CHAPTER 905
EVIDENCE — PRIVILEGES

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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.


This section applies only to privileges specifically and unequivocally provided by law against the disclosure of specific materials.


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 Abt, 224 Wis. 2d 72 (1999), 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 legal privileges is 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 755, 676 N.W.2d 413, 02−1426.

The “inherent or implicit” language in this section is quite narrow in scope and was included by the supreme court to prepare a particular work product privilege already recognized at the time this language was added to the statute, while leaving other privileges to be provided for more expressly in other statutory provisions. Sands v. Whitnall School District, 2008 WI 89, 312 Wis. 2d 1, 754 N.W.2d 439, 05−1026.

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 testacy or by representatives of the client or by the client; 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 client’s lawyer 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.

(5) FORFEITURE OF PRIVILEGE. (a) Effect of inadvertent disclosure. A disclosure of a communication covered by the privilege, regardless of where the disclosure occurs, does not operate as a forfeiture (as that term is used here) if all of the following apply:
1. The disclosure is inadvertent.
2. The holder of the privilege or protection took reasonable steps to prevent disclosure.
3. The holder promptly took reasonable steps to rectify the error, including, if applicable, following the procedures in s. 804.01 (7).

(b) Scope of forfeiture. A disclosure that constitutes a forfeiture under par. (a) extends to an undislosed communication only if all of the following apply:
1. The disclosure is not inadvertent.
2. The disclosed and undiscovered communications concern the same subject matter.
3. The disclosed and undiscovered communications ought in fairness to be considered together.

History: Sup. Ct. ORDER, 2012 WI 47, ¶111 (1973); 1991 a. 32; Sup. Ct. ORDER No. 2004−273 (2004−2005 assurance invitees); 2013 a. 151, 341, 344 Wis. 2d 31; 2014 Wis. Stat. Ann. § 804.01 (10). Judicial Council Note, 2012: Sup. Ct. ORDER No. 12−03 states that “the Judicial Council Notes to Wis. Stat. § 804.01 (2) (c); 804.01 (7); 805.07 (2) (d), and 905.03 (5) are not to be at stake but shall be published and may be consulted for guidance in interpreting and applying the rule.”

Attorneys and those who work with them owe clients and their confidences the utmost respect. Preserving confidences is one of the profession’s highest duties. Arguably, strict rules about the consequences of disclosing confidences, even inadvertent, may serve to promote greater care in dealing with privileged information. However, precautions come at a price. In the digital era, when information is stored, exchanged and produced in considerably greater volumes and in different formats than earlier eras, thorough preproduction privilege review can often be prohibitively expensive. Most clients seek a balanced approach.

The various approaches available are discussed in the Advisory Committee Note and the National Association of Counsel for Children’s Trust v. Linda Gale Sampson v. Sampson’s 1979 Trust, 2004 W1 57; ¶¶28–32, 15–17, 271 Wis. 2d 610. Sub. (5) represents an “intermediate” or “middle ground” approach, which is also an approach taken in a majority of jurisdictions that have addressed the issue. Therefore, attorneys or information owners are free to negotiate more stringent precautions when circumstances warrant.

Sub. (5) is not intended to have the effect of overriding any holding in Sampson. Sampson holds that a lawyer’s deliberate disclosure, without the consent or knowledge of the client, does not waive the lawyer–client privilege. Neither subpart of sub. (5) alters this rule. Sub. (5)(a) shields certain inadvertent disclosures but does not disturb existing law regarding deliberate disclosures. Deliberate disclosures might come into play under sub. (5)(b), which provides that, when a disclosure is inadvertent, a privilege forfeiture under sub. (5)(a) may extend to undiscovered communications. Sub. (5)(b) therefore preserves the attorney-client privilege as well. However, an extension exists only when fairness warrants. Fairness does not warrant the surrender of additional privileged communications and information if the initial disclosure is neutralized by the Sampson rule.

In judging whether the holder of the privilege or protection took reasonable steps to prevent disclosure or to rectify the error, it is appropriate to consider the non–disputation nature of the disclosure as discussed in the Advisory Committee Note: (1) the reasonableness of precautions taken, (2) the time taken to rectify the error, (3) the scope of discovery, (4) the extent of disclosure, (5) the number of documents to be reviewed, (6) the time constraints for production, (7) whether reliable software tools were used to screen documents before production, (8) whether an efficient records management system was in place before litigation; and (9) any overriding issue of fairness.

Measuring the time taken to rectify an inadvertent disclosure between when the processing party first learns, or, with reasonable care, should have learned that a disclosure of protected information was made, rather than when the documents were produced. This standard encourages respect for the privilege without greatly increasing the cost of protecting the privilege.

In judging the fourth factor, which requires a court to determine the quantity of inadvertently produced documents, it is appropriate to consider the total number of documents produced and the percentage of privileged documents produced compared to the total production.

In assessing whether the software tools used to screen documents before production were reliable, it is appropriate, given current technology, to consider whether the producing party designed a search that would distinguish privileged documents from others to be produced and conducted the search before production through methods commonly available and accepted at the time of the review and production.


Out of respect for principles of federalism and comity with other jurisdictions, sub. (5) does not conclusively resolve whether privileged communications inadvertently disclosed in proceedings in other jurisdictions may be used in Wisconsin proceedings or whether privileged communications inadvertently disclosed in Wisconsin proceedings may be used in proceedings in other jurisdictions. Sub. (5) states that it applies “for purposes of this rule” and “in a state court” as defined in sub. (3)(d) only.

The language of sub. (5) also differs from the language of Rule 502 in a way that should not be considered material. Sub. (5) applies to a privileged “communication.” Rule 502 applies to a privileged “communication or information.” The reason for the difference is that sub. (5) is grafted onto sub. (2), which states that the lawyer waives the client–lawyer privilege in terms of “communications” between lawyers and clients, not “communications and information.” Sub. (5) follows suit. This different language is not intended to alter the scope of the lawyer–client privilege or to provide any less protection against inadvertent disclosure of privileged information than is provided by Rule 502.

Sub. (5) is modeled on subsections (a) and (b) of Fed. R. Evid. 502. The following excerpts from the Committee Note of the federal Advisory Committee on Evidence Rules (Revised 11/28/2007) and the Statement of Congressional Intent regarding Rule 502 are instructive, though not binding, in understanding the scope and purposes of those portions of Rule 502 that are borrowed here:

New federal rule has two major purposes:
1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney–client privilege or as work product — specifically those disputes involving inadvertent disclosure and subject matter waiver.
2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney–client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all such communications or information. This concern is especially troubling in cases involving electronic discovery. See, e.g., Hopson v. City of Baltimore, 232 F.R.D. 228, 224 (D. Md. 2005) (electronic discovery may encompass “millions and millions of documents” and to insist upon “record−by−record pre−production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to the difference between those communications or information covered by the attorney−client privilege or work−product protection. Parties to litigation need to know that any inadvertent disclosure of privileged information pursuant to a confidentiality order, the court’s order will be enforceable. Moreover, if a federal court’s confidentiality order is not enforceable in a state court then the burdensome costs of privilege review and retention are unlikely to be reduced.

. . . Subdivision (a). The rule provides that a voluntary disclosure in a federal proceeding or to a federal office agency, or, if a waiver, generally results in a waiver only of the disclosure of communications or information covered by the attorney–client privilege or work−product protection. Parties to litigation need to know that any inadvertent disclosure of privileged information pursuant to a confidentiality order, the court’s order will be enforceable. Moreover, if a federal court’s confidentiality order is not enforceable in a state court then the burdensome costs of privilege review and reten

. . .
RULES, a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation. To assure protection and predictability, the rule provides that if a disclosure is made at the federal level, the federal rule on subject matter determines the scope of the waiver by that disclosing party. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner. And a few courts hold that any inadvertent disclosure of a communication or information protected under the attorney-client privilege or work product constitutes a waiver without regard to the protection taken to avoid such a disclosure. See generally Hopson v. City of Baltimore, 232 F.R.D. 228 (D. Md. 2005), for a discussion of these issues.

The rule opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal court on subject matter does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver.

Cases such as Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D. N.Y. 1985) and Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323, 332 (N.D. Cal. 1985), set out a multi-factor test for determining whether inadvertent disclosure of privileged information is a waiver. The four stated factors (none of which is dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. The rule does not explicitly codify that test, because it really is a set of non-determinative guidelines that vary from case to case. The rule is not enough to accommodate any of those listed factors.

Some considerations bearing on the reasonableness of a producing party’s efforts include the number of documents to be reviewed and the time constraints for production. In some circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken “reasonable steps” to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.

The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.

The rule applies to inadvertent disclosures made to a federal office or agency, including one that is vested with authority to withhold privileged information from current individual directors.

STATEMENT OF CONGRESSIONAL INTENT REGARDING RULE 502 OF THE FEDERAL RULES OF EVIDENCE

During consideration of this rule in Congress, a number of questions were raised as to whether the proposed rule on the present law regarding attorney-client privilege and work-product protection. These questions were ultimately answered satisfactorily, without need to revise the text of the provision as submitted to Congress by the Judicial Conference.

In general, these questions are answered by keeping in mind the limited though important purpose of the rule. The rule addresses only the effect of disclosure, under specified circumstances, of a communication that is otherwise privileged as an attorney-client privilege, or of information that is otherwise privileged as work product, on whether the disclosure itself operates as a waiver of the privilege or protection for purposes of admissibility of evidence in a proceeding in which the holder is a party or as an administrative proceeding. The rule does not alter the substantive law regarding attorney-client privilege or work-product protection in any other respect, including the burden on the party invoking the privilege to prove that the particular information or communication qualifies for it. And it is not intended to alter the rules and practices governing use of information outside this evidentiary context.

Some of these questions are addressed more specifically below, in order to help further clear any uncertainty in the interpretation and application of the rule.

Subdivision (a) — Disclosure vs. Use

This subdivision does not alter the substantive law regarding when a party’s strategic use in litigation of otherwise privileged information obligates that party to waive the privilege regarding other information concerning the same subject matter, the information being used can be fairly considered in context. One situation in which this issue arises, the assertion as a defense in parent—infant litigation that a party was relying on advice of counsel, is discussed elsewhere in this Note. In less common and similar situations, under subdivision (a)(1) the party using an attorney-client communication to its advantage in the litigation has, in so doing, intentionally waived the privilege as to other communications concerning the same subject matter; regardless of the circumstances in which the communication being so used was initially disclosed.

Subdivision (b) — Fairness Considerations

The standard set forth in this subdivision for determining whether a disclosure operates as a waiver of the privilege or protection is, as explained elsewhere in this Note, a majority rule in the federal courts. The majority rule has simply been distilled here into a standard designed to be predictable in its application. This distillation is not intended to foreclose notions of fairness from con-

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905.04 Privilege between certain health-care providers and patients. (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

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physician, naturopathic doctor, 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.

(br) “Naturopathic doctor” means a naturopathic doctor, as defined in s. 990.01 (22m), or an individual reasonably believed by the patient to be a naturopathic doctor.

(c) “Patient” means an individual, couple, family or group of individuals who consults with or is examined or interviewed by a physician, naturopathic doctor, 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 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 psychologist, as defined in s. 990.01 (31m), 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.

(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 naturopathic doctor, 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, naturopathic doctor, 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, naturopathic doctor, 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 sexu-

ally 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.

(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. 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 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.

(em) School violence. There is no privilege for information contained in a report of a threat of violence in or targeted at a school that is provided under s. 175.32 (3).

(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 member may disclose information obtained while providing 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.
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., 267 Wis. 2d 114, 283 Wis. 2d 245, 675 N.W.2d 890, 03 P0784.

The 2020 constitutional amendment creating article I, section 9m, of the Wisconsin Constitution grants standing to a crime victim to oppose and to make arguments supplemental to the victim’s opposition to the death penalty under s. 985.025, 2020 Wis. Act 98. The 2020 constitutional amendment creating article I, section 9m, of the Wisconsin Constitution grants standing to a crime victim to oppose and to make arguments supplemental to the victim’s opposition to the death penalty under s. 985.025, 2020 Wis. Act 98.

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 habeas corpus. 64 Att’y Gen. 82.

A person claiming a privilege in a communication with a person who was not a medical provider under sub. (1) (a) could not have reasonably believed the person to be a medical provider. United States v. Schwenon, 942 F. Supp. 902 (1996).

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

(a) “Abusive conduct” means abuse, as defined in s. 913.122 (1) (a), of a child, as defined in s. 913.122 (1) (b), interspousal battery, as described under s. 940.19 or 940.20 (1m), domestic abuse, as defined in s. 913.12 (1) (am), sexual exploitation by a therapist under s. 940.22, sexual assault under s. 940.225, human 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) 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, assessment, or support services, 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 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) “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 governmental agency.

(e) “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 free of charge to a 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 under the direction of a victim advocate, if the communication was made or the information was 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 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.

(4) EXCEPTIONS. Subsection (2) does not apply to any report concerning child abuse that a victim advocate is required to make under s. 48.981 or concerning a threat of violence in or targeted at a school that a victim advocate is required to make under s. 175.32.

(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.

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.

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

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

(b) In proceedings in which one spouse or former spouse or domestic partner or former domestic partner 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 or domestic partner or former domestic partner is charged with a crime of pandering or prostitution.

(d) If one spouse or former spouse or domestic partner or former domestic partner 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; 2009 a. 28.

Cross-references: 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 two 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 third 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 not a “communication” nor “private” within the meaning of sub. (1). State v. Haber, 79 Wis. 2d 302, 235 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 invoke it to prevent his or her own testimony. Untheofer v. Police & Fire Commission, 2002 WI App 217, 257 Wis. 2d 538, 656 N.W.2d 469, 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., 2001 WI App 1, 259 Wis. 2d 730, 656 N.W.2d 469, 02−1302.

When all outgoing telephone calls made by inmates of a jail were recorded and that policy was disclosed to all inmates, the defendant knowingly exposed the content of any private communication by one to the other made during their marriage or domestic partnership as to matters within the scope of the agency. State v. Welnhofer, 2001 WI App 61, 242 Wis. 2d 205, 626 N.W.2d 821, 00−0557.

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 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. Wofleff, 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 the person 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 other course of 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 gov-
eminent 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 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 may 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 disclosed 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. The proper test is whether the testimony the informer can give is relevant to a fair trial. The proper test is whether the testimony the informer can give is relevant to a fair trial. The proper test is whether the testimony the informer can give is relevant to a fair trial.

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 under this section that a matter or communication can have several “significant parts.” The 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, 370 Wis. 2d 139, 884 N.W.2d 510, 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, R150 (1973); 1987 a. 355; Sup. Ct. Order No. 93–03,179 Wis. 2d xv (1993).

The controlling principle of waiver is the holder’s voluntary disclosure of any significant part of the matter or communication. It is clear from the terms of this section that a matter or communication can have several “significant parts.” The 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, 370 Wis. 2d 139, 884 N.W.2d 510, 15–0457.

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, R151 (1973).
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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 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 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. ss. 7225, 9126 (19); 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 third 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.