidence of negligence.

Note

This rule is reproduced verbatim from CPLR 4504 (*see generally* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4504).

New York's physician-patient privilege "is entirely a creature of statute. At common law, confidential communications between physicians and patients received no protection against disclosure in a legal proceeding" (*Dillenbeck v Hess*, 73 NY2d 278, 283 [1989] [tracing history of privilege]). While limited to licensed physicians when first enacted by the New York Legislature in 1828, the privilege has since been expanded to encompass dentists, podiatrists, chiropractors, registered professional nurses, and licensed practical nurses, as well as corporate health care providers specified in CPLR 4504 (a).

The Court of Appeals has stated three rationales for the physician-patient privilege: (1) to encourage patients to make available to their physicians the information necessary for diagnosis and treatment; (2) to promote candid record keeping by medical professionals; and (3) to protect "patients' reasonable privacy expectations against disclosure of sensitive personal information" (*Matter of Grand Jury Investigation in N.Y. County*, 98 NY2d 525, 529 [2002]). While "information" is broader than the "communications" between a patient and physician, the privilege seeks to protect and foster "confidential communications, not the mere facts and incidents of a person's medical history" (*Williams v Roosevelt Hosp.*, 66 NY2d 391, 396-397 [1985] ["a witness may not refuse to answer questions regarding matters of fact, such as those posed in this case, as to whether her children had any physical or congenital problems, whether she was in the care of a physician or was taking medication during a certain period of time, or concerning the facts surrounding an abortion merely because those topics relate to events that required medical care or advice from a physician"]).

The patient is the privilege-holder and may seek damages in tort for a breach of the privilege (*see Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 53-54 [2016] [detailing elements of a cause of action for breach of physician-patient confidentiality]). If the patient is not a party to the proceeding in which disclosure is sought, another party may assert the physician-patient privilege on the patient's behalf (*see Matter of Grand Jury Investigation of Onondaga County*, 59 NY2d 130, 135 [1983] [hospital or physician may assert privilege for protection of patient suspected or accused of a crime]). Whoever asserts the privilege must establish the following elements: (1) the existence of a professional relationship between the patient and one of the health care professionals or providers specified in CPLR 4504 (a); (2) the information sought to be shielded from disclosure was acquired in the course of this professional relationship and was necessary for the patient's diagnosis or treatment; and (3) the patient intended the information to be kept confidential (*see Koump v Smith*, 25 NY2d 287, 294 [1969]; *Dillenbeck*, 73 NY2d at 289; *People v Decina*, 2 NY2d 133, 145 [1956]).

Only the patient may waive the physician-patient privilege. Waiver occurs "when the patient personally, or through his witnesses, either lay or medical, introduces testimony or documents concerning privileged information . . . . It also results from failure to object to disclosure of privileged information" (*Hughson v St. Francis Hosp. of Port Jervis*, 93 AD2d 491, 500 [2d Dept 1983]). CPLR 4504 (a) provides, however, that a patient may authorize disclosure of privileged information for purposes of obtaining insurance benefits without effecting a waiver.

The privilege is waived where a party affirmatively places his or her physical or mental condition in controversy (*see Koump*, 25 NY2d at 294 [patient affirmatively puts his or her physical or mental condition in issue by bringing a personal injury action]). The burden is on the party seeking disclosure to make an evidentiary showing that the patient's physical condition is in controversy (*Dillenbeck*, 73 NY2d at 288). The waiver extends only to medical information related to the physical or mental condition that has been put in issue. (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C4504:3, *supra*.)

Although in derogation of the common law, the physician-patient privilege is "afforded a broad and liberal construction to carry out its policy . . . . Conversely, exceptions that limit the privilege are afforded a narrow construction" (*People v Rivera*, 25 NY3d 256, 262-263 [2015] [citation and internal quotation marks omitted]). Section 4504 itself contains two exceptions; namely, CPLR 4504 (b) (requiring dentists to disclose information necessary for identification of a patient, and health care professionals to disclose information indicating that a patient under 16 years old has been a crime victim); and CPLR 4504 (c) (generally requiring physicians and nurses to disclose otherwise privileged information about the mental or physical condition of a deceased patient).

The legislature has created numerous other specific exceptions. As the Court of Appeals observed in *Rivera* (at 262):

> "When the legislature has sought to either limit or abrogate the privilege beyond the confines of section 4504, it has been clear in its intent (*see* Social Services Law § 384-b [3] [h] [privilege not available in a proceeding seeking an order committing the guardianship and custody of a destitute or dependent child]; Social Services Law § 413 [identifying class of mandatory reporters of suspected child abuse and maltreatment]; Social Services Law § 415 [providing that reports of suspected child abuse or maltreatment must be made in writing and 'shall be admissible in evidence in any proceedings relating to child abuse or maltreatment']; Family Ct Act § 1046 [a] [vii] [stating that the privilege 'shall (not) be a ground for excluding evidence which otherwise would be admissible' in abuse and neglect proceedings]; Mental Hygiene Law § 81.09 [d] [permitting a court evaluator in guardianship proceedings to apply

> for permission to inspect medical and psychiatric records of the alleged incapacitated persons, and allowing the court to order such disclosure notwithstanding the physician-patient privilege]; Public Health Law § 3373 [stating that '(f)or the purposes of duties arising out of' article 33, relating to controlled substances, 'no communication made to a practitioner shall be deemed confidential within the meaning of the civil practice law and rules relating to confidential communications between such practitioner and patient']).
>
> "Although the legislature may not always explicitly set forth its intention to limit or abrogate the privilege by expressly cross-referencing CPLR 4504, its intent is evident from the directives of the particular statute (*see* Penal Law § 265.25 [requiring attending physicians to report to police every case of 'any . . . injury arising from or caused by the discharge of a gun or firearm' and 'a wound which is likely to or may result in death and is actually or apparently inflicted by a knife, icepick or other sharp or pointed instrument']; Penal Law § 265.26 [requiring physicians to report certain burn injuries to the office of fire prevention and control]; Public Health Law § 2101 [1] [requiring physicians to 'immediately give notice of every case of communicable disease' to the proper authorities])." (*See also Matter of Grand Jury Investigation of Onondaga County*, 59 NY2d at 135-136.)

Finally, CPLR 4504 (d) provides that when someone not authorized to practice medicine performs acts that are a "competent producing proximate or contributing cause of" personal injuries or death to another, the fact that such person engaged in the unauthorized practice of medicine is prima facie evidence of negligence in any ensuing action for damages for personal injury or death.

5.05. Confidential Communication to Clergy Privileged (CPLR 4505)

> **Unless the person confessing or confiding waives the privilege, a clergyman, or other minister of any religion or duly accredited Christian Science practitioner, shall not be allowed [to] disclose a confession or confidence made to him in his professional character as spiritual advisor.**

Note

This rule is reproduced verbatim from CPLR 4505, albeit with the addition of "[to]." (*See* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4505.)

The Court of Appeals has observed that "the privilege originally applied only to communications with members of the clergy who were enjoined from disclosing the substance of such communications under the rules or practices of their religion." (*Lightman v Flaum*, 97 NY2d 128, 134 [2001] [citation omitted].) Now, however, "[a]lthough often referred to as a 'priest-penitent' privilege, the statutory privilege is not limited to communications with a particular class of clerics or congregants. . . . On the contrary, in enacting CPLR 4505, the Legislature intended to recognize the urgent need of people to confide in, without fear of reprisal, those entrusted with the pressing task of offering spiritual guidance without regard to the religion's specific beliefs or practices." (*People v Carmona*, 82 NY2d 603, 608 [1993] [citations and internal quotation marks omitted].) The Court added that "the New York statute is intentionally aimed at all religious ministers who perform 'significant spiritual counselling which may involve disclosure of sensitive matters' (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4505, at 683)." (*Carmona*, 82 NY2d at 608-609.)

As to the nature of the communications to which the privilege applies, the Court has made clear that "[t]he priest-penitent privilege arises not because statements are made to a clergyman. Rather, something more is needed. There must be reason to believe that the information sought required the disclosure of information under the cloak of the confessional or was in any way confidential[,] for it is only confidential communications made to a clergyman in his spiritual capacity which the law endeavors to protect." (*Matter of Keenan v Gigante*, 47 NY2d 160, 166 [1979] [citations and internal quotation marks omitted].) "New York's test for the privilege's applicability distills to a single inquiry: whether the communication in question was made in confidence and for the purpose of obtaining spiritual guidance." (*Carmona*, 82 NY2d at 609, *citing Matter of Keenan v Gigante*, 47 NY2d at 166.)

In *Carmona*, the Court of Appeals has offered as examples of communications to which the privilege did not apply:

- where disclosures were made to a rabbi for the purpose of obtaining his assistance in securing an attorney and a favorable plea bargain (citing *People v Drelich*, 123 AD2d 441 [2d Dept 1986]);

- where a congregant apologized to a priest in the priest's capacity as a victim and solicited the priest's aid in contacting an attorney (citing *People v Schultz*, 161 AD2d 970 [3d Dept 1990]);

- and where a priest informed a congregant of allegations made against him by his wife and stepdaughter and warned him that the authorities would be advised unless he quit his job at a day-care center (citing *Matter of N. & G. Children*, 176 AD2d 504 [1st Dept 1991]). (*Carmona*, 82 NY2d at 609.)

A person to whom the privilege contemplated by the statute applies may expressly waive it or may implicitly waive it by his or her conduct. (*Carmona*, 82 NY2d at 611.)

5.07. Psychologist (CPLR 4507)

The confidential relations and communications between a psychologist registered under the provisions of article one hundred fifty-three of the education law and his client are placed on the same basis as those provided by law between attorney and client, and nothing in such article shall be construed to require any such privileged communications to be disclosed.

A client who, for the purpose of obtaining insurance benefits, authorizes the disclosure of any such privileged communication to any person shall not be deemed to have waived the privilege created by this section. For purposes of this section:

1. "person" shall mean any individual, insurer or agent thereof, peer review committee, public or private corporation, political subdivision, government agency, department or bureau of the state, municipality, industry, co-partnership, association, firm, trust, estate or any other legal entity whatsoever; and

2. "insurance benefits" shall include payments under a self-insured plan.

Note

This rule is reproduced verbatim from CPLR 4507. (*See* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4507.)

The underlying premise of the psychologist-client privilege is that "confidentiality is the essential ingredient for successful psychotherapy" (*Frederick R.C. v Helene C.*, 153 Misc 2d 660, 662 [Sup Ct, Suffolk County 1992]). The privilege as created by CPLR 4507 is analogized to the attorney-client privilege (*People v Wilkins*, 65 NY2d 172, 178 [1985] [privilege was placed "on the same footing as that between attorney and client"]). Thus, the subject communications to be privileged must have been made in confidence and for the purpose of obtaining the psychologist's professional services. (*See* Robert A. Barker & Vincent C. Alexander, Evidence in New York State and Federal Courts § 5:22 [2d ed].)

For the privilege to be invoked, CPLR 4507 requires the psychologist to be registered under Education Law article 153. Thus, the privilege does not extend to psychologists who are not licensed or authorized to practice in New York.

The psychologist's client may waive the privilege, either expressly or impliedly. (*See e.g. Matter of Charles RR.*, 166 AD2d 763, 764 [3d Dept 1990].) However, CPLR 4507 precludes a finding of waiver of the privilege when the client authorizes disclosure in order to obtain insurance benefits.

Statutory exceptions to CPLR 4507 are set forth in Family Court Act § 1046 (a) (vii) (no privilege in child abuse or neglect proceedings); Social Services Law §§ 413 and 415 (cases of suspected child abuse or maltreatment must be reported in writing and such written reports are admissible in any proceedings relating to child abuse or maltreatment); Social Services Law § 384-b (3) (h) (no privilege in proceedings for guardianship and custody of destitute or dependent children); Mental Hygiene Law § 81.09 (d) (court may authorize court evaluator's inspection of psychological records of person alleged to be incapacitated and order "such further disclosure of such records as the court deems proper"); and Mental Hygiene Law § 33.13 (c) (1) (court may order disclosure of mental health records in specified facilities upon finding that interests of justice significantly outweigh need for confidentiality).

A privilege may be breached in a criminal proceeding when necessary to enforce a constitutional right of a defendant. (*See Pennsylvania v Ritchie*, 480 US 39 [1987]; *People v Bridgeland*, 19 AD3d 1122, 1125 [4th Dept 2005] [where a witness's credibility was "crucial" and there was a good faith basis to believe that her testimony was false, the psychologist privilege "must yield to defendant's constitutional right of confrontation"]; *People v Jaikaran*, 95 AD3d 903, 904 [2d Dept 2012]; *cf. People v McCray*, 23 NY3d 193, 198 [2014] [the trial court properly denied disclosure of confidential mental health records after the court conducted an in camera review of the records and determined the "defendant's interest in obtaining the records to be outweighed by the complainant's interest in confidentiality; and defendant's interest could be outweighed only if there was no reasonable possibility that the withheld materials would lead to his acquittal"].)

5.08. Social Worker (CPLR 4508)

(a) Confidential information privileged. A person licensed as a licensed master social worker or a licensed clinical social worker under the provisions of article one hundred fifty-four of the education law shall not be required to disclose a communication made by a client, or his or her advice given thereon, in the course of his or her professional employment, nor shall any clerk, stenographer or other person working for the same employer as such social worker or for such social worker be allowed to disclose any such communication or advice given thereon; except

1. that such social worker may disclose such information as the client may authorize;

2. that such social worker shall not be required to treat as confidential a communication by a client which reveals the contemplation of a crime or harmful act;

3. where the client is a child under the age of sixteen and the information acquired by such social worker indicates that the client has been the victim or subject of a crime, the social worker may be required to testify fully in relation thereto upon any examination, trial or other proceeding in which the commission of such crime is a subject of inquiry;

4. where the client waives the privilege by bringing charges against such social worker and such charges involve confidential communications between the client and the social worker.

(b) Limitations on waiver. A client who, for the purpose of obtaining insurance benefits, authorizes the disclosure of any such privileged communication to

any person shall not be deemed to have waived the privilege created by this section. For purposes of this subdivision:

1. "person" shall mean any individual, insurer or agent thereof, peer review committee, public or private corporation, political subdivision, government agency, department or bureau of the state, municipality, industry, co-partnership, association, firm, trust, estate or any other legal entity whatsoever; and

2. "insurance benefits" shall include payments under a self-insured plan.

Note

This section is reproduced verbatim from CPLR 4508 (*see generally* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4508).

The statute that embodies this rule establishes a privilege for a confidential communication between a licensed social worker and his or her client made during professional employment (*see Matter of Rutland v O'Brien*, 143 AD3d 1060, 1063 [3d Dept 2016] [in an action to modify a prior order of custody, the father could not call the daughter's counselor, a licensed clinical social worker, to testify about their privileged communications in the absence of a knowing waiver from the daughter "notwithstanding the absence of any objection by the attorney for the children"]).

The "social worker" must be a "licensed master social worker or a licensed clinical social worker" pursuant to Education Law article 154 (*cf. Matter of Humberstone v Wheaton*, 21 AD3d 1416, 1417 [4th Dept 2005] [a child's communications to a "school guidance counselor" who was not (as then required) a "certified" social worker were accordingly not privileged]; *People v Bridges*, 142 Misc 2d 789, 790 [Monroe County Ct 1989] [a communication between a patient and a hospital's volunteer counselor who was not a certified social worker was not protected by the "social worker" privilege]).

The privilege extends to any "clerk, stenographer or other person working for the same employer as such social worker or for such social worker" (CPLR 4508 [a]; *cf. Matter of Grand Jury Proceedings [Doe]*, 56 NY2d 348, 353 [1982] [a hospital that is the subject of a grand jury investigation for crimes committed upon its patients may not decline to honor a grand jury subpoena for a patient record

on the ground that it includes notes of a communication between its social worker and a patient]).

The privilege only protects a communication to a social worker that was intended to be confidential (*People v Alaire*, 148 AD2d 731, 737 [2d Dept 1989] [the defendant's statement to his social worker "was made in the presence of a third party, namely (a police sergeant) and (the sergeant's) presence was known to the defendant. In view thereof, it cannot be said that the defendant intended his statement to be confidential and thus, the privilege did not attach"]; *Matter of Allers [G.P.J*, 37 Misc 3d 1219[A], 2012 NY Slip Op 52095[U] [Sup Ct, Dutchess County 2012]).

A communication that reveals the contemplation of a crime or harmful act, though purportedly intended to be confidential, is by statute expressly not privileged (CPLR 4508 [a] [2]).

Similarly, a purported confidential communication of a child under 16 that indicates the child has been the victim or subject of a crime is not privileged when the social worker is required to testify at a proceeding in which the commission of the crime is a subject of inquiry (CPLR 4508 [a] [3]; *see* Social Services Law § 413 [social worker and others required to report cases of suspected child abuse or maltreatment]; Family Ct Act § 1046 [a] [vii] [neither the spousal, physician-patient, psychologist-client, or social worker privilege "shall be a ground for excluding evidence which otherwise would be admissible" in child protective proceedings]).

The client may expressly waive the privilege and thereby permit the social worker to testify to their communications (CPLR 4508 [a] [1]). The client may also impliedly waive the privilege by bringing charges against the social worker which involve the confidential communications (CPLR 4508 [a] [4]), or by otherwise affirmatively placing his or her medical and psychological condition in issue (*see Abraha v Adams*, 148 AD3d 1730, 1731 [4th Dept 2017] [in a medical malpractice action the "plaintiff waived any privilege afforded by CPLR 4508 by affirmatively placing her medical and psychological condition in controversy through the broad allegations of injury in her bills of particulars"]; *Velez v Daar*, 41 AD3d 164, 165 [1st Dept 2007] [in medical malpractice action for psychological and emotional injuries suffered because of a failure to diagnose a cancer, "(p)laintiff clearly waived his statutory social worker-patient confidentiality privilege (CPLR 4508) by placing his psychological condition in controversy, which he did by acknowledging in his testimony that factors other than his thyroid cancer were causes of his psychological symptoms"]; *Robles v Merrill Lynch/WFC/L, Inc.*, 40 AD3d 412, 412 [1st Dept 2007] ["Plaintiff waived the relevant privilege (CPLR 4508) by alleging injuries in her bill of particulars that affirmatively placed her mental condition in issue"]).

By subdivision (b), the client does not waive the privilege for all purposes by simply authorizing disclosure of the privileged communications to obtain insurance (*compare People v O'Gorman*, 91 Misc 2d 539 [Sup Ct, Suffolk County 1977] [privileged information was waived with respect to information given to establish or maintain eligibility for public assistance]).

By a separate statute, the privilege is not lost for the "sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication" (*see* CPLR 4548).

A privilege may be breached in a criminal proceeding when necessary to enforce a constitutional right of a defendant (*see Pennsylvania v Ritchie*, 480 US 39 [1987]; *People v Bridgeland*, 19 AD3d 1122, 1125 [4th Dept 2005] [where a witness's credibility was "crucial" and there was a good faith basis to believe that her testimony was false, the psychologist privilege "must yield to defendant's constitutional right of confrontation"]; *People v Jaikaran*, 95 AD3d 903, 904 [2d Dept 2012]; *cf. People v McCray*, 23 NY3d 193, 198 [2014] [the trial court properly denied disclosure of confidential mental health records after the court conducted an in camera review of the records and determined that the "defendant's interest in obtaining the records to be outweighed by the complainant's interest in confidentiality; and defendant's interest could be outweighed only if there was no reasonable possibility that the withheld materials would lead to his acquittal"]).

5.09. Library records (CPLR 4509)

Library records, which contain names or other personally identifying details regarding the users of public, free association, school, college and university libraries and library systems of this state, including but not limited to records related to the circulation of library materials, computer database searches, interlibrary loan transactions, reference queries, requests for photocopies of library materials, title reserve requests, or the use of audio-visual materials, films or records, shall be confidential and shall not be disclosed except that such records may be disclosed to the extent necessary for the proper operation of such library and shall be disclosed upon request or consent of the user or pursuant to subpoena, court order or where otherwise required by statute.

Note

This rule restates verbatim CPLR 4509.

"The law thus protects the privacy interests of library users whose reading habits are nobody's business but their own. The user may, of course, consent to disclosure, and the statute contains exceptions for proper operation of the library, court-ordered production, subpoenaed materials, and 'where otherwise required by statute.' " (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR 4509.)

5.10. Rape Crisis Counselor (CPLR 4510)

(a) Definitions. When used in this section, the following terms shall have the following meanings:

1. "Rape crisis program" means any office, institution or center which has been approved pursuant to subdivision fifteen of section two hundred six of the public health law, offering counseling and assistance to clients concerning sexual offenses, sexual abuses or incest.

2. "Rape crisis counselor" means any person who has been certified by an approved rape crisis program as having satisfied the training standards specified in subdivision fifteen of section two hundred six of the public health law, and who, regardless of compensation, is acting under the direction and supervision of an approved rape crisis program.

3. "Client" means any person who is seeking or receiving the services of a rape crisis counselor for the purpose of securing counseling or assistance concerning any sexual offenses, sexual abuse, incest or attempts to commit sexual offenses, sexual abuse, or incest, as defined in the penal law.

(b) Confidential information privileged. A rape crisis counselor shall not be required to disclose a communication made by his or her client to him or her, or advice given thereon, in the course of his or her services nor shall any clerk, stenographer or other person working for the same program as the rape crisis counselor or for the rape crisis counselor be allowed to disclose any such communication or advice given thereon nor shall any records made in the course of the services given to the client or recording of any communications made by or to a client be required to

be disclosed, nor shall the client be compelled to disclose such communication or records, except:

1. that a rape crisis counselor may disclose such otherwise confidential communication to the extent authorized by the client;

2. that a rape crisis counselor shall not be required to treat as confidential a communication by a client which reveals the intent to commit a crime or harmful act;

3. in a case in which the client waives the privilege by instituting charges against the rape crisis counselor or the rape crisis program and such action or proceeding involves confidential communications between the client and the rape crisis counselor.

(c) Who may waive the privilege. The privilege may only be waived by the client, the personal representative of a deceased client, or, in the case of a client who has been adjudicated incompetent or for whom a conservator has been appointed, the committee or conservator.

(d) Limitation on waiver. A client who, for the purposes of obtaining compensation under article twenty-two of the executive law or insurance benefits, authorizes the disclosure of any privileged communication to an employee of the office of victim services or an insurance representative shall not be deemed to have waived the privilege created by this section.

Note

This rule is reproduced verbatim from CPLR 4510. (*See generally* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4510.)

By its enactment of CPLR 4510 creating the rape crisis counselor privilege, the legislature sought to ensure that victims of sexual offenses receive needed counseling. (*See* Legislative Mem in Support, Bill Jacket, L 1993, ch 432, 1993 Legis Ann at 311 ["Confidentiality in rape crisis counseling is essential in creating trust, the cornerstone of any therapeutic relationship. Unless the victim is guaranteed confidentiality, he or she will be inhibited in discussion and unable to receive the full benefits of counseling"].)

The privilege by its terms applies to confidential communications disclosed by a client to a rape crisis counselor and includes advice given during the counseling. A "client" is defined in CPLR 4510 (a) (3) as a person seeking or receiving counseling concerning any sexual offense, including sexual abuse, incest, or attempts to commit any of those offenses as defined in the Penal Law. A "rape crisis counselor" is defined in CPLR 4510 (a) (2) as a person who is certified by an approved rape crisis program after completing a training program specified by Public Health Law **§** 206 (15), and who is being directed and supervised by an approved rape crisis program.

Once the privilege attaches to a confidential communication, the client, to maintain the privilege, and a rape crisis counselor, and any person working for the rape crisis program are prohibited from disclosing the communication and any records or recordings made in the course of the counseling. Nor may those parties be compelled to disclose the communications or records.

CPLR 4510 (b) sets forth three exceptions to the privilege: (1) the client authorizes disclosure; (2) the communication reveals the client's intent to commit a crime or other harmful act; and (3) the client waives the privilege by filing charges against the counselor or the rape crisis program and the charges relate to the confidential communication. In addition to these exceptions, Family Court Act § 1046 (a) (vii) provides that the privilege may not be invoked in child abuse or neglect proceedings.

In recognition that the privilege may be breached in a criminal case when necessary to enforce a constitutional right of a defendant, CPL 60.76 establishes a procedure for an in camera review of the privileged information and disclosure as may be required. (*See Pennsylvania v Ritchie*, 480 US 39 [1987]; *People v Bridgeland*, 19 AD3d 1122, 1125 [4th Dept 2005] [where a witness's credibility was "crucial" and there was a good faith basis to believe that her testimony was false, the psychologist privilege "must yield to defendant's constitutional right of confrontation"]; *People v Jaikaran*, 95 AD3d 903, 904 [2d Dept 2012]; Peter Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 60.76; *cf. People v McCray*, 23 NY3d 193, 198 [2014] [the trial court properly denied disclosure of confidential mental health records after the court conducted an in camera review of the records and determined the "defendant's interest in obtaining the records to be outweighed by the complainant's interest in

confidentiality; and defendant's interest could be outweighed only if there was no reasonable possibility that the withheld materials would lead to his acquittal"].)

5.48 Privileged communications; electronic communication thereof (CPLR 4548)

No communication privileged under this article shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication.

Note

This rule restates CPLR 4548. The rule is plainly designed to make clear that a communication of privileged information whether by traditional means or modern electronic means remains privileged, notwithstanding that electronic means may be subject to interception by non-privileged parties.

Further, the "statutory language makes clear that the involvement of a person who plays a *necessary* role in the delivery of the electronic communication does *not* constitute a waiver of privilege." (*Green v Beer*, 2010 WL 3422723, *4, 2010 US Dist LEXIS 87484, *10 [SD NY, Aug. 24, 2010, No. 06 Civ. 4156 (KMW) (JCF)] [plaintiffs lacked "proficiency in the use of email," and "their son's assistance was 'necessary for the delivery or facilitation' of counsel's emailed communications to the (plaintiffs)" (2010 WL 3422723, *5, 2010 US Dist LEXIS 87484, *13)].)

Of course, the communicated message must otherwise conform to the requirements of the privilege. "If a wife, for example, sends her husband an e-mail message with a 'cc' to her brother-in-law, or she knows that a business associate is looking over her shoulder when she types the message on her computer screen, no privilege should attach." (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4548.)

5.50 Parent-Child Privilege

(1) Subject to the remaining provisions of this rule, a parent or person legally responsible for the care of a child shall not be compelled or allowed, without the consent of the child, to disclose a confidential communication by the child to the parent or person legally responsible for the care of a child for the purpose of obtaining support, advice, or guidance.

(2) A child for purposes of the privilege set forth in this rule is, at least, a person who has not attained the age of 18 years.

(3) The privilege is normally waived when the communication is knowingly made in the presence of a third party. The privilege, however, will not be waived when the child is in police custody and the police decline to afford the parties privacy or in the alternative to warn them that if their communications are overheard, they may be testified to by the person who overhears them.

(4) A communication by a child to his or her parent or person legally responsible for the child's care is not privileged if the communication was contrary to the maintenance of familial relationships and the societal interest in protecting and nurturing the parent-child relationship, such as a communication about a crime committed against a member of the family or household.

Note

This rule sets forth New York's parent-child privilege as recognized by the Appellate Division (*People v Harrell*, 87 AD2d 21 [2d Dept 1982], *affd* 59 NY2d 620 [1983] [albeit the parent-child privilege issue was held not preserved for review]; *People v Stover*, 178 AD3d 1138 [3d Dept 2019]; *Matter of A. & M.*, 61 AD2d 426 [4th Dept 1978]). The Court of Appeals has not decided whether the privilege exists. (*See Harrell*, 59 NY2d at 621[the issue was not preserved] and *People v Johnson,* 84 NY2d 956 [1994] [the Court chose not to decide whether the

privilege existed, noting that it "would not even arguably apply" in the case]). The full contours of the privilege (including what constitutes an exception) are still evolving, and this rule "shall not be construed" as "precluding change in the law when appropriate." (Guide to New York Evid rule 1.02, Purpose & Construction; *see generally* Michael J. Hutter, *Parent-Child Privilege: Alive and Well But With Uncertain Conditions*, NYLJ, March. 31, 2023 at 3, col 3.)

The underlying basis and rationale for the privilege is not settled. *A. & M.*, the seminal decision, held that the parents of a 16 year old could refuse to answer grand jury questions concerning admissions their child had made to them in the privacy of their home under a parent-child privilege. The Court determined that the privilege was justified given that "the integrity of family relational interests is clearly entitled to constitutional protection." (*A. & M.* at 432.) The privilege has also been viewed as a derivative of statutory law (CPL 140.20 [6]; Family Ct Act § 724 [a]) that requires the police to advise a parent when a child is taken into custody. (*See* Note to subd [1].)

The justification for the privilege is well summarized in *A. & M.*:

> "It would be difficult to think of a situation which more strikingly embodies the intimate and confidential relationship which exists among family members than that in which a troubled young person, perhaps beset with remorse and guilt, turns for counsel and guidance to his mother and father. There is nothing more natural, more consistent with our concept of the parental role, than that a child may rely on his parents for help and advice. Shall it be said to those parents, 'Listen to your son at the risk of being compelled to testify about his confidences?' . . .
>
> "Surely the thought of the State forcing a mother and father to reveal their child's alleged misdeeds, as confessed to them in private, to provide the basis for criminal charges is shocking to our sense of decency, fairness and propriety. It is inconsistent with the way of life we cherish and guard so carefully and raises the specter of a regime which encourages betrayal of one's offspring." (*A. & M.* at 429, 433-434.)

Subdivision (1), as well as the remaining subdivisions, is derived from *A. & M.* and its progeny.

The key elements of the privilege are that the "communications must originate in confidence," be for "the purpose of obtaining support, advice or guidance," and "be essential to the full and satisfactory maintenance" of the parent-child relationship—a relationship which in society's opinion "ought to be sedulously fostered." (*Matter of A. & M.*, 61 AD2d at 433-434; *cf. Matter of Mark G.*, 65 AD2d 917, 917 [4th Dept 1978] ["It does not appear that respondent made the statement to his father in confidence and for the purpose of obtaining support, advice or guidance"].)

The Appellate Division has in particular applied the privilege to parent-child conversations where the parent's presence with the child was pursuant to a statutory requirement (CPL 140.20 [6]; Family Ct Act § 724 [a]) that the police contact a parent or guardian when a child is taken into custody, and the parent's resulting presence is, naturally, to assist their child. (*See People v Kemp*, 213 AD3d 1321, 1322 [4th Dept 2023] [noting the statutory requirement to advise a parent when a child is taken into custody, the Court applied the privilege to the communications a 15 year old made to his father in a police station interview room]; *Harrell*, 87 AD2d at 26 [the "privilege is rarely more appropriate than when a minor, under arrest for a serious crime, seeks the guidance and advice of a parent in the unfriendly environs of a police precinct. . . . (F)or such a youth, his parent is the primary source of assistance. It would not be consistent with basic fairness to exact as a price for that assistance, his acquiescence to the overhearing presence of government agents"], *affd* 59 NY2d 620 [1983] [albeit the parent-child privilege issue was held not preserved for review]; *Matter of Michelet P.*, 70 AD2d 68, 74 [2d Dept 1979] ["I hold that a conversation between a child (15 years old) and his guardian who appears pursuant to (statutory law) is privileged. Respondent had the right to assume that a statement confidentially made to one who was presented as his guardian would not be divulged].)

Notably, *Michelet P.* applied the privilege to a "guardian" of a child and *Matter of Ryan* (123 Misc 2d 854, 855 [Fam Ct, Monroe County 1984]) applied the privilege to the child's grandmother because "the relationship as testified to by respondent's grandmother . . . leads to the inference that she stands in the place and stead of his parent. To infer otherwise would destroy the familial setting."

An issue may be whether a parent can voluntarily testify to a child's communication even though the communication was made in confidence and for the purpose of obtaining support, advice, or guidance. Thus far cases have granted a child's application to preclude the parent from testifying without adding that the parent could chose to testify voluntarily (*e.g. Kemp*, 213 AD3d 1321; *Michelet P.*,

70 AD2d 68, 74 [2d Dept 1979]). There is language in some cases that gives rise to the question whether the parent may breach the privilege by voluntarily testifying; in those instances, however, the communication was not privileged regardless of whether the parent chose voluntarily to testify to it.

In *A. & M.* (61 AD2d at 435 n 9), the Court in a footnote indicated that there was an "argument" that a parent was not barred from testifying to a child's communication when "for example" in a proceeding where the child was seeking "to prevent his parents from testifying about matters in which they were seeking the intervention and assistance of the court in controlling the child's behavior." In that instance, however, the privilege is not breached by the prospective voluntary testimony of the parent; rather, there is no privilege given that the communication would be "contrary to the maintenance of familial relationships and the societal interest in protecting and nurturing the parent-child relationship," as provided in subdivision (4).

In Matter of Mark G. (65 AD2d 917, 917 [4th Dept 1978]), the Court rejected a law guardian's claim of privilege on behalf of a child stating: "It does not appear that respondent made the statement to his father in confidence and for the purpose of obtaining support, advice or guidance, nor that the father wished to remain silent and keep respondent's answer confidential." The father, however, was compelled to testify to the communication when the objection of a law guardian to his testimony was overruled. In any event, here again the privilege was breached when there was a finding that the communication was not made in confidence for the requisite purposes.

In the Court of Appeals case that listed in dicta the reasons the privilege may not have "arguably" applied, one of the listed reasons was that "the mother testified before the Grand Jury hearing evidence against defendant" (*Johnson*, 84 NY2d at 957); however, the defendant in *Johnson* was charged with killing a member of the household (i.e. "his mother's long-time live-in companion") and as detailed in subdivision (4), a parent-child communication about the killing of a household member would not be privileged.

By contrast, in *People v Fitzgerald* (101 Misc 2d 712, 723 [Westchester County Ct 1979]), the court held that the father in that case, who testified to the child's communication in the grand jury, had been compelled pursuant to law to testify in the grand jury and he had not therefore waived the privilege by testifying to the communication, "and even if it be deemed he has, such waiver cannot effect the jointly existing and independent right of his son to claim such a privilege."

Subdivision (2) addresses the issue of whether the privilege presently extends to all confidential communications by a child regardless of the child's age. Review of the decisional law reveals there is no definitive answer to that issue.

The child in *Matter of A. & M.* was 16 years old, and the Fourth Department emphasized the importance of the privilege to the promotion of the child's emotional development (61 AD2d at 432-433). The child in *Harrell* was 17 years old, and the Second Department in applying the privilege commented that the privilege "is rarely more appropriate than when a minor, under arrest for a serious crime, seeks the guidance and advice of a parent in the unfriendly environs of a police precinct." (87 AD2d at 26.) In recognizing that the privilege extended to minor children, the Second and Fourth Departments did not hold the privilege was limited to minor children. The Third Department, however, in *Stover* expressly held the privilege did not apply to a confidential communication to the parent of the defendant child because the child was 19 years old. (178 AD3d at 1144-1155.) Although the question of whether the parent-child privilege existed was not preserved for review in *Johnson,* the Court of Appeals ventured forward in dicta to state that the privilege would not even "arguably" apply in the case because the defendant "was 28 years old at the time of the conversation with his mother." (84 NY2d at 957.) By contrast, *Fitzgerald* (101 Misc 2d at 719) applied the privilege to a person who was 23 years of age, noting that the "trust and understanding, if such exists, between the parent and child cannot be made subject to the intrusion of the State merely because of a proposed artificial barrier of age."

Subdivision (3) recognizes specifically the Appellate Division holding that the privilege does not "attach to 'communications made in the presence of [a] third part[y], whose presence is known to the defendant.' " (*People v DiLenola*, 245 AD2d 1132, 1133 [4th Dept 1997] [rejecting a claim that a conversation the defendant had with his guardian (his aunt) was privileged because the conversation was held in the presence of a third party whose presence was known to the defendant]; *see Johnson*, 84 NY2d at 957 [stating in dicta that the privilege did not arguably apply in that case because another family member was present].)

The rule also addresses whether an intended confidential communication will be privileged when the police decline to provide the parent and child privacy, perhaps situating themselves so as to overhear the conversation. *Harrell* (87 AD2d at 27) held that the parties should be granted privacy or warned that, if the communications are overheard, they may be testified to by the person who

overhears them, and, if neither privacy nor a warning is given, the person who overhears the communications will be barred from testifying to them.

Subdivision (4) addresses the exemptions that apply to the rule. To understand these exemptions, it must be noted that the central purpose of the privilege is to maintain the familial relationship that society deems important (*Matter of A. & M.*, 61 AD2d at 433-434 ["the interest of society in protecting and nurturing the parent-child relationship is of such overwhelming significance"]; *see* Social Services Law § 384-b [1] [a] [i] [the legislative intent regarding guardianship and custody of destitute or dependent children states: "it is desirable for children to grow up with a normal family life in a permanent home and that such circumstance offers the best opportunity for children to develop and thrive"]).

Given that purpose, a communication that is antithetical to maintaining the familial relationship or societal interest in the relationship will not be privileged. (*See e.g*. Family Ct Act § 1046 [a] [vii] [excluding the applicability of statutory privileges in child protective proceedings]; *Matter of Harry R. v Esther R.*, 134 Misc 2d 404 [Fam Ct, Bronx County 1986] [discussing the privilege in the context of Family Court proceedings]; Proposed NY Code of Evid § 507(d) [1982] [exempting the privilege when the communication related to: the furtherance of crime or fraud; a crime committed against a member of the family or household; civil actions between the parent and child; actions involving custody; and a communication offered in a criminal case by the accused parent or child]; *Johnson,* 84 NY2d at 957 [stating in dicta that the privilege did not arguably apply where the conversation in that case "concerned a crime committed against a member of the household"].)