CHAPTER 905

EVIDENCE — PRIVILEGES

NOTE: Extensive comments by the Judicial Council Committee and the Federal Advisory Committee are printed with chs. 901 to 911 in 59 Wis. 2d. The court did not adopt the comments but ordered them printed with the rules for information purposes.

905.01 Privileges recognized only as provided. Except as provided by or inherent or implicit in statute or in rules adopted by the supreme court or required by the constitution of the United States or Wisconsin, no person has a privilege to:

(1) Refuse to be a witness; or

(2) Refuse to disclose any matter; or

(3) Refuse to produce any object or writing; or

(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

History: Sup. Ct. Order, 59 Wis. 2d R1, R101 (1973).

This section precludes courts from recognizing common law privileges not contained in the statutes, or the U.S. or Wisconsin constitutions. Privileges and confidentialities granted by statute are strictly interpreted. Davison v. St. Paul Fire & Marine Insurance Co. 75 Wis. 2d 190, 248 N.W.2d 433 (1977).

A defendant did not have standing to complain that a physician's testimony violated the witness's physician−patient privilege under s. 905.04; the defendant was not authorized to claim the privilege on the patient's behalf. State v. Echols, 152 Wis. 2d 725, 449 N.W.2d 320 (Ct. App. 1989).

As s. 907.06 (1) prevents a court from compelling an expert to testify, it logically follows that a litigant should not be able to so compel an expert and a privilege to refuse to testify is implied. Burnett. v. Alt, 224 Wis. 2d 72, 589 N.W.2d 21 (1999), 96−3356.

Under *Alt*, a person asserting the privilege not to offer expert opinion testimony can be required to give that testimony only if: 1) there are compelling circumstances present; 2) there is a plan for reasonable compensation of the expert; and 3) the expert will not be required to do additional preparation for the testimony. An exact question requiring expert opinion testimony and a clear assertion of the privilege are required for a court to decide whether compelling circumstances exist. *Alt* does not apply to observations made by a person's treating physician relating to the care or treatment provided to the patient. Glenn v. Plante, 2004 WI 24, 269 Wis. 2d 575, 676 N.W.2d 413, 02−1426.

905.015 Interpreters for persons with language difficulties, limited English proficiency, or hearing or speaking impairments. If an interpreter for a person with a language difficulty, limited English proficiency, as defined in s. 885.38 (1) (b), or a hearing or speaking impairment interprets as an aid to a communication which is privileged by statute, rules adopted by the supreme court, or the U.S. or state constitution, the interpreter may be prevented from disclosing the communication by any person who has a right to claim the privilege. The interpreter may claim the privilege but only on behalf of the person who has the right. The authority of the interpreter to do so is presumed in the absence of evidence to the contrary.

History: 1979 c. 137; 1985 a. 266; 2001 a. 16.

905.02 Required reports privileged by statute. A person, corporation, association, or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if provided by law. A public officer or agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if provided by law. No privilege exists under this section in actions involving false swearing, fraudulent writing, fraud in the return or report, or other failure to comply with the law in question.

History: Sup. Ct. Order, 59 Wis. 2d R1, R109 (1973).

This section applies only to privileges specifically and unequivocally provided by law against the disclosure of specific materials. Davison v. St. Paul Fire & Marine Insurance Co. 75 Wis. 2d 190, 248 N.W.2d 433 (1977).

905.03 Lawyer−client privilege. (1) DEFINITIONS. As used in this section:

(a) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(b) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(c) A "representative of the lawyer" is one employed to assist the lawyer in the rendition of professional legal services.

(d) A communication is "confidential" if not intended to be disclosed to 3rd persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(2) GENERAL RULE OF PRIVILEGE. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client: between the client or the client's representative and the client's lawyer or the lawyer's representative; or between the client's lawyer and the lawyer's representative; or by the client or the client's lawyer to a lawyer representing another in a matter of common interest; or between representatives of the client or between the client and a representative of the client; or between lawyers representing the client.

(3) WHO MAY CLAIM THE PRIVILEGE. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. The lawyer's authority to do so is presumed in the absence of evidence to the contrary.

(4) EXCEPTIONS. There is no privilege under this rule:

(a) *Furtherance of crime or fraud.* If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

(b) *Claimants through same deceased client.* As to a communication relevant to an issue between parties who claim through

the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

(c) *Breach of duty by lawyer or client.* As to a communication relevant to an issue of breach of duty by the lawyer to the lawyer's client or by the client to the client's lawyer; or

(d) *Document attested by lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(e) *Joint clients.* As to a communication relevant to a matter of common interest between 2 or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

History: Sup. Ct. Order, 59 Wis. 2d R1, R111 (1973); 1991 a. 32.

That there was a communication from a client to an attorney is insufficient to find the communication is privileged. Jax v. Jax, 73 Wis. 2d 572, 243 N.W.2d 831 (1975).

There is not a general exception to the lawyer−client privilege in legal malpractice cases. The extent of the privilege is discussed. Dyson v. Hempe, 140 Wis. 2d 792, 413 N.W.2d 379 (Ct. App. 1987).

When a defendant alleges ineffective assistance of counsel, the lawyer−client privilege is waived to the extent that counsel must answer questions relevant to the allegation. State v. Flores, 170 Wis. 2d 272, 488 N.W.2d 116 (Ct. App. 1992).

A litigant's request to see his or her file that is in the possession of current or former counsel does not waive the attorney−client and work−product privileges and does not allow other parties to the litigation discovery of those files. Borgwardt v. Redlin, 196 Wis. 2d 342, 538 N.W.2d 581 (Ct. App. 1995), 94−2701.

Waiver of attorney−client privilege is not limited to direct attacks on attorney performance. An attempt to withdraw a plea on the grounds that it was not knowingly made raised the issue of attorney performance and resulted in a waiver of the attorney−client privilege. State v. Simpson, 200 Wis. 2d 798, 548 N.W.2d 105 (Ct. App. 1996), 95−1129.

Attorney−client privilege is not waived by a broadly worded insurance policy cooperation clause in a coverage dispute. There is not a common interest exception to the privilege when the attorney was not consulted in common by two clients. State v. Hydrite Chemical Co. 220 Wis. 2d 51, 582 N.W.2d 411 (Ct. App. 1998), 96−1780.

The attorney−client privilege is waived when the privilege holder attempts to prove a claim or defense by disclosing or describing an attorney−client communication. State v. Hydrite Chemical Co. 220 Wis. 2d 51, 582 N.W.2d 411 (Ct. App. 1998), 96−1780.

A videotaped interview of a crime victim conducted by the alleged perpetrator's spouse was not privileged as attorney communication because it was made in the presence of a 3rd−party, the victim, and was not confidential. Estrada v. State, is. 2d 459, 596 N.W.2d 496 (Ct. App. 1999), 98−3055.

A former director cannot act on behalf of the client corporation and waive the lawyer−client privilege. Even though documents were created during the former director's tenure as a director, a former director is not entitled to documents in the corporate lawyer's files. Lane v. Sharp Packaging Systems, 2002 WI 28, 251 Wis. 2d 68, 640 N.W.2d 788, 00−1797.

Billing records are communications from the attorney to the client, and producing those communications violates the lawyer−client privilege if production of the documents reveals the substance of lawyer−client communications. Lane v. Sharp Packaging Systems, 2002 WI 28, 251 Wis. 2d 68, 640 N.W.2d 788, 00−1797.

The test for invoking the crime−fraud exception under sub. (4) (a) is whether there is reasonable cause to believe that the attorney's services were utilized in furtherance of the ongoing unlawful scheme. If a prima facie case is established, an in camera review of the requested documents is required to determine if the exception applies. Lane v. Sharp Packaging Systems, 2002 WI 28, 251 Wis. 2d 68, 640 N.W.2d 788, 00−1797.

Counsel's testimony on opinions, perceptions, and impressions of a former client's competency violated the attorney−client privilege and should not have been revealed without the consent of the former client. State v. Meeks, 2003 WI 104, 263 Wis. 2d 794, 666 N.W.2d 859, 01−0263.

A lawyer's voluntary production of documents in response to opposing counsel's discovery request does not constitute a waiver of the attorney−client privilege under this section when the lawyer does not recognize that the documents are subject to the attorney−client privilege and the documents are produced without the consent or knowledge of the client. The agency doctrine does not apply to waiver of attorney−client privilege as it relates to privileged documents. Harold Sampson Trust v. Linda Gale Sampson Trust, 2004 WI 57, 271 Wis. 2d 610, 679 N.W.2d 794, 02−1515.

Attorney−client privilege in Wisconsin. Stover and Koesterer. 59 MLR 227.

Attorney−client privilege: Wisconsin's approach to exceptions. 72 MLR 582 (1989).

905.04 Physician−patient, registered nurse−patient, chiropractor−patient, psychologist−patient, social worker−patient, marriage and family therapist−patient and professional counselor−patient privilege.

(1) DEFINITIONS. In this section:

(a) "Chiropractor" means a person licensed under s. 446.02, or a person reasonably believed by the patient to be a chiropractor.

(b) A communication or information is "confidential" if not intended to be disclosed to 3rd persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication or information or persons who are participating in the diagnosis and treatment under the direction of the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor, including the members of the patient's family.

(bm) "Marriage and family therapist" means an individual who is licensed as a marriage and family therapist under ch. 457 or an individual reasonably believed by the patient to be a marriage and family therapist.

(c) "Patient" means an individual, couple, family or group of individuals who consults with or is examined or interviewed by a physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor.

(d) "Physician" means a person as defined in s. 990.01 (28), or reasonably believed by the patient so to be.

(dm) "Professional counselor" means an individual who is licensed as a professional counselor under ch. 457 or an individual reasonably believed by the patient to be a professional counselor.

(e) "Psychologist" means a licensed psychologist, as that term is defined in s. 455.01 (4), or a person reasonably believed by the patient to be a psychologist.

(f) "Registered nurse" means a nurse who is licensed under s. 441.06 or licensed as a registered nurse in a party state, as defined in s. 441.50 (2) (j), or a person reasonably believed by the patient to be a registered nurse.

(g) "Social worker" means an individual who is certified or licensed as a social worker, advanced practice social worker, independent social worker, or clinical social worker under ch. 457 or an individual reasonably believed by the patient to be a social worker, advanced practice social worker, independent social worker, or clinical social worker.

(2) GENERAL RULE OF PRIVILEGE. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition, among the patient, the patient's physician, the patient's registered nurse, the patient's chiropractor, the patient's psychologist, the patient's social worker, the patient's marriage and family therapist, the patient's professional counselor or persons, including members of the patient's family, who are participating in the diagnosis or treatment under the direction of the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor.

(3) WHO MAY CLAIM THE PRIVILEGE. The privilege may be claimed by the patient, by the patient's guardian or conservator, or by the personal representative of a deceased patient. The person who was the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor may claim the privilege but only on behalf of the patient. The authority so to do is presumed in the absence of evidence to the contrary.

(4) EXCEPTIONS. (a) *Proceedings for hospitalization, guardianship, protective services, or protective placement or for control, care, or treatment of a sexually violent person.* There is no privilege under this rule as to communications and information relevant to an issue in proceedings to hospitalize the patient for mental illness, to appoint a guardian in this state, for court−ordered protective services or protective placement, for review of guardianship, protective services, or protective placement orders, or for control, care, or treatment of a sexually violent person under ch. 980, if the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist, or professional counselor in the course of diagnosis or treatment has determined that the patient is in need of hospitalization, guardianship, protective services, or protective placement or control, care, and treatment as a sexually violent person.

NOTE: Par. (a) is shown as affected by 2 acts of the 2005 Wisconsin legislature and as merged by the revisor under s. 13.93 (2) (c).

(am) *Proceedings for guardianship.* There is no privilege under this rule as to information contained in a statement concern-

ing the mental condition of the patient furnished to the court by a physician or psychologist under s. 54.36 (1) or s. 880.33 (1), 2003 stats.

(b) *Examination by order of judge.* If the judge orders an examination of the physical, mental or emotional condition of the patient, or evaluation of the patient for purposes of guardianship, protective services or protective placement, communications made and treatment records reviewed in the course thereof are not privileged under this section with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(c) *Condition an element of claim or defense.* There is no privilege under this section as to communications relevant to or within the scope of discovery examination of an issue of the physical, mental or emotional condition of a patient in any proceedings in which the patient relies upon the condition as an element of the patient's claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

(d) *Homicide trials.* There is no privilege in trials for homicide when the disclosure relates directly to the facts or immediate circumstances of the homicide.

(e) *Abused or neglected child or abused unborn child.* 1. In this paragraph:

a. "Abuse" has the meaning given in s. 48.02 (1).

b. "Neglect" has the meaning given in s. 48.981 (1) (d).

2. There is no privilege in situations where the examination of an abused or neglected child creates a reasonable ground for an opinion of the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor that the abuse or neglect was other than accidentally caused or inflicted by another.

3. There is no privilege in situations where the examination of the expectant mother of an abused unborn child creates a reasonable ground for an opinion of the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor that the physical injury inflicted on the unborn child was caused by the habitual lack of self−control of the expectant mother of the unborn child in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree.

(f) *Tests for intoxication.* There is no privilege concerning the results of or circumstances surrounding any chemical tests for intoxication or alcohol concentration, as defined in s. 340.01 (1v).

(g) *Paternity proceedings.* There is no privilege concerning testimony about the medical circumstances of a pregnancy or the condition and characteristics of a child in a proceeding to determine the paternity of that child under subch. IX of ch. 767.

(h) *Reporting wounds and burn injuries.* There is no privilege regarding information contained in a report under s. 146.995 pertaining to a patient's name and type of wound or burn injury.

(i) *Providing services to court in juvenile matters.* There is no privilege regarding information obtained by an intake worker or dispositional staff in the provision of services under s. 48.067, 48.069, 938.067 or 938.069. An intake worker or dispositional staff member may disclose information obtained while providing services under s. 48.067 or 48.069 only as provided in s. 48.78 and may disclose information obtained while providing services under s. 938.067 or 938.069 only as provided in s. 938.78.

History: Sup. Ct. Order, 59 Wis. 2d R121; 1975 c. 393; 1977 c. 61, 418; 1979 c. 32 s. 92 (1); 1979 c. 221, 352; 1983 a. 400, 535; 1987 a. 233, 264; Sup. Ct. Order, 151 Wis. 2d xxi (1989); 1991 a. 32, 39, 160; 1993 a. 98; 1995 a. 77, 275, 436; 1997 a. 292; 1999 a. 22; 2001 a. 80; 2005 a. 387, 434; 2005 a. 443 s. 265; s. 13.93 (2) (c).

Sub. (4) (a) applies to proceedings to extend a commitment under the sex crimes act. State v. Hungerford, 84 Wis. 2d 236, 267 N.W.2d 258 (1978).

By entering a plea of not guilty by reason of mental disease or defect, the defendant lost the physician−patient privilege by virtue of s. 905.04 (4) (c) and the confidentiality of treatment records under s. 51.30 (4) (b) 4. State v. Taylor, 142 Wis. 2d 36, 417 N.W.2d 192 (Ct. App. 1987).

A psychotherapist's duty to 3rd parties for dangerous patients' intentional behavior is discussed. Schuster v. Altenberg, 144 Wis. 2d 223, 424 N.W.2d 159 (1988).

A defendant did not have standing to complain that a physician's testimony violated a witness's physician−patient's privilege under s. 905.04; the defendant was not authorized to claim the privilege on the patient's behalf. State v. Echols, 152 Wis. 2d 725, 449 N.W.2d 320 (Ct. App. 1989).

Under sub. (4) (g), the history of a pregnancy is discoverable. The court may permit discovery of the history as long as information regarding the mother's sexual relations outside of the conceptive period is eliminated. In re Paternity of J.S.P. 158 Wis. 2d 100, 461 N.W.2d 794 (Ct. App. 1990).

Because under sub. (4) (f) there is no privilege for chemical tests for intoxication, the results of a test taken for diagnostic purposes are admissible in an OMVWI trial. City of Muskego v. Godec, 167 Wis. 2d 536, 482 N.W.2d 79 (1992).

A patient's mere presence in a physician's office is not within the ambit of this privilege. A defendant charged with trespass to a medical facility, s. 943.145, is entitled to compulsory process to determine if any patients present at the time of the alleged incident had relevant evidence. State v. Migliorino, 170 Wis. 2d 576, 489 N.W.2d 678 (Ct. App. 1992).

To be entitled to an in camera inspection of privileged records, a criminal defendant must show that the sought after evidence is relevant and may be necessary to a fair determination of guilt or innocence. Failure of the record's subject to agree to inspection is grounds for sanctions, including suppressing the record subject's testimony. State v. Shiffra, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993).

The patient's objectively reasonable expectations of confidentiality from the medical provider are the proper gauge of the privilege. State v. Locke, 177 Wis. 2d 590, 502 N.W.2d 891 (Ct. App. 1993).

When a patient's medical condition is at issue the patient−client privilege gives way. Wikrent v. Toys "R" Us, 179 Wis. 2d 297, 507 N.W.2d 130 (Ct. App. 1993).

Ex parte contacts between several treating physicians after the commencement of litigation did not violate this section. This section applies only to judicial proceedings and places restrictions on lawyers, not physicians. Limited ex parte contacts between defense counsel and plaintiff's physicians are permissible, but ex parte discovery is not. Steinberg v. Jensen, 194 Wis. 2d 440, 534 N.W.2d 361 (1995).

There is no general exception to privileged status for communications gathered from incarcerated persons. State v. Joseph P. 200 Wis. 2d 227, 546 N.W.2d 494 (Ct. App. 1996), 95−2547.

Both initial sex offender commitment and discharge hearings under ch. 980 are "proceedings for hospitalization" within the exception to the privilege under sub. (4) (a). State v. Zanelli, 212 Wis. 2d 358, 569 N.W.2d 301 (Ct. App. 1997), 96−2159.

A party may not challenge on appeal an in camera review of records conducted at his own request. State v. Darcy N. K. 218 Wis. 2d 640, 581 N.W.2d 567 (Ct. App. 1998), 97−0458.

This section does not regulate the conduct of physicians outside of a courtroom. Accordingly it does not give a patient the right to exclude others from a treatment area. State v. Thompson, 222 Wis. 2d 179, 585 N.W.2d 905 (Ct. App. 1998), 97−2744.

When a motion has been made seeking a minor victim's health care records, the state shall give notice to the victim and the victim's parents, providing a reasonable time to object to the disclosure. If the victim does not expressly consent to disclosure, the state shall not waive the materiality hearing under *Schiffra.* Jessica J.L. v. State, 223 Wis. 2d 622, 589 N.W.2d 660 (Ct. App. 1998), 97−1368.

The psychotherapist−patient privilege does not automatically or absolutely foreclose the introduction of a therapeutic communication. When a therapist had reasonable cause to believe a patient was dangerous and that contacting police would prevent harm and facilitate the patient's hospitalization, the patient's statements fell within a dangerous patient exception to the privilege. State v. Agacki, 226 Wis. 2d 349, 595 N.W.2d 31 (Ct. App. 1999), 97−3463.

Under the *Schiffra* test, an *in camera* inspection of the victim's mental health records was allowed. The defendant established more than the mere possibility that the requested records might be necessary for a fair determination of guilt or innocence. State v. Walther, 2001 W I App 23, 240 Wis. 2d 619, 623 N.W.2d 205.

Release of records containing information of previous assaultive behavior by a nursing home resident was not prohibited by the physician−patient privilege. A nursing home resident does not have a reasonable expectation of privacy in assaultive conduct. The information may be released by court order. Crawford v. Care Concepts, Inc. 2001 WI 45, 243 Wis. 2d 119, 625 N.W.2d 876, 99−0863.

An in camera inspection of confidential records under *Schiffra* is not restricted to mental health records. State v. Navarro, 2001 WI App 225, 248 Wis. 2d 396, 636 N.W.2d 481, 00−0795.

The preliminary showing for an in camera review of a victim's mental health records requires a defendant to set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative of other evidence available to the defendant. The information will be "necessary to a determination of guilt or innocence" if it "tends to create a reasonable doubt that might not otherwise exist." State v. Green, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298, 00−1392.

The test set out in *Shiffra* and *Green*, pertaining to access to privileged mental health records applies to a defendant requesting confidential records during postconviction discovery and the defendant should be required to meet the preliminary *Shiffra−Green* burden. State v. Robertson, 2003 WI App 84, 349 Wis. 2d 349, 661 N.W.2d 105, 02−1718.

The exception to the privilege under sub. (4) (e) 2. when the examination of a child creates a reasonable ground for an opinion that abuse or neglect was other than accidentally caused or inflicted by another applied when a therapist reported a possible sexual assault to the authorities, presumably pursuant to his mandatory reporting obligations under s. 48.891. State v. Denis L.R. 2005 WI 110, 283 Wis. 2d 358, 699 N.W.2d 154, 03−0384

Communications with an unlicensed therapist were privileged because of the patient's reasonable expectation that they would be and because the unlicensed therapist worked under the direction of a physician. Johnson v. Rogers Memorial Hospital, Inc. 2005 WI 114, 283 Wis. 2d 384, 627 N.W.2d 890, 03−00784

The privilege under this section is not a principle of substantive law, but merely an evidentiary rule applicable at all stages of civil and criminal proceedings, except actual trial on the merits in homicide cases. 64 Atty. Gen. 82.

A person claiming a privilege in a communication with a person who was not a medical provider under sub. (1) (d) to (g) has the burden of establishing that he or she reasonably believed the person to be a medical provider. U.S. v. Schwenson, 942 F. Supp. 902 (1996).

905.045 Domestic violence or sexual assault advocate−victim privilege. (1) DEFINITIONS. In this section:

(a) "Abusive conduct" means abuse, as defined in s. 813.122 (1) (a), of a child, as defined in s. 48.02 (2), interspousal battery, as described under s. 940.19 or 940.20 (1m), domestic abuse, as defined in s. 813.12 (1) (am), or sexual assault under s. 940.225.

(b) "Advocate" means an individual who is an employee of or a volunteer for an organization the purpose of which is to provide counseling, assistance, or support services free of charge to a victim.

(c) A communication or information is "confidential" if not intended to be disclosed to 3rd persons other than persons present to further the interest of the person receiving counseling, assistance, or support services, persons reasonably necessary for the transmission of the communication or information, and persons who are participating in providing counseling, assistance, or support services under the direction of an advocate, including family members of the person receiving counseling, assistance, or support services and members of any group of individuals with whom the person receives counseling, assistance, or support services.

(d) "Victim" means an individual who has been the subject of abusive conduct or who alleges that he or she has been the subject of abusive conduct. It is immaterial that the abusive conduct has not been reported to any government agency.

(2) GENERAL RULE OF PRIVILEGE. A victim has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated among the victim, an advocate who is acting in the scope of his or her duties as an advocate, and persons who are participating in providing counseling, assistance, or support services under the direction of an advocate, if the communication was made or the information was obtained or disseminated for the purpose of providing counseling, assistance, or support services to the victim.

(3) WHO MAY CLAIM THE PRIVILEGE. The privilege may be claimed by the victim, by the victim's guardian or conservator, or by the victim's personal representative if the victim is deceased. The advocate may claim the privilege on behalf of the victim. The advocate's authority to do so is presumed in the absence of evidence to the contrary.

(4) EXCEPTIONS. Subsection (2) does not apply to any report concerning child abuse that an advocate is required to make under s. 48.981.

(5) RELATIONSHIP TO S. 905.04. If a communication or information that is privileged under sub. (2) is also a communication or information that is privileged under s. 905.04 (2), the provisions of s. 905.04 supersede this section with respect to that communication or information.

History: 2001 a. 109.

905.05 Husband−wife privilege. (1) GENERAL RULE OF PRIVILEGE. A person has a privilege to prevent the person's spouse or former spouse from testifying against the person as to any private communication by one to the other made during their marriage.

(2) WHO MAY CLAIM THE PRIVILEGE. The privilege may be claimed by the person or by the spouse on the person's behalf. The authority of the spouse to do so is presumed in the absence of evidence to the contrary.

(3) EXCEPTIONS. There is no privilege under this rule:

(a) If both spouses or former spouses are parties to the action.

(b) In proceedings in which one spouse or former spouse is charged with a crime against the person or property of the other or of a child of either, or with a crime against the person or property of a 3rd person committed in the course of committing a crime against the other.

(c) In proceedings in which a spouse or former spouse is charged with a crime of pandering or prostitution.

(d) If one spouse or former spouse has acted as the agent of the other and the private communication relates to matters within the scope of the agency.

History: Sup. Ct. Order, 59 Wis. 2d R1, R130 (1973); 1991 a. 32.

Cross−reference: As to testimony of husband and wife in paternity action regarding child born in wedlock, see s. 891.39.

A wife's testimony as to statements made by her husband was admissible when the statements were made in the presence of 2 witnesses. Abraham v. State, 47 Wis. 2d 44, 176 N.W.2d 349 (1970).

Spouses can be compelled to testify as to whether the other was working or collecting unemployment insurance, since such facts are known to 3rd persons. Kain v. State, 48 Wis. 2d 212, 179 N.W.2d 777 (1970).

A wife's observation, without her husband's knowledge, of her husband's criminal act committed on a public street was neither a "communication" nor "private" within meaning of sub. (1). State v. Sabin, 79 Wis. 2d 302, 255 N.W.2d 320 (1977).

"Child" under sub. (3) (b) includes a foster child. State v. Michels, 141 Wis. 2d 81, 414 N.W.2d 311 (Ct. App. 1987).

The privilege under sub. (1) belongs to the person against whom testimony is being offered. While an accused may invoke the privilege to prevent his or her spouse from testifying against him or her, the witness spouse may not not invoke it to prevent his or her own testimony. Umhoefer v. Police and Fire Commission of the City of Mequon, 2002 WI App 217, 257 Wis. 2d. 539, 652 N.W.2d 412, 01−3468.

Under sub. (3) (b), it is irrelevant whether the acts of the defendant that constitute a crime against a third party are the same acts that constitute a crime against the spouse or different acts. State v. Richard G. B. 2003 WI App 13, 259 Wis. 2d 730, 656 N.W.2d 469, 02−1302.

905.06 Communications to members of the clergy. (1) DEFINITIONS. As used in this section:

(a) A "member of the clergy" is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting the individual.

(b) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(2) GENERAL RULE OF PRIVILEGE. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a member of the clergy in the member's professional character as a spiritual adviser.

(3) WHO MAY CLAIM THE PRIVILEGE. The privilege may be claimed by the person, by the person's guardian or conservator, or by the person's personal representative if the person is deceased. The member of the clergy may claim the privilege on behalf of the person. The member of the clergy's authority so to do is presumed in the absence of evidence to the contrary.

(4) EXCEPTIONS. There is no privilege under this section concerning observations or information that a member of the clergy, as defined in s. 48.981 (1) (cx), is required to report as suspected or threatened child abuse under s. 48.981 (2) (bm).

History: Sup. Ct. Order, 59 Wis. 2d R1, R135 (1973); 1991 a. 32; 2003 a. 279; 2005 a. 253.

An out−of−court disclosure by a priest that the defendant would lead police to the victim's grave was not privileged under this section. State v. Kunkel, 137 Wis. 2d 172, 404 N.W.2d 69 (Ct. App. 1987).

Should Clergy Hold the Priest−Penitent Privilege? Mazza. 82 MLR 171 (1998).

905.065 Honesty testing devices. (1) DEFINITION. In this section, "honesty testing device" means a polygraph, voice stress analysis, psychological stress evaluator or any other similar test purporting to test honesty.

(2) GENERAL RULE OF THE PRIVILEGE. A person has a privilege to refuse to disclose and to prevent another from disclosing any oral or written communications during or any results of an examination using an honesty testing device in which the person was the test subject.

(3) WHO MAY CLAIM PRIVILEGE. The privilege may be claimed by the person, by the person's guardian or conservator or by the person's personal representative, if the person is deceased.

(4) EXCEPTION. There is no privilege under this section if there is a valid and voluntary written agreement between the test subject and the person administering the test.

History: 1979 c. 319.

A distinction exists between an inquiry into the taking of a polygraph and an inquiry into its results. An offer to take a polygraph is relevant to an assessment of an offeror's credibility. State v. Wofford, 202 Wis. 2d 523, 551 N.W.2d 46 (Ct. App. 1996), 95−0979.

The results of polygraph examinations are inadmissible in civil cases. While an offer to take a polygraph examination may be relevant to the offeror's credibility, that a person agreed to a polygraph at the request of law enforcement has not been found admissible and could not be without proof that the person believed the results would accurately indicate whether he or she was lying. Estate of Neumann v. Neumann, 2001 WI App 61, 242 Wis. 2d 205, 626 N.W.2d 821, 00−0557.

905.07 Political vote. Every person has a privilege to refuse to disclose the tenor of the person's vote at a political election conducted by secret ballot unless the vote was cast illegally.

History: Sup. Ct. Order, 59 Wis. 2d R1, R139 (1973); 1991 a. 32.

905.08 Trade secrets. A person has a privilege, which may be claimed by the person or the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret as defined in s. 134.90 (1) (c), owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

History: Sup. Ct. Order, 59 Wis. 2d R1, R140 (1973); 1985 a. 236.

905.09 Law enforcement records. The federal government or a state or a subdivision thereof has a privilege to refuse to disclose investigatory files, reports and returns for law enforcement purposes except to the extent available by law to a person other than the federal government, a state or subdivision thereof. The privilege may be claimed by an appropriate representative of the federal government, a state or a subdivision thereof.

History: Sup. Ct. Order, 59 Wis. 2d R1, R142 (1973).

905.10 Identity of informer. (1) RULE OF PRIVILEGE. The federal government or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(2) WHO MAY CLAIM. The privilege may be claimed by an appropriate representative of the federal government, regardless of whether the information was furnished to an officer of the government or of a state or subdivision thereof. The privilege may be claimed by an appropriate representative of a state or subdivision if the information was furnished to an officer thereof.

(3) EXCEPTIONS. (a) *Voluntary disclosure; informer a witness.* No privilege exists under this rule if the identity of the informer or the informer's interest in the subject matter of the informer's communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the federal government or a state or subdivision thereof.

(b) *Testimony on merits.* If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case to which the federal government or a state or subdivision thereof is a party, and the federal government or a state or subdivision thereof invokes the privilege, the judge shall give the federal government or a state or subdivision thereof an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits but the judge may direct that testimony be taken if the judge finds that the matter cannot be resolved satisfactorily upon affidavit. If the judge finds that there is a reasonable probability that the informer can give the testimony, and the federal government or a state or subdivision thereof elects not to disclose the informer's identity, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the judge may do so on the judge's own motion. In civil cases, the judge may make an order that justice requires. Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the federal government, state or subdivision thereof. All counsel and parties shall be permitted to be present at every stage of proceedings under this subdivision except a showing in camera at which no counsel or party shall be permitted to be present.

(c) *Legality of obtaining evidence.* If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, the judge may require the identity of the informer to be disclosed. The judge shall on request of the federal government, state or subdivision thereof, direct that the disclosure be made in camera. All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of proceedings under this subdivision except a disclosure in camera at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made in camera, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the appropriate federal government, state or subdivision thereof.

History: Sup. Ct. Order, 59 Wis. 2d R1, R143 (1973); 1991 a. 32.

The trial judge incorrectly determined whether an informer's testimony was necessary to a fair trial. The proper test is whether the testimony the informer can give is relevant to an issue material to the defense and necessary to the determination of guilt or innocence. It is not for the judge to determine whether the testimony will be helpful. State v. Outlaw, 108 Wis. 2d 112, 321 N.W.2d 145 (1982).

The application of the informer privilege to communications tending to identify the informer and consideration by the trial court under sub. (3) (c) of the privileged information in determining reasonable suspicion for an investigative seizure is discussed. State v. Gordon, 159 Wis. 2d 335, 464 N.W.2d 91 (Ct. App. 1990).

When the defendant knew an informer's identity but sought to put the informer's role as an informer before the jury to support his defense that the informer actually committed the crime, the judge erred in not permitting the jury to hear the evidence. State v. Gerard, 180 Wis. 2d 327, 509 N.W.2d 112 (Ct. App. 1993).

The state is the holder of the privilege; disclosure by an informer's attorney is not "by the informer's own action." The privilege does not die with the informer. State v. Lass, 194 Wis. 2d 592, 535 N.W.2d 904 (Ct. App. 1995).

When there was sufficient evidence in the record to permit a rational court to conclude that a reasonable probability existed that the informer could provide relevant testimony necessary to a fair determination on the issue of guilt or innocence, the decision to forego an in camera hearing was within the discretion of the trial court. State v. Norfleet, 2002 WI App 140, 254 Wis. 2d 569, 647 N.W.2d 341, 01−1374.

Once a defendant has made an initial showing that there is a reasonable probability that an informer may be able to give testimony necessary to the determination of guilt or innocence, the state has the opportunity to show, in camera, facts relevant to whether the informer can provide that testimony. Only if the court determines that an informer's testimony is necessary to the defense in that it could create a reasonable doubt of the defendant's guilt, must the privilege to not disclose the informer give way. The state may present evidence that an informer's testimony is unnecessary. State v. Vanmanivong, 2003 WI 41, 261 Wis. 2d 202, 661 N.W.2d 76, 00−3257.

The trial court erred when upon finding affidavits of confidential informers insufficient it, on its own initiative and without contacting either party's attorney, requested additional information from law enforcement. If affidavits are insufficient, the court must hold an in camera hearing and take the testimony of the informers to determine if their testimony is relevant and material to the defendant's defense. State v. Vanmanivong, 2003 WI 41, 261 Wis. 2d 202, 661 N.W.2d 76, 00−3257.

905.11 Waiver of privilege by voluntary disclosure. A person upon whom this chapter confers a privilege against disclosure of the confidential matter or communication waives the privilege if the person or his or her predecessor, while holder of the privilege, voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This section does not apply if the disclosure is itself a privileged communication.

History: Sup. Ct. Order, 59 Wis. 2d R1, R150 (1973); 1987 a. 355; Sup. Ct. Order No. 93−03,179 Wis. 2d xv (1993).

Testimony of an accomplice who waived her privilege is admissible even though she had not been tried or granted immunity. State v. Wells, 51 Wis. 2d 477, 187 N.W.2d 328 (1971).

A litigant's request to see his or her file that is in the possession of current or former counsel does not waive the attorney−client and work−product privileges and does not allow other parties to the litigation discovery of those files. Borgwardt v. Redlin, 196 Wis. 2d 342, 538 N.W.2d 581 (Ct. App. 1995), 94−2701.

A lawyer's voluntary production of documents in response to opposing counsel's discovery request does not constitute a waiver of the attorney−client privilege under this section when the lawyer does not recognize that the documents are subject to the attorney−client privilege and the documents are produced without the consent or knowledge of the client. The agency doctrine does not apply to waiver of attorney−client privilege as it relates to privileged documents. Harold Sampson Trust v. Linda Gale Sampson Trust, 2004 WI 57, 271 Wis. 2d 610, 679 N.W.2d 794, 02−1515.

905.12 Privileged matter disclosed under compulsion or without opportunity to claim privilege. Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege.

History: Sup. Ct. Order, 59 Wis. 2d R1, R151 (1973).

905.13 Comment upon or inference from claim of privilege; instruction. (1) COMMENT OR INFERENCE NOT PERMITTED. The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(2) CLAIMING PRIVILEGE WITHOUT KNOWLEDGE OF JURY. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(3) JURY INSTRUCTION. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

(4) APPLICATION; SELF−INCRIMINATION. Subsections (1) to (3) do not apply in a civil case with respect to the privilege against self−incrimination.

History: Sup. Ct. Order, 59 Wis. 2d R1, R153 (1973); 1981 c. 390.

The prohibition against allowing comments on or drawing an inference from a 3rd−party witness's refusal to testify on 5th amendment grounds does not deny a criminal defendant's constitutional right to equal protection. State v. Heft, 185 Wis. 2d 289, 517 N.W.2d 494 (1994).

905.14 Privilege in crime victim compensation proceedings. (1) Except as provided in sub. (2), no privilege under this chapter exists regarding communications or records relevant to an issue of the physical, mental or emotional condition of the claimant or victim in a proceeding under ch. 949 in which that condition is an element.

(2) The lawyer−client privilege applies in a proceeding under ch. 949.

History: 1979 c. 189.

905.15 Privilege in use of federal tax return information. (1) An employee of the department of health and family services, the department of workforce development or a county department under s. 46.215, 46.22 or 46.23 or a member of a governing body of a federally recognized American Indian tribe who is authorized by federal law to have access to or awareness of the federal tax return information of another in the performance of duties under s. 49.19 or 49.45 or 7 USC 2011 to 2049 may claim privilege to refuse to disclose the information and the source or method by which he or she received or otherwise became aware of the information.

(2) An employee or member specified in sub. (1) may not waive the right to privilege under sub. (1) or disclose federal tax return information or the source of that information except as provided by federal law.

History: 1989 a. 31; 1995 a. 27 ss. 7225, 9126 (19), 9130 (4); 1997 a. 3.