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 W (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 W (2d) R101.

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

See note to 968.26, citing In re Wis. Family Counseling Services v. State, 95 W (2d) 670, 291 NW (2d) 631 (Ct. App. 1980).

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

905.015 Interpreters for persons with language difficulties or hearing or speaking impairments. If an interpreter for a person with a language difficulty 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.

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 W (2d) R109.

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

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 W (2d) R111; 1991 a. 32.

Section is cited in discussion on general law and former statute. Jax v. Jax, 73 W (2d) 572, 243 NW (2d) 831.

Exception under (4) (c) in legal malpractice cases discussed. Dyson v. Hempe, 140 W (2d) 792, 413 NW (2d) 379 (Ct. App. 1987).

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

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

905.035 Communications in mediation. (1) DEFINITIONS. In this section:

(a) "Mediation party" means a person referred to mediation under s. 767.11 (5).

(b) "Mediator" means a person who conducts a mediation proceeding under s. 767.11.

(c) A communication is "confidential" if it is not intended to be disclosed to 3rd persons other than those to whom disclosure is in furtherance of the rendering of mediation services or those reasonably necessary to transmit the communication.

(2) GENERAL RULE. (a) The mediation parties have a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made in mediation under s. 767.11.

(b) In addition to any other type of communication, any material including, but not limited to, any memorandum, file, report, interview, case summary, note or work product, which is made, used or received by a mediator or a person acting on behalf of or employed by a mediator during the course of mediation under s. 767.11 is confidential. No such material is a public record under subch. II of ch. 19. No such material is subject to discovery or admissible in any action or proceeding.

(3) WHO MAY CLAIM. Either mediation party, either mediation party's guardian, either mediation party's counsel, either mediation party's personal representative if the mediation party is deceased, and the person who was the mediator at the time of the communication may claim the privilege under sub. (2), but the privilege may be claimed only on behalf of a mediation party. Authority to claim the privilege is presumed in the absence of evidence to the contrary.

(4) EXCEPTIONS. There is no privilege under this section under any of the following circumstances:

(a) If both mediation parties consent to waive the privilege.

(b) With respect to information necessary for a study under s. 767.11 (14), if both mediation parties consent under that section to have a mediator conduct the study.

(c) In an action by a mediation party against a mediator for damages arising out of mediation under s. 767.11, for the purpose of that action alone.

(d) With respect to a report by a mediator of child abuse under s. 48.981.

(e) Information which would otherwise have to be disclosed under s. 767.27.

History: 1987 a. 355; 1989 a. 359.

NOTE: 1987 Wis. Act 355, which created this section, contains explanatory notes.

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:

NOTE: 905.04 (title) is shown as amended eff. 5-1-93 by 1991 Wis. Act 160. Prior to 5-1-93 it reads:

(title) Physician-patient, registered nurse-patient, chiropractor-patient or psychologist-patient privilege.

(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.

NOTE: Par. (b) is shown as amended eff. 5-1-93 by 1991 Wis. Act 160. Prior to 5-1-93 it reads:

(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 or psychologist, including the members of the patient's family.

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

NOTE: Par. (bm) is created eff. 5-1-93 by 1991 Wis. Act 160.

(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.

NOTE: Par. (c) is shown as amended eff. 5-1-93 by 1991 Wis. Act 160. Prior to 5-1-93 it reads:

(c) "Patient" means a person who consults or is examined or interviewed by a physician, registered nurse, chiropractor or psychologist.

(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 certified as a professional counselor under ch. 457 or an individual reasonably believed by the patient to be a professional counselor.

NOTE: Par. (dm) is created eff. 5-1-93 by 1991 Wis. Act 160.

(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 a person reasonably believed by the patient to be a registered nurse.

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

NOTE: Par. (g) is created eff. 5-1-93 by 1991 Wis. Act 160.

(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 coun-

selor 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.

NOTE: Sub. (2) is shown as amended eff. 5-1-93 by 1991 Wis. Act 160. Prior to 5-1-93 it reads:

(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 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 or psychologist.

(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.

NOTE: Sub. (3) is shown as amended eff. 5-1-93 by 1991 Wis. Act 160. Prior to 5-1-93 it reads:

(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 or psychologist 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.* 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 under s. 880.33, for court-ordered protective services or protective placement or for review of guardianship, protective services or protective placement orders, 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.

NOTE: Par. (a) is shown as amended eff. 5-1-93 by 1991 Wis. Act 160. Prior to 5-1-93 it reads:

(4) EXCEPTIONS. (a) PROCEEDINGS FOR HOSPITALIZATION, GUARDIANSHIP, PROTECTIVE SERVICES OR PROTECTIVE PLACEMENT. 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 under s. 880.33, for court-ordered protective services or protective placement or for review of guardianship, protective services or protective placement orders, if the physician, registered nurse, chiropractor or psychologist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization, guardianship, protective services or protective placement.

(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. 880.33 (1).

(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.* 1. In this paragraph:

a. "Abuse" has the meaning given in s. 48.981 (1) (a).

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

NOTE: Subd. 1 is created eff. 5-1-93 by 1991 Wis. Act 160.

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.

Note: Subd. 2 is shown as renumbered from par. (e) and amended eff. 5-1-93 by 1991 Wis. Act 160. Prior to 5-1-93 par. (e) reads:

(e) ABUSED OR INJURED CHILD. There is no privilege in situations where the examination of an abused or injured child creates a reasonable ground for an opinion of the physician, registered nurse or chiropractor that the condition was other than accidentally caused or inflicted by another.

(f) *Tests for intoxication.* There is no privilege concerning the results of or circumstances surrounding any chemical tests for intoxication or blood alcohol concentration.

(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 ss. 767.45 to 767.53.

(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 or 48.069.

NOTE: Par. (i) is created eff. 5-1-93 by 1991 Wis. Act 160.

History: Sup. Ct. Order, 59 W (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 W (2d) xxii; 1991 a. 32, 39, 160.

See note to Art. I, sec. 11, citing State v. Jenkins, 80 W (2d) 426, 259 NW (2d) 109.

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

Court erred in refusing to prohibit informal pretrial interview by defense attorney of plaintiff's physician without plaintiff's consent. State ex rel. Klieger v. Alby, 125 W (2d) 468, 373 NW (2d) 57 (Ct. App. 1985).

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

Psychotherapist's duty to third parties for dangerous patients' intentional behavior discussed. Schuster v. Altenberg, 144 W (2d) 223, 424 NW (2d) 159 (1988).

See note to 905.01, citing State v. Echols, 152 W (2d) 725, 449 NW (2d) 320 (Ct. App. 1989).

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

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

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.

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 W (2d) R130; 1991 a. 32.

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

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

A wife can be compelled to testify as to whether or not he was working or collecting unemployment insurance, since such facts are known to 3rd persons. Kain v. State, 48 W (2d) 212, 179 NW (2d) 777.

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

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

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.

History: Sup. Ct. Order, 59 W (2d) R135; 1991 a. 32.

Out-of-court disclosure by priest that defendant would lead police to victim's grave was not privileged under this section. State v. Kunkel, 137 W (2d) 172, 404 NW (2d) 69 (Ct. App. 1987).

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.

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 W (2d) R139; 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 employe, 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 W (2d) R140; 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 W (2d) R142.

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 W (2d) R143; 1991 a. 32.

Trial judge incorrectly applied test of whether informer's testimony was necessary to a fair trial. State v. Outlaw, 108 W (2d) 112, 321 NW (2d) 145 (1982).

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

905.11 Waiver of privilege by voluntary disclosure. (1) Except as provided under sub. (2), a person upon whom this chapter confers a privilege against disclosure of the confidential matter or communication waives the privilege if that 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.

(2) The privilege under s. 905.035 is waived under this section if both parties voluntarily disclose or consent to disclosure of any significant part of the confidential matter or communication.

(3) Subsections (1) and (2) do not apply if the disclosure is a privileged communication.

History: Sup. Ct. Order, 59 W (2d) R150; 1987 a. 355.

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 W (2d) R151.

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 W (2d) R153; 1981 c. 390.

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 employe of the department of health and social services 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 employe 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.