CHAPTER 905  
EVIDENCE — PRIVILEGES

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.


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.

905.07 Political vote.
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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.


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

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. “Lawyer” is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

c. “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 and 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,
The language concerning subject matter waiver — “ought in fairness” — is taken from Rule 106, because the animating principle is the same. Under both rules, the language concerning subject matter waiver — “ought in fairness” — is taken from Rule 106, because the animating principle is the same. Under both rules, the language concerning subject matter waiver — “ought in fairness” — is taken from Rule 106, because the animating principle is the same. Under both rules, the language concerning subject matter waiver — “ought in fairness” — is taken from Rule 106, because the animating principle is the same. Under both
Updated 2015–16 Wis. Stats. Published and certified under s. 35.18, December 14, 2017.

3  Updated 15–16 Wis. Stats.

RULES OF EVIDENCE 905.04


(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 it is 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, to persons reasonably necessary for the transmission of the communication or information, or to persons who are participating in the diagnosis and treatment under the direction of the physician, nurse, chiropractor, psychologist, social worker, marital and family therapist, podiatrist or professional counselor.

There is a communication from a client to an attorney is insufficient to find the communication is privileged. See In re Jones, 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, 411 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).

The rationale for a defendant’s request to see his or her attorney’s file is that in the possession of the defendant’s 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 462, 538 N.W.2d 581 (Ct. App. 1995), rev. denied.

Waiver of attorney–client privilege is not limited to directed 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.

The 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. Hydrie 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 in the presence of a 3rd–party, the victim, and was not confidential. Estrada v. State, 228 Wis. 2d 459, 596 N.W.2d 496 (Ct. App. 1999), 99–0305.

Cases such as Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 331 Wis. 2d 697, 488 N.W.2d 116, 2002 WI 28, 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 providing 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.

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. Privilege is not lost 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.

The defendant’s lawyer–client privilege is established if he or she can answer questions relevant to the privilege when the attorney was not consulted in common by two clients. State v. Hydrie Chemical Co., 220 Wis. 2d 51, 582 N.W.2d 411 (Ct. App. 1998), 96–1780.

An association inviting attorney–client privilege is the client and has the exclusive authority to withhold privileged information from current individual directors. When a lawyer represents an organization, the organization is the client, not the organization’s constituents. Fouts v. Breezy Point Condominium Association, 2014 WI App 77, 35 Wis. 2d 487, 851 N.W.2d 845, 13–1583.


Note: In 1995, the legislature amended s. 347.60 to constitute a waiver by the attorney of client–attorney privilege not to produce documents."
physician, podiatrist, 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, podiatrist, 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.

(dg) “Podiatrist” means a person licensed under s. 448.63 or a person reasonably believed by the patient to be a podiatrist.

(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 registered nurse who is licensed under s. 441.06 or who holds a multistate license, as defined in s. 441.51 (2) (h), issued in a party state, as defined in s. 441.51 (2) (k), or a person reasonably believed by the patient to be a registered nurse.

NOTE: Par. (f) is shown as amended eff. 1–19–18 by 2017 Wis. Act 135. Prior to 1–19–18 reads:

(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, and is engaged in the practice of social work 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 podiatrist, 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, podiatrist, 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, podiatrist, 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 commitment, 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 probable cause or final proceedings to commit the patient for mental illness under s. 51.20, 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 commitment, guardianship, protective services, or protective placement or control, care, and treatment as a sexually violent person.

(am) Proceedings for guardianship. There is no privilege under this rule as to information contained in a statement concerning 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. 2m. There is no privilege for information contained in a report of child abuse or neglect that is provided under s. 48.981 (3).

3. There is no privilege in situations where the examination of the expectant mother of an aborted 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. 255.40 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.


Sub. (4) (a) applies to proceedings to extend a commitment under ch. 975. 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 sub. (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 in Schiffra, 585 N.W.2d 905 (Ct. App. 1998).

A defendant did not have standing to complain that a physician’s testimony violated a witness’s physician–patient privilege under this section; the defendant was not entitled to claim the privilege on the patient’s behalf. State v. Echols, 212 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. 199 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 defendant was not aggrieved with trespasses to a medical facility. State v. Shiffra, 349 Wis. 2d 349, 859 N.W.2d 125, 11–2680.

A patient’s mere presence in a physician’s office is not within the ambit of this privilege. State v. Schiffra, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993).

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 the person's spouse or former spouse or domestic partner or vent the person's spouse or former spouse or domestic partner or domestic abuse, as defined in s. 940.43 (2) (am), sexual exploitation by a therapist under s. 940.22, sexual trafficking involving a commercial sex act under s. 940.302, or child sexual abuse under s. 948.02, 948.025, or 948.05 to 948.11.

A communication or communication in “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 for the purpose of a victim 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.

“Vicit” means an individual who has been the subject of abusive conduct of 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.

“Victim advocate” means an individual who is an employee of or by the careful doing of the purpose of which is to provide counseling, assistance, or support services to the victim.

Who may claim the privilege. The privilege may be claimed by the victim, by the victim’s guardian or conservator, by the victim’s personal representative if the victim is deceased. The victim advocate may claim the privilege on behalf of the victim. The victim advocate’s authority to do so is presumed in the absence of evidence to the contrary.

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

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.


A person claiming a privilege in a communication with a person who was not a medical provider under sub. (1) (d) (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 victim privilege. (1) DEFINITIONS. In this section:

(a) “Abusive conduct” means abuse, as defined in s. 131.122 (1) (a), of a child, as defined in s. 131.122 (1) (b), interspousal battery, as described under s. 940.19 or 940.20 (1m), domestic abuse, as defined in s. 940.12 (1) (am), sexual exploitation by a therapist under s. 940.22, sexual trafficking involving a commercial sex act under s. 940.302, or child sexual abuse under s. 948.02, 948.025, or 948.05 to 948.11.

(b) “Communication or communication in “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 for the purpose of a victim 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.

(c) “Domestic partner” means a domestic partner under ch. 897.

(d) “Patient” means a person who is receiving mental health services.

(e) “Psychotherapist” means a person who is licensed to practice as a psychotherapist under ch. 488.

(f) “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.

(g) “Victim 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 to the victim.

(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, a victim advocate who is acting in the scope of his or her duties as a victim advocate, and persons who are participating in providing counseling, assistance, or support services for the purpose of a victim 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.

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

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

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.


905.05 Husband–wife and domestic partner privilege. (1) GENERAL RULE OF PRIVILEGE. A person has a privilege to prevent the person’s spouse or former spouse or domestic partner or former domestic partner from testifying against the person as to any private communication by one to the other made during their marriage or domestic partnership. As used in this section, “domestic partner” means a domestic partner under ch. 770.

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

EXCEPTIONS. There is no privilege under this rule.
905.05 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 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) 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.

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

History: Sup. Ct. Order, 59 Wis. 2d R1, R139 (1973); 1991 a. 32; 2009 a. 28.

905.06 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 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 the offerer’s credibility. State v. Wolford, 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 offerer’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 requests that the judge determine whether it would be for the public interest to disclose the informer’s identity, the judge on motion of the defendant in a criminal case shall dismiss the case 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 s. 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 privilege of informer to communications tending to identify the informer, by the court below under sub. (3) (c) of the privilege, when a court shall determine whether the testimony will be helpful. State v. Gordon, 159 Wis. 2d 335, 464 N.W.2d 91 (Ct. App. 1990).

When the trial judge 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. 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. Nordolet, 2002 WI App 140, 254 Wis. 2d 369, 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 that it could create a reasonable doubt of the defendant’s guilt, must the privilege to not disclose the informer give way. If the court determines that a present evidence that an informer’s testimony is unnecessary. State v. Vanmanvong, 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 to, on its own initiative and without contacting either party, the court 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 the material is relevant and material to the defendant’s defense. State v. Vanmanvong, 2003 WI 41, 261 Wis. 2d 202, 661 N.W.2d 76, 00−3257.

EVIDENCE — PRIVILEGES

**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 xx (1993).

Testimony of an accomplice who waived her privilege is admissible even though she may have 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 Giglio Sampson Trust, 2004 WI 57, 271 Wis. 2d 610, 679 N.W.2d 794, 02−1515.

The controlling principle of waiver is the privilege holder’s voluntary disclosure of any significant part of the matter or communication. It is clear from the terms of the privilege that a matter or communication can have several “significant parts.” Thus, significance of any portion of a communication is measured by the importance of its subject matter to the overall communication. State v. Schmidt, 2016 WI App 45, 82 Wis. 2d ___, ___ N.W.2d __, 15−0457.

**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−INCORPORATION.** Subsections (1) to (3) do not apply in a civil case with respect to the privilege against self−incorporation.

**History:** Sup. Ct. Order, 59 Wis. 2d R1, R153 (1973); 1981 c. 130.

The prohibition against allowing comments on or drawing an inference from a 3rd−party witness’s refusal to testify on an amendment ground does not arise a claimant’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 law−yer−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 services, the department of children and families 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

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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; 2007 a. 20 s. 3779, 9121 (6) (a).

905.16 Communications to veteran mentors. (1) Definitions. As used in this section:

(a) A communication is “confidential” if not intended to be disclosed to 3rd parties other than to those persons present to further the interests of the veteran or member or to persons reasonably necessary for the transmission of the communication.

(b) A “veteran mentor” is an individual who meets all of the following criteria:

1. Served on active duty in the U.S. armed forces or in forces incorporated in the U.S. armed forces, served in a reserve unit of the U.S. armed forces, or served in the national guard.
2. Has successfully completed a judicially approved veterans mentoring training program.
3. Has completed a background information form approved by a circuit court judge from a county that is participating in a veterans mentoring program.
4. Is on the list of persons authorized by a circuit court judge to provide assistance and advice in a veterans mentoring program.

(c) “Veteran or member” means an individual who is serving or has served on active duty in the U.S. armed forces or in forces incorporated in the U.S. armed forces, in a reserve unit of the U.S. armed forces, or in the national guard.

(d) “Veterans mentoring program” is a program approved by a circuit court judge to provide assistance and advice to a veteran or member.

(2) General rule of privilege. A veteran or member has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication made by the veteran or member to a veteran mentor while the veteran mentor is acting within the scope of his or her duties under the veterans mentoring program.

(3) Who may claim the privilege. The privilege may be claimed by the veteran or member, by the veteran’s or member’s guardian or conservator, or by the veteran’s or member’s personal representative if the veteran or member is deceased. The veteran mentor may claim the privilege on behalf of the veteran or member. The veteran mentor’s authority to claim the privilege on behalf of the person is presumed in the absence of evidence to the contrary.

(4) Exception. There is no privilege under this section as to the following:

(a) A communication that indicates that the veteran or member plans or threatens to commit a crime or to seriously harm himself or herself.

(b) A communication that the veteran or member has agreed in writing to allow to be disclosed as a condition of his or her participation in the veterans mentoring program.