

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]).