CHAPTER 905

EVIDENCE — PRIVILEGES

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

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

(1) Refuse to be a witness; or

(2) Refuse to disclose any matter; or

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

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

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

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

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

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

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

The "inherent or implicit" language in this section is quite narrow in scope and was included by the supreme court to preserve 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. The Whitnall School District, 2008 WI 89, 312 Wis. 2d 1, 754 N.W.2d 439, 05−1026.

Closed Session, Open Book: Sifting the *Sands* Case. Bach. Wis. Law. Oct. 2009.

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

(2) In addition to the privilege under sub. (1), a person who is licensed as an interpreter under s. 440.032 (3) may not disclose any aspect of a confidential communication facilitated by the interpreter unless one of the following conditions applies:

(a) All parties to the confidential communication consent to the disclosure.

(b) A court determines that the disclosure is necessary for the proper administration of justice.

History: 1979 c. 137; 1985 a. 266; 2001 a. 16; 2009 a. 360.

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

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

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

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

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

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

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

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

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

(3) WHO MAY CLAIM THE PRIVILEGE. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee,

or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. The lawyer's authority to do so is presumed in the absence of evidence to the contrary.

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

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

(b) *Claimants through same deceased client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

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

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

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

(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 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 undisclosed communication only if all of the following apply:

1. The disclosure is not inadvertent.

2. The disclosed and undisclosed communications concern the same subject matter.

3. The disclosed and undisclosed communications ought in fairness to be considered together.

History: Sup. Ct. Order, 59 Wis. 2d R1, R111 (1973); 1991 a. 32; Sup. Ct. Order No. 12–03, 2012 WI 114, 344 Wis. 2d xxi; 2013 a. 151 s. 28.

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 adopted, but will 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 inadvertently, may serve to promote greater care in dealing with privileged information. However, precaution comes at a price. In the digital era, when information is stored, exchanged and produced in considerably greater volumes and in different formats than in earlier eras, thorough preproduction privilege review often can be prohibitively expensive. Most clients seek a balanced approach.

The various approaches available are discussed in the Advisory Committee Note and in Harold Sampson Children's Trust v. Linda Gale Sampson 1979 Trust, 2004 WI 57, ¶¶28–32, nn.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. Clients and lawyers are free to negotiate more stringent precautions when circumstances warrant.

Sub. (5) is not intended to have the effect of overruling 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 not inadvertent, a privilege forfeiture under sub. (5)(a) may extend to undisclosed communications and information as well. However, such an extension ensues 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–dispositive factors 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 should commence when the producing 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, among other things, the 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 assurance testing before production through methods commonly available and accepted at the time of the review and production.

Sub. (5) employs a distinction drawn lately between the terms "waiver" and "forfeiture." See State v. Ndina, 2009 WI 21, ¶¶28–31, 315 Wis. 2d 653.

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; nor whether privileged communications inadvertently disclosed in Wisconsin proceedings may be used in proceedings in other jurisdictions. Sub. (5) states that it applies "regardless of where the disclosure occurs," but to the extent that the law of another jurisdiction controls the question, it is not trumped by sub. (5). The prospect for actual conflicts is minimized because sub. (5) is the same or similar to the rule applied in the majority of jurisdictions that have addressed this issue. If conflicts do arise, for example, because a rule dictates that a disclosure in a jurisdiction other than Wisconsin should be treated as a forfeiture in Wisconsin, or that a disclosure in Wisconsin should be treated as a forfeiture in a jurisdiction other than Wisconsin, a court should consider a choice–of–law analysis. See Beloit Liquidating Trust v. Grade, 2004 WI 39, ¶¶24–25, 270 Wis. 2d 356.

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 the general rule regarding the lawyer–client 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:

> This new [federal] rule has two major purposes:
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> 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.
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> 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 protected 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, 244 (D. Md. 2005) (electronic discovery may encompass "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 what is at stake in the litigation").
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> The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney–client privilege or work–product protection. Parties to litigation need to know, for example, that if they exchange 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.
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> Subdivision (a). The rule provides that a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. See, e.g., In re United Mine Workers of America Employee Benefit Plans Litig., 159 F.R.D. 307, 312 (D.D.C. 1994) (waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver. See Rule 502(b). The rule rejects the result in In re Sealed Case, 877 F.2d 976 (D.C. Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.
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> The language concerning subject matter waiver — "ought in fairness" — is taken from Rule 106, because the animating principle is the same. Under both

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 waiver governs subsequent state court determinations on the scope of the waiver by that disclosure.

Subdivision (b). Courts are in conflict over whether an inadvertent disclosure of a communication or information protected as privileged or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. 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 as work product constitutes a waiver without regard to the protections 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 this case law.

The rule opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency 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 is a waiver. The 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 is really a set of non−determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors. Other 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. Depending on the 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 but not limited to an office or agency that is acting in the course of its regulatory, investigative or enforcement authority. The consequences of waiver, and the concomitant costs of pre−production privilege review, can be as great with respect to disclosures to offices and agencies as they are in litigation.

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 about the scope and contours of the effect of the proposed rule on current law regarding attorney−client privilege and work−product protection. These questions were ultimately answered satisfactorily, without need to revise the text of the rule as submitted to Congress by the Judicial Conference.

In general, these questions are answered by keeping in mind the limited though important purpose and focus of the rule. The rule addresses only the effect of disclosure, under specified circumstances, of a communication that is otherwise protected by attorney−client privilege, or of information that is protected by work−product protection, on whether the disclosure itself operates as a waiver of the privilege or protection for purposes of admissibility of evidence in a federal or state judicial or 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 (or protection) 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 avoid 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 obliges that party to waive the privilege regarding other information concerning the same subject matter, so that the information being used can be fairly considered in context. One situation in which this issue arises, the assertion as a defense in patent−infringement litigation that a party was relying on advice of counsel, is discussed elsewhere in this Note. In this 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, the 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 continuing to inform application of the standard in all aspects as appropriate in particular cases — for example, as to whether steps taken to rectify an erroneous inadvertent disclosure were sufficiently prompt under subdivision (b)(3) where the receiving party has relied on the information disclosed.

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

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

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

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

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

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

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

A videotaped interview of a crime victim conducted by the alleged perpetrator's spouse was not privileged as attorney communication because it was made in the presence of a third−party, the victim, and was not confidential. Estrada v. State, 228 Wis. 2d 459, 596 N.W.2d 496 (Ct. App. 1999), 98−3055.

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

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

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

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

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

The defendant's lawyer−client privilege is waived to the extent that counsel must answer questions relevant to a charge of ineffective assistance. This application of the attorney−client privilege applies with equal force when a defendant in a criminal case claims that he or she cannot effectively communicate with his or her lawyer. Otherwise no court could assess whether there was a total lack of communication between them. State v. Boyd, 2011 WI App 25, 331 Wis. 2d 697, 797 N.W.2d 546, 10−1090.

An association invoking 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 Ass'n, 2014 WI App 77, 355 Wis. 2d 487, 851 N.W.2d 845, 13−1585.

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

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

Attorney−Client Privilege and the *Kovel* Doctrine: Should Wisconsin Extend the Privilege to Communications with Third−Party Consultants? Lopez. 102 MLR 605 (2018).

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 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, naturopathic doctor, podiatrist, registered nurse, chiro-

practor, 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 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 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 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 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 in the provision of services under s. 48.067, 48.069, 938.067 or 938.069. An intake worker or dispositional staff member may disclose information obtained while providing services under s. 48.067 or 48.069 only as provided in s. 48.78 and may disclose information obtained while providing services under s. 938.067 or 938.069 only as provided in s. 938.78.

History: Sup. Ct. Order, 59 Wis. 2d R121; 1975 c. 393; 1977 c. 61, 418; 1979 c. 32 s. 92 (1); 1979 c. 221, 352; 1983 a. 400, 535; 1987 a. 233, 264; Sup. Ct. Order, 151 Wis. 2d xxi (1989); 1991 a. 32, 39, 160; 1993 a. 98; 1995 a. 77, 275, 436; 1997 a. 292; 1999 a. 22; 2001 a. 80; 2005 a. 387, 434; 2005 a. 443 s. 265; 2007 a. 53, 97, 130; 2009 a. 113; 2013 a. 158; 2017 a. 135, 143; 2021 a. 22, 130, 131.

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 third parties for dangerous patients' intentional behavior is discussed. Schuster v. Altenberg, 144 Wis. 2d 223, 424 N.W.2d 159 (1988).

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

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

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

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

To be entitled to an in camera inspection of privileged records, a criminal defendant must show that the sought after evidence is relevant and may be necessary to a fair determination of guilt or innocence. Failure of the record's subject to agree to inspection is grounds for sanctions, including suppressing the record subject's testimony. State v. Shiffra, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993). See also State v. Lynch, 2015 WI App 2, 359 Wis. 2d 482, 859 N.W.2d 125, 11−2680.

Affirmed. 2016 WI 66, 371 Wis. 2d 1, 885 N.W.2d 89, 11−2680.

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

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

Ex parte contacts between several treating physicians after the commencement of litigation did not violate this section. This section applies only to judicial proceedings and places restrictions on lawyers, not physicians. Limited ex parte contacts between defense counsel and plaintiff's physicians are permissible, but ex parte discovery is not. Steinberg v. Jensen, 194 Wis. 2d 439, 534 N.W.2d 361 (1995).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

905.045 Domestic violence or sexual assault advocate−victim privilege.

(1) DEFINITIONS. In this section:

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

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

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

(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 obtained or disseminated for the purpose of providing counseling, assistance, or support services to the victim.

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

History: 2001 a. 109; 2013 a. 334; 2015 a. 351; 2017 a. 143.

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

A wife's testimony as to statements made by her husband was admissible when the statements were made in the presence of 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 neither a "communication" nor "private" within meaning of sub. (1). State v. Sabin, 79 Wis. 2d 302, 255 N.W.2d 320 (1977).

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

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

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

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 the call to a third party. That constituted a waiver of any marital privilege. State v. Eison, 2011 WI App 52, 332 Wis. 2d 331, 797 N.W.2d 890, 10–0909.

The fact that the defendant was untruthful in his statements to his wife was not an exception to the marital privilege. State v. Eison, 2011 WI App 52, 332 Wis. 2d 331, 797 N.W.2d 890, 10–0909.

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

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

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

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

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

(4) EXCEPTIONS. There is no privilege under this section concerning observations or information that a member of the clergy, as defined in s. 48.981 (1) (cx), is required to report as suspected or threatened child abuse under s. 48.981 (2) (bm) or as a threat of violence in or targeted at a school under s. 175.32.

History: Sup. Ct. Order, 59 Wis. 2d R1, R135 (1973); 1991 a. 32; 2003 a. 279; 2005 a. 253; 2017 a. 143.

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

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

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

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

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

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

History: 1979 c. 319.

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

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

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

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

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

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

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

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

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

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

(3) EXCEPTIONS. (a) *Voluntary disclosure; informer a witness.* No privilege exists under this rule if the identity of the informer

or the informer's interest in the subject matter of the informer's communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the federal government or a state or subdivision thereof.

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

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

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

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

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

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

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

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

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

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

The required showing to trigger an in camera review under sub. (3) (b) is a reasonable possibility, grounded in the facts and circumstances of the case, that a confidential informer may have information necessary to the defendant's theory of defense. The phrase "may be able to give testimony" confirms that the defendant's initial burden under the statute involves only a possibility the confidential informer may have information necessary to the defense, but it must be a reasonable possibility. A circuit court should consider all of the evidence to determine whether to grant an in camera review, not just the contents of the defendant's motion. State v. Nellessen, 2014 WI 84, 360 Wis. 2d 493, 849 N.W.2d 654, 12−0150. State v. Toliver, 2014 WI 85, 356 Wis. 2d 642, 851 N.W.2d 251, 12−0393.

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

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

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

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

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

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 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, R151 (1973).

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

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

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

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

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

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

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

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

History: 1979 c. 189.

905.15 Privilege in use of federal tax return information. (1) An employee of the department of health 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. 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.

History: 2009 a. 210.