Appendix A

Sec. 5-1. General Rule

[Except as otherwise required by the constitution of the United States, the constitution of this state, the General Statutes or the Practice Book, privileges shall be governed by the principles of the common law].

A person may not be compelled to testify or to produce other evidence that he or she is privileged or obligated by privilege not to divulge by the constitution of the United States, the constitution of Connecticut, relevant federal statutes, the General Statutes, or any Practice Book rule adopted before June 18, 2014, the date on which the Supreme Court adopted the Code.

COMMENTARY

[See Section 1-2 (b) and the commentary thereto.]

The rules in Article V retain Connecticut law concerning privileges. All constitutional, statutory, and common-law privileges remain in force, subject to change by due course of law.

As the rules of privilege inhibit the fact finding process, they "must be applied . . . cautiously and with circumspection. . . ." (Internal quotation marks omitted.) *State* v. *Christian*, 267 Conn. 710, 727, 841 A.2d 1158 (2004); see *Harrington* v. *Freedom of Information Commission*, 323 Conn. 1, 12–13, 144 A.3d 405 (2016). The person asserting a privilege has the burden of establishing its foundation. See *State* v. *Mark R.*, 300 Conn. 590, 598, 17 A.3d 1 (2011); *PSE Consulting, Inc.* v. *Frank Mercede & Sons, Inc.*, 267 Conn. 279, 330, 838 A.2d 135 (2004); *State* v. *Hanna*, 150 Conn. 457, 466, 191 A.2d 124 (1963). Whether a claimed privilege covers particular testimony or other evidence as to which it is asserted is a preliminary question to be determined by the court. Section 1-3 (a). Privileges shall apply at all stages of all proceedings in the court. Section 1-1 (c).

In addition to evidentiary privileges recognized at common law, many privileges have been created or codified by Connecticut statute. The General Statutes and the common law should be reviewed for additional evidentiary privileges. Further,

evidentiary privileges and confidential matters can have different meanings and legal effects. See *State* v. *Kemah*, 289 Conn. 411, 417 n.7, 957 A.2d 852 (2008); see generally *State* v. *Orr*, 291 Conn. 642, 673–74, 969 A.2d 750 (2009) (*Palmer, J.*, concurring). “Evidentiary privileges should be sharply distinguished from information that is protected from public disclosure because the information was obtained under statute or procedure that made it confidential.” (Internal quotation marks omitted.) C. Tait & E. Prescott, Tait’s Handbook of Connecticut Evidence (5th Ed. 2014) § 5.2, p. 248. What follows is a brief, nonexhaustive description of several privileges that are most commonly invoked and honored in courts of this state.

Healthcare Provider Privileges

In Connecticut, there is no common-law physician-patient privilege. Rather, a form of physician-patient privilege has been enacted in General Statutes § 52-146o (a). It should be noted that the provisions of § 52-146o apply to civil actions, but not to criminal prosecutions. See *State* v. *Anderson*, 74 Conn. App. 633, 653–54, 813 A.2d 1039, cert. denied, 263 Conn. 901, 819 A.2d 837 (2003); see also *State* v. *Legrand*, 129 Conn. App. 239, 262–63, 20 A.3d 521, cert. denied, 302 Conn. 912, 27 A.3d 371 (2011).

The General Assembly has also enacted analogous privileges for communication with certain other health care providers, counselors or social workers. These include privileges for psychiatrist-patient; General Statutes §§ 52-146d and 52-146e; psychologist-patient; General Statutes § 52-146c (b); domestic violence/sexual assault counselor-victim; General Statutes § 52-146k; see *In re Robert H.*, 199 Conn. 693,706, 509 A.2d 475 (1986); marital/family therapist communications; General Statutes § 52-146p (b); and licensed professional counselor communications. General Statutes § 52-146s (b). Each of these statutes has their own provisions governing the assertion or the waiver of the privilege and should be consulted.

Privileged Communications Made to Clergy

While Connecticut common law does not recognize privileged communications to clergy; *State* v. *Mark R.*, 300 Conn. 590, 597, 17 A.3d 1 (2011); see generally *Cox* v. *Miller*, 296 F.3d 89, 102 (2d Cir. 2002), cert. denied, 537 U.S. 1192, 123 S. Ct. 1273, 154 L. Ed. 2d 1026 (2003); a related privilege has been codified in General Statutes § 52-146b. That statute protects from disclosure, in any civil or criminal case, or in any administrative or legislative proceeding, confidential communications made to a member of the clergy of any "religious denomination" who is accredited by "the religious body to which he belongs, who is settled in the work of the ministry . . . ." General Statutes § 52-146b. For such a privilege to apply, the person asserting it must establish that there was a communication, that the communication was confidential, that the communication was made to a member of the clergy within the meaning of § 52-146b, that it was made to the clergy member in his or her professional capacity, that the disclosure was sought as part of a criminal or civil case, and with a showing that the communication was meant to be confidential and that the privilege was not waived. *State* v. *Mark R.*, supra, 597–98; *State* v. *Rizzo*, 266 Conn. 171, 283, 833 A.2d 363 (2003).

Privilege Against Self-Incrimination

The fifth and fourteenth amendments to the constitution of the United States, article first, §8, of the constitution of Connecticut and General Statutes § § 51-35 (b) and 52-199 all protect a person from being compelled to give potentially incriminating evidence against himself or herself that would expose such person to criminal liability. A criminal defendant cannot be forced to testify as a witness in his or her own case to invoke the privilege. U.S. Const., amends. V, XIV; Conn. Const., art. I, § 8; see General Statutes § 46-137 (b) (juvenile proceedings); see generally C. Tait & E. Prescott, Tait's Handbook of Connecticut Evidence (5th Ed. 2014) § 5.5.2, pp. 251–53.

The privilege against self-incrimination "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also

privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." (Internal quotation marks omitted.) *Olin Corp.* v. *Castells*, 180 Conn. 49, 53, 428 A.2d 319 (1980); see *Garrity* v. *New Jersey*, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967) (public employees' self-incriminating statements obtained during investigation by threat of discharge cannot be used against them in subsequent criminal proceeding). The privilege "extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute. . . . [I]f the witness, upon interposing his claim, were required to prove the hazard . . . he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is . . . asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." (Internal quotation marks omitted.) *Malloy* v. *Hogan*, 378 U.S. 1, 11–12, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

This privilege, however, protects only natural persons and not corporations. *Lieberman* v. *Reliable Refuse Co.*, 212 Conn. 661, 672–76, 563 A.2d 1013 (1989). Because the statute embodying the privilege, § 52-199, serves only to codify the common law and constitutional limitations, corporations in Connecticut do not enjoy a privilege against self-incrimination. Id., 672. Corporate officers and agents, however, can claim the privilege against self-incrimination on their own behalf "when summoned to testify or produce documentary material in connection with a suit in which his [or her] corporation is a party." Id., 674.

Additionally, while the privilege against self-incrimination is absolute, unless waived, when it is invoked in a civil proceeding, its invocation may have adverse consequences for the person asserting it. See, e.g., *Pavlinko* v. *Yale-New Haven Hospital*, 192 Conn. 138, 470 A.2d 246 (1984) (plaintiff who invokes privilege at deposition in civil action risks dismissal of complaint); *Olin Corp.* v. *Castells*, supra, 180

Conn. 53–54 (adverse inference may be drawn against party in civil action when such party invokes privilege); c.f. *In re Samantha C.*, 268 Conn. 614, 663, 847 A.2d 883 (2004) (when respondent invokes rule of practice instead of constitutional privilege, adverse inference may be drawn in termination of parental rights proceeding, if prior notice of adverse inference is given); see *Greenan* v. *Greenan*, 150 Conn. App. 289, 298 n.8, 91 A.3d 909 (noting exceptions to drawing adverse inference in General Statutes §§ 46b-138a and 52-146k [f]), cert. denied, 314 Conn. 902, 99 A.3d 1167 (2014). This rule is extended to the invocation of the privilege by a nonparty, assuming that the court determines that the "probative value of admitting the evidence exceeds the prejudice to the party against whom it will be used . . . ." *Rhode* v. *Milla*, 287 Conn. 731, 738, 949 A.2d 1227 (2008); see Section 4-3. A defendant may always waive this privilege and choose to testify. *James* v. *Commissioner of Correction*, 74 Conn. App. 13, 20, 810 A.2d 290 (2002), cert. denied, 262 Conn. 946, 815 A.2d 675 (2003).

Settlement, Mediation and Negotiation Privilege

Privileges related to specific negotiation and mediation processes are recognized by statute, elsewhere in this Code, and by the rules of practice. See General Statutes § § 52-235d (b) (civil action mediation); 46b-53 (c) (Superior Court family mediation program); 31-96 (mediators appointed by Labor Commission); 46a-84 (e) (mediation and settlement efforts involving human rights discrimination claims); Practice Book §§ 11-20A (i), 25-59A (g) and 42-49A (h); see also Section 4-8; *Tomasso Bros., Inc.* v. *October Twenty-Fourth, Inc.*, 221 Conn. 194, 198, 602 A.2d 1011 (1992). No evidence of guilty pleas, guilty pleas entered under the *Alford* doctrine, nolo contendere pleas or statements made in proceedings at which a plea was offered but not accepted by the judicial authority can be received at the trial of that case. Section 4-8A; Practice Book § 39-25. With limited exceptions, no statement made during plea discussions of a criminal case can be admitted at the trial of the case. Section 4-8A.

(New) Sec. 5-2. Attorney-Client Privilege

Communications when made in confidence between a client and an attorney for the purpose of seeking or giving legal advice are privileged.

COMMENTARY

The attorney-client privilege is a privilege protecting confidential communications between an attorney and client for the purpose of seeking or giving legal advice. *Blumenthal* v. *Kimber Mfg. Inc.*, 265 Conn. 1, 10, 826 A.2d 1088 (2003); *Doyle* v. *Reeves*, 112 Conn. 521, 523, 152 A. 882 (1931); *Goddard* v. *Gardner*, 28 Conn. 172, 175 (1859). The term "client" also includes prospective clients. See Rules of Professional Conduct 1.18. "Because the application of the attorney-client privilege tends to prevent the full disclosure of information and the true state of affairs, it is both narrowly applied and strictly construed." *Harrington* v. *Freedom of Information Commission*, 323 Conn. 1, 12–13, 144 A.3d 405 (2016); see also *PSE Consulting, Inc.* v. *Frank Mercede & Sons, Inc.*, 267 Conn. 279, 330, 838 A.2d 135 (2004).

The privilege protects both the confidential giving of advice by an attorney and the providing of information to the attorney by the client or the client's agent. *Metro Life Ins. Co.* v. *Aetna Casualty & Surety Co.*, 249 Conn. 36, 52, 730 A.2d 51 (1999); *State* v. *Cascone*, 195 Conn. 183, 186–87, 487 A.2d 186 (1985). To be protected, the communications must be in connection with and necessary for the seeking or giving of legal advice. *PSE Consulting, Inc.* v. *Frank Mercede & Sons, Inc.*, supra, 267 Conn. 329; *Ullman* v. *State*, 230 Conn. 698, 713, 647 A.2d 324 (1994). The privilege belongs to the client and usually can only be waived with the client's consent. See Rules of Professional Conduct 1.6; but see *Olson* v. *Accessory Controls & Equipment Corp.*, 254 Conn. 145, 171, 757 A.2d 14 (2000) (discussion of crime fraud exception contained in Rule 1.6 of Rules of Professional Conduct).

The privilege does not protect communications made in the presence of or made available to third parties. *State* v. *Burak*, 201 Conn. 517, 526, 518 A.2d 639 (1986); *State* v. *Gordon*, 197 Conn. 413, 423–24, 504 A.2d 1020 (1985). There are various exceptions to this rule where communications to or in the presence of a third party will

be protected by the privilege. This includes: where the third party is deemed to be an agent or employee of the client or attorney who is involved with or necessary to the giving or effectuating of the legal advice; *State* v. *Gordon*, supra 424; communications made to or in the presence of employees of the attorney (paralegals, secretaries, clerks); *Goddard* v. *Gardner*, supra, 28 Conn. 175; or experts retained by counsel; *State* v. *Taste*, 178 Conn. 626, 628, 424 A.2d 293 (1979); *Stanley Works* v. *New Britain Development Agency*, 155 Conn. 86, 94–95, 230 A.2d 9 (1967); or certain officers and employees of the client, including in-house counsel. *Shew* v. *Freedom of Information Commission*, 245 Conn 149, 158 n.11, 714 A.2d 664 (1998). Also, communications made to other clients or counsel who have an established common interest in the prosecution or defense of an action can be protected. *State* v. *Cascone*, supra, 195 Conn. 186.

Also, confidential communications with a governmental attorney in connection with civil or criminal cases or legislative and administrative proceedings are privileged. General Statutes §52-146r. The privilege can be waived when a party specifically pleads reliance on an attorney's advice as an element of a claim or defense, voluntarily testifies regarding portions of the attorney-client communication or specifically places in issue some matter concerning the attorney-client relationship (e.g. claim of malpractice). See *Metropolitan Life Ins. Co.* v. *Aetna Casualty & Surety Co.*, 249 Conn. 36, 52–53, 730 A.2d 51 (1999); *Pierce* v. *Norton*, 82 Conn. 441, 445–47, 74 A. 686 (1909); see also Rules of Professional Conduct 1.6 (d). If the privileged communication is later disclosed to a third party, the privilege is waived unless the disclosure is shown to be inadvertent. See *Harp* v. *King*, 266 Conn. 747, 767–70, 835 A.2d 953 (2003).

The common law has long recognized that making of a statement through an interpreter to one's own attorney does not waive or abrogate the attorney-client privilege due to the presence of the interpreter. See *State* v. *Christian*, 267 Conn. 710, 749, 841 A.2d 1158 (2004); *Olson* v. *Accessory Controls & Equipment Corp.*, supra, 265 Conn. 1; *Goddard* v. *Gardner*, supra, 28 Conn. 175–76.

There is nothing in the law that would indicate that this definition of the privilege is not applicable to other common-law or statutory privileges. Thus, whenever a deaf or

non-English speaking person communicates through an interpreter to any person under such circumstances that the underlying communication would be privileged, such person should not be compelled to testify as to the communications. Nor should the interpreter be allowed to testify as to the communication unless the privilege has been waived.

(New) Sec. 5-3. Marital Privileges

(a) A person in a criminal proceeding may refuse to testify against his or her lawful spouse unless the criminal proceeding involves criminal conduct jointly undertaken by both spouses or a claim of bodily injury, sexual assault or other violence attempted, committed or threatened against the other spouse or minor child of, or in the custody or care of, either spouse, including risk of injury to such minor child. See General Statutes § 54-84a.

(b) A spouse may not be compelled to testify, or be allowed to testify, if the other spouse objects, about confidential communications made during the marriage unless the confidential communication is in a criminal proceeding involving joint participation in criminal conduct or conspiracy to commit a crime at the time of the communication, or a claim of bodily injury, sexual assault or other violence attempted, committed or threatened against the other spouse or any minor child, of or in the custody or care of, either spouse, including risk of injury to such minor child. See General Statutes § 54-84b.

COMMENTARY

There are two separate, distinct privileges pertaining to one spouse testifying in court against the other spouse: the adverse spousal testimony privilege and the marital communications privilege. Under the adverse spousal testimony privilege, the witness spouse in a criminal prosecution has the privilege to refuse to testify against the other spouse, as long as they are still married at the time of the action. General Statutes § 54-84a; *State* v. *Christian,* 267 Conn. 710, 724, 725, 841 A.2d 1158 (2004). The privilege

does not apply if the proceeding involves the claims enumerated in § 54-84a (b) (e.g., joint criminal participation, personal violence against spouse or child of either spouse). See also General Statutes § 52-146. The spouse still may invoke other applicable privileges available to any witness (e.g., self-incrimination).

The marital communications privilege "permits an individual to refuse to testify, and to prevent a spouse or former spouse from testifying, as to any confidential communication made by the individual to the spouse during their marriage." *State* v. *Christian*, supra, 267 Conn. 725. Section 54-84b of the General Statutes embodies the common-law requirements for recognizing the privilege and adds the requirement that the communication must be "induced by the affection, confidence, loyalty and integrity of the marital relationship." General Statutes § 54-84b (a); (internal quotation marks omitted) *State* v. *Davalloo*, 320 Conn. 123, 140, 128 A.3d 492 (2016). Like the adverse spousal testimony privilege, the testimony of the witness spouse may, however, be compelled under the marital communications privilege for any of the reasons enumerated in § 54-84b (c).

While § 54-84b (b) codified and amended the common-law spousal privilege as it relates to criminal prosecutions, the privilege, when invoked in a civil matter, is still defined by common law. See generally *State* v. *Christian*, supra, 267 Conn. 728–30; *State* v. *Saia*, 172 Conn. 37, 43, 372 A.2d 144 (1976).