Chapter 5
Privileges
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CHAPTER 5

PRIVILEGES

I. PRIVILEGES - RULE 501

A. OFFICIAL TEXT:

(a) General Rule. Except as provided by constitution, statute, any rules promulgated by the Indiana Supreme Court, or common law, no person has a privilege to:

(1) refuse to be a witness;

(2) refuse to disclose any matter;

(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.

(b) Waiver of Privilege by Voluntary Disclosure. Subject to the provisions of Rule 502, a person with a privilege against disclosure waives the privilege if the person or person's predecessor while holder of the privilege voluntarily and intentionally discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.

(c) Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege. A claim of privilege is not defeated by a disclosure which was (1) compelled erroneously or (2) made without opportunity to claim the privilege.

(d) Comment Upon or Inference from Claim of Privilege; Instruction. Except with respect to a claim of the privilege against self-incrimination in a civil case:

(1) Neither the judge nor counsel may comment upon the claim of a privilege, whether in the present proceeding or on a prior occasion. No inference may be drawn from the claim of a privilege.

(2) In jury cases, the judge, to the extent practicable, must conduct proceedings so as to allow parties and witnesses to claim privilege without the jury's knowledge.

(3) If requested by a party against whom the jury might draw an adverse inference from a claim of privilege, the court must instruct the jury that the jury must not draw an adverse inference from the claim of privilege.

B. PROCEDURE

1. Privileges are statutory, disfavored and strictly construed

"In Indiana, privileges are statutory in nature, and it is within the General Assembly's power to create them." State v. Fromme (In re Crisis Connection, Inc.), 949 N.E.2d 789, 793 (Ind. 2011).

> Rogers v. State, 60 N.E.3d 256, 261 (Ind. Ct. App. 2017) ("A grant of privilege and the scope of that privilege are policy choices of the Legislature.").

Because privileges may exclude reliable and relevant evidence, they are frequently, but not always, disfavored and strictly construed. Miller, 12 *Indiana Evidence* 615 § 501.101 (4th ed.). See also Branzburg v. Hayes, 408 U.S. 665, 690 n.29, 92 S.Ct. 2646, 2661 n.29, 33 L.Ed.2d 626 n.29 (1972).

"[W]hen the General Assembly creates a privilege, it puts two policies of the law in direct conflict:

> 'On the one hand is a policy which dictates exclusion of material and relevant evidence for its effectuation; on the other is the policy which favors full disclosure of all relevant facts at trial in order to arrive at a just determination of the issues presented. While the latter must give sway to the former where applicable, it would seem unwise indeed to give unwarranted effect to the former so as to utterly and unreasonably frustrate the fact-finding process.'"

State v. Fromme (In re Crisis Connection, Inc.) 949 N.E.2d 789, 793 (Ind. 2011), *quoting* Collins v. Bair, 256 Ind. 230, 236-37, 268 N.E.2d 95, 98 (1971).

2. Privilege statutes apply prospectively

Privileges are created by statutes, which must be strictly construed. Kavanaugh v. State, 695 N.E.2d 629 (Ind.Ct.App. 1998). Because the focus of a privilege statute is on the underlying communication, the date information was gathered determines whether the statute applies. Pelley v. State, 828 N.E.2d 915 (Ind. 2005). Moreover, absent clear legislative intent to the contrary, statute should not be applied retroactively and only protects communications made after the effective date. Id.

3. Burden on party claiming privilege

The party claiming the privilege has the burden of showing that she is entitled to its protection. In re WTHR-TV, State v. Cline, 693 N.E.2d 1, 25 (Ind. 1998); Canfield v. Sandock, 563 N.E.2d 526, 531 (Ind. 1990); Hoffman v. United States, 341 U.S. 479, 71 S.Ct. 814, 95 L. Ed. 1118 (1951).

4. Separating privileged from unprivileged testimony

The applicability of the claimed privilege must be established as to each question asked or document sought. Buntin v. Becker, 727 N.E.2d 734 (Ind.Ct.App. 2000). When privileged testimony can safely be separated from the unprivileged testimony of a witness, only the privileged testimony may be excluded. 81 Am.Jur.2d *Witnesses* § 195 (1976); Matter of Estate of Niemiec, 435 N.E.2d 570, 572 (Ind.Ct.App. 1982).

> Roviaro v. United States, 353 U.S. 53, 60, 77 S.Ct. 623, 627 (1957) ("where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged").

5. Overriding privileges

a. Sufficient showing of need

Given a sufficient showing of need for the evidence, courts have been willing to surmount evidentiary privileges. Crull v. State, 540 N.E.2d 1195 (Ind. 1989); Mengon v. State, 505 N.E.2d 788, 790 (Ind. 1987). In some cases, "privilege must give way to a specific need for evidence in a criminal case." In re WTHR-TV, State v. Cline, 693 N.E.2d 1 (Ind. 1998); see also Stearns v. Zulka, 489 N.E.2d 146 (Ind.Ct.App. 1986); and United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

PRACTICE POINTER: In many cases where a party has successfully overcome a claim of privilege, the courts have resolved the issue by finding that the claimed privilege does not apply, or does not exist, rather than by applying a balancing test. Cf. Garland v. Torre, 259 F.2d 545 (2d Cir.1958), *cert. denied*, 358 U.S. 910, 79 S.Ct. 237, 3 L.Ed.2d 231 (1958); Imwinkelried, *Exculpatory Evidence* § 10-5(a) (1990).

b. Standard

Standard for overcoming privilege at trial of criminal case: Where defendant shows that privileged evidence "is **relevant and helpful** to the defense... **or is essential to a fair determination of a cause**, the privilege must give way." Roviaro v. United States, 353 U.S. 53, 60-61, 77 S.Ct. 623, 628 (*emphasis added*) (federal "informer's privilege").

c. 3-Part Balancing Test for Discoverability

1. sufficiently specific designation of the items sought (particularity)
2. material to the defense (relevance)
3. if both particularity and relevance requirements are met, trial court must grant discovery (or conduct *in camera* review) unless there is a "paramount interest" in non-disclosure.

"[B]alancing test … includes evaluation of the relevance of the material, its availability from other sources, the burden of compliance measured in terms of difficulty, and the nature and importance of any interests invaded." In re WTHR-TV, 693 N.E.2d 1, 7 - 8 (Ind. 1998). Cline's three-step test for the discoverability of information is not reached when information is protected by an unqualified privilege unless a criminal defendant's constitutional rights would be violated by enforcing the privilege. Crawford v. State, 948 N.E.2d 1165 (Ind. 2011).

Skinner v. State, 920 N.E.2d 263 (Ind. Ct. App. 2010) (Defendant sought to compel disclosure of information from his first attorney regarding first attorney's representation of jailhouse snitch. Given importance of attorney-client privilege and availability of snitch's criminal record and negotiation demands, trial court properly denied motion to compel.)

PRACTICE POINTER: Where important evidence may be unavailable because of a claim of privilege, pursue it through aggressive discovery. Designate the evidence sought "with reasonable particularity," and show that it is "material to the defense," per Trial Rules 26(B)(1) and 34(C). See In re WTHR-TV, State v. Cline, 693 N.E.2d 1, 10-16 (Ind. 1998).
Ask the court to inspect the material *in camera*.
Seek pre-trial rulings on the eventual admissibility of privileged evidence.
If unsuccessful before trial, renew your request (or objection) at trial to avoid waiver.

6. Waiver, generally

a. Voluntary disclosure: Rule 501(b)

Rule 501(b) deals with privileges other than the attorney-client and work product privilege; Rule 502 deals specifically with waiver of those privileges.

"Waiver of Privilege by Voluntary Disclosure: Subject to the provisions of Rule 502, a person with a privilege against disclosure waives the privilege if the person or person's predecessor while holder of the privilege voluntarily and intentionally discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged."

Rule 501(b) takes precedence over prior common and statutory law regarding the waiver of a privilege. See, e.g., Swanson v. State, 666 N.E.2d 397 (Ind. 1996). Under Rule 501(b), the waiver must be voluntary in the sense that it is not compelled. Miller, 12 *Indiana Evidence* 501.201 (4th ed.). Whether the privilege holder also must have known and understood the right to prevent disclosure remains to be decided. Wright and Miller's Federal Practice and Procedure, Evidence § 5726.

b. Inadvertent disclosure

(1) Accidental disclosure

The trial court may consider all of the relevant circumstances in determining whether a privilege is forfeited by an accidental disclosure. JWP Zack v. Hoosier Energy Rural Electric Co-op, 709 N.E.2d 336 (Ind.Ct.App. 1999) (work-product privilege). Factors include the reasonableness of the precautions to prevent inadvertent disclosure, the time taken to rectify the error, the scope of discovery, the extent of disclosure, and an overreaching issue of fairness and the protection of an appropriate privilege which, of course, must be judged against the care or negligence with which the privilege is guarded with care and diligence or negligence and indifference." Id. (*citing* Lois Sportswear v. Levi Strauss, 104 F.R.D. 103, 105 (S.D.N.Y. 1985)); see also Jenkins v. State, 627 N.E.2d 789, 798 (Ind. 1993), *cert. den.*; John T. Hundley, Annotation, *Waiver of Evidentiary Privilege by Inadvertent Disclosure - State Law*, 51 A.L.R. 5th 603 (1999).

(2) Erroneous compelled disclosure or disclosure without opportunity to object: Rule 501(c)

A claim of privilege is not defeated by a disclosure which was (1) compelled erroneously or (2) made without opportunity to claim the privilege.

Indiana Rule of Evidence 501(c).

c. Only client can waive attorney-client privilege

The attorney-client privilege belongs to the client and can only be waived by conduct attributable to the client. Mayberry v. State, 670 N.E.2d 1262 (Ind. 1996).

7. Improper to comment on, or draw inference from, claim of privilege in criminal cases

a. Inference improper

In criminal cases, it is improper to permit the jury to draw an inference that the testimony of privileged witnesses would be unfavorable, when the witness does not testify. Rule 501(d)(1) The refusal to testify in a civil case cannot be used against the one asserting the privilege in a subsequent criminal proceeding. In re A.G., 6 N.E.3d 952, 957 (Ind. Ct. App. 2014).

Hardiman v. Cozmanoff, 4 N.E.3d 1148, 1152 (Ind. 2014) (Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them).

b. Claim of privilege without knowledge of jury

(1) Rule 501(d)(2)
Rule 501(d)(2) requires proceedings to be conducted to facilitate the making of claims of privilege without the jury's knowledge "to the extent practicable."

A trial court may properly prevent counsel from asking questions of a witness that are reasonably likely to draw a claim of privilege in the presence of the jury. Brown v. State, 746 N.E.2d 63, 68 (Ind. 2001) (attorney-client privilege).

(2) Procedure to use when witness refuses to answer
Ind. Code 35-37-3-1 sets out the procedure to be used when a witness refuses to answer a question or produce an item. The court must remove the jury and "immediately conduct a hearing on the witness's refusal."

(3) Fifth Amendment privilege

"[I]t is reversible error to [knowingly] permit a co-defendant or accomplice to take the stand in front of the jury and refuse to testify." Brown v. State, 671 N.E.2d 401, 404 (Ind. 1996); Tucker v. State, 534 N.E.2d 1110 (Ind. 1989); Aubrey v. State, 310 N.E.2d 556 (Ind. 1974); see also Douglas v. Alabama, 380 U.S. 415, 419, 85 S.Ct. 1074, 1077 (1965).

c. Defendant's decision whether to instruct jury on right not to testify

"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." Rule 501(d)(3).

The Fifth Amendment privilege against self-incrimination requires that an instruction be given when requested by a non-testifying defendant. Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112 (1981).

Where a non-testifying co-defendant requests this instruction and another co-defendant objects to it, the instruction must be given. Lucas v. State, 499 N.E.2d 1090, 1093 (Ind. 1986).

A defendant who does not testify has the right to decide whether or not the instruction will be given. Giving the instruction over a non-testifying defendant's objection violates the Indiana Constitution, Article 1 § 14. Bush v. State, 775 N.E.2d 309, 310-11 (Ind. 2002); Priest v. State, 386 N.E.2d 686 (Ind. 1979).

NOTE: Ind. Pattern Jury Instruction 13.2300 states: "No defendant may be compelled to testify. A defendant has no obligation to testify. The Defendant did not testify. You must not consider this in any way."

d. Adverse witness

Possible responses by defense counsel when an adverse witness invokes a privilege:

- Ask the court to order the witness to answer.
- Ask for an immediate hearing to determine whether the witness is entitled to claim the privilege. If the claim of privilege is of questionable validity, make a record on how it will prejudice your client if the witness is permitted to invoke the privilege.
- Ask for a mistrial.
- Ask the court to order all of the witness' testimony stricken from evidence.

e. Federal Rule

Rule 501 (cf. Ind. R. Evid. 501) authorizes federal courts to define new privileges by interpreting the principles of common law in light of reason and experience. Jaffee v. Redmond, 116 S.Ct. 1923 (1996).

> Jaffee v. Redmond, 116 S.Ct. 1923 (1996) (under authority of Fed. R. Evid. 501, the Supreme Court recognizes "psychotherapist" privilege, which extends not only to psychiatrists and psychologists, but to confidential communications made to licensed social workers in the course of psychotherapy).

C. PURPOSE AND JUSTIFICATION FOR PRIVILEGES

Rules of privilege exist for the "protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some sacrifice of availability of evidence relevant to the administration of justice." 1 *McCormick on Evidence* § 72, at 466-67

(7th ed. 2013). See also Ernst & Ernst v. Underwriters Nat'l Assurance Co., 381 N.E.2d 897 (Ind. Ct. App. 1978).

Rules of privilege protect people who have communicated in confidence. Protection is found in the nondisclosure of the communication's content, or in the nondisclosure of the communicant, depending upon the privilege involved. Miller, 12 *Indiana Evidence* 615 § 501.101 (4th ed.).

1. Two theories of the rationale for privileges

a. Utilitarian theory

Many privileges "operate to protect communications made within the context of various professional relationships, e.g., attorney and client.... [P]ublic policy requires the encouragement of the communications without which these relationships cannot be effective." 1 *McCormick on Evidence* § 72, at 467 (7th ed. 2013).

b. Non-utilitarian theory

"[C]ertain privacy interests in the society are deserving of protection by privilege irrespective of whether [the privilege] actually operates substantially to affect conduct within the protected relationships.... [T]hey serve to protect the essential privacy of certain significant human relationships." 1 *McCormick on Evidence* § 72, at 467-68 (7th ed. 2013).

2. Exception to rule

Privileges constitute an exception to the commonly accepted rule that the public has the right to every man's evidence. 8 Wigmore, *Evidence* § 2192 at 70 (McNaughton rev. 1961). For a discussion of the construction of privileges, see Matter of C.P., 563 N.E.2d 1275, 1277 (Ind. 1990).

3. Common and statutory law

Rule 501 incorporates Indiana common and statutory law regarding the existence of particular privileges.

a. Intent of the Rules Committee

Rule 501 was not intended to change the law regarding the existence of particular privileges in Indiana. *Committee Commentary, Burns Ind. I.R.E. 501* (1998).

b. Prior law

Before the adoption of the Indiana Rules of Evidence, Indiana statutory law provided for over thirty different privileges, most of which were not included in the Uniform Rules of Evidence. Only a very few privileges in Indiana were the products of case law. *Committee Commentary, Burns Ind. I.R.E. 501* (1998).

c. Rationale behind Rule 501 as originally adopted

The rules committee initially considered adopting additional parts of Article V (Privileges) of the Uniform Rules of Evidence, with some modification, and drafting additional rules for Article V of the Indiana Rules of Evidence to attempt to recodify all of the statutory and common law of privilege in Indiana. The idea was rejected after considering the great number of statutory privileges in Indiana. It was noted that the existence of a privilege generally represents a political decision to protect the privacy of a particular form of communication, even at the cost of losing relevant evidence, and that historically, privileges in Indiana have been predominantly legislative, rather than judicial, creations. See, e.g., Hunter v. State, 360 N.E.2d 588 (Ind. Ct. App. 1977), *cert. denied*. *Committee Commentary, Burns Ind. I.R.E. 501* (1998).

D. Ind. Code § 34-46-3-1: ATTORNEYS, PHYSICIANS, CLERGY and SPOUSES

1. Statutory construction

Except as otherwise provided by statute, the following persons shall not be required to testify regarding the following communications:

(1) Attorneys, as to confidential communications made to them in the course of their professional business, and as to advice given in such cases.

(2) Physicians, as to matters communicated to them by patients, in the course of their professional business, or advice given in such cases.

(3) Clergymen, as to the following confessions, admissions or confidential communications:

(A) Confessions or admissions made to a clergyman in the course of discipline enjoined by the clergyman's church.

(B) A confidential communication made to a clergyman in the clergyman's professional character as a spiritual adviser or counselor.

(4) husband and wife, as to communications made to each other.

Ind. Code 34-46-3-1.

Previous versions of the statute declared that persons in these categories were "not competent witnesses," Ind. Code 34-1-14-5 (repealed 1998). Despite that language, the Indiana courts interpreted the statute to create a privilege which could be waived, rather than to make certain persons completely incompetent to testify. See, e.g., Dwigans v. State, 54 N.E.2d 100, 101 (Ind. 1944).

Elliott v. State, 152 N.E.3d 27, 34 (Ind. Ct. App. 2020) ("the purpose of the privileges statute is to prevent certain statements by a person, here the defendant, 'made to' an attorney, physician, or clergyman from being used in evidence against the defendant").

2. Physicians

"Physicians, as to matters communicated to them by patients, in the course of their professional business, or advice given in such cases." Ind. Code 34-46-3-1(2).

a. Purpose

The object of the privilege is to inspire full and complete disclosure of knowledge pertinent and necessary to a trustful and proper relationship, and the privilege may not be used as a shield for criminal activity. Green v. State, 257 Ind. 244, 274 N.E.2d 267 (1972).

Vargas v. Shepherd, 903 N.E.2d 1026, 1030 (Ind. Ct. App. 2009) ("This privilege has been justified on the basis that it encourages free communication and frank disclosure between patient and physician and provides assistance in the proper diagnosis and appropriate treatment.").

b. Statements must be made for purposes of treatment

(1) Insanity defense

Statements made during a mental examination to determine whether the insanity defense applied to the case are not privileged because they are not made for purposes of treatment. Corder v. State, 467 N.E.2d 409 (Ind. 1984).

(2) Statements about attack

Darnell v. State, 674 N.E.2d 19 (Ind. Ct. App. 1996) (defendant's statement to ER nurse that he never stabbed victim was not made for purposes of his treatment but revealed how he reacted after he was attacked; therefore, it was not privileged).

(3) Prescriptions

Sharp v. State, 569 N.E.2d 962 (Ind. Ct. App. 1991) (testimony concerning what drugs were prescribed to patient in drug conspiracy prosecution was not privileged communications because they did not involve reasons for treatment, or any statements made by defendant during course of treatment).

PRACTICE POINTER: Arguably, Sharp, *supra,* is inconsistent with the purpose and intent of Ind. Code 25-26-13-15, which protects disclosure of prescriptions by a pharmacist and his office.

c. Extension to other medical staff

Although the physician-patient privilege has been extended to third persons who aid physicians or transmit information to physicians on behalf of patients, the key to whether the third persons are covered by the physician-patient privilege is "the nature and degree of control exercised" over the third persons by the physician. Matter of C.P., 563 N.E.2d 1275, 1279 (Ind. 1990).

Darnell v. State, 674 N.E.2d 19 (Ind. Ct. App. 1996) (the privilege does not apply to statements to nurses where there is no showing that nurse treated the declarant under the direct supervision of physician; ER nurse who was only under general supervision of doctors was not covered by privilege).

Elliott v. State, 630 N.E.2d 202 (Ind. 1994) (statements to therapist who worked with psychiatrist were not protected under doctor-patient privilege; therapist acted on her own in conducting interviews and in attempting to aid patients and received no direct orders from psychiatrist as to how to treat patients).

Schultz v. State, 417 N.E.2d 1127 (Ind. Ct. App. 1981) (when a technician draws the defendant's blood to check for alcohol content at the request of the doctor, the doctor-patient privilege covers the technician).

d. Exceptions

(1) Implied consent law

Ind. Code 9-30-6-6 requires a physician or person acting under the direction of a physician to provide law enforcement with results from blood, urine, or other tests of bodily substances for use as evidence in proceedings under Ind. Code 9-30-6-5, Ind. Code 9-30-6-6, or Ind. Code 9-30-6-9 (operating while intoxicated). Whenever suspect is taken for treatment and/or testing as described in Ind. Code 9-11-4-6 (now Ind. Code 9-30-6-6), the physician-patient privilege is waived regardless of whether samples are obtained, or tests performed. Hurt v. State, 553 N.E.2d 1243 (Ind.Ct.App. 1990), *disapproved on other grounds,* Ham v. State, 826 N.E.2d 640 (Ind. 2005).

Hurt v. State, 553 N.E.2d 1243 (Ind.Ct.App. 1990) (physician's testimony that he noticed defendant had problems with her gait, smelled of alcohol, and was glassy-eyed, and that defendant snapped at him, "There's no way that you can prove I'm drunk or I'm intoxicated" was admissible; statements were made after compelled examination under Ind. Code 9-30-6-6), *disapproved on other grounds,* Ham v. State, 826 N.E.2d 640 (Ind. 2005).

PRACTICE POINTER: Be aware of the HIPAA implications of a hospital's disclosure of medical records and statements made by the defendant. See Eichhorst v. State, 879 N.E.2d 1144 (Ind. Ct. App. 2008) (suppression of evidence is not the remedy for a HIPAA violation). For a sample letter warning of HIPAA requirements to the hospital where your client has been treated after an accident, see the IPDC Motions Manual, Chapter 4, Discovery.

(2) Child Abuse

A defendant's claim of physician-patient privilege is abrogated under the statute requiring disclosure of privileged communications in proceedings arising from reports of child abuse. Ind. Code 31-32-11-1; Devore v. State, 658 N.E.2d 657 (Ind. Ct. App. 1995), *overruled on other grounds by* Biddinger v. State, 868 N.E.2d 407 (Ind. 2007).

The abrogation statute is to be construed liberally to protect children from abuse. Hayes v. State, 667 N.E.2d 222 (Ind. Ct. App. 1996). While it is most often implicated in criminal cases, it applies as well to other proceedings arising from reported child abuse, including child custody proceedings. J.B. v. E.B., 935 N.E.2d 296 (Ind. Ct. App. 2010).

For more information, see Section I.G of this chapter.

e. Waiver

A physician is required to remain silent as to physician-patient communications contemplated by the privilege statute where patient has not waived physician-patient privilege. State v. Jaggers, 506 N.E.2d 832 (Ind. Ct. App. 1987). Only the patient or his heirs or personal representatives after his death may waive the privilege. Thomas v. State, 656 N.E.2d 819 (Ind. Ct. App. 1995).

Thomas v. State, 656 N.E.2d 819 (Ind. Ct. App. 1995) (in relating details of attack to detective, victim-patient impliedly waived privilege with respect to statements made to physician pertaining to same subject matter as was discussed with detective).

A defendant waives the privilege by placing his mental or physical condition into issue. But, even then, medical information not related to the claim retains its privileged status and is not discoverable. Watson v. State, 784 N.E.2d 515 (Ind. Ct. App. 2003).

Schultz v. State, 417 N.E.2d 1127 (Ind. Ct. App. 1981) (defendant's testimony that he had been drinking but was not intoxicated put his physical condition at issue and waived privilege).

3. Clergy

"Clergymen, as to the following confessions, admissions, or confidential communications: (A) Confessions or admissions made to a clergyman in the course of discipline enjoined by the clergyman's church. (B) A confidential communication made to a clergyman in the clergyman's professional character as a spiritual adviser or counselor." Ind. Code 34-46-3-1(3). The clergyman privilege applies only to confidential communications made to a clergyman in the clergyman's professional character as a spiritual adviser or counselor and confessions or admissions made to a clergyman in the course of discipline enjoined by the clergyman's church. Elliot v. State, 152 N.E.3d 27 (Ind. Ct. App. 2020).

The party asserting the privilege must show that the elements of the privilege exist. In re Commitment of J.B., 766 N.E.2d 795 (Ind. Ct. App. 2000).

Rutledge v. State, 525 N.E.2d 326 (Ind. 1988) (visitor was farmer who belongs to Gideons International, a group of businessmen who pass out Bibles; Gideons "present to prisoners a plan of salvation but they do not encourage them to make confessions" and is not affiliated with any church; thus, Gideon member was not clergyman within meaning of the statute).

Mullins v. State, 721 N.E.2d 335 (Ind. Ct. App. 1999) (where victim of theft "just happened to be a priest" and confronted defendant about stolen property, defendant's apology and promise to repay was not "within the sanctity of confession"). See also Haggenjos v. State, 493 N.E.2d 448 (Ind. 1986).

In re Commitment of J.B., 766 N.E.2d 795 (Ind. Ct. App. 2000) (respondent claimed on appeal that his statements to a church deacon were in a 'priest/penitent capacity' but failed to support that argument with evidence of the role of a deacon in that church or evidence of the nature of the communications).

Shanabarger v. State, 798 N.E.2d 210 (Ind.Ct.App. 2003) (statements defendant made to a police chaplain were not privileged because the police chaplain told the defendant that any statements he made were not confidential).

Bonham v. State, 644 N.E.2d 1223 (Ind. 1994) (pastor's testimony about statement in which the defendant described killing victim was admissible where church had no course of discipline that required formal confession of sins). See also Ball v. State, 419 N.E.2d 137 (Ind. 1981).

The trial judge and counsel may not comment on the fact a clergyman privilege has been claimed, and the court must instruct the jury not to draw an adverse inference if requested to do so by the party claiming privilege. Ind. Evid. R. 501(d).

4. Husband and wife

a. Statutes

(1) Ind. Code 34-36-3-1(4)

"Husband and wife, as to communications made to each other." Ind. Code 34-46-3-1(4) (formerly Ind. Code 34-1-14-5).

(a) Must have valid marriage

The parties must have a legally recognized marriage in order to claim the benefit of marital communications privilege. Hazelwood v. State, 609 N.E.2d 10 (Ind. Ct. App. 1993).

Indiana does not recognize a "fraudulent" marriage exception to the marital privilege, and the Court is reluctant to require trial courts to inquire into the quality of a marriage beyond examining whether the marriage was for purpose of disqualifying a witness. Glover v. State, 836 N.E.2d 414 (Ind. 2005).

Karlos v. State, 476 N.E.2d 819 (Ind. 1985) (trial court did not err in allowing testimony of defendant's girlfriend with whom he had lived; the court refuses to so extend marital privilege).

Barajas v. State, 627 N.E.2d 437 (Ind. 1994) (because defendant was not divorced from his first wife when he married present wife, second marriage was void and spousal privilege did not apply).

A divorce does not remove privilege as to confidences between the husband and wife which were communicated during their marriage. Sheperd v. State, 277 N.E.2d 165, 257 Ind. 229 (1971).

(b) Must have communication made because of marriage

Former statute, Ind. Code 34-1-14-5, only excluded testimony of spouse as to information gained from communications arising from confidential relationship of marriage. Such communications are not limited to "utterances," but include any communication by act which is done only because of marital confidence. It is important to determine whether the acting spouse intended to convey a

message to the other. There must be some indication that the other spouse's presence or attention was desired, and that communication was intended. Kindred v. State, 524 N.E.2d 279 (Ind. 1988). Acts of spouse which are not intended to convey a message are not covered by the confidentiality statute. Gordon v. State, 609 N.E.2d 1085 (Ind. 1993).

Kindred v. State, 524 N.E.2d 279 (Ind. 1988) (when the defendant handed his wife his license and bankbook before reaching roadblock, the only message arguably intended was "conceal these items because they may incriminate me"; wife's testimony regarding the defendant giving her these items was properly excluded; however, contents of items were not disclosed to wife by the defendant, but by her own later actions; thus, testimony regarding contents was properly admitted).

State v. Roach, 669 N.E.2d 1009 (Ind. Ct. App. 1996) (where wife signed affidavit used to charge husband with battery, court could compel wife to testify regarding battery; battery is not a confidential communication).

Rubalcada v. State, 731 N.E.2d 1015 (Ind. 2000) (privilege did not apply to the defendant's threats to wife that he would kill her if she disclosed details of his crimes; threats were not privileged communications).

Russell v. State, 743 N.E.2d 269 (Ind. 2001) (defendant's instructions to wife to lie to police and threats were not privileged confidential communications but disclosure that he was involved in the sexual assaults on the victim were; their admission was harmless error).

(2) Ind. Code 34-46-3-2

Ind. Code 34-46-3-2, which stated "[w]hen the husband or wife is a party, and not required to testify in his or her own behalf, the person's spouse shall also be excluded," was repealed effective March 24, 2006.

b. Purpose

In contrast to the other privileges, the marital privilege is grounded at least in significant part not on a policy of promoting disclosure but on concern for the health of the ongoing relationship between husband and wife and the policy of preventing further conflict between them by forcing one to testify against the other. Glover v. State, 836 N.E.2d 414 (Ind. 2005).

c. Waiver

(1) By spouse choosing to testify

The marital privilege prevents a court from requiring a spouse to testify as to confidential marital communications but does not bar the spouse from testifying if the spouse chooses to do so. Glover v. State, 836 N.E.2d 414 (Ind. 2005). The 1998 recodification of the statutory privilege did not change the existing law. Wilson v. State, 836 N.E.2d 407 (Ind. 2005). Indiana abolished rule of absolute spousal incompetence in favor of narrow privilege encompassing only confidential

communications and information gained by reason of marital relationship. State v. Roach, 669 N.E.2d 1009 (Ind. Ct. App. 1996).

Glover v. State, 836 N.E.2d 414 (Ind. 2005) (wife, if she chooses, could testify that her husband admitted to her that he murdered the victim).

House v. State, 535 N.E.2d 103 (Ind. 1989) (witness did not waive marital privilege when he testified to having conversation with his wife regarding his involvement in murder where he did not go into detail regarding the conversation).

(2) Spouse disclosing statements to third party

Communication intended to be transmitted to a third person is not privileged because the communication is not confidential. Solomon v. State, 439 N.E.2d 570 (Ind. 1982).

Solomon v. State, 439 N.E.2d 570 (Ind. 1982) (incriminating letter defendant wrote to victim while in jail awaiting trial for burglary and rape was not privileged because defendant gave letter to his wife who put it in envelope, addressed it to victim and mailed it).

Leonard v. State, 537 N.E.2d 480 (Ind. 1989) (where nothing in record indicates that defendant or wife intended any other person to be privy to their conversation about sneaking saw blades into jail for escape plan, the wife should not have been forced to testify; there was no evidence that the wife and defendant had communicated their plan to the inmate they were going to use to effectuate their plan).

Overstreet v. State, 783 N.E.2d 1140 (Ind. 2003) (defendant's instruction to wife to say that he had been drinking with friends if someone asked why he had been at crime scene was not a disclosure made within confines of the marital relationship because the defendant intended his wife to transmit the comment to a third party).

Recorded conversation between a defendant and his wife from jail are not protected under the marital communications privilege because it was made in the presence of a third party, i.e., the sheriff. Dixson v. State, 865 N.E.2d 704 (Ind. Ct. App. 2007); see also State v. Farber, 677 N.E.2d 1111 (Ind. Ct. App. 1997).

d. Special cases

(1) Where spouse is a victim

A spouse-victim may not invoke the privilege to avoid testifying. Van Donk v. State, 676 N.E.2d 349 (Ind. Ct. App. 1997); State v. Roach, 669 N.E.2d 1009 (Ind. Ct. App. 1996).

(2) Child abuse

Child abuse and neglect, and cases arising from failure to report: See Ind. Code 31-32-11-1(1) (husband-wife privilege not a ground for excluding evidence). For more analysis, see Section I.G of this Chapter.

(3) Privilege extends to crimes

Even where they participate in crime, communications between husband and wife concerning that crime are privileged. Leonard v. State, 537 N.E.2d 480 (Ind. 1989).

E. JOURNALISTS

1. Statutory privilege

Journalists have a statutory privilege under Ind. Code 34-46-4-1 and Ind. Code 34-46-4-2 against disclosing the identity of their sources.

Ind. Code 34-46-4-2 does not create a privilege against disclosing the substance of information a journalist has obtained from a confidential source. See I.B.2., *supra*; Roviaro v. United States, 353 U.S. 53, 60, 77 S.Ct. 623, 627, 1 L.Ed.2d 639 (1957). The privilege is personal to the newsperson and cannot be claimed by the source. The statute encompasses essentially all persons who are paid for gathering, writing, editing and interpretation of the news.

In re Indiana Newspapers Inc., 963 N.E.2d 534 (Ind. Ct. App. 2012) (statute's protection applicability is not available to one who simply posts a comment on an already-published online story).

2. No "qualified reporter's privilege"

Indiana courts have not recognized "qualified reporter's privilege" against giving evidence in a criminal proceeding under either the First Amendment to the U.S. Constitution, or Article I, Section 9 of the Indiana Constitution. In re WTHR-TV, State v. Cline, 693 N.E.2d 1 (1998); Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972). See also In re Indiana Newspapers Inc., 963 N.E.2d 534 (Ind. Ct. App. 2012).

A television news station may be compelled to disclose unaired video footage of an interview with a criminal defendant in response to defendant's otherwise proper discovery request. In re WTHR-TV, State v. Cline, 693 N.E.2d 1 (1998).

Crawford v. State, 948 N.E.2d 1165 (Ind. 2011) (three-step test from Cline applies only to requests for non-privileged materials; here, some of defendant's requests for footage from police show regarding this case were not sufficiently specific, thus trial court properly granted the show's motion to quash those requests).

In Cline, the Indiana Supreme Court did not address the question of whether a reporter's notes or other records were protected by a privilege. In re WTHR-TV, State v. Cline, 693 N.E.2d 1, 24, n.8 (1998).

3. Search warrants and Journalist's Privilege against disclosure of source

Ind. Code § 35-33-5-14 (effective July 1, 2014), provides certain procedures for the issuance of search warrants concerning electronic communication service or remote computing service that affect the law concerning a journalist's privilege against disclosure of an information source.

F. PRIVILEGES LISTED IN Ind. Code 34-46-2

Indiana Code 34-46-2-1 Listing of other privileges; effect of listing

Sec. 1. (a) This chapter contains a list of references to other privileged communication privileges outside Ind. Code 34.

(b) Listing in this chapter does not equate to the creation of a privilege, and failure to be listed in this chapter does not negate a privileged communication recognized elsewhere in the Indiana Code.

(c) Many of the statutes granting privilege also contain exceptions to the privilege granted and therefore each statute must be consulted directly to determine the extent of the privilege provided.

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1. Mediators and mediation (Ind. Code 36-46-2-2 and 3)

Ind. Code 4-21.5-3.5-18 and Ind. Code 4-21.5-3.5-27.

2. Adult protective services (Ind. Code 35-46-2-5)

Ind. Code 12-10-3-11 limits the class of persons who may be excused from testifying regarding an Aendangered adult report@ on grounds of privilege. Ind. Code 12-10-3 also limits the uses and disclosure of these reports.

3. Communicable diseases (Ind. Code 35-46-2-9 and 10)

Reports of communicable diseases, Ind. Code 16-41-2-4, and warnings of communicable diseases, Ind. Code 16-41-7-3.

4. School psychologists (Ind. Code 35-46-2-12)

Ind. Code 20-28-12-5 limits the circumstances in which a school psychologist may disclose information acquired in a professional capacity.

5. School counselors (Ind. Code 34-46-2-13)

Ind. Code 20-28-10-17 creates a privilege for communications from a student to a school counselor except as provided in Ind. Code 31-32-11-1.

Ind. Code 20-28-12-5 creates a privilege protecting any information acquired from persons with whom the psychologist has dealt in a professional capacity except as listed.

6. Social Workers, Counselors, and psychologists (Ind. Code 34-46-2-20 and 23)

a. Statutes

(1) Social workers and counselors

Matters communicated to a counselor in the counselor's official capacity by a client are privileged information and may only be disclosed by the counselor to any person, except in the following circumstances:

(a) In a criminal proceeding involving a homicide if the disclosure relates directly to the fact or immediate circumstances of the homicide.

(b) If the communication reveals the contemplation or commission of a crime or a serious harmful act.

(c) If:

  (i) the client is an un-emancipated minor or an adult adjudicated to be incompetent; and

  (ii) the information communicated to the counselor indicates the client was the victim of abuse or a crime.

(d) In a proceeding to determine mental competency, or a proceeding in which a defense of mental incompetency is raised.

(e) In a civil or criminal malpractice action against the counselor.

(f) If the counselor has the express consent of:

  (i) the client; or

  (ii) in the case of a client's death or disability, the express consent of the client's legal representative.

(g) To a physician if the physician is licensed under Ind. Code 25-22.5 and has established a physician-patient relationship with the client.

(h) Circumstances under which privileged communication is abrogated under Indiana law.

Ind. Code 25-23.6-6-1.

The intent of the counselor privilege statute is to protect confidential communications between counselor and client. The statute does not apply to communications that occurred before its enactment in 1990. Pelley v. State, 828 N.E.2d 915 (Ind. 2005).

J.B. v. E.B., 935 N.E.2d 296 (Ind. Ct. App. 2010) (by enacting I.C. 25-23.6-6-1, the legislature extended to counselors the same privilege that exists for physicians; privilege is in derogation of common law, so it must be strictly construed).

Friend v. State, 134 N.E.3d 441 (Ind. Ct. App. 2019) (in child molesting prosecution, trial court did not err by denying defendant's requests for discovery of records of the complainant's one-on-one sessions with her counselor because they were privileged under Ind. Code § 25-23.6-6-1 and could not be disclosed).

(3) Psychologists

A psychologist licensed under this article may not disclose any information acquired from persons with whom the psychologist has dealt in a professional capacity, except under the following circumstances:

(1) Trials for homicide when the disclosure relates directly to the fact or immediate circumstances of said homicide.

(2) Proceedings the purpose of which is to determine mental competency, or in which a defense of mental incompetency is raised.

(3) Actions, civil or criminal, against a psychologist for malpractice.

(4) Upon an issue as to the validity of a document such as a will of a client.

(5) If the psychologist has the expressed consent of the client or subject, or in the case of a client's death or disability, the express consent of the client's legal representative.

(6) Circumstances under which privileged communication is abrogated under the laws of Indiana.

Ind. Code 25-33-1-17.

b. Asserting privilege

Kavanaugh v. State, 695 N.E.2d 629 (Ind. Ct. App. 1998) (in order to make clear that therapy sessions were not in lieu of charges being brought, meeting was scheduled with therapist, defendant, defendant's attorney, victim's mother, and representatives of County Division of Family and Children Services; at the meeting, the defendant's attorney asked the county representatives to leave room and then asked the defendant, in presence of victim's mother and therapist, whether the defendant admitted to therapist that he molested step-child; the defendant's answer of "yes" was not protected under the statutory privilege because the defendant was neither communicating with his therapist nor participating in therapy session when the defendant made statement.

Goodwin v. State, 573 N.E.2d 895 (Ind. Ct. App. 1991) (defendant could not prevent psychologist who concluded that rape victim suffered from PSTD from testifying regarding their conversations even though victim allegedly had not waived privilege).

c. Privilege does not include communications with unlicensed counselors/social workers

Rogers v. State, 60 N.E.3d 256 (Ind. Ct. App. 2016) (counselor/client privilege does not include communications with unlicensed counselors including unlicensed social workers).

d. Exceptions

The proper procedure for determining whether records fall within an exception is an *in camera* review. See, e.g., Pelley v. State, 828 N.E.2d 915 (Ind. 2005). Although a trial court may grant a party review of the requested documents under a confidential protective order, it is not compelled to do so. Id. at 921.

(1) Homicide exception

Pelley v. State, 828 N.E.2d 915 (Ind. 2005) (trial court properly reviewed the documents *in camera* and determined that they did not fall within homicide exception; State did not explain what information it obtained from witnesses that formed basis for its belief that documents it requested should information concerning facts and immediate circumstances of murders).

Whitehead v. State, 511 N.E.2d 284 (Ind. 1987) (trial court did not err in allowing psychologist who met with the defendant on seven occasions at juvenile detention center, to testify regarding defendant's inconsistent statements relating to murder), *overruled on other grounds by* Wheldon v. State, 765 N.E.2d 1276 (Ind. 2002)).

Jorgensen v. State, 574 N.E.2d 915 (Ind. 1991) (information sought by defendant from psychologist and social worker regarding any incriminating statements third person may have made relating to fact or immediate circumstances of homicide with which defendant was charged would not be protected by privilege; remanded for review of excluded information to make relevancy determination).

(2) CHINS / termination

Social worker-patient privilege is abrogated in proceedings for involuntary termination of parent-child relationship and CHINS proceedings. Stone v. Daviess County Div. of Children and Family Serv., 656 N.E.2d 824 (Ind. Ct. App. 2002).

PRACTICE POINTER: Mental health records are protected. A party must go through the proper procedure to obtain these records. See Ind. Code 16-39-3-1 et. seq.; see also Miller v. State, 825 N.E.2d 884 (Ind. Ct. App. 2005); Williams v. State, 819 N.E.2d 381 (Ind. Ct. App. 2004). Moreover, medical records, including substance abuse records, are protected under federal law. See, e.g., 42 U.S.C. § 290dd-2; Hurt v. State, 694 N.E.2d 1212 (Ind. Ct. App. 1998) (federal protection of substance abuse records). If the federal law concerning disclosure of mental health records is more stringent than the State law, the federal law preempts the State law. 45 C.F. R. 160.203; Northwestern Mem's Hosp. v. Ashcroft, 362 F.3d 923 (7th Cir. 2004).

7. Mental health evaluator screening. (Ind. Code 34-46-2-28.5)

Ind. Code 31-32-2- 2.5 and Ind. Code 31-37-8-4.5 concern information communicated to an evaluator providing mental health screening, evaluation, or treatment to a child in connection with a juvenile proceeding or probation proceeding. The communications cannot be admitted as evidence against the child on the issue of whether the child committed a delinquent act or a crime but may be admissible in a probation revocation or modification of a dispositional decree proceeding. The confidentiality rule does not apply when the juvenile interposes the defense of insanity. Nor does the rule affect the disclosure or reporting requirements of statements relating to the immediate circumstances of a homicide or that reveal that the child may intend to commit a crime.

8. Victims and victim counselors

(a) The following persons or entities may not be compelled to give testimony, to produce records, or to disclose any information concerning confidential communications and confidential information to anyone or in any judicial, legislative, or administrative proceeding:

(1) A victim.

(2) A victim advocate or victim service provider unless the victim specifically consents to the disclosure in a written authorization that contains the date the consent expires.

(b) A victim advocate, victim service provider, or victim may not be compelled to provide testimony in any judicial, legislative, or administrative proceeding that would identify the name, address, location, or telephone number of any facility that provided temporary

emergency shelter to the victim of the offense or transaction that is the subject of the proceeding unless the facility is a party to the proceeding.

(c) A victim service provider or victim advocate may not require a victim to consent to the disclosure of information concerning confidential communications and confidential information as a condition of the victim receiving services.

(d) This section does not prohibit a victim from providing testimony concerning an offense.

(e) The consent to disclose information on behalf of:

(1) a child who is less than eighteen (18) years of age and is un-emancipated; or

(2) an incapacitated victim;

may be made by a custodial parent, custodian, guardian, or guardian ad litem in a written authorization that contains the date the consent expires.

(f) A consent under subsection (e) may not be given by a custodial parent, custodian, guardian, or guardian ad litem of the victim if the custodial parent, custodian, guardian, or guardian ad litem:

(1) committed; or

(2) is alleged to have committed, an offense against the victim.

Ind. Code 35-37-6-9 (2014).

In re Crisis Connection, Inc., 949 N.E.2d 789 (Ind. 2011) (victim counselor privilege arises from State's interest in maintaining the confidentiality of information gathered in the course of serving emotional and psychological needs of victims of domestic violence and sexual abuse; victim does not waive this privilege by testifying about the crime, but would waive the privilege by bringing a malpractice suit against the victim counselor or counseling center; unlike similar privileges, the victim counselor privilege does not allow disclosure or *in camera* inspection, even in homicide cases).

9. Drug prescription records. Ind. Code 34-46-2-22

(a) A pharmacist shall hold in strictest confidence all prescriptions, drug orders, records, and patient information. He may divulge such information only when it is in the best interest of the patient or when requested by the board or its representatives or by a law enforcement officer charged with the enforcement of laws pertaining to drugs or devices or the practice of pharmacy.

(b) A person who has knowledge by virtue of his office of any prescription drug order, record, or patient information may not divulge such information except in connection with a criminal prosecution or proceeding or a proceeding before the board, to which the person to whom the information relates is a party.

(c) A pharmacist or pharmacy is immune from civil liability for any action based on its good faith release of information under this section.

Ind. Code 25-26-13-15.

Williams v. State, 819 N.E.2d 381 (Ind. Ct. App. 2004) (in trial for rape and criminal deviate conduct, defendant made a sufficient showing of particularity and materiality in that prescription records would provide insight on medication the complaining witness may have ingested the night of the alleged offense which relates to her ability to accurately perceive and recount the events).

Williams v. State, 959 N.E.2d 360 (Ind. Ct. App. 2012) (the privilege protecting prescription records in the State Board of Pharmacy's INSPECT database belongs to the individuals, not the Board, and a criminal defendant may waive his own privilege and obtain discovery of his own prescription records from the database); see also Lundy v. State, 26 N.E.3d 656 (Ind. Ct. App. 2015).

10. Obstruction of justice

Ind. Code 35-44.1-2-2 provides a defense to an obstruction of justice charge for attorneys, physicians, clergy, and spouses who are not required to testify under IC 34-46-3-1.

G. STATUTORY EXCEPTION FOR CHILD ABUSE

1. Abrogation of privilege

The privileged communication between:

(1) a husband and wife;
(2) a health care provider and the health care provider's patient;
(3) a:
  (i) licensed social worker;
  (ii) licensed clinical social worker;
  (iii) licensed marriage and family therapist;
  (iv) licensed mental health counselor;
  (v) licensed addiction counselor; or
  (vi) licensed clinical addiction counselor;

and a client of any of the professionals described in clauses (A) through (F);

(4) a school counselor and a student; or
(5) a school psychologist and a student;

is not a ground for excluding evidence in any judicial proceeding resulting from a report of a child who may be a victim of child abuse or neglect or relating to the subject matter of the report or failing to report as required by IC 31-33.

Ind. Code 31-32-11-1.

This statute abrogating privilege with respect to matters of child abuse is to be liberally construed and does not only apply when the child reports the abuse. Hayes v. State, 667 N.E.2d 222 (Ind. Ct. App. 1996)

Hayes v. State, 667 N.E.2d 222 (Ind. Ct. App. 1996) (just because the defendant was actively seeking rehabilitative therapy at time therapist reported perceived abuse, the therapist's actions did not frustrate rehabilitation goal of Reporting Statute; the purpose

of statute was fulfilled when therapist reported abuse, not prior to the defendant's communication and therapist's disclosure of that communication).

Devore v. State, 658 N.E.2d 657 (Ind. Ct. App. 1995) (medical records from hospital where defendant voluntarily admitted himself to learn to control child molesting were admissible at sentencing), *overruled on other grounds by* Biddinger v. State, 868 N.E.2d 407 (Ind. 2007).

2. Exception – court-ordered treatment

Ind. Code 31-6-11-1 (now 31-32-11-1) requiring reports of child abuse does not abrogate physician-patient privilege regarding communications undertaken in course of treatment required by CHINS order. If the privilege is denied to those family members involved in CHINS counseling, abusers will be discouraged from openly and honestly communicating with counselors, and treatment, which is ultimately aimed toward serving and protecting child, will be hindered. Daymude v. State, 540 N.E.2d 1263 (Ind. Ct. App. 1989). Moreover, the defendant in all probability believed that the communication would be kept confidential. Watson v. State, 784 N.E.2d 515 (Ind. Ct. App. 2003).

The Juvenile Mental Health Statute's limited immunity prohibits both use and derivative use of a juvenile's statements to prove delinquency but does not necessarily prohibit use of those statements for all other purposes. State v. I.T., 4 N.E.3d 1139 (Ind. 2014).

Watson v. State, 784 N.E.2d 515 (Ind. Ct. App. 2003) (defendant waived privilege as to first counselor who treated defendant during course of court-ordered treatment for CHINS action where defendant voluntarily put his mental condition at issue by raising it as an affirmative defense via testimony of second counselor who stated that defendant was very mentally disturbed during his police interview involving alleged battery).

Lomax v. State, 510 N.E.2d 215 (Ind. Ct. App. 1987) (privilege did not protect doctor's observations of defendant's treatment of her son).

Moreover, where a defendant is compelled to seek treatment from counselor, information given to the counselor is privileged and cannot be used against him at trial. Sims v. State, 601 N.E.2d 344 (Ind. 1992). Admission of counselor's testimony was tantamount to circumvention of the defendant's Fifth Amendment rights. Id.

The Indiana Supreme Court has held that the Department of Corrections' SOMM program, which requires offenders and parolees to answer potentially incriminating questions, does not violate the privilege against self-incrimination. Bleeke v. Lemmon, 6 N.E.3d 907 (Ind. 2014), *citing* McKune v. Lile, 536 U.S. 24 (2002).

"[A] prison clinical rehabilitation program, bearing a rational relationship to a legitimate state objective, does not violate the privilege against self-incrimination if the adverse consequences an inmate faces for not participating are related to the program objectives and do not constitute atypical and significant hardships in relation to the ordinary incidents of prison life." Bleeke v. Lemmon, 6 N.E.3d 907, 930 (Ind. 2014) (internal quotations omitted), *citing* McKune v. Lile, 536 U.S. 24 (2002).

H. A COMMON LAW PRIVILEGE: INFORMANT'S IDENTITY

1. Definition

The informant's identity privilege gives the government the right, in some circumstances, to refuse to disclose an informant's identity. Where disclosure of an informant's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair trial, the Government's privilege to withhold disclosure of the informer's identity must give way. Roviaro v. United States, 353 U.S. 53, 60-62, 77 S.Ct. 623 (1957).

The Supreme Court recognized the informant's identity privilege as a legitimate means to further and protect the public interest in law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. Scher v. United States, 305 U.S. 251, 254, 59 S.Ct. 174, 176, 83 L. Ed. 151 (1938); In re Quarles, 158 U.S. 532, 15 S.Ct. 959, 39 L Ed. 1080 (1895).

Indiana courts have recognized the informant's identity privilege. Tinnin v. State, 488 N.E.2d 699, 702 (Ind. 1986); Randall v. State, 455 N.E.2d 916 (Ind. 1983). See Miller, 12 *Indiana Evidence* 702, § 501.571 *et seq.* (4th ed.).

A defendant's request for an interview with an informant is treated the same as a request for disclosure of the informant's identity. State v. Jones, 169 N.E.3d 397, 400-401 (Ind. 2021). The privilege protects the informant's physical appearance. Id. at 402.

2. Burden

The State must meet its initial burden to demonstrate the informer's privilege applies. A valid assertion of the privilege shifts the burden to the defendant to demonstrate that disclosure of the requested evidence is either relevant and helpful to his defense or necessary for a fair trial. Specifically, the defense must show it's not speculating that the information may prove useful; and a court should not permit an exception for a "mere fishing expedition." State v. Jones, 169 N.E.3d 397, 405 (Ind. 2021) (cleaned up).

If the defense meets that burden, it has shown an exception is warranted. The State then gets the opportunity to dispute whether disclosure is necessary to the defense or show that disclosure would threaten its ability to recruit or use confidential informants in the future. The trial court should balance the respective interests to determine whether the general rule of nondisclosure has been overcome. State v. Jones, 169 N.E.3d 397, 405-06 (Ind. 2021).

In situations where it is unknown whether the informer's privilege applies, the State should ask the trial court to review the evidence *in camera* to determine whether it contains privileged information.

> Beville v. State, 71 N.E.3d 13 (Ind. 2017) (State failed to meet its burden of establishing the essential elements of privilege, i.e., that the confidential informant's identity would be revealed if defendant's discovery request is granted; accordingly, trial court abused its discretion in denying defendant's motion to compel video recording of an alleged controlled buy between him and C.I.).

3. Overcoming the privilege

a. Required showing

A defendant seeking disclosure must demonstrate an exception to the privilege that the informer remains anonymous. United States v. Alvarez, 472 F.2d 111 (9th Cir. 1973), *cert. denied*, 412 U.S. 921, 93 S.Ct. 2742 (1973). The defendant must show that disclosure of the informer's identity, or the contents of his communication, is relevant and helpful to the defense, or is essential to a fair trial. Roviaro v. United States, 353 U.S. 53, 60-62, 77 S.Ct. 623 (1957); Schlomer v. State, 580 N.E.2d 950 (Ind. 1991).

The defendant has the burden of showing a need for disclosure of the informer's identity. Shell v. State, 927 N.E.2d 413, 420 (Ind. Ct. App. 2010).

> Beville v. State, 71 N.E.3d 13 (Ind. 2017) (even if the State had proven that video would have revealed informant's identity, defendant would still have been entitled to video because he carried his burden of establishing that the evidence was relevant and helpful to his defense).
>
> Scheckles v. State, 24 N.E.3d 978 (Ind. Ct. App. 2015) (Court rejected defendant's claim that he was entitled to disclosure of confidential informant because there was discrepancy in amount of cocaine sold).

Defendant must show that he does not know the identity of the confidential informant. Mays v. State, 907 N.E.2d 128, 131 (Ind. Ct. App. 2009).

> Heyen v. State, 936 N.E.2d 924 (Ind. Ct. App. 2010) (any refusal by trial court to disclose confidential informant's identity was harmless error because defendant already knew informant's identity).

b. Once defendant has made showing, court applies a balancing test

In each case the court must balance the public interest in protecting the flow of information against the individual's right to prepare his defense, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. Roviaro v. United States, 353 U.S. 53, 62, 77 S.Ct. 623 (1957).

> Beville v. State, 71 N.E.3d 13 (Ind. 2017) (where, as here, defendant demonstrates that an exception to the informer's privilege applies, the State must show why disclosure would threaten its ability to use or recruit confidential informants in the future; other than asserting general policy reasons underlying the informer's privilege, State presented no evidence to satisfy this burden).

For additional cases where the defendant overcame the privilege, see Burst v. State, 499 N.E.2d 1140 (Ind. Ct. App. 1986). Cf. Parker v. State, 773 N.E.2d 867 (Ind. Ct. App. 2002); Geiger v. State, 721 N.E.2d 891 (Ind. Ct. App. 1999); Furman v. State, 496 N.E.2d 811 (Ind. Ct. App. 1986); State v. Cook, 582 N.E.2d 444 (Ind. Ct. App. 1991); and Smith v. State, 829 N.E.2d 64 (Ind. Ct. App. 2005).

II. ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT; LIMITATIONS ON WAIVER - RULE 502

A. OFFICIAL TEXT:

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) **Intentional disclosure; scope of a waiver**. When a disclosure is made in a court proceeding and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) **Inadvertent disclosure.** When made in a court proceeding, a disclosure does not operate as a waiver if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and,

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Indiana Rule of Trial Procedure 26(B)(5)(b).

(c) **Controlling effect of a party agreement.** An agreement on the effect of disclosure in a proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(d) **Controlling effect of a court order.** If a court incorporates into a court order an agreement between or among parties on the effect of disclosure in a proceeding, a disclosure that, pursuant to the order, does not constitute a waiver in connection with the proceeding in which the order is entered is also not a waiver in any other court proceeding.

B. STATUTORY AUTHORITY FOR THE ATTORNEY-CLIENT PRIVILEGE

Except as otherwise provided by statute, the following persons shall not be required to testify regarding the following communications:

(1) Attorneys, as to confidential communications made to them in the course of their professional business, and as to advice given in such cases.

Ind. Code 34-46-3-1(a).

The current form of Ind. Code 34-46-3-1, adopted in 1998, expressly creates a privilege for attorneys, physicians, clergy, and spouses. The 1998 Recodification Act was intended to recodify existing law, not to change it. Wilson v. State, 836 N.E.2d 407 (Ind. 2005).

C. PURPOSE

The attorney-client privilege is intended to encourage full and frank communication between an attorney and client and thereby promote broader public interests. At the same time, the privilege gives the client the assurance that his confidences will not be violated. TP Orthodontics, Inc. v. Kesling, 15 N.E.3d 985 (Ind. 2014). These two goals were affirmed in Groth v. Pence: "The privilege protects those in need of legal services by providing for complete and confidential information to an attorney so the attorney may be fully advised in serving the client while assuring the client that these confidences will not be revealed." Groth v. Pence, 67 N.E.3d 1104, 1118 (Ind. Ct. App. 2017). The privilege is not defeated by the Indiana Access to Public Records Act ("APRA"), IC 5-14-3-4, but in fact is exempted by that statute. Groth, 67 N.E.3d 1104.

D. PREREQUISITES

The essential prerequisites to the invocation of the attorney-client privilege are to establish by a preponderance of the evidence the existence of an attorney-client relationship and that a confidential communication was involved. Brown v. Katz, 868 N.E.2d 1159 (Ind. Ct. App. 2007); Mayberry v. State, 670 N.E.2d 1262 (Ind. 1996).

1. Confidential communications

Not every communication between an attorney and client is a 'confidential communication' entitled to the protection of the attorney-client privilege. The privilege addresses evidence of the communication, not other evidence of the facts to which the communication related. Price v. Charles Brown Charitable Remainder Unitrust Trust, 27 N.E.3d 1168, 1175 (Ind. Ct. App. 2015). Information with respect to attorney's fees, the identity of a client, or identity of a third-party payer of client's fees are not protected unless disclosure would convey the substance of the confidential communication. Hueck v. State, 590 N.E.2d 581 (Ind. Ct. App. 1992). Communications intended by the client to be made public are not privileged because there is no reasonable expectation of confidentiality surrounding such information. Lahr v. State, 731 N.E.2d 479 (Ind. Ct. App. 2000).

Korff v. State, 567 N.E.2d 1146 (Ind. 1991) (it is not a violation of the attorney-client privilege for a lawyer to testify that he informed his client of time, date and place of client's trial where defendant failed to appear in court).

Skinner v. State, 920 N.E.2d 263 (Ind. Ct. App. 2010) (after defendant's first counsel withdrew because of conflict of interest arising from prior representation of State's witness, successor counsel could not discover from first counsel what privileged information first counsel had about the witness).

Lahr v. State, 731 N.E.2d 479 (Ind. Ct. App. 2000) (two forged letters the defendant gave his attorney in hopes of bolstering his self-defense claim were not protected by the attorney-client privilege being that the defendant intended to make them public).

Lewis v. State, 451 N.E.2d 50 (Ind. 1983) (no error in denying the defendant's motion for mistrial made during State's rebuttal presentation of police officer who testified to substance of conversation he overheard between the defendant and his attorney at jail; circumstances illustrated the conversation was not confidential).

Taylor v. State, 587 N.E.2d 1293 (Ind. 1992) (statement that defendant wrote at counsel's request but was not yet given to counsel was not confidential because its content was similar to information given to police during the defendant's initial interview about his wife's death; transcript of this interview was admitted without objection, and therefore subject matter of statement was already in evidence).

Bassett v. State, 895 N.E.2d 1201 (Ind. 2008) (where attorney and client were aware that telephone conversations from jail were being recorded, conversations were not confidential and thus were not privileged).

a. Attorney's employees or agents – common interest privilege

Statements by an attorney's client to an attorney's employee or agent are protected under the statute, so long as: (1) the communication involves the subject matter about which the attorney was consulted; and (2) the agent was retained by the attorney for the purposes of assisting the attorney in rendering legal advice to or conducting litigation on behalf of the client. Shanabarger v. State, 798 N.E.2d 210, 216 (Ind. Ct. App. 2003); Brown v. State, 448 N.E.2d 10, 14 (Ind. 1983). It is of no moment that there is no pendency or expectation of litigation, or no fee has been paid. Mayberry v. State, 670 N.E.2d 1262, 1266 (Ind. 1996).

> Mayberry v. State, 670 N.E.2d 1262 (Ind. 1996) (victim's communications with his friend who worked as a paralegal in law firm were protected by attorney-client privilege in murder prosecution; victim had approached friend at law firm where she worked as paralegal/office manager and asked her to consult attorney regarding his legal concerns).
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> State v. Thompson, 329 S.C. 72, 495 S.E.2d 437 (S.C. 1998) (attorney-client privilege extends to communications with psychiatrist retained to aid in preparation of case, and fact that psychiatrist's conclusion regarding defendant's eligibility for sex offender treatment was intended to be turned over in aid of plea negotiations did not waive privilege for defendant's statements made in obtaining that conclusion; trial court's ruling that prosecutor could use statements made to psychiatrist to impeach defendant if he testified unconstitutionally deprived him of right to testify).

The common interest privilege is an extension of the attorney-client privilege. United States v. BDO Seidman, LLP, 492 F.3d 806, 815 (7th Cir. 2007). In effect, the common interest privilege extends the attorney-client privilege to otherwise nonconfidential communications between parties represented by separate attorneys. Id. The common interest privilege "treats all involved attorneys and clients as a single attorney-client unit, at least insofar as a common interest is pursued." 2 Stephen A. Saltzberg, et al., Federal Rules of Evidence Manual 501-30 (10th ed. 2011). The privilege is an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party. BDO Seidman, 492 F.3d at 815; see Cavallaro v. United States, 284 F.3d 236, 250 (1st Cir. 2002).

The common interest privilege permits parties whose legal interests coincide to share privileged materials with one another in order to more effectively prosecute or defend their claims. It applies in civil and criminal litigation, and even in purely transactional contexts. See Groth v. Pence, 67 N.E.3d 1104, 1119 (Ind. Ct. App. 2017).

b. Waiver

The attorney-client privilege belongs to the client and can only be waived by conduct attributable to the client. Mayberry v. State, 670 N.E.2d 1262, 1267 (Ind. 1996). An intentional waiver of the attorney-client or work-product privilege by disclosure of some privileged communications in a court proceeding does not waive the privilege or protection with respect to undisclosed communications or information unless the waiver was intentional, Ind. Evid. R. 502(a)(1); or the undisclosed matter concerns the same subject matter as the disclosed communication. Ind. Evid. R. 502(a)(2).

When the prerequisites for invoking the privilege have been satisfied, the burden then shifts to the party opposing the assertion to show that the communications were not protected by the privilege because the confidentiality was waived or otherwise nullified. Bassett v. State, 895 N.E.2d 1201, 1206 (Ind. 2008).

Lindsey v. State, 485 N.E.2d 102, 107 (Ind. 1985) (by testifying that he did not discuss merits of case with attorneys with whom he was initially consulting, the defendant waived any attorney-client privilege that may have existed and the State was properly allowed to call the attorney in rebuttal).

Webster v. State, 302 N.E.2d 763 (Ind. 1973) (conversation between attorney and third party at request of client cannot be considered confidential or subject to attorney-client privilege).

Brown v. State, 448 N.E.2d 10 (Ind. 1983) (by having polygraph examiner who administered polygraph to defendant at defendant's attorney's request testify at juvenile waiver hearing concerning communication with the defendant, the defendant waived attorney-client privilege).

Logston v. State, 363 N.E.2d 975, 266 Ind. 395 (1977) (where a defendant alleges incompetency of his lawyer, he has waived the attorney-client privilege). See also Zordani v. State, 371 N.E.2d 396, 175 Ind.App. 297 (1978).

Gubitz v. State, 360 N.E.2d 259, 265, 172 Ind.App. 343 (1977) (attorney was properly permitted to invoke attorney-client privilege when he was asked whether his client, a witness at such trial, had been promised leniency in exchange for his testimony).

c. Survives client's death

The attorney-client privilege survives the client's death. Mayberry v. State, 670 N.E.2d 1262 (Ind. 1996).

d. Remedy for eavesdropping on attorney-client communications – presumptive taint rather than blanket suppression

The attorney-client privilege recognizes the necessity of a defendant conferring privately with counsel. The State's eavesdropping or intrusion on these communications is presumptively prejudicial but does not require blanket suppression of evidence. Lafler v. Cooper, 132 S.Ct. 1376, 1388-89 (2012). Rather, the State can rebut the presumption by

disproving prejudice beyond a reasonable doubt for every item of tainted evidence and testimony.

> Taylor v. State, 49 N.E.3d 1019 (Ind. 2016) (on remand, State must prove independent source for tainted witnesses' testimony without implicating their Fifth Amendment privilege and without derogating defendant's right of confrontation).

E. WORK PRODUCT PRIVILEGE

1. Scope of the privilege

The work product privilege is distinguished from the attorney-client privilege. "[T]he memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case [and] writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories" are not within the attorney-client privilege. Hickman v. Taylor, 329 U.S. 495, 508 (1947). But the work product privilege generally protects from discovery "written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties." Id. at 610.

The work product doctrine protects materials prepared by agents for the attorney as well as those prepared by the attorney himself. State ex rel. Keaton v. Circuit Court of Rush County, 475 N.E.2d 1146 (Ind. 1985), *citing* United States v. Nobles, 422 U.S. 225 (1975).

PRACTICE POINTER: A 1985 Indiana case, which has not been overturned, held 3-2 that "police reports" are protected from discovery by the work product privilege. State ex rel. Keaton v. Circuit Court of Rush County, 475 N.E.2d 1146 (Ind. 1985). As the dissent pointed out, however, the term "police report" was not defined in the record. Keaton, 475 N.E.2d at 1149 (dissenting opinion of DeBruler, J.). Since then, the Court of Appeals has suggested that Keaton should be reconsidered because the point of the work product privilege is "to protect the fruits of the prosecutor's intellectual labor, rather than the investigative paper trail of the police." Gault v. State, 861 N.E.2d 728, 736 (Ind. Ct. App. 2007), *transfer granted, affirmed in part, and reversed in part,* 878 N.E.2d 1260 (Ind. 2008). After granting transfer, however, the Indiana Supreme Court declined to revisit Keaton's holding in Gault, resolving the case instead on grounds that the prosecutor waived any work product privilege by using the police report at trial to refresh the memory of a witness. Gault v. State, 878 N.E.2d 1260 (Ind. 2008). In Minges v. State, 180 N.E.3d 391 (Ind. Ct. App. 2022), *trans. pending*, the Court of Appeals agreed with Defendant that Keaton's holding, and analysis are problematic and urged the Supreme Court urged to reconsider precedent regarding police reports as the prosecutor's work product.

2. Documents prepared by opposing counsel are not subject to discovery without a showing of need

"Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney." Hickman v. Taylor, 329 U.S. 495, 510 (1947).

However, not "all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or

give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty." Hickman v. Taylor, 329 U.S. 495, 511 (1947).

3. Waiver of the privilege

The State should not be permitted to invoke the work product privilege to prevent defense counsel from examining a police report which a witness has used to refresh his memory while testifying. In light of Evidence Rule 612, the State waived any privilege by using the document to refresh the officer's memory. Gault v. State, 878 N.E.2d 1260 (Ind. 2008).

> Gault v. State, 878 N.E.2d 1260 (Ind. 2008) (State, who allowed its witness to refresh his memory with police report waived work-product privilege in the report).