

**User Name:** Charlena Fuqua

**Date and Time:** Tuesday, August 3, 2021 2:31:00 PM CDT

**Job Number:** 149813517

## Documents (45)

1. [Synopsis to CHAPTER 5 : ARTICLE V. TENNESSEE LAW OF EVIDENCE—PRIVILEGES](#)  
**Client/Matter:** -None-
2. [§ 5.01 Rule 501. Privileges Recognized Only as Provided](#)  
**Client/Matter:** -None-
3. [§ 5.02 Fifth Amendment Privilege](#)  
**Client/Matter:** -None-
4. [§ 5.03 Attorney-Client Privilege](#)  
**Client/Matter:** -None-
5. [§ 5.04 Lawyer's Disciplinary Board-Complainant Privilege](#)  
**Client/Matter:** -None-
6. [§ 5.05 Attorney-Investigator Privilege](#)  
**Client/Matter:** -None-
7. [§ 5.06 Accountant-Client Privilege; Accountant Peer Review](#)  
**Client/Matter:** -None-
8. [§ 5.07 Psychologist-Client Privilege](#)  
**Client/Matter:** -None-
9. [§ 5.08 Social Worker-Client Privilege](#)  
**Client/Matter:** -None-
10. [§ 5.09 Licensed Marital and Family Therapists or Licensed Professional Counselors-Client Privilege](#)  
**Client/Matter:** -None-
11. [§ 5.10 Mediation Privileges](#)  
**Client/Matter:** -None-
12. [§ 5.11 Crisis Intervention Privilege](#)  
**Client/Matter:** -None-
13. [§ 5.12 Psychiatrist-Patient Privilege](#)  
**Client/Matter:** -None-
14. [§ 5.13 Psychiatric Nurse-Patient Privilege](#)  
**Client/Matter:** -None-
15. [§ 5.14 Physician-Patient Privilege](#)  
**Client/Matter:** -None-
16. [§ 5.15 Clergy-Penitent Privilege](#)  
**Client/Matter:** -None-
17. [§ 5.16 Interpreter for Deaf Person Privilege](#)  
**Client/Matter:** -None-
18. [§ 5.17 Spousal Privilege](#)

- Client/Matter:** -None-
19. [§ 5.18 Grand Jury-Witness Protection](#)
- Client/Matter:** -None-
20. [§ 5.19 Witness in Judicial Proceeding](#)
- Client/Matter:** -None-
21. [§ 5.19A Potential Participant in Judicial Proceeding](#)
- Client/Matter:** -None-
22. [§ 5.19B Religious Sermons](#)
- Client/Matter:** -None-
23. [§ 5.20 Legislative Privileges](#)
- Client/Matter:** -None-
24. [§ 5.21 Deliberative Process Privilege](#)
- Client/Matter:** -None-
25. [§ 5.22 Medical Review Committee-Informant Privilege; Quality Control](#)
- Client/Matter:** -None-
26. [§ 5.23 Psychology Peer Review Committee](#)
- Client/Matter:** -None-
27. [§ 5.24 Impaired Practice Programs](#)
- Client/Matter:** -None-
28. [§ 5.25 News Reporter's Privilege](#)
- Client/Matter:** -None-
29. [§ 5.26 Government Informant Privilege](#)
- Client/Matter:** -None-
30. [§ 5.27 Law Enforcement Privilege](#)
- Client/Matter:** -None-
31. [§ 5.28 Electronic Surveillance Results](#)
- Client/Matter:** -None-
32. [§ 5.29 Automobiles](#)
- Client/Matter:** -None-
33. [§ 5.30 Tax Returns](#)
- Client/Matter:** -None-
34. [§ 5.31 Banks and Insurance](#)
- Client/Matter:** -None-
35. [§ 5.32 Tenure Deliberations](#)
- Client/Matter:** -None-
36. [§ 5.32A Employment](#)
- Client/Matter:** -None-
37. [§ 5.33 \[Reserved\]](#)
- Client/Matter:** -None-
38. [§ 5.34 Corporations and Limited Liability Companies](#)
- Client/Matter:** -None-
39. [§ 5.35 Juveniles](#)
- Client/Matter:** -None-
40. [§ 5.36 Family Violence Shelter's Location](#)



**Client/Matter:** -None-

41. [§ 5.37 Sex Offenders](#)

**Client/Matter:** -None-

42. [§ 5.38 Health](#)

**Client/Matter:** -None-

43. [§ 5.39 Child Sexual Abuse Exception to Privileges](#)

**Client/Matter:** -None-

44. [§ 5.39A Child Custody Exception to Privileges](#)

**Client/Matter:** -None-

45. [§ 5.40 Rule 502. Limitations on Waiver of Privileged Information or Work Product](#)

**Client/Matter:** -None-

## [1 Tennessee Law of Evidence CHAPTER 5.syn](#)

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE—PRIVILEGES**

## **CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE—PRIVILEGES**

### [§ 5.01 Rule 501. Privileges Recognized Only as Provided](#)

- [1] Text of Rule
- [2] Overview of Rule 501
- [3] Comparison to Federal Rule 501
- [4] Privileges
  - [a] In General
  - [b] Holder
  - [c] Waiver
  - [d] Burden of Proof
  - [e] Strict Construction
  - [f] Universal Applicability
  - [g] Liability for Wrongful Disclosure

### [§ 5.02 Fifth Amendment Privilege](#)

### [§ 5.03 Attorney-Client Privilege](#)

- [1] In General
  - [a] Policy
  - [b] Rules of Professional Conduct
  - [c] Attorney-Client Relationship
  - [d] Waiver
  - [e] Burden of Proof and Appellate Review
  - [f] Survival After Client's Death
  - [g] Common or Joint Interests
- [2] Exclusions
  - [a] Reflect Client's Disclosures to Lawyer

## 1 Tennessee Law of Evidence CHAPTER 5.syn

- [b] Intended to be Confidential
- [c] Subject Matter of Statement
- [d] Litigation Involving Attorney
- [e] Testamentary Issues

[3] Open Meetings Law

[4] Sanctions

[§ 5.04 \*Lawyer's Disciplinary Board-Complainant Privilege\*](#)

[§ 5.05 \*Attorney-Investigator Privilege\*](#)

[§ 5.06 \*Accountant-Client Privilege; Accountant Peer Review\*](#)

[§ 5.07 \*Psychologist-Client Privilege\*](#)

- [1] In General
- [2] Exception for Threatened Harm
- [3] Other Exceptions

[§ 5.08 \*Social Worker-Client Privilege\*](#)

[§ 5.09 \*Licensed Marital and Family Therapists or Licensed Professional Counselors-Client Privilege\*](#)

[§ 5.10 \*Mediation Privileges\*](#)

- [1] Mediator Privilege
- [2] Divorce Mediation Privilege
- [3] Victim-Offender Mediation Center

[§ 5.11 \*Crisis Intervention Privilege\*](#)

[§ 5.12 \*Psychiatrist-Patient Privilege\*](#)

- [1] In General
- [2] Exceptions
- [3] Unprivileged Information

[§ 5.13 \*Psychiatric Nurse-Patient Privilege\*](#)

[§ 5.14 \*Physician-Patient Privilege\*](#)

[§ 5.15 \*Clergy-Penitent Privilege\*](#)

- [1] In General
- [2] Exceptions

[§ 5.16 Interpreter for Deaf Person Privilege](#)

[§ 5.17 Spousal Privilege](#)

- [1] In General
- [2] Spousal Testimonial Privilege
- [3] Confidential Communications in Criminal Cases
  - [a] Communication Originated in Confidence
  - [b] Confidentiality Essential to Full Maintenance of Relationship
  - [c] Community Opinion That The Relationship Ought to be Fostered
  - [d] Balancing Harm to Relationship Against Benefits to Resolving Litigation
- [4] Confidential Communications in Civil Cases
- [5] During Marriage
- [6] Types of Communications
- [7] Exceptions
- [8] Claiming and Waiving

[§ 5.18 Grand Jury-Witness Protection](#)

[§ 5.19 Witness in Judicial Proceeding](#)

[§ 5.19A Potential Participant in Judicial Proceeding](#)

[§ 5.19B Religious Sermons](#)

[§ 5.20 Legislative Privileges](#)

- [1] In General
- [2] Witness Before Legislative Committee
- [3] Tennessee State Senators and Representatives
- [4] Subordinate Legislative Bodies
- [5] Certain Public Records

[§ 5.21 Deliberative Process Privilege](#)

[§ 5.22 Medical Review Committee-Informant Privilege; Quality Control](#)

[§ 5.23 Psychology Peer Review Committee](#)

[§ 5.24 Impaired Practice Programs](#)

- [1] Health Workers

## 1 Tennessee Law of Evidence CHAPTER 5.syn

[2] Lawyer's Assistance Program

[3] Impaired Lawyer Programs

[4] Law Enforcement, Firefighters, and Similar Emergency Personnel Group Counseling

[§ 5.25 News Reporter's Privilege](#)

[1] In General

[2] Automatic Exception

[3] Discretionary Exception

[§ 5.26 Government Informant Privilege](#)

[§ 5.27 Law Enforcement Privilege](#)

[§ 5.28 Electronic Surveillance Results](#)

[§ 5.29 Automobiles](#)

[§ 5.30 Tax Returns](#)

[§ 5.31 Banks and Insurance](#)

[1] In General

[2] Records of Department of Financial Institutions

[3] Risk-Based Capital Reports

[4] Risk Management and Own Risk and Solvency Assessment

[5] Flexible Credit Act

[6] Commerce and Insurance Investigations

[7] Bank Account and Credit Card Information

[§ 5.32 Tenure Deliberations](#)

[§ 5.32A Employment](#)

[§ 5.33 \[Reserved\]](#)

[§ 5.34 Corporations and Limited Liability Companies](#)

[1] In General

[2] Professional Limited Liability Company

[§ 5.35 Juveniles](#)

[1] Juvenile's Fingerprint, Photograph and Other Files

[2] Juvenile Court Records

[§ 5.36 Family Violence Shelter's Location](#)[§ 5.37 Sex Offenders](#)[§ 5.38 Health](#)

- [1] HIV Test Results
- [2] Traumatic Brain Injury Registry
- [3] Certain Medical Records in Workers' Compensation Cases
- [4] Information Employer Receives Through Drug-testing Program
- [5] Hospital Claims Data
- [6] Evaluation of Health Care Provider
- [7] Disposition of Fetus

[§ 5.39 Child Sexual Abuse Exception to Privileges](#)

- [1] In General
- [2] Child Sexual Abuse Reports

[§ 5.39A Child Custody Exception to Privileges](#)[§ 5.40 Rule 502. Limitations on Waiver of Privileged Information or Work Product](#)

- [1] Text of Rule
- [2] Inadvertent Disclosure Not Deemed Waiver
- [3] Reasonable Steps to Prevent Disclosure
- [4] Reasonable Steps to Rectify the Erroneous Disclosure

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

## **1 Tennessee Law of Evidence § 5.01**

**Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE—  
PRIVILEGES**

### **§ 5.01 Rule 501. Privileges Recognized Only as Provided**

---

#### **[1] Text of Rule**

##### **Rule 501 Privileges Recognized Only as Provided**

Except as otherwise provided by constitution, statute, common law, or by these or other rules promulgated by the Tennessee Supreme Court, 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.

##### **Advisory Commission Comment:**

The following statutes and rules deal with some Tennessee privileges. They are provided for the convenience of the bench and bar. The relevant statutes and rules should be consulted to ensure accuracy and completeness. Many other statutes make certain documents confidential, but the Commission did not view such confidentiality concepts as synonymous with privilege theories.

##### **T.C.A. § 55-10-114(b). ACCIDENT REPORT PRIVILEGE.**

No report or information mentioned in this section [accident report made by “any person or by garages”] shall be used as evidence in any trial, civil or criminal, arising out of an accident, except that the department [of safety] shall furnish upon demand of any party to such trial, or upon demand of any court, a certificate showing that a specified accident report has or has not been made to the department in compliance with the law.

##### **T.C.A. § 55-12-128. SAME, CIVIL SUITS.**

Neither the reports required by this chapter [operator’s report of financial responsibility], the action taken by the commissioner pursuant to this chapter, the findings of the commissioner upon which such action is based, nor the security filed as provided in this chapter shall be referred to in any way, nor constitute any evidence of the negligence or due care of either party at the trial of any action at law to recover damages.

##### **T.C.A. § 62-1-116. ACCOUNTANT-CLIENT PRIVILEGE.**

##### **(a)**

Licensees shall not divulge, nor shall they in any manner be required to divulge, any information which is communicated to them or obtained by them by the reason of the confidential nature of their employment. Such information shall be deemed confidential; provided, that nothing herein shall be construed as prohibiting the disclosure of information

required to be disclosed by the standards of the public accounting profession in reporting on the examination of financial statements or as prohibiting disclosures in investigations or proceedings under this chapter, in ethical investigations conducted by private professional organizations, or in the course of peer reviews, or to other persons active in the organization performing services for that client on a need to know basis or to persons in the entity who need this information for the sole purpose of assuring quality control. Disclosure of confidential information pursuant to this section shall not constitute a waiver of the confidential nature of such information for any other purpose.

(b)

Information derived as a result of such professional employment is deemed to be confidential, except that nothing in any section of this chapter shall be construed as modifying, changing or affecting the criminal or bankruptcy laws of this state or of the United States.

**T.C.A. § 23-3-105. ATTORNEY-CLIENT PRIVILEGE.**

No attorney, solicitor or counselor shall be permitted, in giving testimony against a client, or person who consulted the attorney, solicitor or counselor professionally, to disclose any communication made to the attorney, solicitor or counselor as such by such person, during the pendency of the suit, before or afterwards, to the person's injury.

**T.C.A. § 23-3-107. SAME.**

Any attorney offering to give testimony in any of the cases provided for in [T.C.A. § 23-3-105](#) ... shall be rejected by the court, and such attorney commits a Class C misdemeanor, for which, on conviction, the attorney shall also be stricken from the rolls, if a practicing attorney.

**T.C.A. § 24-1-209. ATTORNEY-INVESTIGATOR PRIVILEGE.**

Communication between an attorney and a private detective or investigator hired by such attorney, while acting in their respective professional capacities shall be privileged communications.

**T.C.A. § 37-1-614. CHILD SEXUAL ABUSE EXCEPTION TO PRIVILEGES.**

The privileged quality of communication between husband and wife and between any professional person and the professional person's patient or client, and any other privileged communication except that between attorney and client, as such communication relates both to the competency of the witness and to the exclusion of confidential communications, shall not apply to any situation involving known or suspected child sexual abuse and shall not constitute grounds for failure to report as required by this part [[T.C.A. § 37-1-605](#)], failure to cooperate with the department in its activities pursuant to this part [[T.C.A. § 37-1-611\(b\)](#)], or failure to give evidence in any judicial proceeding relating to child sexual abuse.

**T.C.A. § 24-1-206. CLERGY-PENITENT PRIVILEGE.**

(a)

(1)

No minister of the gospel, no priest of the Catholic Church, no rector of the Episcopal Church, no ordained rabbi, and no regular minister of religion of any religious organization or denomination usually referred to as a church, over the age of eighteen (18) years, shall be allowed or required in giving testimony as a witness in any litigation, to disclose any



information communicated to that person in a confidential manner, properly entrusted to that person in that person's professional capacity, and necessary to enable that person to discharge the functions of such office according to the usual course of that person's practice or discipline, wherein such person so communicating such information about such person or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted.

(2)

It shall be the duty of the judge of the court wherein such litigation is pending, when such testimony as prohibited in this section is offered, to determine whether or not that person possesses the qualifications which prohibit him from testifying to the communications sought to be proven by that person.

(b)

The prohibition of this section shall not apply to cases where the communicating party, or parties, waives the right so conferred by personal appearance in open court so declaring, or by an affidavit properly sworn to by such a one or ones, before some person authorized to administer oaths, and filed with the court wherein litigation is pending.

(c)

Nothing in this section shall modify or in any way change the law relative to "hearsay testimony."

(d)

Any minister of the gospel, priest of the Catholic Church, rector of the Episcopal Church, ordained rabbi, and any regular minister of religion of any religious organization or denomination usually referred to as a church, who violates the provision of this section, commits a Class C misdemeanor.

#### **T.C.A. 24-1-211(f). DEAF PERSON—INTERPRETER PRIVILEGE.**

Before a qualified interpreter will participate in any proceedings subsequent to an appointment under the provisions of this section, such interpreter shall make an oath or affirmation that such interpreter will make a true interpretation in an understandable manner to the deaf person for whom the interpreter is appointed and that such interpreter will interpret the statements of the deaf person desiring that statements be made, in the English language to the best of such interpreter's skill and judgment. The appointing authority shall provide recess periods as necessary for the interpreter when the interpreter so indicates. Any and all information that the interpreter gathers from the deaf person pertaining to any proceeding then pending shall at all times remain confidential and privileged, or on an equal basis with the attorney-client privilege, unless such deaf person desires that such information be communicated to other persons.

#### **Tenn. S. Ct. Rule 9, § 27.1.<sup>0.1</sup> DISCIPLINARY BOARD-COMPLAINANT PRIVILEGE.**

Communications to the board, hearing committee members or disciplinary counsel relating to lawyer misconduct or disability and testimony given in the proceedings shall be absolutely privileged, and no civil lawsuit predicated thereon may be instituted against any complainant or witnesses. Members of the board, hearing committee members, disciplinary

---

<sup>0.1</sup> This provision is now found at Tenn. S. Ct. Rule 9, 17.

**counsel and staff shall be immune from civil suit for any conduct in the course of their official duties.**

**T.C.A. 24-7-114. LEGISLATIVE COMMITTEE—WITNESS PRIVILEGE.**

**From and after February 20, 1959, without the consent of such witness there shall not be admitted into evidence in any civil proceeding in the courts of this state the testimony of a witness given before any committee of the general assembly of the State of Tennessee, provided such testimony when given was pertinent to the inquiry of such committee or responsive to a question from such committee.**

**QUALITY IMPROVEMENT COMMITTEE PRIVILEGE**

*Tenn. Code Ann. §§ 63-1-150(d)(1) and [68-11-272\(c\)\(1\)](#).*

Records of a QIC [Quality Improvement Committee] and testimony or statements by a healthcare organization's officers or directors, trustees, healthcare providers, administrative staff, employees or other committee members or attendees relating to activities of the QIC shall be confidential and privileged and shall be protected from direct or indirect means of discovery, subpoena or admission into evidence in any judicial or administrative proceeding. Any person who supplies information, testifies or makes statements as part of a QIC may not be required to provide information as to the information, testimony or statements provided to or made before such a committee or opinions formed by such person as a result of committee participation.

*But see Tenn. Code Ann. § 63-1-150(a) (listing statutes to which Section 63-1-150 does not apply).*

**T.C.A. § 24-1-208. NEWS REPORTER'S PRIVILEGE.**

**(a)**

**A person engaged in gathering information for publication or broadcast connected with or employed by the news media or press, or who is independently engaged in gathering information for publication or broadcast, shall not be required by a court, a grand jury, the general assembly, or any administrative body, to disclose before the general assembly or any Tennessee court, grand jury, agency, department, or commission any information or the source of any information procured for publication or broadcast.**

**(b)**

**Subsection (a) shall not apply with respect to the source of any allegedly defamatory information in any case where the defendant in a civil action for defamation asserts a defense based on the source of such information.**

**(c)**

**(1)**

**Any person seeking information or the source thereof protected under this section may apply for an order divesting such protection. Such application shall be made to the judge of the court having jurisdiction over the hearing, action, or other proceeding in which the information sought is pending.**

**(2)**

**The application shall be granted only if the court after hearing the parties determines that the person seeking the information has shown by clear and convincing evidence that:**

(A)

There is probable cause to believe that the person from whom the information is sought has information which is clearly relevant to a specific probable violation of law;

(B)

The person has demonstrated that the information sought cannot reasonably be obtained by alternative means; and

(C)

The person has demonstrated a compelling and overriding public interest of the people of the State of Tennessee in the information.

(3)

(A)

Any order of the trial court may be appealed to the court of appeals in the same manner as other civil cases. The court of appeals shall make an independent determination of the applicability of the standards in this subsection to the facts in the record and shall not accord a presumption of correctness to the trial court's findings.

(B)

The execution of or any proceeding to enforce a judgment divesting the protection of this section shall be stayed pending appeal upon the timely filing of a notice of appeal in accordance with *Rule 3 of the Tennessee Rules of Civil Procedure*, and the appeal shall be expedited upon the docket of the court of appeals upon the application of either party.

(C)

Any order of the court of appeals may be appealed to the Supreme Court of Tennessee as provided by law.

#### **T.C.A. § 63-22-114. PROFESSIONAL COUNSELOR/MARITAL AND FAMILY THERAPIST/CLINICAL PASTORAL THERAPIST-CLIENT PRIVILEGE.**

The confidential relations and communications between licensed marital and family therapists, licensed professional counselors or certified clinical pastoral therapists and clients are placed upon the same basis as those provided by law between attorney and client, and nothing in this part shall be construed to require any such privileged communication to be disclosed. However, nothing contained within this section shall be construed to prevent disclosures of confidential communications in proceedings arising under title 37, chapter 1, part 4 concerning mandatory child abuse reports.

#### **T.C.A. § 24-1-207. PSYCHIATRIST-PATIENT PRIVILEGE.**

(a)

Communications between a patient and a licensed physician when practicing as a psychiatrist in the course of and in connection with a therapeutic counseling relationship regardless of whether the therapy is individual, joint, or group, are privileged in proceedings before judicial and quasi-judicial tribunals. Neither the psychiatrist nor any member of the

**staff may testify or be compelled to testify as to such communications or otherwise reveal them in such proceedings without consent of the patient except:**

**(1)**

**In proceedings in which the patient raises the issue of the patient's mental or emotional condition;**

**(2)**

**In proceedings for which the psychiatrist was ordered by the tribunal to examine the patient if the patient was advised that communications to the psychiatrist would not be privileged, but testimony as to the communications is admissible only on issues involving the patient's mental or emotional condition; and**

**(3)**

**In proceedings to involuntarily hospitalize the patient under § 33-6-103 or § 33-6-104, if the psychiatrist decides that the patient is in need of care and treatment in a residential facility. Unless otherwise ordered by the court, the exception is limited to disclosures necessary to establish that the patient poses a substantial likelihood of serious harm requiring involuntary hospitalization under § 33-6-103 or § 33-6-104.**

**(b)**

**When personally identifiable patient information is to be disclosed in a judicial or quasi-judicial proceeding or any other public proceeding, the authority conducting the proceeding shall take reasonable steps to prevent unnecessary exposure of such information to the public and to further this section's policy of protecting the right of privacy. Such steps may include screening of questions in pre-hearing conferences and in camera inspection of papers.**

**(c)**

**(1)**

**Privileged communications between a patient and a licensed physician when practicing as a psychiatrist in the course of and in connection with a therapeutic counseling relationship, regardless of whether the therapy is individual, joint, or group, may be disclosed without consent of the patient if:**

**(A)**

**Such patient has made an actual threat to physically harm an identifiable victim or victims; and**

**(B)**

**The treating psychiatrist makes a clinical judgment that the patient has the apparent capability to commit such an act and that it is more likely than not that in the near future the patient will carry out the threat.**

**(2)**

The psychiatrist may disclose patient communications to the extent necessary to warn or protect any potential victim. No civil or criminal action shall be instituted, nor shall liability be imposed due to the disclosure of otherwise confidential communications by a psychiatrist pursuant to this sub-section.

**T.C.A. § 63-11-213. PSYCHOLOGIST/PSYCHOLOGICAL EXAMINER-CLIENT PRIVILEGE.**

For the purpose of this chapter, the confidential relations and communications between licensed psychologist or psychological examiner and client are placed upon the same basis as those provided by law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communication to be disclosed.

**T.C.A. § 33-3-114. EXCEPTIONS TO EVIDENTIARY PRIVILEGE OF MENTAL HEALTH PROFESSIONALS.**

Notwithstanding any evidentiary privilege, [sic] a qualified mental health professional may have, including §§ 24-1-207, 63-11-213, 63-22-114, and 63-23-107, the qualified mental health professional may be compelled to testify in:

(1)

Judicial proceedings under this title to commit a person with mental illness, serious emotional disturbance, or developmental disability to treatment if the qualified mental health professional decides that the service recipient is in need of compulsory care and treatment; and

(2)

In proceedings for which the qualified mental health professional was ordered by the court to examine the service recipient if the service recipient was advised that communications to the qualified health professional would not be privileged.

**T.C.A. § 63-23-107.<sup>0.2</sup> SOCIAL WORKER-CLIENT PRIVILEGE.**

(a)

The confidential relations and communications between a client and a certified master social worker, or an independent practitioner of social work holding a valid certificate of registration, as defined in this chapter, are placed upon the same basis as those provided by law between licensed psychologists and psychological examiners and client, and nothing in this chapter shall be construed to require any such privileged communication to be disclosed.

(b)

Nothing contained within this section shall be construed to prevent disclosure of confidential communications in proceedings arising under title 37, chapter 1, part 4 concerning mandatory child abuse reports.

**T.C.A. § 24-1-201. SPOUSAL PRIVILEGE.**

(a)

---

<sup>0.2</sup> Editor's Note: Former § 63-23-107, relating to privileged communications, was transferred to § 63-23-109 by Acts 2008, ch. 1016, § 1, effective July 1, 2008.

In either a civil or criminal proceeding, no married person has privilege to refuse to take the witness stand solely because that person's spouse is a party to the proceeding.

(b)

In a civil proceeding, confidential communications between married persons are privileged and inadmissible if either spouse objects. This communications privilege shall not apply to proceedings between spouses or to proceedings concerning abuse of one (1) of the spouses or abuse of a minor in the custody of or under the dominion and control of either spouse, including, but not limited to, proceedings arising under title 36, chapter 1, part 1 [adoption]; title 37, chapter 1, parts 1 [juvenile courts], 4 [interstate compact on juveniles]; and 6 [child sexual abuse]; title 37, chapter 2, part 4 [foster care]; and title 71, chapter 6, part 1 [protective services for adults]. This confidential communications privilege shall not apply to any insured's obligations under a contract of insurance in civil proceedings.

(c)

(1)

In a criminal proceeding a marital confidential communication shall be privileged if:

(A)

The communications originated in a confidence that they will not be disclosed;

(B)

The element of confidentiality is essential to the full and satisfactory maintenance of the relation between the parties;

(C)

The relation must be one which, in the opinion of the community, ought to be sedulously fostered; and

(D)

The injury to the relation by disclosure of the communications outweighs the benefit gained for the correct disposal of litigation.

(2)

Upon a finding that a marital communication is privileged, it shall be inadmissible if either spouse objects. Such communication privileges shall not apply to proceedings concerning abuse of one (1) of the spouses or abuse of a minor in the custody of or under the dominion and control of either spouse, including, but not limited to proceedings arising under title 37, chapter 1, parts 1 [juvenile courts] and 4 [interstate compact on juveniles]; title 37, chapter 2, part 4 [foster care]; and title 71, chapter 6, part 1 [protective services for adults].

2010 Advisory Commission Comment:

Delete from the 1999 comment the reference to [Tenn. R. Crim. P. 6\(k\)](#), which is not really a privilege.

## 1 Tennessee Law of Evidence § 5.01

Rule 501 expresses the general concept that evidence should ordinarily be made fully available to the trier of fact to facilitate ascertainment of truth. Accordingly, Rule 501 prohibits anyone from refusing to be a witness, to disclose any matter, or to produce any object or writing, and prohibits one person from preventing anyone else from doing these things, unless some other law grants an exception. Exceptions are authorized where a privilege from testifying has been created by statute, common law, constitution, or rules of the Tennessee Supreme Court.<sup>1</sup>

Rule 501, which is the only rule in Tennessee's Article V, contains no specific privileges. In order to assist the practitioner in locating major Tennessee privileges, Rule 501 contains in the Advisory Commission Comment a collection of statutes and court rules providing privileges and one general exception to privileges. Because some of these provisions may have been changed since last updated by the Tennessee Advisory Commission on Court Rules, the practitioner must check the current form of the relevant statute or court rule. Most Tennessee privileges are discussed in subsequent sections of this chapter.<sup>2</sup> This chapter also discusses various Tennessee laws making certain information confidential. Though not formally privileges, these rules bar certain testimony and documents from being introduced in evidence that may be important for the practitioner or judge to know. Constitutional privileges are generally beyond the scope of this book.

### [3] Comparison to Federal Rule 501

Rule 501 of the Tennessee Rules of Evidence varies drastically in format, though not in effect, from the equivalent article in the Federal Rules of Evidence. The latter focuses on the concept of privileges and enumerates a variety of specific confidential communications protected from disclosure.<sup>3</sup> The Tennessee rule specifically provides that testimony must be given unless protected by constitution, statute, common law, or Tennessee Supreme Court rules. Federal Rule 502, adopted in 2008, provides a privilege for materials covered by either the attorney-client privilege or the work product rule.

### [4] Privileges

#### [a] In General

Privileges are policy-based exceptions to the general rule that a witness must testify whenever he or she can provide relevant information. Thus, privileges differ from other evidence rules which ordinarily are designed to provide the trier of fact with evidence that facilitates the ascertainment of truth. The Tennessee Supreme Court has noted that "Tennessee's discovery and evidentiary rules reflect a broad policy favoring discovery of all non-privileged information."<sup>4</sup> Accordingly, Tennessee Evidence Rule 501 "embodies the general concept that evidence should ordinarily be made available to the trier of fact to facilitate the ascertainment of truth."<sup>5</sup> Privileges, on the other hand, often make it more difficult to assess the truth because they may prevent the trier of fact from being presented with crucial, reliable testimony.

Since privileges sometimes interfere with the search for truth, "the rules of evidence generally disfavor privileges in civil proceedings."<sup>6</sup> However, privileges are recognized, despite their impact on truth-finding,

---

<sup>1</sup> See generally, J. Houston Gordon, *Privileged and Confidential Information*, 23 MEM. ST. U. L. REV. 565 (1993).

<sup>2</sup> See below [§§ 5.01\[4\]-5.38](#). See also [Tenn. Code Ann. § 10-7-504](#) (confidentiality of certain records).

<sup>3</sup> FED. [R. Evid. 501](#).

<sup>4</sup> [Lee Medical, Inc. v. Beecher](#), 312 S.W3d 515, 525 (Tenn. 2010).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

when they protect values deemed even more important than the ascertainment of truth.<sup>6.1</sup> But Tennessee courts note that privileges should not be broadly construed since they do impede the search for truth.<sup>7</sup>

Most privileges exist to protect confidential communications between individuals whose relationship is found to have such social significance that its protection is more important than the information the privilege keeps from the trier of fact.<sup>8</sup> In some instances, such as the attorney-client privilege,<sup>9</sup> the privilege exists for the benefit of the individual entitled to claim it. Other types of communications, such as testimony before the legislature<sup>10</sup> or a grand jury,<sup>11</sup> are privileged for a broader benefit, most often for the good of the general public.

### **[b] Holder**

Ordinarily a privilege exists to protect a particular person or relationship. This person is called the *holder* of the privilege. Since the privilege is for the holder's benefit, the privilege can be waived only by the holder or someone acting on the holder's behalf. For example, the attorney-client privilege protects the client's confidential disclosures so that the client can be candid with his or her attorney.<sup>12</sup> The client is the holder of the attorney-client privilege.

Sometimes a privilege benefits the public at large or third parties, such as the peer review privilege under the Healthcare Quality Improvement Act (HQIA).<sup>12.1</sup> In this instance, privilege does not protect an individual "holder," but rather, benefits all who participate in or provide information to a Quality Improvement Committee.

### **[c] Waiver**

Since a privilege exists to protect a person or relationship, the privilege can be waived by the holder of the privilege, who is the person or persons for whom the privilege exists. The holder may waive a privilege in several ways. An *express waiver* occurs when the holder or the holder's representative articulates that the privilege is waived.<sup>12.2</sup> An *implied waiver* occurs if the holder testifies without asserting a known privilege, or

---

<sup>6.1</sup> [\*Pinkard v. HCA Health Servs. of Tenn.\*, 2017 Tenn. App. LEXIS 418 \(Tenn. Ct. App. 2017\)](#) (we recognize privileges "when they protect values deemed even more important than the ascertainment of truth") (*quoting* Neil P. Cohen, Sarah Y. Sheppard & Donald F. Paine, [Tennessee Law of Evidence § 5.01\[4\]\[a\]](#), at 5-12 (6th ed. 2013)).

<sup>7</sup> *Id.* See also [\*Culbertson v. Culbertson\*, 455 S.W.3d 107 \(Tenn. Ct. App. 2014\)](#) (a privilege against compelled disclosure of relevant evidence runs counter to the fundamental theory of the judicial system that the fullest disclosure of the facts will best lead to the truth. For that reason, in general, privileges are construed narrowly in favor of admitting relevant evidence.)

<sup>8</sup> MCCORMICK ON EVIDENCE 131 (6th ed. 2006). See also [\*Culbertson v. Culbertson\*, 455 S.W.3d 107 \(Tenn. Ct. App. 2014\)](#) (the communications privileges are generally considered to be premised on the following conditions: (1) the privileged communications originate in confidence; (2) confidentiality is an essential element of the proper relationship between the parties; (3) the relationship is one that the community wishes to encourage; and (4) the injury caused by damaging the relationship through disclosure of the communications would be greater than the benefit gained).

<sup>9</sup> See below [§ 5.03](#).

<sup>10</sup> See below [§ 5.20](#).

<sup>11</sup> See below [§ 5.18](#).

<sup>12</sup> See below [§ 5.03](#).

<sup>12.1</sup> See, e.g., peer review privilege under the Health Quality Improvement Act, § 63-6-219(e). See below [§ 5.22](#).



fails to object when privileged testimony is sought through discovery or is presented in court. A waiver also occurs for a privilege based on confidential communication if the holder voluntarily discloses the content of the communication to a third party.<sup>13</sup> A waiver may also occur if a patient sues a mental health professional for professional misconduct. The lawsuit constitutes a waiver of any privilege held by the patient.<sup>13.1</sup>

Under Tennessee evidence law, however, a privilege is not waived by an inadvertent disclosure where the holder took both reasonable steps to prevent disclosure and prompt measures to rectify the error of the disclosure.<sup>14</sup> It is also not waived with regard to communications with treating psychologists if the patient introduces reports of court-appointed psychologists.<sup>14.1</sup>

Tennessee courts have also held that waiver should not be permitted if the waiver undermines public policy or impairs the rights of third parties.<sup>14.2</sup>

#### **[d] Burden of Proof**

In most cases a privilege protects an individual, who alone possesses the facts needed to support the existence of the privilege. Accordingly, it is generally held that the party asserting a privilege has the burden of proving that the privilege is applicable.<sup>15</sup> The trial judge ruling on a privilege issue should explain on the record why a privilege does or does not apply, including when relevant the extent of any waiver of the privilege.<sup>15.1</sup>

#### **[e] Strict Construction**

Since a privilege keeps relevant information from the trier of fact, often courts are reluctant to find that a privilege is applicable. These courts typically hold that a privilege is to be strictly construed.<sup>16</sup>

<sup>12.2</sup> See *Culbertson v. Culbertson*, 455 S.W.3d 107 (Tenn. Ct. App. 2014) (waiver of psychologist-client privilege occurs if patient discloses privileged information in testimony; but there was no waiver when patient simply admitted he had mental health condition for which he was being treated and did not disclose content of communications with psychologist).

<sup>13</sup> *State v. Buford*, 216 S.W.3d 323, 326 (Tenn. 2007) (client waived attorney-client privilege by disclosing content of privileged communication while testifying under oath).

<sup>13.1</sup> *Tenn. Code Ann. § 10-7-504(a)(14)* (Supp. 2014).

<sup>14</sup> *Tenn. R. Evid. 502*. See below § 5.40.

<sup>14.1</sup> *Culbertson v. Culbertson*, 455 S.W.3d 107 (Tenn. Ct. App. 2014).

<sup>14.2</sup> In *Powell v. Cmty. Health Sys.*, 312 S.W.3d 496 (Tenn. 2010), the court specifically addressed the right to waive the peer review privilege under former *Tenn. Code Ann. § 63-6-219(e)* (see now §§ 68-11-272 and 63-1-150), but in doing so, commented on the right to waive privileges generally. The court summarized this right as follows: "In the absence of a statute to the contrary, only the person entitled to the benefit of a privilege may waive the privilege. However, the ability to waive a privilege, even a statutory one, is not without limit. Over seventy years ago, we endorsed the principle that 'one may waive by agreement the benefit of a statutory provision, unless public policy or the rights of third parties would be violated.'" See also *Pinkard v. HCA Health Servs. of Tenn.*, 2017 Tenn. App. LEXIS 418, 29, (Tenn. Ct. App. 2017) (quoting Powell: "Under Tennessee law, waiver of a statutory privilege should not be permitted if the waiver undermines public policy or impairs the rights of third parties").

<sup>15</sup> See, e.g., *In re Southern Indus. Banking Corp.*, 35 B.R. 643, 647 (Bankr. E.D. Tenn. 1983) (considering Tennessee law); *Flowers v. Tennessee Trucking Assn. Self Insurance Group Trust*, 209 S.W.3d 602, 616 (Tenn. Ct. App. 2006) (party asserting attorney-client privilege has burden of proving the privilege is applicable). *Johnson v. State*, 2017 Tenn. Crim. App. LEXIS 297 (Tenn. Crim. App. 2017) (marital communications privilege).

<sup>15.1</sup> *Culbertson v. Culbertson*, 393 S.W.3d 678 (Tenn. Ct. App. 2012).

<sup>16</sup> See, e.g., *In re Southern Indus. Banking Corp.*, 35 B.R. 643, 647 (Bankr. E.D. Tenn. 1983) (considering Tennessee law); *Culbertson v. Culbertson*, 455 S.W.3d 107, 130 (Tenn. Ct. App. 2014).

**[f] Universal Applicability**

Because of the social importance of the values protected by privileges and the fact that these values would often be compromised if the privileged information were revealed in any place, Tennessee law makes privileges applicable in virtually all forums. Thus, [\*Rule 104\(a\) of the Tennessee Rules of Evidence\*](#) specifically provides that the rules of evidence, *except for privileges*, do not apply when the trial judge has a hearing to resolve preliminary questions about the admissibility of evidence, the qualifications of a witness, or the existence of a privilege.

**[g] Liability for Wrongful Disclosure**

If information protected by a privilege is wrongfully disclosed in court, it is possible that a civil action could be maintained to redress the wrong. This action could be based on such theories as breach of implied contract.<sup>17</sup> Such disclosure is not actionable, however, if it occurred under court order. In *Guity v. Kandilakis*,<sup>18</sup> a trial court erroneously ordered a psychologist to testify about information the psychologist had obtained while conducting marital counseling with a couple who were later involved in a divorce proceeding. Noting that the psychologist only testified because erroneously ordered to do so by the trial court, the appellate court held that the psychologist was immune from suit based on the wrongful disclosure.

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>17</sup> Cf. [\*Quarles v. Sutherland\*, 215 Tenn. 651, 389 S.W.2d 249 \(1965\)](#) (possible remedy for physician's wrongful disclosure of confidential information is civil suit for breach of implied contract).

<sup>18</sup> [\*821 S.W.2d 595 \(Tenn. Ct. App. 1991\)\*](#).

## 1 Tennessee Law of Evidence § 5.02

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE—PRIVILEGES**

#### **§ 5.02 Fifth Amendment Privilege**

---

Although constitutional privileges are beyond the reach of this book, a line of Tennessee cases on the subject bears mention. It is hornbook law that the [Fifth Amendment](#) protects against compulsory self-incrimination.<sup>19</sup> This privilege is personal and cannot be vicariously asserted.<sup>20</sup> An accused lacks standing to assert the [Fifth Amendment](#) rights of a third party.<sup>21</sup>

When a witness indicates that he or she will assert the [Fifth Amendment](#) to decline to answer certain questions, long-standing Tennessee authority holds that neither the defendant nor the prosecution should benefit from any inferences a criminal jury may draw when a witness asserts his or her [Fifth Amendment](#) privilege against self-incrimination.<sup>22</sup> Accordingly, the prosecution may not deliberately call a witness closely identified with the defendant if the prosecution knows that the witness will assert his or her [Fifth Amendment](#) right to remain silent.<sup>23</sup>

When a witness erroneously is called to the stand to assert the [Fifth Amendment](#), Tennessee does not necessarily require a reversal in every case. Rather, Tennessee follows federal authority<sup>24</sup> in considering two general factors to determine whether a conviction should be reversed.<sup>25</sup> First, courts assess the degree of prosecutorial misconduct. Did the district attorney make a conscious and flagrant attempt to bolster the government's case by use of inferences arising from the witness's assertion of the [Fifth Amendment](#) privilege? Second, was the defendant unfairly prejudiced because the assertion of the privilege added weight to the prosecution's case in a manner that could not be countered by cross examination? In assessing these two factors, Tennessee courts look at six more detailed factors: the prosecutor's intent in calling the witness, the number of questions that were not answered because of the assertion of the privilege, whether either side attempted to draw inferences from the refusal to testify, whether the inferences relate to central or collateral issues, whether the inferences constitute the only evidence on the issue, and whether the court gave curative instructions.<sup>26</sup>

---

<sup>19</sup> See [Miranda v. Arizona](#), 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The privilege may be asserted during sentencing proceedings. [State v. Souder](#), 105 S.W.3d 602, 608 (Tenn. Crim. App. 2002).

<sup>20</sup> [Rogers v. United States](#), 340 U.S. 367, 71 S. Ct. 438, 95 L. Ed. 344 (1951).

<sup>21</sup> [State v. Austin](#), 87 S.W.3d 447 (Tenn. 2002) (affirming opinion of Tenn. Ct. Crim. App.).

<sup>22</sup> [State v. Dicks](#), 615 S.W.2d 126 (Tenn. 1981). See also [State v. Butler](#), 880 S.W.2d 395 (Tenn. Crim. App. 1994).

<sup>23</sup> [State v. Maraschiello](#), 88 S.W.3d 586, 607 (Tenn. Crim. App. 2000) (citing [Busby v. Holt](#), 781 F.2d 1475, 1477 (11th Cir. 1986)).

<sup>24</sup> [Namer v. United States](#), 373 U.S. 179, 83 S. Ct. 1151, 10 L. Ed. 2d 278 (1963).

<sup>25</sup> [State v. Maraschiello](#), 88 S.W.3d 586, 607 (Tenn. Crim. App. 2000).

<sup>26</sup> *Id.*

## 1 Tennessee Law of Evidence § 5.02

When a witness's [Fifth Amendment](#) privilege against self-incrimination conflicts with the defendant's right to compulsory process, the right against self-incrimination is the "stronger and paramount right."<sup>26.1</sup>

A statement made during a custodial interrogation is inadmissible at trial unless the State can establish a knowing, voluntary waiver of Miranda rights.<sup>26.2</sup> The State bears the burden of establishing waiver by a preponderance of the evidence.<sup>26.3</sup> Although the State need not show that the waiver was express,<sup>26.4</sup> the giving of an uncoerced statement following the provision of Miranda warnings, standing alone, is insufficient to demonstrate an implied waiver;<sup>26.5</sup> the State must also establish that a *Miranda* warning was given and that it was understood.<sup>26.6</sup>

In parental termination cases, the court is permitted to draw a negative inference from a witness's invocation of his or her [Fifth Amendment](#) right.<sup>26.7</sup>

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>26.1</sup> [State v. Dicks, 615 S.W.2d 126, 129 \(Tenn. 1981\)](#). See also, [State v. Campbell, 2020 Tenn. Crim. App. LEXIS 294 \(Tenn. Crim. App. Apr. 24, 2020\)](#) (where defendant claimed that the trial court denied him his right to compulsory process by allowing the officer to invoke his [Fifth Amendment](#) right; the Court of Criminal Appeals held that the trial court did not commit error in allowing the privilege to be invoked, since (1) the officer's testimony related to events that occurred *after* the defendant shot the victim, and (2) there was overwhelming proof as to what happened before and during the shooting).

<sup>26.2</sup> [State v. Massengale, 2019 Tenn. Crim. App. LEXIS 290 \(Tenn. Crim. App. 2019\)](#). See also, [North Carolina v. Butler, 441 U.S. 369, 99 S. Ct. 1755 \(1979\)](#) (the State "bears a heavy burden" in demonstrating that a defendant knowingly and intelligently waived the privilege against self-incrimination and the right to retain or be appointed counsel); [Colorado v. Spring, 479 U.S. 564 \(1987\)](#) (*Miranda* requires that the a suspect be "fully advised" of their [Fifth Amendment](#) privilege).

<sup>26.3</sup> [State v. Massengale, 2019 Tenn. Crim. App. LEXIS 290 \(Tenn. Crim. App. 2019\)](#).

<sup>26.4</sup> An implicit waiver of the right to remain silent is sufficient to admit a suspect's statement into evidence. *Id.* See also, [Berghuis v. Thompkins, 560 U.S. 370 \(2010\)](#). To establish an implied waiver of the right to remain silent, the State must show that a *Miranda* warning was given and that it was understood by the accused. [Berghuis v. Thompkins, 560 U.S. 370, 130 S. Ct. 2250 \(2010\)](#). [State v. Massengale, 2019 Tenn. Crim. App. LEXIS 290 \(Tenn. Crim. App. 2019\)](#). No formal procedure is required to waive Miranda rights. [State v. Massengale, 2019 Tenn. Crim. App. LEXIS 290 \(Tenn. Crim. App. 2019\)](#). See also, [Berghuis v. Thompkins, 560 U.S. 370 \(2010\)](#). But waiver will be presumed when a person acts in a way that is inconsistent with an exercise of those rights. [State v. Massengale, 2019 Tenn. Crim. App. LEXIS 290 \(Tenn. Crim. App. 2019\)](#). See also, [Berghuis v. Thompkins, 560 U.S. 370 \(2010\)](#).

<sup>26.5</sup> [State v. Massengale, 2019 Tenn. Crim. App. LEXIS 290 \(Tenn. Crim. App. 2019\)](#), *quoting* [Miranda v. Arizona, 384 U.S. 436, 475 \(1966\)](#).

<sup>26.6</sup> Waiver of *Miranda* rights may be implied by a suspect's "silence, coupled with an understanding of [the suspect's] rights and a course of conduct indicating waiver," but waiver will not be presumed "merely from the silence of the accused after warnings are given, or simply from the fact that a confession was in fact eventually obtained". [State v. Massengale, 2019 Tenn. Crim. App. LEXIS 290 \(Tenn. Crim. App. May 2, 2019\)](#) (*quoting* [Berghuis v. Thompkins, 560 U.S. 370 \(2010\)](#)).

<sup>26.7</sup> [In re Jeremiah S., 2020 Tenn. App. LEXIS 177, \\*17 \(Tenn. Ct. App. Apr. 23, 2020\)](#) (where mother invoked her [Fifth Amendment](#) right against self-incrimination when asked about her children's injuries, the court drew a negative inference). See also [In re Nickolas E., 2010 Tenn. App. LEXIS 106 \(Tenn. Ct. App. Feb. 9, 2010\)](#) (in parental termination proceedings, there is "no constitutional infirmity" when the trial court draws a negative inference from a parent not testifying).

## **1 Tennessee Law of Evidence § 5.03**

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE— PRIVILEGES**

## **§ 5.03 Attorney-Client Privilege**

---

### **[1] In General**

#### **[a] Policy**

The relationship between attorney and client is considered to be the one worthy of the greatest protection. Tennessee lawyers have substantial ethical obligations to protect their clients' confidences.<sup>27</sup> In addition to this ethical duty, under Tennessee law, communications between attorney and client are privileged<sup>28</sup> in order to encourage full communications between the two.<sup>28.1</sup> A client, especially a defendant, would be less likely to divulge the entire truth to counsel if the statements could be used against him or her during the course of the proceedings. Without an accurate disclosure of the facts, an attorney cannot provide the best possible representation of the client.

#### **[b] Rules of Professional Conduct**

The Tennessee Rules of Professional Conduct, adopted by the Tennessee Supreme Court in 2002, contain a detailed approach to the issue of client confidentiality. Rule 1.6<sup>29</sup> prohibits an attorney from revealing information regarding the representation of a client, absent the client's consent<sup>29.1</sup> after consultation, except in limited circumstances.<sup>30</sup> While the concept of attorney-client privilege applies to those situations in which an attorney might be called upon to testify or give evidence against a client, such as a judicial proceeding, the scope of Rule 1.6 is significantly more broad, also encompassing confidentiality in all aspects of the attorney's professional relationship with the client.<sup>31</sup> However, the policies set forth in Rule 1.6 and its comments are applicable to the privilege issue. Although there has been little case law since the

---

<sup>27</sup> See Tenn. S. Ct. R. 8, R.P.C. 1.6 (2011) (confidentiality).

<sup>28</sup> [Tenn. Code Ann. § 23-3-105](#) (2009); Tenn. S. Ct. R. 8, R.P.C. 1.6 (2011) (confidentiality). See generally PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES October 27, 2000 (2d ed. 1999). See also FED. [R. EVID. 502](#) (attorney-client privilege).

<sup>28.1</sup> [Dialysis Clinic, Inc. v. Medley](#), 567 S.W.3d 314 (Tenn. 2019).

<sup>29</sup> Tenn. S. Ct. R. 8, R.P.C. 1.6. (2011). Rule 1.6 was amended by order filed March 6, 2017, effective upon filing.

<sup>29.1</sup> Tenn. S. Ct. R. 8, R.P.C. 1.9(c). See also [In re Vogel](#), 482 S.W.3d 520 (Tenn. 2016), (because the attorney failed to get informed consent under R.P.C. 1.9(c), he was only allowed to disclose confidential information to the extent R.P.C. 1.6 authorized the disclosure).

<sup>30</sup> Tenn. S. Ct. R. 8, R.P.C. 1.6. See also [Runyon v. Zacharias](#), 556 S.W.3d 732, 2018 Tenn. App. LEXIS 26 (Tenn. Ct. App. Jan. 23, 2018) (no violation of Tenn. Sup. Ct. R. 8, R.P.C. 1.6 where the appointment order for a guardian ad litem expressly authorized disclosure of information to the court); [Hartman v. Cunningham](#), 217 S.W.3d 408, 2006 Tenn. App. LEXIS 709 (Tenn. Ct. App. 2006), appeal denied, [S.W.3d](#), 2007 Tenn. LEXIS 186 (Tenn. 2007) (where an attorney filed an affidavit in response to his client's allegation of malpractice, which arose in another proceeding; the affidavit did not violate Tenn. Sup. Ct. R. 8, R.P.C. 1.6(b), since the attorney reasonably believed that disclosure was necessary to defend against the allegation).

<sup>31</sup> Tenn. S. Ct. R. 8, R.P.C. 1.6 (Comment 5).

implementation of the ethics rules, it is reasonable to assume that these ethical concepts will carry over into future court decisions regarding the issue of attorney client privilege.

### **[c] Attorney-Client Relationship**

In order for communications between an attorney and a client to be privileged, the relationship of attorney and client must have been established between them,<sup>31.1</sup> although it is not necessary that litigation be pending or anticipated.<sup>32</sup> Indeed, the attorney-client privilege exists irrespective of the payment of a retainer or fee. The key is whether the lawyer was consulted in a professional capacity. The Tennessee privilege statute applies to “a client, or person who consulted the attorney, solicitor, or counselor professionally.”<sup>33</sup> If the client simply seeks general legal information, the privilege may not apply.<sup>34</sup>

An interesting issue arose in *State v. Jackson*.<sup>34.1</sup> A lawyer, who was a friend of the homicide victim, went to the scene of a murder and spoke with the defendant. The defendant said she talked with the lawyer because of the latter’s occupation. On the other hand, the lawyer repeatedly told the defendant that the lawyer was not acting as defendant’s attorney. The Tennessee Supreme Court upheld the trial court’s finding that there was no attorney-client relationship because the defendant had “no reasonable belief or expectation” that counsel “had assented” to the formation of an attorney-client relationship.

Once the privilege exists, it continues after the attorney-client relationship has ended.<sup>35</sup>

The attorney-client privilege generally does not protect communications between attorneys and clients that take place in the presence of a third party or are divulged to a third party. But when the third party is an agent of the client, the privilege applies.<sup>35.1</sup> In *Dialysis Clinic, Inc., v. Medley*,<sup>35.2</sup> the Tennessee Supreme Court applied the “functional equivalent” test<sup>35.3</sup> to hold that communications between a corporation’s in-

<sup>31.1</sup> See, e.g., *Diemoz v. Huneycutt*, 2020 Tenn. App. LEXIS 204 (Tenn. Ct. App. May 6, 2020) (since counsel was not licensed to practice law prior to the filing of the lawsuit, her discussions with plaintiffs prior to her licensure were exempt from the attorney-client privilege; moreover, since she was a necessary fact witness on the issue of when construction defects arose, the trial court properly disqualified her from serving as plaintiffs’ counsel under Tenn. Sup. Ct. R. 8, R.P.C. 3.7).

<sup>32</sup> See *McMannus v. State*, 39 Tenn. 213 (1858). See also *State v. Jones*, 2016 Tenn. Crim. App. LEXIS 282 (Tenn. Crim. App. 2016), appeal denied and opinion ordered not published by *State v. Jones*, 2016 Tenn. LEXIS 642 (Sep. 22, 2016) (attorney-client relationship not established where inmate, who was not an attorney, assisted other inmates in filing legal motions did not tell the defendant he was an attorney; court noted that “there is simply no precedent for extending the attorney-client privilege to communications between a defendant and someone who is not actually an attorney ... [and] [t]o hold otherwise would open the floodgates for the assertion of the privilege and minimize the importance of a true attorney-client relationship”).

<sup>33</sup> *Tenn. Code Ann. § 23-3-105* (2009). See also, *Dialysis Clinic, Inc. v. Medley*, 567 S.W.3d 314 (Tenn. 2019) (whether the privilege codified at *Tenn. Code Ann. § 23-3-105* applies to a communication is “necessarily question, topic and case specific”).

<sup>34</sup> *McMannus v. State*, 39 Tenn. 213, 216 (1858). The court may have given too little weight to the fact that the client had come to see a particular lawyer and talked with another lawyer because the first lawyer was absent.

<sup>34.1</sup> *State v. Jackson*, 444 S.W.3d 554 (Tenn. 2014).

<sup>35</sup> *Lang v. Ingalls Zinc Co.*, 49 S.W. 288, 295 (Tenn. Ch. App. 1898). See also Tenn. S. Ct. R. 8, Rule 1.6, Comment 20 and Tenn. S. Ct. R. 8, Rule 1.9(c) (2011).

<sup>35.1</sup> *Dialysis Clinic, Inc. v. Medley*, 567 S.W.3d 314 (Tenn. 2019); *Waste Admin. Servs. v. Krystal Co.*, 2018 Tenn. App. LEXIS 568 (Tenn. Ct. App. 2018).

<sup>35.2</sup> *Dialysis Clinic, Inc. v. Medley*, 567 S.W.3d 314 (Tenn. 2019).

<sup>35.3</sup> Under the “functional equivalent” test, a court may consider the following non-exclusive factors: (1) whether the nonemployee performs a specific role on behalf of the entity; (2) whether the nonemployee acts as a representative of the entity in interactions



house legal counsel and the corporation's property management company were protected under the attorney-client privilege, because the property management company was the functional equivalent of an employee of the corporation, the communications related to the subject matter of counsel's representation of the corporation, and the communications were made with the intention that they would be kept confidential.

#### **[d] Waiver**

Since the privilege belongs to the client rather than the attorney and is for the client's protection, the client is the holder of the privilege and can waive it.<sup>36</sup> It logically follows that the attorney has no authority to waive the privilege, absent the client's consent.

#### **[e] Burden of Proof and Appellate Review**

A trial court's decisions concerning the attorney-client privilege and the work product doctrine are reviewed on appeal using an abuse of discretion standard.<sup>37</sup> The party asserting the attorney-client privilege has the burden of establishing its existence,<sup>38</sup> and there is a presumption that communications with an attorney are made for the sake of legal advice.<sup>37.1</sup>

#### **[f] Survival After Client's Death**

Little is found in Tennessee law regarding whether, and under what circumstances, the attorney-client privilege survives the client's death. The United States Supreme Court, analyzing Federal Rule 501, held

---

with other people or other entities; (3) whether, as a result of performing its role, the nonemployee possesses information no one else has; (4) whether the nonemployee is authorized by the entity to communicate with its attorneys on matters within the nonemployee's scope of work to facilitate the attorney's representation of the entity; and (5) whether the nonemployee's communications with the entity's attorneys are treated as confidential. If a court determines that a nonemployee's communications qualify for the attorney-client privilege because the nonemployee is the functional equivalent of an employee, then the court should, on a case-by-case, communication-by-communication basis, determine whether the communication involves the subject matter of counsel's representation of the entity and whether the communication was made with the intent that the communication be kept confidential. *Id.* See also, [Waste Admin. Servs. v. Krystal Co., 2018 Tenn. App. LEXIS 568 \(Ct. App. 2018\)](#) (finding vendor's employee was the functional equivalent of defendant's employee when he was told by defendant's president to "take the lead" on defendant's dealings with plaintiff and, therefore, the vendor's employee's subsequent communications with the defendant's chief legal officer might be privileged; case was remanded for additional findings consistent with the court's ruling).

<sup>36</sup> See, e.g., [State v. Arnold, 719 S.W.2d 543 \(Tenn. Crim. App. 1986\)](#); [Smith Cty. Educ. Ass'n v. Anderson, 676 S.W.2d 328, 333 \(Tenn. 1984\)](#). It is important to know who the client is in order to determine who can assert the privilege. If an insurance company, pursuant to the insurance policy, pays a lawyer to represent an insured person or business organization, the person or organization is the client; the insurance company is not and cannot assert the attorney-client privilege to prevent the insured from receiving correspondence from the lawyer to the insurance company. [Blaylock & Brown Constr. v. AIU Ins. Co., 796 S.W.2d 146, 155 \(Tenn. Ct. App. 1990\)](#). See also [Boyd v. Comdata Network, Inc., 88 S.W.3d 203 \(Tenn. Ct. App. 2002\)](#) (attorney-client privilege belongs to client, who may waive it); [Culbertson v. Culbertson, 393 S.W.3d 678, 684 \(Tenn. Ct. App. 2012\)](#) (attorney-client privilege protects the client who may waive it).

<sup>37</sup> [Dialysis Clinic, Inc. v. Medley, 567 S.W.3d 314 \(Tenn. 2019\)](#); [Boyd v. Comdata Network, Inc., 88 S.W.3d 203 \(Tenn. Ct. App. 2002\)](#).

<sup>38</sup> See, e.g., [Flowers v. Tennessee Trucking Assn. Self Insurance Group Trust, 209 S.W.3d 602, 616 \(Tenn. Ct. App. 2006\)](#); [Culbertson v. Culbertson, 393 S.W.3d 678, 684 \(Tenn. Ct. App. 2012\)](#) (burden is on client to establish communications were made pursuant to an attorney-client relationship and with the intention that the communications remain confidential). See also [Pagliara v. Pagliara, 2020 Tenn. App. LEXIS 299 \(Ct. App. June 29, 2020\)](#) (same; wife did not meet her burden where she could not identify the specific attorney meetings in which third party was present, and thus, failed to meet her burden of proving the attorney-client privilege applied to all of the meetings).

<sup>37.1</sup> [Dialysis Clinic, Inc. v. Medley, 567 S.W.3d 314 \(Tenn. 2019\)](#).

that the privilege survives the client's death.<sup>39</sup> The Court found a client's ability to know that communications will remain confidential, even posthumously, will encourage a client to communicate fully and frankly with counsel. The same result has occurred under Tennessee law.

In *Estate of Queener v. Helton*,<sup>40</sup> three individuals filed claims against the estate of an intestate decedent, under a variety of theories. All three claimants were beneficiaries under a draft of a will prepared by decedent's attorney pursuant to conversations with the decedent. However, the decedent died prior to executing the will. The trial court permitted the testimony of the attorney, and admitted a copy of the draft will into evidence. The Court of Appeals reversed, finding that the attorney-client privilege survives death,<sup>41</sup> but the court also recognized an exception for decedent's statements to counsel regarding the drafting and execution of a will in a suit between devisees under the will.<sup>42</sup> In *Estate of Queener*, however, the exception failed to apply because there was no signed will being probated. Thus, the general attorney-client privilege law applied, and the attorney's conversations and draft document were inadmissible, constituting privileged communications between attorney and client that survived the client's death.

### **[g] Common or Joint Interests**

The attorney client privilege has also been extended to confidential communications shared among people with a common or at least similar interest in order to permit them to set up a common defense.<sup>43</sup> Courts look at the actual or potential relationship of the parties rather than any formal alignment. The purpose of this application of the attorney client privilege, sometimes called the common or joint defense privilege, is to facilitate the free flow of information necessary for sound legal advice to avoid or deal with likely or pending litigation.

In Tennessee the common interest privilege covers communications and documents generated during the period of time that there was cooperation on a common defense, but it also embraces pre-existing communications and documents shared during the common efforts.<sup>44</sup> Accordingly, a court considering a common interest privilege must look at the circumstances surrounding the disclosure rather than on when the documents were generated.<sup>45</sup> A lawyer's affidavit is admissible to establish the elements of this

---

<sup>39</sup> [\*Swidler & Berlin v. United States\*, 524 U.S. 399, 118 S.Ct. 2081, 141 L.Ed.2d 379 \(1998\).](#)

<sup>40</sup> [\*119 S.W.3d 682 \(Tenn. Ct. App. 2003\).\*](#)

<sup>41</sup> [\*Id.\* at 685–86.](#)

<sup>42</sup> *Id.*, citing [\*Glover v. Patten\*, 165 U.S. 394, 17 S. Ct. 411, 41 L. Ed. 760 \(1897\)](#), and [\*Estate of Hamilton v. Morris\*, 67 S.W.3d 786 \(Tenn. Ct. App. 2001\)](#). See also [\*In re Estate of Morrison\*, 2015 Tenn. App. LEXIS 327 \(Tenn. Ct. App. 2015\)](#) (applying the reasoning of *Estate of Hamilton* to be equally applicable where subsequent legal controversy involved two potential beneficiaries of decedent's property; former attorney presented testimony concerning decedent's intent in executing documents in order to substantiate decedent's desires regarding his property rather than attack the validity of the documents or otherwise thwart the decedent's wishes and, therefore, the appellate court held the trial court did not err in allowing attorney's testimony to be admitted).

<sup>43</sup> See, e.g., [\*Royal Surplus Lines Ins. v. Sofamor Danek Group\*, 190 F.R.D. 463, 472 \(W.D. Tenn. 1999\)](#); [\*Boyd v. Comdata Network, Inc.\*, 88 S.W.3d 203 \(Tenn. Ct. App. 2002\)](#) (Tennessee recognizes the common interest privilege as an extension of the attorney-client privilege; purpose is to encourage free flow of information among attorneys for parties sharing a common interest in litigation).

<sup>44</sup> [\*Boyd v. Comdata Network, Inc.\*, 88 S.W.3d 203 \(Tenn. Ct. App. 2002\).](#)

<sup>45</sup> *Id.*



privilege.<sup>46</sup> But no formal agreement among the parties is necessary; indeed, a formal agreement concerning a joint defense may itself be privileged.<sup>47</sup>

## [2] Exclusions

### [a] Reflect Client's Disclosures to Lawyer

While the client's confidential statements to counsel are privileged, that protection does not extend to statements made by the attorney to the client, except to the extent that the lawyer's statements reflect the essence of the client's disclosures.<sup>48</sup> For example, the attorney's statement, "What did you do after you shot Mr. Smith?" is privileged because it reveals the client's admission of shooting the victim. The attorney's disclosure of the attorney's own misconduct to the client is not privileged.

### [b] Intended to be Confidential

Not all communications from the client to the attorney are protected from disclosure. Only those communications that are intended to be confidential receive this protection.<sup>49</sup> Since the attorney-client privilege applies only to communications *intended* to be confidential, Tennessee courts have looked to whether the client wanted confidentiality when the communication was made. In *Hazlett v. Bryant*,<sup>50</sup> for example, a hospitalized client executed a deed of gift with her attorney. During this transaction, the client told her lawyer of her intent to give certain property, supposedly covered by the deed, to her husband. The Tennessee Supreme Court held that the attorney-client privilege did not bar the attorney from revealing the information provided by the client since the client did not intend for the communication to be confidential. The *Hazlett* court found the client's intent by focusing on the fact that the client wanted the executed deed delivered to her husband and registered in the public records office.

Obviously, statements made in public or in the presence of a third party are not covered because they are not intended to be confidential unless the third party is an agent of the client<sup>51</sup> or the attorney. For example, a niece's presence during a conversation between an aunt and the aunt's attorney was held to be sufficient

---

<sup>46</sup> [Id. at 215 n.18.](#)

<sup>47</sup> *Id.*

<sup>48</sup> See, e.g., [Dialysis Clinic, Inc. v. Medley](#), 567 S.W.3d 314 (Tenn. 2019) (attorney-client privilege protects both the client's communications to the attorney and the attorney's communications to the client when the communications are based on the client's communications, or when disclosure of the attorney's communications would reveal the substance of the client's communications); [Smith Cty. Educ. Ass'n v. Anderson](#), 676 S.W.2d 328, 333 (Tenn. 1984); [State v. Buford](#), 216 S.W.3d 323, 326 (Tenn. 2007) (while the Tennessee attorney-client privilege protects privileged communications made to the lawyer, under some circumstances it also protects communications made by the attorney to the client to the extent that the lawyer's communications were based upon a client's confidential communications or would otherwise, if disclosed, reveal the nature of a confidential communication).

<sup>49</sup> See, e.g., [In re Southern Indus. Banking Corp.](#), 35 B.R. 643 (Bankr. Tenn. 1983); [Dialysis Clinic, Inc. v. Medley](#), 567 S.W.3d 314 (Tenn. 2019) (for privilege to apply, the communication must involve the subject matter of the representation and must be made with the intention that the communication will be kept confidential); [Flowers v. Tennessee Trucking Assn. Self Insurance Group Trust](#), 209 S.W.3d 602, 616 (Tenn. Ct. App. 2006) (communication protected by the attorney-client privilege must be made with the intention that the communication will be kept confidential).

<sup>50</sup> [192 Tenn. 251, 241 S.W.2d 121 \(1951\).](#)

<sup>51</sup> See [Smith Cty. Educ. Ass'n v. Anderson](#), 676 S.W.2d 328 (Tenn. 1984). See also [Royal Surplus Lines Ins. v. Sofamor Danek Group](#), 190 F.R.D. 463 (W.D. Tenn. 1999); [State v. Buford](#), 216 S.W.3d 323, 326 (Tenn. 2007) (client waived attorney-client privilege by disclosing content of privileged communication while testifying under oath; client therefore voluntarily disclosed to third parties the content of the confidential communication).

to destroy the confidentiality requirement of the attorney-client privilege.<sup>52</sup> The practitioner should be cautious of conducting a client interview in which the client is accompanied by another individual who is neither a party or the lawyer's assistant. The client's communications to counsel in the presence of such a third party are not privileged.<sup>52.1</sup>

A client may also waive the privilege by disclosing the confidential information after it was originally protected by the attorney-client privilege. This may occur in a later legal proceeding<sup>52.2</sup> or at any other time when the context indicates that the privilege does not apply.

### **[c] Subject Matter of Statement**

In Tennessee, there is a presumption that communications with an attorney are made for the sake of legal advice.<sup>52.3</sup> Sometimes, however, the subject of a communication or information is deemed to be outside the scope of the attorney-client privilege. For example, statements unrelated to the legal advice being sought are not covered by the privilege.<sup>53</sup> Advice about a future crime was held to not be privileged if the crime occurred.<sup>54</sup> Under Tennessee Rule of Professional Conduct 1.6 (c), a lawyer is required to reveal information he or she reasonably believes is necessary to prevent reasonably certain death or substantial bodily harm.<sup>55</sup> In most cases, the fact of employment and the identity of the client,<sup>56</sup> the amount paid in attorney's fees and the date upon which services were rendered,<sup>57</sup> are not privileged and are subject to disclosure. An attorney may sometimes be required to identify the client's handwriting, and to state what money the attorney collected and paid, and to whom it was paid.<sup>58</sup> However, if unusual circumstances are present and the disclosure of information will actually reveal confidential communications, Tennessee

---

<sup>52</sup> [Hazlett v. Bryant, 192 Tenn. 251, 257, 241 S.W.2d 121, 123 \(1951\).](#)

<sup>52.1</sup> See, e.g., [Pagliara v. Pagliara, 2020 Tenn. App. LEXIS 299 \(Tenn. Ct. App. June 29, 2020\)](#) (where wife met with attorneys and a third party, but could not remember which specific meetings the person had attended with her, the court rejected her contention that all of the meetings with her attorneys were covered by the attorney-client privilege; since she could not identify the specific meetings at issue, she did not meet her burden of establishing that the communications were made pursuant to the attorney-client relationship and with the intention that the communications remain confidential).

<sup>52.2</sup> [State v. Buford, 216 S.W.3d 323 \(Tenn. 2007\)](#) (client disclosed confidential communication in subsequent hearing); [Culbertson v. Culbertson, 393 S.W.3d 678, 684 \(Tenn. Ct. App. 2012\)](#) (client waives attorney-client privilege when he or she divulges the communications).

<sup>52.3</sup> [Dialysis Clinic, Inc. v. Medley, 567 S.W.3d 314 \(Tenn. 2019\).](#)

<sup>53</sup> See, e.g., [Jackson v. State, 155 Tenn. 371, 293 S.W. 539 \(1927\)](#) (threat to have brother whip someone not protected by attorney-client privilege); [Flowers v. Tennessee Trucking Assn. Self Insurance Group Trust, 209 S.W.3d 602, 616 \(Tenn. Ct. App. 2006\)](#) (communication protected by the attorney-client privilege must involve the subject matter of the representation). See also [Nieves v. Baptist Mem. Med. Grp., Inc., 2020 U.S. Dist. LEXIS 109742 \(W.D. Tenn. June 23, 2020\)](#) (communications between an attorney and client of "primarily a business nature" do not fall within the privilege).

<sup>54</sup> [McMannus v. State, 39 Tenn. 213 \(1858\).](#)

<sup>55</sup> T. S. Ct. R. 8, R.P.C. 1.6 (c) (1) (2011).

<sup>56</sup> See [State v. Bobo, 724 S.W.2d 760, 765 \(Tenn. Crim. App. 1981\)](#) (identity of client must be disclosed).

<sup>57</sup> See [Humphreys, Hutcheson & Moseley v. Donovan, 568 F. Supp. 161, 175 \(M.D. Tenn. 1983\)](#), *aff'd*, [755 F.2d 1211 \(6th Cir. 1985\).](#)

<sup>58</sup> [Johnson v. Patterson, 81 Tenn. 626, 649 \(1884\).](#)

## 1 Tennessee Law of Evidence § 5.03

courts have indicated a willingness to invoke the attorney-client privilege to bar disclosure of such information.<sup>59</sup>

Where the evidence demonstrates that the subject matter of the communication or documents is directly related to issues raised in subsequent litigation, the attorney-client privilege applies and such evidence will be held inadmissible.<sup>59.1</sup>

#### **[d] Litigation Involving Attorney**

Tennessee authorities have also excepted the attorney-client privilege when the attorney is personally involved in litigation stemming from the provision of legal services.<sup>60</sup> Thus, the privilege would not bar the attorney from testifying in defense of a legal malpractice case or in order to obtain fees earned while representing the client. Similarly, when a criminal defendant challenges a conviction on the basis of ineffective assistance of counsel, the privilege is waived, at least to the extent necessary to address the issue. The client is not permitted to give one version of communications between the client and the attorney, while implementing the privilege as a shield to prevent the attorney from telling his or her side of the event or conversation.<sup>61</sup>

#### **[e] Testamentary Issues**

Another exception to the attorney-client privilege is the so-called testamentary exception. In order to help establish the intent of a testatrix or testator, Tennessee law permits a lawyer to testify about statements by the deceased to the lawyer-witness concerning the execution of the will or other similar document.<sup>62</sup> However, it appears that a valid will is a precursor to the successful exercise of this exception.<sup>63</sup>

### **[3] Open Meetings Law**

The Tennessee open meetings law<sup>64</sup> requires that all meetings of a public body must be public meetings, unless the Tennessee Constitution provides otherwise.<sup>65</sup> This rule could seriously interfere with a public body's

<sup>59</sup> See [State v. Bobo, 724 S.W.2d 760, 766 \(Tenn. Crim. App. 1981\)](#) (identity of client).

<sup>59.1</sup> See, e.g., [Davidson v. Bredesen, Tenn. App. LEXIS 708 \(Tenn. Ct. App. 2013\)](#) (in a protestor's civil rights action against the former governor and deputy governor, alleging retaliation for the exercise of protestor's [First Amendment](#) rights, the attorney client privilege applied to certain documents created by the governor's legal counsel because the documents specifically related to the attorney's analysis of questions presented by the governor, issues surrounding the protest at the capitol, and reflected advice given to the governor and his advisors in that regard).

<sup>60</sup> Cf. [Lang v. Ingalls Zinc Co., 49 S.W. 288, 295 \(Tenn. Ch. App. 1898\)](#) (attorney-client privilege not enforced to prejudice of attorney, or when it would deprive attorney of opportunity to assert or defend attorney's rights).

<sup>61</sup> [Bryan v. State, 848 S.W.2d 72 \(Tenn. Crim. App. 1992\)](#). See also [State v. Buford, 216 S.W.3d 323, 326 \(Tenn. 2007\)](#) (client, at later perjury trial, testified that his lawyer advised him to lie during murder trial; lawyer permitted to testify that he did not so advise the client. A client may not use his or her version of events involving a lawyer while raising the attorney-client privilege as a shield to prevent the attorney from in responding to the attack).

<sup>62</sup> See [Estate of Hamilton v. Morris, 67 S.W.3d 786, 792 \(Tenn. Ct. App. 2001\)](#). [In re Estate of Morrison, 2015 Tenn. App. LEXIS 327 \(Tenn. Ct. App. 2015\)](#) (applying the reasoning of [Estate of Hamilton](#) to be equally applicable where subsequent legal controversy involved two potential beneficiaries of decedent's property; former attorney presented testimony concerning decedent's intent in executing documents in order to substantiate decedent's desires regarding his property rather than attack the validity of the documents or otherwise thwart the decedent's wishes and, therefore, the appellate court held the trial court did not err in allowing attorney's testimony to be admitted).

<sup>63</sup> [Estate of Queener v. Helton, 119 S.W.3d 682 \(Tenn. Ct. App. 2003\)](#).

<sup>64</sup> [Tenn. Code Ann. § 8-44-101 et seq.](#) (2002).

ability to consult candidly with its lawyer if the rule is read as requiring that a public body may confer with its lawyer only in a public meeting. In *Smith County Education Association v. Anderson*,<sup>66</sup> the Tennessee Supreme Court dealt with this issue and held that the Tennessee Constitution authorizes the Tennessee Supreme Court to license and regulate the practice of law. The court, in turn, has promulgated rules mandating that a lawyer must preserve the confidences of his or her client.<sup>67</sup> In order to avoid compromising the lawyer's duty of secrecy, the Tennessee Supreme Court in *Smith County* held that conversations between a public body and its lawyer are not subject to the Tennessee open meetings law if they concern pending litigation and the public body is a named party in a lawsuit.<sup>68</sup> According to *Smith*, this will permit the public body to provide its lawyer with factual information and will enable the attorney to advise the body about the legal ramifications of those facts.<sup>69</sup> However, the open meetings law is applicable once the public body's members begin to discuss what action to take based on their lawyer's advice. Obviously, the *Smith* decision would make it difficult for a public body to conduct negotiations to settle a lawsuit if the public body's deliberations must be done in public. Adversary counsel would have access to the tactical decisions inherent in the give-and-take of negotiated settlements.

In *Cooper v. Williamson County Board of Education*,<sup>70</sup> the Tennessee Supreme Court appeared to retreat somewhat from the *Smith* decision. A school board met "informally" with its attorney to discuss a settlement offer by a fired employee, who had previously been reinstated by a federal court order apparently still in effect. Since the board made no decision and undertook no preliminary deliberations at this meeting, the Tennessee Supreme Court in *Williamson County* held that the *Smith* attorney-client exception applied. It should be noted, however, that it would be surprising if at least some informal discussions of the proposed settlement did not occur at this meeting.

#### [4] Sanctions

Although the Tennessee statute does not specifically create a civil cause of action against an attorney who makes improper disclosure of confidential information,<sup>71</sup> violation of the statute is a misdemeanor punishable by up to thirty days in jail and a fine not to exceed \$50.00.<sup>72</sup> The attorney "shall also be stricken from the rolls, if a practicing attorney."<sup>73</sup>

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---



---

<sup>65</sup> [Tenn. Code Ann. § 8-44-102\(b\)](#) (2002).

<sup>66</sup> [676 S.W.2d 328 \(Tenn. 1984\)](#).

<sup>67</sup> Tenn. S. Ct. R. 8, R.P.C. 1.6 (2011).

<sup>68</sup> [676 S.W.2d at 335](#).

<sup>69</sup> [Id. at 334](#).

<sup>70</sup> [746 S.W.2d 176, 183 \(Tenn. 1987\)](#).

<sup>71</sup> See [Quarles v. Sutherland, 215 Tenn. 651, 389 S.W.2d 249 \(Tenn. 1965\)](#).

<sup>72</sup> [Tenn. Code Ann. §§ 23-3-107](#) (2009); 40-35-111(e)(3) (2010).

<sup>73</sup> [Tenn. Code Ann. § 23-3-107](#) (2009).

## **1 Tennessee Law of Evidence § 5.04**

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE— PRIVILEGES**

#### **§ 5.04 Lawyer's Disciplinary Board-Complainant Privilege**

In order to facilitate communications about lawyer misconduct, the Tennessee Supreme Court has created a broad privilege protecting communications to the Board of Professional Responsibility, hearing committee members, or disciplinary counsel.<sup>74</sup> This board, through its hearing committee and disciplinary counsel, convenes judicial proceedings for the purpose of examining allegations of attorney misconduct or disability and, if appropriate, recommending discipline.

Tennessee Law of Evidence  
Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>74</sup> [Tenn. S. Ct. Rule 9, § 32.1.](#)

## 1 Tennessee Law of Evidence § 5.05

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE— PRIVILEGES**

#### **§ 5.05 Attorney-Investigator Privilege**

---

The confidentiality surrounding an attorney's representation of his or her client extends to communications between the attorney and a private detective or investigator. Tennessee law deems such communications to be privileged if the investigator was hired by the attorney and both are acting in their respective professional capacities.<sup>75</sup> This privilege is essential if the lawyer and the investigator are to work together effectively on behalf of the client. Like the attorney-client privilege, the attorney-investigator privilege may also be waived.<sup>75.1</sup>

Although a literal reading of this privilege suggests that it does not extend to communications between the attorney's client and the private detective, the rule should be so extended if the client's statements to the investigator were made in order to facilitate the investigator's work. This could occur if the investigator interviewed the client in order to obtain information about possible witnesses or other investigative leads.

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>75</sup> [\*Tenn. Code Ann. § 24-1-209\*](#) (2000).

<sup>75.1</sup> [\*State v. Sanders\*, \*S.W.3d\*, 2018 Tenn. Crim. App. LEXIS 585 \(Tenn. Crim. App. 2018\)](#) (defendant waived any claim of investigative privilege by sharing the investigator's report with the State).

## 1 Tennessee Law of Evidence § 5.06

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE—PRIVILEGES**

#### **§ 5.06 Accountant-Client Privilege; Accountant Peer Review**

---

Accountants, like lawyers, need to be able to preserve the confidences of their clients in order to facilitate client candor and accurate professional advice and services. Accordingly, Tennessee law provides that both public accountants and certified public accountants are protected from being required to divulge information they acquired by reason of the confidential nature of their employment.<sup>76</sup>

The Tennessee Supreme Court has held that the accountant-client privilege is similar to the lawyer-client privilege:

[W]e are of the opinion that the relationship between an accountant and his employer is analogous to the relationship between an attorney and his client. It is highly fiduciary in its nature and of a very delicate, exacting, and confidential character, requiring a high degree of fidelity and good faith. It is purely a personal relation, involving the highest personal trust and confidence.<sup>77</sup>

Since the purpose of this privilege is to ensure that clients will be candid with their accountants, the accountant-client privilege belongs to the client, who can waive it.<sup>78</sup> In the leading case, *Federal Insurance Co. v. Arthur Anderson & Co.*,<sup>79</sup> the client, a construction company, waived its accountant-client privilege when the company's president executed a sworn, notarized waiver of any rights of confidentiality with the defendant accountant.

The accountant-client privilege has undergone an unusual metamorphosis in Tennessee in recent years. In 1998, the privilege was, to a large extent, done away with, apparently in error. In 1999, the privilege was clarified and re-instated.<sup>80</sup> It is now clear that the privilege exists, but that there are certain enumerated circumstances constituting limited exceptions to the privilege. These generally involve procedures monitoring the propriety of the actions of the accountant, such as peer review proceedings and ethical investigations.

Another Tennessee statute confers confidentiality and immunity from liability on a peer review committee established to review work done by accountants.<sup>81</sup> This provision renders beyond the scope of a subpoena or other legal process in a civil action or administrative proceeding, the proceedings, records, and work papers of such a review committee. However, the fact that documents are privileged within the scope of the peer review committee does not render them immune from subpoena if available from some other source. The statute specifically exempts any peer review documents, information, or records that are available publicly.<sup>81.1</sup>

---

<sup>76</sup> [Tenn. Code Ann. § 62-1-116](#) (2009).

<sup>77</sup> [Federal Ins. Co. v. Arthur Anderson & Co., 816 S.W.2d 328, 330 \(Tenn. 1991\).](#)

<sup>78</sup> [Id. at 330.](#)

<sup>79</sup> [816 S.W.2d 328 \(Tenn. 1991\).](#)

<sup>80</sup> [Tenn. Code Ann. § 62-1-116](#) (2009).

<sup>81</sup> [Tenn. Code Ann. § 62-1-202\(a\)](#) (2009).

<sup>81.1</sup> [Tenn. Code Ann. § 62-1-202\(a\).](#)

1 Tennessee Law of Evidence § 5.06

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document



## **1 Tennessee Law of Evidence § 5.07**

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE—PRIVILEGES**

## **§ 5.07 Psychologist-Client Privilege**

---

### **[1] In General**

The communications between a licensed psychologist psychological examiner, senior psychological examiner, or certified psychological assistant and client are on the same plane as the attorney-client privilege in terms of confidentiality and are therefore privileged from testimony according to Tennessee law.<sup>82</sup> As is the case with the attorney-client privilege, the testimonial protection afforded to psychologist-client communications stems from the substantial chilling effect that would result if an individual ran the risk of his or her confidences to the therapist becoming courtroom testimony. It is obvious that the relationship between psychotherapist and client involves the revelation of extremely personal matters that the client is most reluctant to discuss with others. In order for the therapist to provide the most assistance to the client, their communications must be private to facilitate full disclosure of relevant facts. The fact that a spouse was present during marital counseling with a psychologist does not destroy the confidential nature of the communication and the privilege still applies.<sup>83</sup>

Because the privilege is designed to facilitate patient candor, the privilege covers communications from the patient to the treating therapist. It does not cover the treating psychologist's opinions, observations, diagnoses, or treatment alternatives.<sup>83.1</sup>

### **[2] Exception for Threatened Harm**

A Tennessee statute apparently creates an exception to the privilege afforded to confidential communications between a patient and a qualified mental health professional in the event that the patient has clearly identified a victim against whom an actual threat of bodily harm has been made and the mental health professional has or should have determined that the patient has the apparent ability to commit such an act and is likely to do so unless prevented.<sup>84</sup> A mental health professional is broadly defined by statute.<sup>85</sup> If the therapist, using reasonable professional judgment, determines that the patient has the apparent capability to carry out the threat of harm, the statute imposes upon the mental health professional a duty either to "predict, warn of, or

---

<sup>82</sup> [Tenn. Code Ann. § 63-11-213](#) (2010). A licensed psychotherapist privilege is also recognized in federal courts when federal privilege law is used pursuant to Federal Rule 501. [Jaffee v. Redmond, 518 U.S. 1 \(1996\)](#).

<sup>83</sup> [Guity v. Kandilakis, 821 S.W.2d 595 \(Tenn. Ct. App. 1991\)](#).

<sup>83.1</sup> [Culbertson v. Culbertson, 455 S.W.3d 107, 151 \(Tenn. Ct. App. 2014\)](#). See also [Bottorff v. Bottorff, 2020 Tenn. App. LEXIS 246 \(Tenn. Ct. App. May 27, 2020\)](#) (sealed records of clinical psychologist did not contain confidential disclosures made by the patient to psychologist, but instead concerned the psychologist's testimony in the father's custody and divorce trial, including a report concerning the parties and the eldest child and session notes detailing only the group sessions and one private session with the mother; since the psychologist-patient did not apply, it could not provide a compelling reason to maintain the seal).

<sup>84</sup> [Tenn. Code Ann. § 33-3-206](#) (2007). For a discussion of the broader legal implications arising from this exception, see Balancing Public Safety with the Rights of the Mentally Ill: The Benefit of a Behavioral Approach in Reducing Gun Violence in Tennessee, [45 U. Mem. L. Rev. 671 \(2015\)](#).

<sup>85</sup> [Tenn. Code Ann. § 33-1-101](#) (Supp. 2010).

take precautions to protect the identified victim ... .”<sup>86</sup> This duty to warn may be accomplished by informing the victim, having the individual admitted, either voluntarily or involuntarily, to a hospital, or taking other steps deemed professionally appropriate. In so doing, a statute abolishes any cause of action or basis for monetary liability against the mental health professional who discloses an otherwise confidential communication in giving the statutorily mandated warning or otherwise meeting the statutory duty.<sup>87</sup>

This statutory scheme also covers employees of mental health facilities who are not mental health professionals. They discharge their obligations if they tell a mental health professional that a patient has threatened bodily harm against a particular person.<sup>88</sup> This duty also includes notifying law enforcement of the threat.<sup>88.1</sup>

### [3] Other Exceptions

An exception is also created in cases involving known or suspected child sexual abuse.<sup>89</sup> In such cases, the psychologist is not privileged to refrain from reporting the incident or giving evidence “in any judicial proceeding relating to child sexual abuse.”<sup>90</sup>

The psychologist-client privilege also does not apply in any dependency and neglect proceeding resulting from a report of harm or a criminal prosecution for severe child abuse,<sup>91</sup> in certain civil commitment proceedings, and in guardianship, conservatorship, and veterans’ guardianship proceedings.<sup>92</sup>

The psychologist-patient privilege may also be inapplicable when the patient files suit placing his or her mental condition at issue.<sup>93</sup> This exception could greatly decrease the use of the psychologist-patient privilege, as it has the psychiatrist-patient privilege.

Finally, there appears to be an exception to this privilege when a criminal defendant seeks information helpful to the defense. In *State v. Carter*,<sup>94</sup> the Tennessee Court of Criminal Appeals held that “[e]very defendant has a constitutional right to compulsory process for witnesses in a criminal case.” Accordingly, the court said that a clinical psychologist would have to answer a defense subpoena for his records of treatment sessions with a rape victim. The psychologist-patient privilege was deemed inapplicable.

In order for a psychologist who is licensed in another state, but not in Tennessee, to be qualified to testify as an expert witness in Tennessee, the psychologist must obtain authorization from the Board of Examiners in Psychology.<sup>95</sup>

---

<sup>86</sup> [Tenn. Code Ann. § 33-3-206](#) (2007).

<sup>87</sup> [Tenn. Code Ann. § 33-3-209](#) (2007).

<sup>88</sup> [Tenn. Code Ann. § 33-3-208](#) (2007).

<sup>88.1</sup> [Tenn. Code Ann. § 33-3-210](#) (Supp. 2013).

<sup>89</sup> [Tenn. Code Ann. § 37-1-614](#) (2010). See below [§ 5.39](#).

<sup>90</sup> [Tenn. Code Ann. § 37-1-614](#) (2010).

<sup>91</sup> [Tenn. Code Ann. §§ 37-1-411](#).

<sup>92</sup> [Tenn. Code Ann. § 33-3-114](#) (Supp. 2010).

<sup>93</sup> See *Kirchner v. Mitsui & Co.*, 184 F.R.D. 124, 129 (M.D. Tenn. 1998) (using Tennessee law); *Culbertson v. Culbertson*, 393 S.W.3d 678 (Tenn. Ct. App. 2012) (husband’s seeking custody of child does not automatically waive husband’s psychologist-patient privilege); *Culbertson v. Culbertson*, 455 S.W.3d 107 (Tenn. Ct. App. 2014) (patient can waive psychologist-patient privilege by putting own mental health in issue).

<sup>94</sup> [682 S.W.2d 224, 227 \(Tenn. Crim. App. 1984\)](#).

1 Tennessee Law of Evidence § 5.07

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>95</sup> [Tenn. Code Ann. § 63-11-211\(b\)](#) (2010).

## 1 Tennessee Law of Evidence § 5.08

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE—PRIVILEGES**

#### **§ 5.08 Social Worker-Client Privilege**

---

Confidential communications between a client and a licensed social worker are given the same protection as stated above for licensed psychologists.<sup>96</sup> However, an exception is carved out for communications involving mandatory child abuse reports,<sup>97</sup> cases involving known or suspected child sexual abuse,<sup>98</sup> certain civil commitment cases and other judicial proceedings,<sup>99</sup> and cases involving threatened harm to named individuals.<sup>100</sup> One court also found an expansive exception when the client filed suit placing her mental condition at issue.<sup>101</sup> In any such proceeding, the disclosure of confidential information is permitted.

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>96</sup> [Tenn. Code Ann. § 63-23-109](#) (2010). Federal law, applicable in federal courts when federal privilege law is used under Federal Rule 501, also recognizes a privilege for confidential communications to a licensed social worker. [Jaffee v. Redmond, 518 U.S. 1 \(1996\)](#).

<sup>97</sup> [Tenn. Code Ann. § 63-23-109\(b\)](#) (2010).

<sup>98</sup> See [Tenn. Code Ann. § 37-1-614](#) (2010). See below [§ 5.39](#).

<sup>99</sup> [Tenn. Code Ann. § 33-3-114](#) (2010).

<sup>100</sup> *Id.* at § 33-3-206 (2007). See also [Tenn. Code Ann. § 33-3-210](#) (Supp. 2013) (notify law enforcement officials of threat).

<sup>101</sup> [Kirchner v. Mitsui & Co., 184 F.R.D. 124, 129 \(M.D. Tenn. 1998\)](#) (using Tennessee law).

## 1 Tennessee Law of Evidence § 5.09

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE—PRIVILEGES**

## **§ 5.09 Licensed Marital and Family Therapists or Licensed Professional Counselors-Client Privilege**

---

By statute, confidential relations and communications between licensed marital and family therapists, licensed professional counselors, or certified clinical pastoral therapists and their clients are privileged to the same extent as those between attorneys and their clients.<sup>102</sup> This privilege does not bar disclosure of confidential communications required for mandatory child abuse reports.<sup>103</sup> Like other mental health professionals, these professionals can also be compelled to testify at certain specified types of judicial proceedings.<sup>104</sup>

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>102</sup> [Tenn. Code Ann. § 63-22-114](#) (2010). Federal law, applicable in federal courts when federal law is used under Rule 501, recognizes a privilege for licensed social workers and their clients. [Jaffee v. Redmond, 518 U.S. 1 \(1996\)](#). But it is unclear whether this federal privilege extends to licensed marital and family therapists or licensed professional counselors, although the logic of ensuring confidentiality suggests that the federal privilege should be so extended. Where the counseling involves a therapist and a minor, the privilege may be waived by the minor's parents, so long as the waiver is found to be in the child's best interests. See [Watson v. Myers, 2015 Tenn. App. LEXIS 826 \(Tenn. Ct. App. 2015\)](#), where father argued that the privilege under [Tenn. Code Ann. § 63-22-114](#) applied to communications his ten-year-old daughter had with a family therapist, and therefore, those communications should not have been admitted as evidence in the child custody proceeding. The trial court held that although the daughter had a confidential relationship with the therapist, it was subject to waiver by either of her parents unless the trial court determined the waiver would be contrary to her best interest. The trial court also rejected the father's privilege argument, but noted that the outcome might be different if the child were "older", such as sixteen or seventeen. On appeal, the Court of Appeals affirmed, finding no abuse of discretion. See also, [Shaw v. Shaw, 2011 Tenn. App. LEXIS 16 \(Tenn. Ct. App. Jan. 20, 2011\)](#) (child's records from therapist sessions were privileged, but the privilege can be waived by either parent, unless to do so would not be in the child's best interest).

<sup>103</sup> [Tenn. Code Ann. § 63-22-114](#) (2010).

<sup>104</sup> [Tenn. Code Ann. § 33-3-114](#) (Supp. 2010).

## [1 Tennessee Law of Evidence § 5.10](#)

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE— PRIVILEGES**

## **§ 5.10 Mediation Privileges**

---

### **[1] Mediator Privilege**

Tennessee Supreme Court Rule 31, which sets forth the standards and procedures applicable to Rule 31 dispute resolution proceedings and to neutrals serving under this Rule, requires a mediator to preserve and maintain the confidentiality of all aspects of the mediation, except where disclosure is required by law.<sup>105</sup>

### **[2] Divorce Mediation Privilege**

In order to encourage mediation in divorce cases, Tennessee law bars the mediator from divulging information disclosed by the parties or others during the course of the mediation.<sup>106</sup> Records, reports, and other documents developed for the mediation are also privileged.<sup>107</sup> Disclosure is permissible, however, when all the parties to the mediation agree in writing to disclosure; in an action between the mediator and a party for damages stemming from the mediation; when items are otherwise discoverable and were not prepared specifically for use and used in the mediation; when a court orders disclosure in a case involving litigation between the parties to the mediation and a third party; or when the disclosure reveals child abuse or neglect by one of the parties. The statute specifically provides that the mediator may not be compelled to testify unless all parties and the mediator agree in writing.<sup>108</sup> This appears to give the mediator a veto over whether he or she will testify.

### **[3] Victim-Offender Mediation Center**

Tennessee law authorizes victim-offender mediation centers to be operated throughout the State.<sup>109</sup> Because confidentiality is important to the centers' success, all written products and files of such centers are confidential and privileged from disclosure in any judicial proceeding unless it is determined that the materials were submitted to the center for purposes of avoiding discovery in a later proceeding.<sup>110</sup> Communications relating to the mediation process are also privileged unless all parties to the communication waive the privilege. Threats to a party to the dispute and communications relevant in a criminal matter are not privileged.<sup>110.1</sup> The center's records are not public records.<sup>110.2</sup>

Tennessee Law of Evidence

---

<sup>105</sup> TENN. S. CT. R. 31 § 10(d). See also [Ledbetter v. Ledbetter](#), 163 S.W.3d 681 (Tenn. 2005).

<sup>106</sup> [Tenn. Code Ann. § 36-4-130](#) (2010).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> [Tenn. Code Ann. § 16-20-101 et seq.](#) (2009).

<sup>110</sup> *Id.* at § 16-20-103 (2009).

<sup>110.1</sup> *Id.* at 16-20-103(b).

<sup>110.2</sup> *Id.*

1 Tennessee Law of Evidence § 5.10

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

## 1 Tennessee Law of Evidence § 5.11

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE—PRIVILEGES**

#### **§ 5.11 Crisis Intervention Privilege**

---

Tennessee law has long recognized the importance of confidentiality in communications between mental health providers and those that they counsel.<sup>111</sup> This concept has been expanded by statute to cover crisis response services provided by a registered critical incident stress management team.<sup>112</sup> For example, subsequent to a crisis, such as a bank robbery or school or restaurant shooting, a critical incident stress management team, which consists of members trained in providing crisis response services, might meet with the victims and bystanders involved in the crisis to help them address the trauma they have endured.

While certain members of the team will typically be mental health providers whose oral communications are covered by existing Tennessee privilege statutes, some team members may be first responders, paramedics, firefighters or volunteers with regard to whom no statutory privilege applies. [Tennessee Code Annotated section 24-1-204](#) provides that the communications between members of a critical incident stress management team and those individuals participating in the crisis intervention are privileged.<sup>113</sup> Thus, the presence of a firefighter team member at such a counseling session would not cause a waiver of the communications made to the mental health professional.

This statutory provision addressing oral communications is consistent with prior Tennessee law that renders confidential the written communications, memoranda, work notes and similar communications regarding mental health intervention techniques, even if made by emergency services providers to whom no general confidentiality privilege usually attaches.<sup>114</sup>

There are exceptions to these privilege provisions.<sup>115</sup> For example, no testimonial privilege will attach if the oral communication indicates the existence of danger to an individual,<sup>116</sup> the existence of child or adult abuse or

---

<sup>111</sup> See, e.g. [§ 5.07](#) (psychologist-client privilege); § 5.08 (social worker-client privilege); § 5.09 (licensed marital and family therapist or licensed professional counselor-client privilege); § 5.12 (psychiatrist-patient privilege); § 5.13 (psychiatric nurse-patient privilege).

<sup>112</sup> [Tenn. Code Ann. § 24-1-204](#) (Supp. 2010).

<sup>113</sup> [Tenn. Code Ann. § 24-1-204](#) (Supp. 2010).

<sup>114</sup> [Tenn. Code Ann. § 10-7-504\(A\)\(13\)](#) (Supp. 2010).

<sup>115</sup> See [Tenn. Code Ann. § 24-1-204\(d\)](#) (Supp. 2010); [Tenn. Code Ann. § 10-7-504\(a\)\(13\)](#) (Supp. 2010).

<sup>116</sup> [Tenn. Code Ann. § 24-1-204\(d\)\(1\)](#) (Supp. 2010).



## 1 Tennessee Law of Evidence § 5.11

domestic violence,<sup>117</sup> or the existence of acts constituting a crime or intentional tort.<sup>118</sup> Also, the privilege can be waived with consent of all involved.<sup>119</sup>

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>117</sup> [Tenn. Code Ann. § 24-1-204\(d\)\(2\)](#) (Supp. 2010).

<sup>118</sup> [Tenn. Code Ann. § 24-1-204\(d\)\(3\)](#) (Supp. 2010).

<sup>119</sup> [Tenn. Code Ann. § 24-1-204\(d\)\(4\)](#) (Supp. 2010).

## 1 Tennessee Law of Evidence § 5.12

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE—PRIVILEGES**

## **§ 5.12 Psychiatrist-Patient Privilege**

---

### **[1] In General**

Although Tennessee has no physician-patient privilege,<sup>120</sup> communications made by a patient to a licensed psychiatrist acting in the scope of his or her capacity as such are often privileged under Tennessee law.<sup>121</sup> The privilege extends to the doctor's staff members and includes disclosures made by the patient in therapy sessions involving more than one patient, such as joint or group therapy.<sup>122</sup> Thus, under these restricted conditions, the mere presence of a third party or parties will not serve to invalidate the privilege.

This privilege is less extensive than the psychologist-client privilege, because the psychologist receives the same treatment as the attorney-client privilege, while the psychiatrist is subject to many additional statutory exclusions. The rationale for having different standards for these two types of professionals is somewhat difficult to fathom, because the underlying policy considerations for the testimonial privilege of each would appear to be the same.

### **[2] Exceptions**

*Patient Raises Own Mental Health.* The psychiatrist-patient privilege differs markedly from the psychologist-patient privilege because the former contains so many statutory exceptions that the privilege often is inapplicable. The primary exception for psychiatrists arises in proceedings in which the patient raises the issue of his or her mental or emotional condition.<sup>123</sup> For example, a plaintiff fit within this exception when she sought damages for emotional distress.<sup>124</sup> This exception does not apply if the issue of the patient's condition is raised by a party other than the patient.<sup>124.1</sup>

---

<sup>120</sup> See below [§ 5.14](#). See, e.g., [Quarles v. Sutherland](#), 215 Tenn. 651, 389 S.W.2d 249 (1965); [State v. Fears](#), 659 S.W.2d 370 (Tenn. Crim. App. 1983), cert. denied, 465 U.S. 1082 (1983).

<sup>121</sup> [Tenn. Code Ann. § 24-1-207](#) (2000). Federal evidence law, applicable in federal courts when federal privilege law is used under Federal Rule 501, recognizes a privilege for confidential communications to a licensed psychiatrist. [Jaffee v. Redmond](#), 518 U.S. 1 (1996).

<sup>122</sup> [Tenn. Code Ann. § 24-1-207\(a\)](#) (2000); see also [Ellis v. Ellis](#), 63 Tenn. App. 361, 472 S.W.2d 741 (1971) (privilege applied to statements made by a patient in the presence of a spouse; court noted applicability of spousal privilege).

<sup>123</sup> [Tenn. Code Ann. § 24-1-207\(a\)\(1\)](#) (2000).

<sup>124</sup> [Kirchner v. Mitsui & Co.](#), 184 F.R.D. 124 (M.D. Tenn. 1998).

<sup>124.1</sup> See, e.g., [Herman v. Herman](#), 2012 Tenn. App. LEXIS 296 (Tenn. Ct. App. 2012) (where father raised issue of mother's mental health records, seeking to introduce them by claiming they were necessary for the court to satisfy its statutory duty to consider the parents' mental health in making custody its determination, the court held that the records were clearly confidential under [Tenn. Code Ann. § 24-1-207](#) (psychiatrist-patient privilege) and [Tenn. Code Ann. § 63-11-213](#) (psychologist/psychological examiner-client privilege); although courts should and do consider the mental health of the parents when one or both parties provide evidence relating to the mental health of the parents or caregivers, such consideration "is not ... a license to disregard statutory privileges from disclosure").

*Court-Ordered Evaluation.* Another statutory exception arises in proceedings in which the court ordered the psychiatric examination and the patient was advised that the communications to the psychiatrist were not privileged.<sup>125</sup> The psychiatrist-patient privilege applies if no such notice was given. This exception, involving a court-ordered psychiatric exam, only admits the psychiatrist's testimony on issues involving the patient's mental or emotional condition. The psychiatrist may not testify about other matters covered by the privilege.

*Involuntary Hospitalization.* A third statutory exception to the psychiatrist-patient privilege occurs when the psychiatrist decides that the patient needs residential treatment and the psychiatrist is asked to testify in proceedings to involuntarily hospitalize the patient. The psychiatrist may do so to the extent the testimony is "necessary to establish that the patient poses a substantial likelihood of serious harm requiring involuntary hospitalization ... ." <sup>126</sup> The psychiatrist in these cases may also testify about other matters when ordered by the court.

*Child Abuse.* A fourth statutory exception, in which the psychiatrist's privilege regarding confidential communications with patients does not apply, involves "any situation involving known or suspected child sexual abuse ... ." <sup>127</sup>

*Threats of Physical Harm to Identifiable Victim.* Another exception permits a psychiatrist to disclose a confidential communication in which a patient makes an actual threat to physically harm an identifiable victim, and the doctor concludes that the patient has the capability to carry out the threat and, more likely than not, will do so in the near future.<sup>128</sup> The psychiatrist may warn or protect the potential victim without incurring any civil or criminal liability for the disclosure.<sup>128.1</sup>

### [3] Unprivileged Information

Tennessee law establishing the psychiatrist-patient privilege contains an unusual provision that also limits disclosure of *unprivileged* patient information.<sup>129</sup> If, in a judicial or quasi-judicial proceeding, disclosure of identifiable patient information occurs, the authority conducting the proceeding must take reasonable steps to protect the patient's right of privacy and prevent unnecessary exposure of such information to the public.<sup>130</sup> Examples include the use of a pretrial conference to screen questions and, under various procedural rules, *in camera* inspection of papers.

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>125</sup> [Tenn. Code Ann. §§ 24-1-207\(a\)\(2\)](#) (2000); 33-3-114 (Supp. 2010). See also [Tenn. R. Civ. P. P. 35.02\(2\)](#) and [Tenn. R. Crim. P. 12.2\(c\)](#) regarding court-ordered mental examinations.

<sup>126</sup> [Tenn. Code Ann. § 24-1-207\(a\)\(3\)](#) (2000). See also *id.* § 33-3-114 (Supp. 2010) (civil commitment).

<sup>127</sup> [Tenn. Code Ann. § 37-1-614](#) (2010). See also *below* [§ 5.39](#).

<sup>128</sup> [Tenn. Code Ann. § 24-1-207\(c\)](#) (2000). [Tenn. Code Ann. § 33-3-206](#) (2007) creates a similar duty to warn for various "qualified mental health professionals." This term now includes psychiatrists. [Tenn. Code Ann. § 33-1-101](#) (Supp. 2010); see also [Tenn. Code Ann. § 33-3-210](#) (Supp. 2013) (notify law enforcement officials of threat).

<sup>128.1</sup> For a discussion of cases addressing psychiatrist's civil liability for a patient's violent conduct, see Civil Liability of Psychiatrist Arising out of [Patient's Violent Conduct Resulting in Injury to or Death of Patient or Third Party Allegedly Caused in Whole or Part by Mental Disorder, 80 A.L.R.6th 469 \(2012\)](#).

<sup>129</sup> [Tenn. Code Ann. § 24-1-207\(b\)](#) (2000).

<sup>130</sup> *Id.*

## 1 Tennessee Law of Evidence § 5.13

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE— PRIVILEGES**

#### **§ 5.13 Psychiatric Nurse-Patient Privilege**

---

A registered nurse who is nationally certified as a specialist in mental health and psychiatric nursing and who is practicing within those fields enjoys a privilege identical to the psychiatrist-patient privilege of [Tennessee Code Annotated § 24-1-207](#).<sup>131</sup> Confidential communications between these health care professionals and their patients are privileged and confidential, except in cases of child or adult abuse.<sup>132</sup>

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>131</sup> [Tenn. Code Ann. § 63-7-125](#) (2010).

<sup>132</sup> See also [Tenn. Code Ann. § 33-3-114](#) (Supp. 2010) (civil commitment exception); [Tenn. Code Ann. § 33-3-210](#) (Supp. 2013) (notify law enforcement officials of threat of serious bodily harm or death to reasonably identifiable victim or victims).

## 1 Tennessee Law of Evidence § 5.14

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE—PRIVILEGES**

#### **§ 5.14 Physician-Patient Privilege**

---

Following the common law, Tennessee has no general physician-patient privilege.<sup>133</sup> Accordingly, irrespective of the ethical edicts of the medical profession, Tennessee courts do not bar a physician from testifying about the confidences of a patient. The only exception is when the physician is serving as a psychiatrist, as discussed elsewhere in this book.<sup>134</sup> Various statutes making medical and related records confidential<sup>135</sup> do not create a physician-patient privilege and do not necessarily bar their use in court.<sup>136</sup> There is a covenant of confidentiality that places some limits on discovery of medical information of patients.<sup>137</sup>

---

<sup>133</sup> *State v. Fears*, 659 S.W.2d 370, 376 (Tenn. Crim. App. 1983), cert. denied, 465 U.S. 1082 (1984); *Quarles v. Sutherland*, 215 Tenn. 651, 389 S.W.2d 249 (1965); *Alsip v. Johnson City Medical Center*, 197 S.W.3d 722, 725 (Tenn. 2006) (there is no testimonial privilege protecting doctor-patient communications in Tennessee) (superseded by *Tenn. Code Ann. § 29-26-121(f)* on other grounds, as stated by *Caldwell v. Baptist Mem. Hosp.*, 2016 Tenn. App. LEXIS 389 (Tenn. Ct. App. 2016) and *Dean-Hayslett v. Methodist Healthcare*, 2015 Tenn. App. LEXIS 22 (Tenn. Ct. App. 2015)).

<sup>134</sup> See above [§ 5.14](#).

<sup>135</sup> E.g., *Tenn. Code Ann. § 10-7-504(a)(1)* (Supp. 2010) (medical records of people receiving treatment in state hospitals or at state expense are confidential); § 10-7-504(d) (Supp. 2010) (medical records of an employee of a state or local government, maintained relative to the employee's participation in an employee assistance program, and encompassing records of impairments due to health, marriage, drug, alcohol or mental health problems are confidential); § 8-25-109 (2002) (medical records submitted to or compiled by any person or entity providing deferred compensation plan services are confidential except they may be disclosed pursuant to subpoena, when the employee consents, when necessary to provide services covered by the plan, for audit, or in certain administrative or judicial proceedings); § 68-10-113 (2006) (records of people with sexually transmitted diseases are confidential, except as provided for by statute. See also *In re Lena G.*, 2017 Tenn. App. LEXIS 358 (Tenn. Ct. App. May 26, 2017) (in mother's termination of parental rights proceeding, the trial court erroneously admitted the mother's hospital records by relying on Tenn. R. Juv. P. 39(e)(5) and failing to assess their admissibility under *Tenn. Code Ann. § 68-11-404(a)*, which required such records to be sealed absent the patient's waiver or consent; the Court of Appeals held that since the statute governed the trial court procedure for admitting the records, it applied "regardless of whether a privilege existed" under Tenn. R. Juv. P. 39(e)(5))). See below [§ 5.38](#).

<sup>136</sup> *State v. Fears*, 659 S.W.2d 370, 376 (Tenn. Crim. App. 1983). Compliance with a court order to produce confidential health information is deemed a permissible disclosure. TENN. CODE ANN. § 39-26-121(f) (Supp. 2016).

<sup>137</sup> *Alsip v. Johnson City Medical Center*, 197 S.W.3d 722, 725 (Tenn. 2006) (prohibiting ex parte interviews during judicial proceedings based on the public policy interest of protecting confidentiality). In response to *Alsip*, the General Assembly enacted *Tenn. Code Ann. § 29-26-121(f)(1)*, to allow ex parte interviews between defendants and plaintiff's healthcare providers. Although superseded by the statute, *Alsip* remains valid as to its ruling that the implied covenant of confidentiality between physicians and patients is recognized in Tennessee. In 2020, the Tennessee Supreme Court held that the mandatory language in *Tenn. Code Ann. § 29-26-121(f)(1)* was unconstitutional, because it removed trial courts' discretion in pretrial matters. *Willeford v. Klepper*, 597 S.W.3d 454 (Tenn. 2020). The Court recognized that "the legislature has the authority to create a privilege in furtherance of public policy" as well as to "determine that a privilege ... does not exist." *Id.*, \*468. But the Court concluded that § 29-26-121(f)(1) "impermissibly intrudes on the authority of the judiciary over procedural matters" and, therefore, violated the separation clause of the *Tennessee Constitution*. *Willeford v. Klepper*, 597 S.W.3d 454, 470 (Tenn. 2020). Accordingly, the Court elided the provision to make it permissive and upheld the elided statute. *Id.*, \*473.

## 1 Tennessee Law of Evidence § 5.14

The Tennessee Health Care Liability Act<sup>137.1</sup> permits the disclosure of protected health care information in ex parte interviews conducted during judicial proceedings, at the trial court's discretion.<sup>137.2</sup>

---

<sup>137.1</sup> [\*Tenn. Code Ann. § 29-26-121\(f\)\*](#), as elided by [\*Willeford v. Klepper\*, 597 S.W.3d 454 \(Tenn. 2020\)](#). In *Willeford v. Klepper*, the Tennessee Supreme Court held that [\*Tenn. Code Ann. § 29-26-121\(f\)\*](#), while constitutional as to its general purpose, was unconstitutional to the extent that subsection (f)(1) mandated ex parte interviews and removed trial court discretion in pre-trial procedural matters. [\*Willeford v. Klepper\*, 597 S.W.3d 454 \(Tenn. 2020\)](#). The Court, therefore, elided the mandatory language in (f)(1) to make it permissive. *Id.* The elided version of § 29-26-121(f)(1) allows defendants in healthcare liability actions to petition trial courts for an ex parte interview with non-party treating healthcare providers, but “leaves the disposition of that petition ... to the discretion of the trial courts.” *Id.*, \*472–473. In light of *Willeford*, prior decisions construing the statute must be read carefully to determine their continued viability. See, e.g., [\*Caldwell v. Baptist Mem. Hosp.\*, 2016 Tenn. App. LEXIS 389 \(Tenn. Ct. App. 2016\)](#) (although [\*Tenn. Code Ann. § 29-26-121\*](#) allows for ex parte interviews to seek medical information relevant to a healthcare liability claim, the statute limits the discoverable medical records to those held by providers sent notice by the claimant, and it requires the records be treated as confidential and that they be used only by the parties, their counsel, and their consultants); [\*Dean-Hayslett v. Methodist Healthcare\*, 2015 Tenn. App. LEXIS 22 \(Tenn. Ct. App. 2015\)](#) (construing [\*Tenn. Code Ann. 29-26-121\(f\)\*](#) and its impact on decisions rendered prior to its enactment).

[\*Tenn. Code Ann. § 29-26-121\(f\)\(1\)\*](#), as elided, is set forth below:

“(1) Upon the filing of any “healthcare liability action,” as defined in § 29-26-101, the named defendant or defendants may petition the court for a qualified protective order allowing the defendant or defendants and their attorneys the right to obtain protected health information during interviews, outside the presence of claimant or claimant's counsel, with the relevant patient's treating “healthcare providers,” as defined by § 29-26-101.

(A) The petition must identify the treating healthcare provider or providers for whom the defendant or defendants seek a qualified protective order to conduct an interview;

(B) The claimant may file an objection seeking to limit or prohibit the defendant or defendants or the defendant's or defendants' counsel from conducting the interviews;

(C)(i) The qualified protective order shall expressly limit the dissemination of any protected health information to the litigation pending before the court and require the defendant or defendants who conducted the interview to return to the healthcare provider or destroy any protected health information obtained in the course of any such interview, including all copies, at the end of the litigation;

(ii) The qualified protective order shall expressly provide that participation in any such interview by a treating healthcare provider is voluntary.

(2) Any healthcare provider's disclosure of relevant information in response to a court order under this section, including, but not limited to, protected health information, opinions as to the standard of care of any defendant, compliance with or breach of the standard, and causation of the alleged injury, shall be deemed a permissible disclosure under Tennessee law.

(3) Nothing in this part shall be construed as restricting in any way the right of a defendant or defendant's counsel from conducting interviews outside the presence of claimant or claimant's counsel with the defendant's own present or former employees, partners, or owners concerning a healthcare liability action.”

<sup>137.2</sup> [\*Tenn. Code Ann. § 29-26-121\(f\)\*](#), as elided by [\*Willeford v. Klepper\*, 597 S.W.3d 454 \(Tenn. 2020\)](#). The elided statute places the burden on defendants to demonstrate that patients' non-discoverable health information will remain confidential if the ex parte interview is granted. [\*Willeford v. Klepper\*, 597 S.W.3d 454, \\*472 \(Tenn. 2020\)](#). When a trial court grants an ex parte interview under § 29-26-121(f)(1), it should “fashion orders carefully and with specificity as to scope.” *Id.*, note 12, quoting [\*Baker v. Wellstar Health Sys., Inc.\*, 288 Ga. 336, 703 S.E.2d 601, 605 \(Ga. 2010\)](#). More specifically, the Court suggests trial courts include the following information when it grants the order: “(1) the name(s) of the health care provider(s) who may be interviewed; (2) the medical condition(s) at issue in the litigation regarding which the health care provider(s) may be interviewed; (3) the fact that the interview is at the request of the defendant, not the patient-plaintiff, and is for the purpose of assisting defense counsel in the litigation; and (4) the fact that the health care provider's participation in the interview is voluntary. In addition, when issuing or modifying such orders, trial courts should consider whether the circumstances—including any evidence indicating that ex parte interviews have or are expected to stray beyond their proper bounds—warrant requiring defense counsel

1 Tennessee Law of Evidence § 5.14

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

to provide the patient-plaintiff with prior notice of, and the opportunity to appear at, scheduled interviews or, alternatively, requiring the transcription of the interview by a court reporter at the patient-plaintiff's request." *Id.*

Charlena Fuqua

## 1 Tennessee Law of Evidence § 5.15

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE— PRIVILEGES**

## **§ 5.15 Clergy-Penitent Privilege**

---

### **[1] In General**

Priests, rectors, rabbis, and other religious ministers cannot be required to disclose information confidentially communicated by a person seeking spiritual counsel and advice, if the information was “necessary to enable that person to discharge the functions of such office according to the usual course of that person’s practice or discipline . . . .”<sup>138</sup>

A good example of this privilege is *State v. Boling*,<sup>139</sup> a criminal case in which a minister testified against the defendant, who was convicted of burglary and larceny. The minister was both the defendant’s close personal friend and a preacher in the church the defendant attended. The minister initiated contact with the defendant and took the defendant to a motel room. In an effort to provide comfort to the defendant who was “really burdened down,” the minister asked the defendant, “Are you having any problems?” The minister counseled the defendant to put trust in God; the defendant told the minister that God had sent the minister to help the defendant. The minister and defendant had talked about religious matters regularly over time. Although the minister testified that he did not distinguish between his role as minister and that as friend, the Tennessee Court of Criminal Appeals held that the former role was sufficient to satisfy Tennessee’s clergy-penitent privilege. According to the appellate court:

Clearly, the minister inquired of defendant’s troubles, consoled him and counselled him to put his faith in God and the defendant felt the minister was God’s emissary.<sup>140</sup>

The court, not the jury, determines whether an individual meets the requirements to be considered a clergy member and is thus privileged from testifying.<sup>141</sup> A clergy member who violates this provision is guilty of a misdemeanor.<sup>142</sup>

Since this privilege is designed to encourage people to engage in frequent and truthful communications with members of the clergy, it belongs to the person communicating with the clergy member. Accordingly, the communicating person may waive the privilege.<sup>143</sup> If testimony protected by the clergy-penitent privilege is

---

<sup>138</sup> [Tenn. Code Ann. § 24-1-206\(a\)](#) (2000).

<sup>139</sup> [806 S.W.2d 202 \(Tenn. Crim. App. 1990\)](#).

<sup>140</sup> [Id. at 204](#).

<sup>141</sup> [Tenn. Code Ann. § 24-1-206\(a\)\(2\)](#) (2000).

<sup>142</sup> [Tenn. Code Ann. § 24-1-206\(d\)](#) (2000).

<sup>143</sup> [Tenn. Code Ann. § 24-1-206\(b\)](#) (2000). Cf. [Vermilye v. State, 754 S.W.2d 82, 86 \(Tenn. Crim. App. 1987\)](#). It should be noted that in *Vermilye* nothing was introduced at trial that was protected by the clergy privilege. However, if records of protected conversations had been used, the clergy member should have been permitted to raise the privilege on behalf of the holder of the privilege.



## 1 Tennessee Law of Evidence § 5.15

erroneously admitted into evidence, the harmless error rule can prevent an appellate reversal.<sup>144</sup> If the penitent declines to waive the privilege, the evidence will not be admitted.<sup>145146146</sup>

**[2] Exceptions**

The clergy-penitent privilege does not apply in any judicial proceeding relating to child sexual abuse, including any termination of parental rights proceeding relating to child sexual abuse.<sup>147</sup>

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>144</sup> See, e.g., [State v. Boling](#), 806 S.W.2d 202 (Tenn. Crim. App. 1990).

<sup>145</sup> See, e.g., [State v. Reid](#), 164 S.W.3d 286 (Tenn. 2005) (competency hearing).

<sup>146</sup> [Reserved].

<sup>147</sup> See [Tenn. R. Juv. P. 101\(c\)\(A\)](#) (2015) (Tenn. Rules of Civil Procedure govern termination of parental rights proceedings and child abuse prosecutions), [Tenn. Code Ann. §§ 36-1-113\(j\)](#) (termination of parental rights proceedings), 37-1-614 (2010) (sex abuse cases). See also [State v. Workman](#), 2011 Tenn. Crim. App. LEXIS 909 (Tenn. Crim. App. 2011) appeal denied by [Workman v. State](#), 2016 Tenn. LEXIS 557 (Aug. 18, 2016) (trial court properly refused to exclude clergymen's testimony about defendant's confessions to them about having sex with minor victim because, under [Tenn. Code Ann. § 37-1-614](#), clergymen-penitent privilege did not apply to instances of child sexual abuse). See below [§ 5.39](#).

## 1 Tennessee Law of Evidence § 5.16

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE—PRIVILEGES**

#### **§ 5.16 Interpreter for Deaf Person Privilege**

---

A deaf person involved in judicial and administrative proceedings is entitled to have a qualified oral interpreter appointed by the court or agency, whether the deaf individual's posture is that of a complainant, defendant, or witness.<sup>148</sup> The right to an interpreter also extends to deaf persons who are arrested.<sup>148.1</sup> Statements taken before the interpreter is present are inadmissible in court.<sup>149</sup> Once appointed, the interpreter must take an oath or affirmation to translate and interpret accurately.<sup>150</sup> The interpreter should interpret the proceedings for the deaf person, interpret the deaf person's statements and testimony, and assist in the deaf person's work with counsel.<sup>151</sup> In order to ensure that the presence and involvement of the interpreter do not compromise the deaf person's need to communicate confidentially with various people, the statute creates a broad privilege, coextensive with the attorney-client privilege, that protects information gathered by the interpreter from the deaf person.<sup>152</sup> The deaf person can waive this privilege.<sup>153</sup>

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>148</sup> [Tenn. Code Ann. § 24-1-211\(b\)\(1\)](#) (Supp. 2010).

<sup>148.1</sup> See [Tucker v. Tennessee, 539 F.3d 526, \(6th Cir. 2008\)](#) (although [Tenn. Code Ann. § 24-1-211\(b\)\(1\)](#) requires a court to appoint a sign language interpreter in any proceeding in which a deaf person is a defendant, the statute also requires the deaf person to notify the court of the need and make a request for an interpreter from the state court under § 24-1-211(c); although defendants claimed they were discriminated against by the county for failing to provide an interpreter after their request, the evidence only showed that they made this request at the jail the night before their initial appearance—there was no evidence that they repeated this request at their initial appearance the following morning and, therefore, even if they did make this request of the jailers, the court could not be held liable for any failure of the jail to relay the information).

<sup>149</sup> [Tenn. Code Ann. § 24-1-211\(b\)\(3\)](#) (Supp. 2010).

<sup>150</sup> [Tenn. Code Ann. § 24-1-211\(f\)](#) (Supp. 2010).

<sup>151</sup> [Tenn. Code Ann. § 24-1-211\(b\)\(1\)](#) (Supp. 2010).

<sup>152</sup> [Tenn. Code Ann. § 24-1-211\(f\)](#) (Supp. 2010).

<sup>153</sup> *Id.*

## **1 Tennessee Law of Evidence § 5.17**

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE—PRIVILEGES**

## **§ 5.17 Spousal Privilege**

---

### **[1] In General**

Anglo-American law has long recognized a privilege that bars evidence of some communications between spouses. This privilege is designed to facilitate “the sacredness of the home and the peace of families.”<sup>154</sup>

Unlike some other jurisdictions, the Tennessee marital privilege has evolved to reject automatic nondisclosure in favor of an approach attempting to promote marital harmony that actually exists at the time of disclosure.<sup>155</sup>

Tennessee law regarding privileges between spouses has changed several times in recent years. To some extent the changes were the product of disagreement and confusion about the theory and scope of the two applicable spousal privileges: the confidential communications privilege and the spousal witness privilege. The latter is sometimes viewed as a rule of competency rather than a privilege.

A great deal of confusion arose as the result of the Tennessee Supreme Court’s decision in *State v. Hurley*,<sup>156</sup> which seemed to collapse these two different privileges into one.<sup>157</sup> As a direct result of that decision, [Tennessee Code Annotated § 24-1-201](#) was amended in 1995 and again in 2000.

### **[2] Spousal Testimonial Privilege**

Under the revised Tennessee statute, which applies in both criminal and civil proceedings, there is clearly no spousal witness privilege. An individual cannot refuse to take the witness stand merely because his or her spouse is a party to the proceeding.<sup>158</sup>

### **[3] Confidential Communications in Criminal Cases**

While Tennessee does not recognize a spousal *witness* privilege, it does have a limited spousal *confidential communications* privilege that differs markedly in criminal (discussed in this section) and civil

---

<sup>154</sup> [State v. Price, 46 S.W.3d 785, 799 \(Tenn. Crim. App. 2000\)](#). [Johnson v. State, 2017 Tenn. Crim. App. LEXIS 297 \(Tenn. Crim. App. 2017\)](#).

<sup>155</sup> See [State v. Mitchell, 137 S.W.3d 630, 639 \(Tenn. Crim. App. 2003\)](#).

<sup>156</sup> **876 S.W.2d 57 (Tenn. 1993)**. *Hurley* is procedural, as opposed to substantive, and may be applied retroactively without violating the *ex post facto* provision. [State v. Bragen, 920 S.W.2d 227, 241 \(Tenn. Crim. App. 1995\)](#).

<sup>157</sup> In *Hurley*, because the wife, according to the Supreme Court, was a willing witness, the letters written to her by the defendant-husband were admissible into evidence, irrespective of their confidential nature. As the result of *Hurley*, if one spouse opted to take the stand in a criminal case, the confidential communications privilege was also apparently waived, irrespective of the view of the defendant spouse. According to *Hurley*, this rule did not encourage marital problems because the marriage was already in disrepair if one spouse willingly testified against the other in a criminal case. *Hurley* was legislatively overruled by the 1995 amendment to [Tenn. Code Ann. § 24-1-201](#) (2000).

<sup>158</sup> [Tenn. Code Ann. § 24-1-201\(a\)](#) (2000). See also [State v. Price, 46 S.W.3d 785, 799 \(Tenn. Crim. App. 2000\)](#) (no spousal witness privilege in Tennessee).

(discussed in the next section) cases. Either spouse may object to disclosure of privileged confidential communications.<sup>159</sup>

In criminal cases, the statutory confidential communications privilege can be asserted in most criminal proceedings, but is not applicable in child or spouse abuse cases.<sup>160</sup>

The Tennessee statute provides as follows in criminal cases:

**24-1-201(c) Privileges and Immunities; Marital Communications**

**(c) In a criminal proceeding a marital confidential communication shall be privileged if:**

**(A) The communications originated in a confidence that they will not be disclosed;**

**(B) The element of confidentiality is essential to the full and satisfactory maintenance of the relation between the parties;**

**(C) The relation must be one which, in the opinion of the community, ought to be sedulously fostered; and**

**(D) The injury to the relation by disclosure of the communications outweighs the benefit gained for the correct disposal of litigation.<sup>161</sup>**

**[a] Communication Originated in Confidence**

Thus, in criminal proceedings, in order to meet the statutory definition of a “privileged” communication, the requirements are quite stringent, using the criteria set forth in *State v. Hurley*.<sup>162</sup> The first requirement is that the communications originated in confidence, which is also required in civil cases. This factor requires an assessment of the intent and belief of each party. Each should believe that the communication would remain confidential between the parties.<sup>163</sup> This expectation of confidentiality is measured at the time of the communication, not at the time of the disclosure in court.<sup>164</sup>

A good illustration is *State v. Winters*,<sup>165</sup> where the communication consisted of a letter the defendant wrote his wife while he was in jail awaiting trial. The letter detailed some facts about the homicide and also referred to the couple’s wedding vows and the defendant’s love for his wife. The Court of Criminal Appeals correctly found that the parties expected the communication to be private.

The opposite result is illustrated by *State v. Price*<sup>166</sup> where a defendant called his wife to ask for transportation to assist in disposing of a car involved in the crime. The Tennessee Court of Criminal

---

<sup>159</sup> [Tenn. Code Ann. §§ 24-1-201\(c\)](#)(2000), 37-1-614 (evidentiary privileges inapplicable in child sexual abuse cases).

<sup>160</sup> *Id.*

<sup>161</sup> [Tenn. Code Ann. § 24-1-201](#)© (2000). See also [State v. Powers, 101 S.W.3d 383 \(Tenn. 2003\)](#) (factors adopted in 2000 statute are designed to return spousal privilege law to pre-*Hurley* status; 2000 statute restored factors adopted in [Adams v. State, 563 S.W.2d 804 \(Tenn. Crim. App. 1978\)](#), that court applied to crime committed in 1996).

<sup>162</sup> **876 S.W.2d 57 (Tenn. 1993)**. [Johnson v. State, 2017 Tenn. Crim. App. LEXIS 297 \(Tenn. Crim. App. 2017\)](#) (a trial court must find all four factors applicable before permitting a spouse to invoke the marital communication privilege).

<sup>163</sup> See [State v. Winters, 137 S.W.3d 641, 662 \(Tenn. Crim. App. 2003\)](#).

<sup>164</sup> [State v. Mitchell, 137 S.W.3d 630, 638 \(Tenn. Crim. App. 2003\)](#).

<sup>165</sup> [137 S.W.3d 641 \(Tenn. Crim. App. 2003\)](#).

Appeals found that the communication was not privileged because it was not intended to be confidential. The defendant had previously asked two other people for transportation and then, with his wife's assistance, disposed of the car in a public place such that the incident could have been witnessed by other people.

In the criminal proceeding, there are three other requirements that focus on the relationship between the spouses. These requirements are somewhat difficult to analyze.

### **[b] Confidentiality Essential to Full Maintenance of Relationship**

The second factor in criminal cases is that the “element of confidentiality is essential to the full and satisfactory” maintenance of the relationship.<sup>167</sup> This element requires the court to assess the spouses’ relationship at the time the statement is offered in evidence.<sup>168</sup> A close, ongoing marriage would suggest the criterion may be satisfied. On the other hand, if the marriage was ending and reconciliation was not contemplated, this factor is not present.<sup>169</sup>

### **[c] Community Opinion That The Relationship Ought to be Fostered**

The third element is that the relation is “one which, in the opinion of the community, ought to be sedulously fostered.”<sup>170</sup> Surely this factor refers to the particular marriage rather than to the institution of marriage in general, which of course public policy would “sedulously foster.”

The community “opinion” is interpreted as referring to “community standards.”<sup>171</sup> The crucial time period is the status of the marriage at the time the statement is to be offered in court.<sup>172</sup> Clearly if the parties are estranged or if the criminal accused has been physically abusive to his or her spouse, the relationship may well be one that community standards would not sedulously foster.<sup>173</sup>

### **[d] Balancing Harm to Relationship Against Benefits to Resolving Litigation**

The fourth element of the definition of confidentiality in a criminal proceeding is that the injury to the relationship by disclosure “outweighs the benefits gained for the correct disposal of litigation.”<sup>174</sup> This

<sup>166</sup> [State v. Price, 46 S.W.3d 785, 799 \(Tenn. Crim. App. 2000\)](#) (confidential communications privilege does not extend to communications made to, or in the presence of, third parties; criminal case).

<sup>167</sup> [Tenn. Code Ann. § 24-1-201\(c\)\(1\)\(B\)](#) (2000).

<sup>168</sup> [State v. Winters, 137 S.W.3d 641, 662 \(Tenn. Crim. App. 2003\)](#).

<sup>169</sup> See, e.g., [State v. Mitchell, 137 S.W.3d 630, 640 \(Tenn. Ct. Crim. App. 2003\)](#) (confidentiality not essential to relationship because the spouses were separated, wife had no interest in reconciliation, and wife was saving money to get a divorce); [Johnson v. State, 2017 Tenn. Crim. App. LEXIS 297 \(Tenn. Crim. App. 2017\)](#) (marital communication privilege did not apply where the record indicated husband and wife were not speaking to one another by the time of trial and that the petitioner-husband was seeking a divorce; on these facts, it was unclear how the husband could assert that the statement should be kept confidential for “the full and satisfactory maintenance of the relation between the parties” and that his tenuous relationship with his wife “ought to be sedulously fostered”), writ of state habeas corpus dismissed, [Johnson v. Settles, 2019 U.S. Dist. LEXIS 14779](#) (M.D. Tenn. 2019 (marital confidence cannot exist when the marriage doesn't yet exist; accordingly, statements made before marriage were not privileged)).

<sup>170</sup> [Tenn. Code Ann. § 24-1-201\(c\)\(1\)\(B\)](#) (2000).

<sup>171</sup> [State v. Mitchell, 137 S.W.3d 630, 639 \(Tenn. Crim. App. 2003\)](#).

<sup>172</sup> [State v. Mitchell, 137 S.W.3d 630, 638 \(Tenn. Ct. Crim. App. 2003\)](#).

<sup>173</sup> See [State v. Mitchell, 137 S.W.3d 630, 639–40 \(Tenn. Ct. Crim. App. 2003\)](#) (relationship not one the community would sedulously foster because the spouses were estranged and wife wanted a divorce).

element requires the court to balance the harm disclosure would have on the spouses' marital relationship against the benefits disclosure would have to the "correct disposal of litigation," which suggests an accurate determination of the disputed facts. The relevant time period is the time the evidence is offered in court.<sup>175</sup>

Like the previous factors, the "balancing factor" mandates an assessment of the quality of the relationship. If it has failed, the benefits to the ascertainment of truth may well outweigh any benefits to the relationship of nondisclosure.<sup>176</sup>

The "correct disposal" factor requires an evaluation of the importance of the evidence. An illustration is *State v. Price*<sup>177</sup> where the wife's testimony about a communication concerning a homicide was significant because there was no eyewitness testimony. Since the other side of the balance showed the wife had notified defendant of her desire for a divorce, then, a year later, filed for divorce before the trial, the court found the benefit of disclosure outweighed the harm to the marriage that disclosure would create.

These elements must be weighed in determining whether the requirements exist for the communication to be privileged in a criminal proceeding. If the requirements are not met, the spouse can be compelled to testify.

#### **[4] Confidential Communications in Civil Cases**

The statute is less clear with regard to the requirements that must be met to invoke the spousal confidential communications privilege in civil cases, although the standard is much less rigorous than in criminal cases. First, the communication between the spouses must be confidential,<sup>178</sup> and the element of confidentiality must be essential to maintaining the parties' relationship.<sup>179</sup> Any communication that occurs during the marriage is "by implication, confidential, and a contrary intention must be made to appear by the circumstances of any given case."<sup>180</sup>

It is difficult to determine exactly what is covered by this privilege. As the Tennessee Supreme Court stated:

[I]t is practically impossible to lay down any general rule to determine what matters occur between husband and wife by virtue of, or in consequence of, the marital relation, and are, therefore, forbidden by the statute to be testified to. It is evident that all secret, confidential disclosures and communications between the husband and wife which would, if publicly disclosed, betray the conjugal confidence and trust, and tend to

<sup>174</sup> [Tenn. Code Ann. § 24-1-201\(c\)\(1\)\(D\)](#) (2000). See [State v. Price, 46 S.W.3d 785, 799 \(Tenn. Crim. App. 2000\)](#) (potential harm to defendant's marriage by permitting disclosure of communication to defendant's wife was outweighed by the benefit of the wife's testimony; one year before trial the wife notified defendant of her desire for a divorce; she filed for divorce before trial; hence the marriage was failing whether or not the wife testified against defendant; this testimony was of significant benefit to jury since there was no eyewitness to homicide).

<sup>175</sup> [State v. Mitchell, 137 S.W.3d 630, 638 \(Tenn. Crim. App. 2003\)](#).

<sup>176</sup> See, e.g., [State v. Mitchell, 137 S.W.3d 630, 640 \(Tenn. Crim. App. 2003\)](#) (at time of trial, "marriage was over, with lack of money being the only reason" the wife had not filed for divorce; benefit to correct disposition of litigation far outweighs damage to the marital relationship).

<sup>177</sup> [46 S.W.3d 785, 799 \(Tenn. Crim. App. 2000\)](#).

<sup>178</sup> [Tenn. Code Ann. § 24-1-201\(b\)](#) (2000). See also [State v. Price, 46 S.W.3d 785 \(Tenn. Crim. App. 2000\)](#) (because defendant's telephone call to spouse seeking a ride in the early morning hours was not intended to be confidential, the trial court correctly ruled that it was not privileged).

<sup>179</sup> See [State v. Garland, 617 S.W.2d 176 \(Tenn. Crim. App. 1981\)](#); [Adams v. State, 563 S.W.2d 804 \(Tenn. Crim. App. 1978\)](#).

<sup>180</sup> [Burton v. State, 501 S.W.2d 814, 818 \(Tenn. Crim. App. 1973\)](#).

## 1 Tennessee Law of Evidence § 5.17

produce discord in the family, are prohibited . . . . The facts of each case must control, to a large extent, the rule in such case.<sup>181</sup>

Thus, communications in the presence of a third party are generally not protected.<sup>182</sup> Communications to a third party are also not privileged.<sup>183</sup> Some Tennessee decisions have suggested that the marital privilege does not extend to facts that are not confidential because actually or easily known by others. This includes, for example, the fact and date of separation, the number and residence of a couple's children, the clothing a spouse wears in public, whether a spouse kept a cloth under the sink, and the fact that certain items were not seen in an apartment.<sup>184</sup>

On the other hand, other Tennessee decisions show greater respect for marital privacy and ban a spouse's testimony about acts, even public acts, that occurred as the result of the marital relationship. In one case, for example, the Tennessee Supreme Court held that a wife could not be required to testify that she helped her husband spend stolen money.<sup>185</sup> However, matters clearly outside of the marital relationship are not privileged.<sup>186</sup>

### [5] During Marriage

The spousal privilege protects communications made during a marriage. Accordingly, marriage does not extend a blanket of protection to communications made before the parties were married.<sup>187</sup> Similarly, death or divorce does not change the status of inadmissible communications made between spouses during the marriage,<sup>188</sup> and a communication made after divorce is not privileged.<sup>189</sup>

### [6] Types of Communications

The spousal privilege goes beyond oral communications. The statute protects any matter between spouses that meets the other requirements for privilege. Thus, letters between spouses fall within the privilege,<sup>190</sup> as do acts,

---

<sup>181</sup> [\*Insurance Co. v. Shoemaker\*, 95 Tenn. 72, 81 \(1895\).](#)

<sup>182</sup> See, e.g., [\*State v. Garland\*, 617 S.W.2d 176 \(Tenn. Crim. App. 1981\)](#); [\*Hazlett v. Bryant\*, 192 Tenn. 251, 241 S.W.2d 121 \(1951\)](#); [\*State v. Price\*, 46 S.W.3d 785, 799 \(Tenn. Crim. App. 2000\)](#) (confidential communications privilege does not extend to communications made to, or in the presence of, third parties; criminal case).

<sup>183</sup> [\*Bishop v. State\*, 582 S.W.2d 86 \(Tenn. Crim. App. 1979\)](#) (wife gave incriminating statement to police); [\*Lee v. State\*, 542 S.W.2d 379 \(Tenn. Crim. App. 1976\)](#) (prison poems to offender's family and to assault victim not privileged); [\*Clark v. State\*, 159 Tenn. 507, 19 S.W.2d 228 \(1929\)](#) (wife gave incriminating statement to police who testified about it). [\*State v. Killebrew\*, 760 S.W.2d 228, 236 \(Tenn. Crim. App. 1988\)](#) (wife gave husband letter to deliver to third party).

<sup>184</sup> [\*State v. Garland\*, 617 S.W.2d 176, 182 \(Tenn. Crim. App. 1981\).](#)

<sup>185</sup> [\*Hanvy v. State\*, 215 Tenn. 322, 385 S.W.2d 752 \(1965\).](#)

<sup>186</sup> See [\*Martin v. State\*, 584 S.W.2d 830 \(Tenn. Crim. App. 1979\).](#)

<sup>187</sup> [\*Harp v. State\*, 158 Tenn. 510, 14 S.W.2d 720 \(1929\)](#); [\*Johnson v. Settles\*, 2019 U.S. Dist. LEXIS 14779 \(M.D. Tenn. 2019\)](#) (marital confidence cannot exist when the marriage doesn't yet exist; accordingly, statements made before marriage were not privileged). But see [\*Norman v. State\*, 127 Tenn. 340, 155 S.W. 135 \(1912\).](#)

<sup>188</sup> See, e.g., [\*Pillow v. Thomas\*, 60 Tenn. 120 \(1873\)](#); [\*Kimbrough v. Mitchell\*, 38 Tenn. 539 \(1858\)](#) (divorce).

<sup>189</sup> See MCCORMICK ON EVIDENCE 1459 (6th ed. 2006.).

<sup>190</sup> See [\*McCormick v. State\*, 135 Tenn. 218, 186 S.W. 95 \(1916\).](#)



## 1 Tennessee Law of Evidence § 5.17

if confidential and arising out of the relationship.<sup>191</sup> Actions are not privileged if performed in public where easily observable by others,<sup>192</sup> or if observed by one spouse without the other spouse's knowledge.<sup>193</sup>

### [7] Exceptions

The privilege is made inapplicable in divorce cases or in proceedings between the spouses. This should include interspousal torts because the doctrine of interspousal tort immunity has been abolished in Tennessee.<sup>194</sup> Other exceptions include proceedings involving abuse of a spouse or a child in the custody or control of at least one of the spouses.<sup>195</sup> These exceptions were recognized even prior to the recent statutory amendment.<sup>196</sup>

Another specific exception is any communication related to "any situation involving known or suspected child sexual abuse . . . ." <sup>197</sup> Also excepted are confidential communications between spouses that a chancellor deems necessary in the interest of an adult in a proceeding involving protective services.<sup>198</sup>

Another exception is for evidence in a dependency and neglect proceeding resulting from a report of harm or a criminal prosecution for severe child abuse<sup>199</sup>. Finally, the statute contains an exclusion for any insured's obligations under a contract of insurance in civil proceedings.<sup>200</sup>

### [8] Claiming and Waiving

The Tennessee spousal privilege bars either spouse from testifying about a confidential communication.<sup>201</sup> However, the spouse objecting to the testimony should assert the privilege or risk waiving it.<sup>202</sup> If both husband and wife want to waive the marital privilege, there should be no bar to waiver.<sup>203</sup>

<sup>191</sup> See [Hanvy v. State, 215 Tenn. 322, 385 S.W.2d 752 \(1965\)](#); [Phoenix Fire & Marine Ins. Co. v. Shoemaker, 95 Tenn. 72, 31 S.W. 270 \(1895\)](#). See also, [Johnson v. Settles, 2019 U.S. Dist. LEXIS 14779 \(M.D. Tenn. 2019\)](#) (fiance's act of bringing home rubber gloves and petitioner's act of owning a shotgun, even if they could constitute confidential "communications", did not occur during their marriage, and therefore, were not privileged under the [Tenn. Code Ann. § 24-1-201](#); the court also expressed skepticism over whether such acts could even constitute "communications" within the meaning of [Tenn. Code Ann. § 24-1-201\(b\)](#), but it did not reach the issue since the marital privilege was held not to apply to pre-marital communications).

<sup>192</sup> [Dowdy v. State, 194 Tenn. 212, 250 S.W.2d 78 \(1952\)](#) (held gun and chased wife on public street); [Burton v. State, 501 S.W.2d 814 \(Tenn. Crim. App. 1973\)](#).

<sup>193</sup> [State v. Garland, 617 S.W.2d 176 \(Tenn. Crim. App. 1981\)](#); [Martin v. State, 584 S.W.2d 830, 832 \(Tenn. Crim. App. 1979\)](#).

<sup>194</sup> [Davis v. Davis, 657 S.W.2d 753 \(Tenn. 1983\)](#).

<sup>195</sup> [Tenn. Code Ann. § 24-1-201\(b\)](#) (2000). See also [Tenn. Code Ann. § 36-6-234](#) (Uniform Child Custody Jurisdiction Act) (2005); [Tenn. Code Ann. § 36-5-2316](#) (Uniform Interstate Family Support Act) (Supp. 2010).

<sup>196</sup> [Martin v. State, 584 S.W.2d 830, 832 \(Tenn. Crim. App. 1979\)](#) (incest); [Adams v. State, 563 S.W.2d 804 \(Tenn. Crim. App. 1978\)](#) (child abuse); [Royston v. State, 1 Tenn. Crim. 748, 450 S.W.2d 39 \(1970\)](#) (attempting to burn residence of estranged wife).

<sup>197</sup> [Tenn. Code Ann. § 37-1-614](#) (2010). See also [Tenn. Code Ann. § 37-1-411](#) (husband-wife privilege defined in [Tenn. Code Ann. § 24-1-201](#) is not a ground for excluding evidence regarding harm or the cause of harm to a child in any dependency and neglect proceeding resulting from a report of such harm under [Tenn. Code Ann. § 37-1-403](#) or a criminal prosecution for severe child abuse).

<sup>198</sup> *Id.* at § 71-6-106 (2004)

<sup>199</sup> [Tenn. Code Ann. § 37-1-411](#). See also [Tenn. Code Ann. § 24-1-201\(b\)](#) (spousal privilege inapplicable to proceedings between spouses or to proceedings concerning abuse of one of the spouses or abuse of a minor in the custody of or under the dominion and control of either spouse).

<sup>200</sup> [Tenn. Code Ann. § 24-1-201\(b\)](#) (2000).



1 Tennessee Law of Evidence § 5.17

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>201</sup> See *id.*

<sup>202</sup> See, e.g., [McCormick v. State, 135 Tenn. 218, 186 S.W. 95 \(1916\)](#).

<sup>203</sup> Cf. [Hunt v. Hunt, 169 Tenn. 1, 80 S.W.2d 666 \(1935\)](#) (neither spouse objected; testimony by both spouses admissible).

## 1 Tennessee Law of Evidence § 5.18

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE—PRIVILEGES**

#### **§ 5.18 Grand Jury-Witness Protection**

---

All proceedings before the grand jury, including the testimony of witnesses, must be kept secret.<sup>204</sup> Policy considerations behind this rule include encouragement of free disclosure of information by grand jury witnesses, protection of the reputations of those investigated but not indicted, and preventing “the forewarning and flight of those accused before publication of the indictment . . . .”<sup>205</sup>

A testimonial privilege extends to members of the grand jury, who cannot be compelled to disclose what took place in the grand jury except in two situations. A grand jury member may be called upon by a court to relate a witness’s grand jury testimony if the court is attempting to ascertain whether the witness’s testimony in court was consistent with his or her grand jury testimony.<sup>206</sup> Further, a grand jury member may be compelled to testify at a witness’s perjury trial.<sup>207</sup>

A grand jury witness’s [first amendment](#) rights ordinarily permit the witness to disclose in public the content of his or her grand jury testimony.<sup>208</sup> It is not clear whether the witness could be barred from such disclosure in extraordinary circumstances, such as when disclosure would facilitate the escape of the person who was the target of the grand jury’s investigation.<sup>209</sup>

Tennessee Law of Evidence  
Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>204</sup> [Tenn. R. Crim. P. 6\(k\)](#).

<sup>205</sup> MCCORMICK ON EVIDENCE 188 (6th ed. 2006).

<sup>206</sup> [Tenn. R. Crim. P. 6\(k\)](#).

<sup>207</sup> *Id.*

<sup>208</sup> [Butterworth v. Smith, 494 U.S. 624, 110 S.Ct. 1376, 108 L.Ed.2d 572 \(1990\)](#).

<sup>209</sup> [Id. at 633 n.3](#).

## **1 Tennessee Law of Evidence § 5.19**

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE— PRIVILEGES**

#### **§ 5.19 Witness in Judicial Proceeding**

---

In order to encourage candor in judicial proceedings, Tennessee law has long provided witnesses in a judicial proceeding with an absolute privilege that protects them from liability for suits based on their testimony. According to a recent case:

[N]o civil action for damages may lie against a witness based upon his testimony in a case, though his testimony may have been damaging to one of the parties of the lawsuit in which he testified. [citations omitted] The reason for the rule is to protect witnesses from fear of subsequent actions based on their testimony.<sup>210</sup>

It is obvious, of course, that this “privilege” is really a form of immunity. It protects people who testify rather than protecting them from testifying.

Tennessee Law of Evidence  
Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>210</sup> [\*Wilson v. Ricciardi\*, 778 S.W.2d 450, 453 \(Tenn. Ct. App. 1989\).](#)

## 1 Tennessee Law of Evidence § 5.19A

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE— PRIVILEGES**

#### **§ 5.19A Potential Participant in Judicial Proceeding**

---

Just as Tennessee recognizes a litigation privilege for witnesses in a judicial proceeding, it also does so for potential participants in a legal proceeding. In *Issa v. Benson*<sup>210.1</sup> a Chattanooga City Council member was told by a petitioner for a rezoning that if the rezoning application was not approved the petitioner would sue the City Council. The defendant, a member of the City Council, replied in an informal setting (a deli) that if suit were filed, the council member would accuse the petitioner of attempting to bribe the council member to vote in favor of the rezoning.

When the rezoning was not approved, the petitioner sued the council member for defamation for the threat to accuse the petitioner of bribery. The Tennessee Court of Appeals held that the suit was barred by a “litigation privilege.” Some communications made with respect to proposed litigation are absolutely privileged, even if the communications are false or malicious. The Court cited *Jones v. Trice* for the proposition that “statements made in the course of judicial proceedings which are relevant and pertinent to the issues are absolutely privileged and therefore cannot be used as a basis for a libel action for damages.”<sup>210.2</sup>

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>210.1</sup> [\*Issa v. Benson\*, 420 S.W.3d 23 \(Tenn. Ct. App. 2013\).](#)

<sup>210.2</sup> [\*Jones v. Trice\*, 360 S.W.2d 48, 50 \(Tenn. 1962\).](#)

## **1 Tennessee Law of Evidence § 5.19B**

**Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE—  
PRIVILEGES**

### **§ 5.19B Religious Sermons**

---

Tennessee law offers significant protections for religious freedom. One statute extends this to religious sermons and notes which cannot be subpoenaed by a government entity for use in a civil or administrative action.<sup>210.3</sup>

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>210.3</sup> [Tenn. Code Ann. § 4-1-407](#) (Supp. 2016).

## [1 Tennessee Law of Evidence § 5.20](#)

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE— PRIVILEGES**

## **§ 5.20 Legislative Privileges**

---

### **[1] In General**

Tennessee law contains several privileges that protect communications involving state and local legislatures.

### **[2] Witness Before Legislative Committee**

Tennessee law provides that testimony given by a witness before any committee of the Tennessee General Assembly that is pertinent to the committee's inquiry or in response to a question from the committee is protected from admission into evidence in a civil proceeding, absent consent of the witness.<sup>211</sup> The privilege does not bar testimony in a criminal case. The purpose of the statute is to encourage open disclosure by witnesses before the legislature so that the legislators may base their decisions on complete information.

### **[3] Tennessee State Senators and Representatives**

Both the United States Constitution<sup>212</sup> and the Tennessee Constitution<sup>213</sup> provide a “speech or debate” privilege. The Tennessee version states that “for any speech or debate in either House, they [Senators and Representatives] shall not be questioned in any other place.”<sup>214</sup> This privilege serves the important public goal of permitting legislators to freely speak their minds.<sup>215</sup> While the scope of the privilege afforded members of the Tennessee General Assembly has not been fully defined by Tennessee courts, the United States Supreme Court held that the federal [speech and debate clause](#) protects members of Congress “against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts.”<sup>216</sup> Presumably, the same rule applies to the Tennessee [speech and debate clause](#). This would bar proof of a legislator's statements in legislative committee hearings and the legislator's votes and speeches on the floor of the House or Senate.<sup>217</sup>

In *United States v. Gillock*,<sup>218</sup> the United States Supreme Court held that neither federal common law nor comity bars evidence of a state legislator's acts from being admitted in a federal criminal prosecution.

---

<sup>211</sup> [Tenn. Code Ann. § 24-7-114](#) (2000).

<sup>212</sup> [U.S. Const. Art I, § 6](#).

<sup>213</sup> TENN. CONST. Art II, § 13.

<sup>214</sup> *Id.*

<sup>215</sup> [Cornett v. Fetzer](#), 604 S.W.2d 62 (Tenn. Ct. App. 1980).

<sup>216</sup> [United States v. Gillock](#), 445 U.S. 360, 366–67, 100 S.Ct. 1185, 63 L.Ed.2d 454 (1980), quoting [United States v. Brewster](#), 408 U.S. 501, 525, 92 S.Ct. 2531, 33 L.Ed.2d 507 (1972). See also, [Bogan v. Scott-Harris](#), 523 U.S. 44, 54, 118 S. Ct. 966 (1998) (absolute legislative immunity attaches to all actions taken “in the sphere of legitimate legislative activity”).

<sup>217</sup> [United States v. Gillock](#), 445 U.S. 360, 367 (1980). See [Logan's Super Mkts. v. McCalla](#), 208 Tenn. 68, 343 S.W.2d 892 (1961).

## 1 Tennessee Law of Evidence § 5.20

Whether an act is legislative “turns on the nature of the act, rather than on the motive or intent of the official performing it[.]” because “it simply is not consonant with our scheme of government for a court to inquire into the motives of legislators.”<sup>218.1</sup>

#### [4] Subordinate Legislative Bodies

Drawing an analogy to the reasoning behind the protection state legislators receive from the Tennessee [speech and debate clause](#), Tennessee appellate courts have found an equivalent common-law privilege that applies to the work of various local legislative bodies. This privilege extends both to members of the local legislative body<sup>219</sup> and to people who testify in a hearing before the local legislative body.<sup>220</sup>

#### [5] Certain Public Records

Tennessee law contains a series of broad statutes dealing with the confidential status of many types of public records.<sup>220.1</sup> Each relevant provision must be consulted to assess the exact parameters of confidentiality.

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>218</sup> [445 U.S. 360, 100 S.Ct. 1185, 63 L.Ed.2d 454 \(1980\)](#).

<sup>218.1</sup> [Bogan v. Scott-Harris, 523 U.S. 44, 54–55, 118 S. Ct. 966 \(1998\)](#). See also [Miller v. Wyatt, 457 S.W.3d 405, \\*412 \(Tenn. Ct. App. 2014\)](#) (since councilman’s allegedly defamatory statement during City Council meeting arose “from the conduct of the affairs” of the City Council, it fell within the scope of his legislative function and was cloaked with immunity; accordingly, the court would not probe into his intentions or motivations).

<sup>219</sup> See [Cornett v. Fetzer, 604 S.W.2d 62 \(Tenn. Ct. App. 1980\)](#) (in defamation action, city council members have absolute privilege for remarks which relate to scope of the council’s authority). [Issa v. Benson, 420 S.W.3d 23 \(Tenn. Ct. App. 2013\)](#) (legislative privilege barred defamation lawsuit against member of Chattanooga City Council who stated that plaintiff had tried to bribe the Council member to secure a vote on a rezoning request; discussion about rezoning was within the scope of the City Council’s legitimate legislative sphere; statements were made in conversations with other Council members, not during formal Council meeting, but legislative privilege still applies).

<sup>220</sup> In [Boody v. Garrison, 636 S.W.2d 715 \(Tenn. Ct. App. 1981\)](#), the court held that in a defamation action, there is an absolute privilege for persons testifying before subordinate legislative bodies such as a city council. The defendant had voluntarily appeared before a city council to present a proposed insurance plan. He made an allegedly defamatory remark in response to a question why a former insurance employee was not present. Apparently defendant lost, because his testimony was before the city council but not during a “hearing.” The policy behind the privilege would have been better served had the privilege been held to be applicable.

<sup>220.1</sup> See generally [Tenn. Code Ann. §§ 10-7-504, 10-7-515](#) (Supp. 2016) (including various mental health, investigative, military, school, real estate evaluations, veterinary, venture capital, credit card, alcohol, personnel, and museum donor records); § 8-11-112 (Supp. 2016) (county trustee’s records). See also the Healthcare Consumers Right-to-Know Act, [Tenn. Code Ann. § 63-32-105](#), requiring health boards to collect and maintain a publicly accessible database of licensee profiles, subject to certain restrictions).

## 1 Tennessee Law of Evidence § 5.21

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE—PRIVILEGES**

#### **§ 5.21 Deliberative Process Privilege**

---

Tennessee courts recognize a rather undefined “deliberative process” privilege, designed to “protect communications between high government officials and those who advise and assist them in the performance of their official duties.”<sup>221</sup> This privilege, however, “must be applied cautiously because it could become the exception that swallows up the rule favoring governmental openness and accountability.”<sup>222</sup> The actual applicability of the privilege depends on the government official involved.<sup>222.1</sup> The leading case noted that the governor could invoke the privilege in meetings with staff or cabinet officials.<sup>223</sup> The General Assembly may also invoke it, but the privilege does not apply to records of an assistant district attorney general preparing for a state court hearing.<sup>224</sup>

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>221</sup> [\*Swift v. Campbell\*, 159 S.W.3d 565, 578 \(Tenn. Ct. App. 2004\)](#); [\*Davidson v. Bredesen\*, 2013 Tenn. App. LEXIS 708 \(Tenn. Ct. App. 2013\)](#) (trial court did not abuse its discretion in ruling that the deliberative process privilege applied to documents; agreeing with *Swift*, the court held there is a “valid need” that the advice high governmental officials receive be protected from disclosure, because the officials who are able to claim the privilege are those vested with the responsibility of developing and implementing law and public policy, many times requiring that differing and various interests and viewpoints be considered).

<sup>222</sup> *Id.*

<sup>222.1</sup> [\*Davidson v. Bredesen\*, 2013 Tenn. App. LEXIS 708 \(Tenn. Ct. App. 2013\)](#).

<sup>223</sup> *Id.* (holding privilege does not apply to an assistant district attorney general preparing for a state *coram nobis* hearing).

<sup>224</sup> [\*Swift v. Campbell\*, 159 S.W.3d 565, 578 \(Tenn. Ct. App. 2004\)](#).



## 1 Tennessee Law of Evidence § 5.22

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE— PRIVILEGES**

#### **§ 5.22 Medical Review Committee-Informant Privilege; Quality Control**

Tennessee recognizes a variety of committees that monitor and evaluate many facets of health care professionals' conduct and competence.<sup>225</sup> Often, the committee is made up of physicians or other health care providers. In keeping with the philosophy that full disclosure is more probable when there is no risk that the information will later constitute harmful or embarrassing court testimony, the peer review statute provides that all information and data furnished to the committee, as well as its findings, recommendations and records, are privileged from disclosure and are not subject to either discovery or trial subpoena.<sup>226</sup>

The peer review statute protects the records of Quality Improvement Committees (QICs) and statements made to QICs during an investigation, and it allows QIC members to share such information with each other without fear of liability.<sup>226.1</sup> Since the statute is a state law privilege, it does not apply in federal question cases.<sup>226.2</sup>

Materials covered by the peer review statute are inadmissible in court unless an exception to the peer review law applies.<sup>227</sup> Although the privilege is broad, it does not shield members who commit acts of perjury or fraud.<sup>227.1</sup>

---

<sup>225</sup> See, e.g., the Healthcare Consumers Right-to-Know Act, [Tenn. Code Ann. § 63-32-105](#), requiring health boards to collect and maintain a publicly accessible database of licensee profiles, subject to certain restrictions), and [Tenn. Code Ann. § 63-6-219\(a\)](#) (2010) [Tenn. Code Ann. § 63-6-101](#) (2010) (Board of Medical Examiners); [Tenn. Code Ann. § 63-9-114](#) (2010) (osteopath review board); [Tenn. Code Ann. § 63-10-405](#) (2010) (pharmacy peer review committee; pharmacy continuous quality improvement program or quality assurance program); [Roy v. City of Harriman](#), 279 S.W.3d 296 (Tenn. Ct. App. 2008) (peer review privilege extends to information given by a physician to an insurance company seeking information about another physician applying to become a provider for that insurance company). [Tenn. Code Ann. § 63-6-219\(a\)](#) (2010) was repealed by the Tennessee Patient Safety and Quality Improvement Act of 2011, codified at [Tenn. Code Ann. §§ 63-1-150\(d\)](#), [68-11-272\(c\)](#) (privilege applicable to records of a Quality Improvement Committee). [Tenn. Code Ann. § 68-11-272\(c\)](#) was amended effective March 22, 2018 to add subsection (b)(1)(K), which expands the definition of "healthcare organization" to include university medical schools or health science centers. [Tenn. Code Ann. § 64-9-114](#) has been repealed. See [Tenn. Code Ann. §§ 63-9-101, et seq.](#) (board of osteopathic examination).

<sup>226</sup> [Tenn. Code Ann. § 63-6-219\(e\)](#) (2010). [Tenn. Code Ann. § 63-6-219\(e\)](#) (2010) was repealed by the Tennessee Patient Safety and Quality Improvement Act of 2011, [Tenn. Code Ann. §§ 63-1-150\(d\)](#), [68-11-272\(c\)](#) (privilege applicable to records of a Quality Improvement Committee). [Tenn. Code Ann. § 68-11-272\(c\)](#) was amended effective March 22, 2018 to add subsection (b)(1)(K), which expands the definition of "healthcare organization" to include university medical schools or health science centers.

<sup>226.1</sup> [Tenn. Code Ann. 68-11-272\(c\)](#).

<sup>226.2</sup> [Allgood v. Baptist Mem. Med. Grp., Inc.](#), 2020 U.S. Dist. LEXIS 2206 (W.D. Tenn. Jan. 7, 2020) (peer review privilege under [Tenn. Code Ann. 68-11-272\(c\)\(1\)](#) did not apply in federal False Claims Act retaliation action; defendants failed to point to any caselaw that suggested a federal privilege law "recognizes a parallel privilege to the one established by § 68-11-272(c)(1) ... [and] federal courts have repeatedly held no parallel federal privilege exists").

<sup>227</sup> See, e.g., [Roy v. City of Harriman](#), 279 S.W.3d 296 (Tenn. Ct. App. 2008) (construing former statute; peer review privilege bars admissibility of information given by a physician to an insurance company concerning the professional abilities of another physician seeking to become a provider for that insurance company).

## 1 Tennessee Law of Evidence § 5.22

A good illustration of the scope of the peer review privilege is *Eyring v. Fort Sanders Parkwest Medical Center*,<sup>228</sup> where a physician sued a hospital for revocation of his staff privileges. The physician attempted to depose peer review participants to discover whether the committees acted in good faith and without malice in order to assess whether the participants satisfied the qualified immunity protection granted by Tennessee law. Citing the peer review statute's policy of protecting the confidentiality of the peer review process,<sup>229</sup> the Tennessee Supreme Court held that the statute "encompasses any and all matters related to the peer review process."<sup>230</sup> Discovery was allowed, however, for the limited purposes of investigating the committee members' good faith, malice, and reasonable knowledge or belief, but was specifically disallowed for "any inquiry into the peer review process itself."<sup>231</sup> This privilege does not preclude the use, in a later proceeding, of information presented to the committee if the information is independently available from and obtained from other sources.<sup>232</sup>

A medical review committee or peer review committee does not waive either confidentiality or privilege if it discloses confidential, privileged information in a report to the board of medical examiners or during advocacy for physicians before other medical peer review committees, peer review organizations, health care entities, private and governmental insurance carriers, national or local accreditation bodies, and the state board of medical examiners of Tennessee or any other state. Moreover, the Court of Appeals held in *Pinkard v. HCA Health Servs. of Tenn.* that the statutory peer review privilege cannot be waived,<sup>232.1</sup> because (1) it arises pursuant to statute and the statute

<sup>227.1</sup> [Reynolds v. Gray Med. Inv'rs, LLC, 578 S.W.3d 918, \\*923 \(Tenn. Ct. App. 2018\)](#) (while "most all of what happens" during a QIC meeting is protected, the peer review privilege provided by [Tenn. Code Ann. § 68-11-272](#) was never intended to allow a healthcare provider to force an employee to commit perjury or fraud; such crimes directly undermine the statute's purpose, because they "make it more difficult to 'evaluate the safety, quality, processes, costs, appropriateness or necessity of healthcare services'" in accord with [Tenn. Code Ann. § 68-11-272\(b\)\(4\)](#) (2013)). *Reynolds'* logic would seem to extend to any other crime or "bad act" that a QIC member commits, to the extent that the crime or action violates the purpose of the statute; the court's own language implies this, *i.e.*, the privilege does not shield members who commit "*such acts* as suborning perjury and then hide or cover up those *bad acts* by claiming peer review privilege (emphasis added)." *Id.*

<sup>228</sup> [991 S.W.2d 230 \(Tenn. 1999\)](#) (discussing former peer review statute).

<sup>229</sup> [Tenn. Code Ann. § 63-6-219](#) (2010). See [Lee Medical Inc. v. Beecher, 312 S.W.3d 515 \(Tenn. 2010\)](#) (§ 63-6-219(e) applies only to peer review proceedings before a peer review committee, defined in § 63-6-219(c), involving a physician's conduct, competence, or ability to practice medicine). [Tenn. Code Ann. § 63-6-219](#) (2010) was repealed by the Tennessee Patient Safety and Quality Improvement Act of 2011, codified at [Tenn. Code Ann. §§ 63-1-150\(d\), 68-11-272\(c\)](#) (privilege applicable to records of a Quality Improvement Committee (QIC)). [Tenn. Code Ann. § 272\(c\)](#) was amended effective March 22, 2018 to add subsection (b)(1)(K), expanding the definition of "healthcare organization" to include university medical schools or health science centers.

<sup>230</sup> [Eyring v. Fort Sanders Parkwest Med. Center, 991 S.W.2d 230, 239 \(Tenn. 1999\)](#).

<sup>231</sup> *Id.*

<sup>232</sup> [Tenn. Code Ann. § 68-11-272\(c\)\(2\)](#) (2017). See also [Pinkard v. HCA Health Servs. of Tenn., 2017 Tenn. App. LEXIS 418 \(Tenn. Ct. App. 2017\)](#) (discussing "original source" exception in [Tenn. Code Ann. § 68-11-272\(c\)\(2\)](#), pursuant to which any information, documents or records that were not produced for use by a QIC, or which were not produced by persons acting on behalf of a QIC, and are available from original sources, are not immune from discovery or admission into evidence even if the information was presented during a QIC proceeding; persons who provide testimony or information to, or as part of, a QIC also are not exempt from discovery and are not prohibited from testifying as to their knowledge of facts or their opinions).

<sup>232.1</sup> [Pinkard v. HCA Health Servs. of Tenn., 545 S.W.3d 443 \(Tenn. Ct. App. 2017\)](#), following the reasoning of [Powell v. Cmty. Health Sys., 312 S.W.3d 496, 2010 Tenn. LEXIS 448 \(Tenn. 2010\)](#) (privilege under former Tennessee Peer Review Law could not be waived, because the privilege is intended to benefit the entire peer review process, not simply the individuals participating in the process). As the *Powell* court explained: "Waiver of a statutory privilege should not be permitted if the waiver undermines public policy or impairs the rights of third parties. Permitting participants in a peer review proceeding to waive the privilege—no matter how meritorious the justification—not only undermines the efficacy of the peer review process but also adversely affects those who provided information or opinions to the peer review committee in reliance on the statutory assurance of

contains no express waiver provision; (2) the privilege does not protect an individual “holder,” but rather, benefits all who participate in or provide information to a Quality Improvement Committee; and (3) although one may waive by agreement the benefit of a statutory provision, one may not exercise this waiver right where public policy or the rights of third parties would be violated.<sup>232.2</sup>

The *Pinkard* decision also noted that the legislature did not amend the peer review statute after the Tennessee Supreme Court ruled in *Powell v. Cmty. Health Sys.*<sup>232.3</sup> and, therefore, “the proper course is to defer to the General Assembly, as the author of the peer review privilege, to determine if and under what circumstances the privilege may be waived.”<sup>232.4</sup> In light of the legislature’s inaction, the Court of Appeals held that “courts cannot empower [participants] in the Quality Improvement Committee process to waive confidentiality unilaterally when the general assembly itself has recognized no exceptions to the confidentiality requirement.”<sup>232.5</sup>

In addition to the statutory peer review privilege applicable to QIC proceedings, practitioners should consult any other confidentiality provisions that apply to particular review proceedings. For instance, a statute provides that materials and documents relating to investigations of misconduct by the Board of Medical Examiners “shall be exempt from the public records act until the filing of a notice of charges.”<sup>232.6</sup> After the filing of a notice of charges, if certain conditions are satisfied, only the information and those materials and documents upon which the charges are based are available for disclosure.<sup>232.7</sup>

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

confidentiality.” [\*Powell v. Cmty. Health Sys.\*, 312 S.W.3d 496, 2010 Tenn. LEXIS 448, \\*513 \(Tenn. 2010\)](#). See also **Tenn. Code Ann. §§ 63-1-150(d)**, [68-11-272\(c\)](#).

<sup>232.2</sup> [\*Pinkard v. HCA Health Servs. of Tenn.\*, 545 S.W.3d 443 \(Tenn. Ct. App. 2017\)](#).

<sup>232.3</sup> [\*Id.\*, 456](#) (“it stands to reason that the General Assembly would have made substantive changes” to the peer review statute “if it disagreed with the Court’s interpretation of the ... privilege in *Powell*”). See also [\*Powell v. Cmty. Health Sys.\*, 312 S.W.3d 496, 2010 Tenn. LEXIS 448 \(Tenn. 2010\)](#).

<sup>232.4</sup> [\*Powell v. Cmty. Health Sys.\*, 312 S.W.3d 496, 2010 Tenn. LEXIS 448, \\*513 \(Tenn. 2010\)](#).

<sup>232.5</sup> [\*Pinkard v. HCA Health Servs. of Tenn.\*, 545 S.W.3d 443, \\*457 \(Tenn. Ct. App. 2017\)](#), quoting *Powell*, [\*id.\*, \\*513](#).

<sup>232.6</sup> [Tenn. Code Ann. § 63-6-214\(h\)](#).

<sup>232.7</sup> *Id.*

## **1 Tennessee Law of Evidence § 5.23**

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE— PRIVILEGES**

#### **§ 5.23 Psychology Peer Review Committee**

---

The peer review committees involving the practice of psychology now enjoy a testimonial privilege. A Tennessee statute renders privileged all information, documentation, records, and testimony presented to a psychological peer review committee.<sup>233</sup> In addition, the findings, conclusions, and recommendations of such committees are privileged. However, the mere fact that documentation or information was used in such a hearing does not render the evidence privileged in another proceeding if available from some other source.

Tennessee Law of Evidence  
Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>233</sup> [\*Tenn. Code Ann. § 63-11-220\*](#) (2010).

## [1 Tennessee Law of Evidence § 5.24](#)

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE— PRIVILEGES**

## **§ 5.24 Impaired Practice Programs**

---

### **[1] Health Workers**

Regulatory boards, commissions, and agencies attached to the division of health-related boards are authorized to participate in programs that assist in the rehabilitation of impaired health practitioners who are licensed, certified, or registered.<sup>234</sup> In order to ensure that necessary information is shared and to encourage participation in the impaired professional program, the law creates a broad privilege. All information, interviews, reports, statements, memoranda, and other data furnished to a nonprofit professional association or foundation, and the results of proceedings of such entities, are rendered “privileged and confidential.”<sup>235</sup> The records of such proceedings may be used only for purposes of the board, commission, or agency, and are not available for court subpoena or discovery proceedings.<sup>236</sup>

### **[2] Lawyer’s Assistance Program**

In order to ensure candid communications between people involved in a lawyer’s assistance program, all information furnished the program is privileged to the same extent as the attorney-client privilege.<sup>237</sup>

### **[3] Impaired Lawyer Programs**

If a bar association or other entity creates an impaired lawyers program to assist lawyers with substance abuse or other problems affecting their performance, there is a privilege for information and actions taken by the program.<sup>238</sup> Information may be released to the lawyer’s family and others with the lawyer’s consent.

### **[4] Law Enforcement, Firefighters, and Similar Emergency Personnel Group Counseling**

When various emergency service personnel, such as law enforcement and firefighters, are involved in group counseling by mental health professionals, the notes, files, and communications from such sessions are privileged and cannot be divulged without a waiver of the privilege.<sup>238.1</sup> The privilege also does not apply in a healthcare liability action filed by the patient, or his or her survivor, against a mental health professional for claims arising out of the professional relationship; in such cases memoranda, work notes or products, case files and communications that would otherwise be privileged under the statute are discoverable and admissible in the court action, in accord with the Rules of Civil Procedure.<sup>238.2</sup>

---

<sup>234</sup> *Id.* at § 63-1-136(a) (2010).

<sup>235</sup> *Id.* at § 63-1-136(d) (2010).

<sup>236</sup> *Id.*

<sup>237</sup> Tenn. Code Ann. § 23-4-104 (2009).

<sup>238</sup> [Tenn. S. Ct. R. 33](#) § 33.10.

<sup>238.1</sup> [Tenn. Code Ann. § 10-7-504\(a\)\(13\)\(A\)](#) (2019).

<sup>238.2</sup> *Id.* at § 10-7-504(a)(13)(E) (2019).

1 Tennessee Law of Evidence § 5.24

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

## 1 Tennessee Law of Evidence § 5.25

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE— PRIVILEGES**

## **§ 5.25 News Reporter's Privilege**

---

### **[1] In General**

In order to maximize the public's interest in having information disseminated in the news media, Tennessee law provides a broad privilege that protects people who, whether employed or independent, gather information for publication or broadcast.<sup>239</sup> These people may not be required to disclose "any information or the source of any information procured for publication or broadcast."<sup>240</sup> The privilege provided by Tennessee's "Shield Law" applies to nonconfidential as well as confidential information,<sup>241</sup> and bars compulsory disclosure in court, before a grand jury, or in legislative or administrative proceedings. The privilege applies in both criminal and civil proceedings.<sup>242</sup> The language of the statute suggests that the reporter rather than the source is the holder of the privilege and can waive it.

### **[2] Automatic Exception**

The privilege is inapplicable in a defamation action in which a defendant, often the reporter, raises a defense based on the source of such information.<sup>243</sup> The privilege likewise does not apply in any situation involving known or suspected child sexual abuse.<sup>244</sup>

---

<sup>239</sup> [Tenn. Code Ann. § 24-1-208](#) (2000).

<sup>240</sup> *Id.* at § 24-1-208(a) (2000). See also [Funk v. Scripps Media, Inc.](#), \_\_\_ S.W.3d \_\_\_, 2017 Tenn. App. LEXIS 779 (Tenn. Ct. App. Nov. 30, 2017) (trial court erred in granting the public figure's motion to compel based upon [Tenn. Code Ann. § 24-1-208\(b\)](#) where it had interpreted the exemption in a way that swallowed up the protection that [Tenn. Code Ann. § 24-1-208\(a\)](#) provided to media defendants whenever disclosure of a source was sought; [Tenn. Code Ann. § 24-1-208\(b\)](#) allowed a media defendant to assert the fair report privilege while also subjecting to disclosure only the sources it identified as the basis for the story), *aff'd*, [Funk v. Scripps Media, Inc.](#), 570 S.W.3d 205, 2019 Tenn. LEXIS 101 (Tenn. 2019). For purposes of [Tenn. Code Ann. § 24-1-208\(b\)](#), a "source" is the means by which a reporter obtains information, but "information" is what the reporter learned from the interview or the document. Thus, the exception to the news media shield law allows a court to compel disclosure of the source of a media defendant's information, i.e., how media defendants know something; but it does not authorize a court to compel media defendants to disclose the information the source provided. [Funk v. Scripps Media, Inc.](#), 570 S.W.3d 205 (Tenn. 2019).

<sup>241</sup> [Austin v. Memphis Pub'g Co.](#), 655 S.W.2d 146, 149 (Tenn. 1983).

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* See [Tenn. Code Ann. § 24-1-208\(b\)](#) (2000). In [Funk v. Scripps Media, Inc.](#), 2017 Tenn. App. LEXIS 779 (Tenn. Ct. App. Nov. 30, 2017), *aff'd* [Funk v. Scripps Media, Inc.](#), 570 S.W.3d 205 (Tenn. 2019), in which the Court of Appeals summarized the effect of the statute once a reporter raises the fair report privilege as a defense to defamation: "Once a news gatherer asserts the fair report privilege, the protections of section (a) of the Shield Law [[Tenn. Code Ann. § 24-1-208\(a\)](#)] come into play to protect sources. To the extent that under the fair report privilege the news gatherer must indicate the source of the news report, that source loses its protected status under section (b) of the Shield Law [[Tenn. Code Ann. § 24-1-208\(b\)](#)] and must be disclosed. If 'the source of any allegedly defamatory information' is one or more documents, the document(s) must be produced to the claimant. This is the only way a court can compare the alleged source with the publication or broadcast to determine whether the news gatherer is, in fact, entitled to assert the fair report privilege as a defense to the claim for defamation, i.e., whether the publication or broadcast was a fair and accurate report of the proceeding or document and whether the report was



**[3] Discretionary Exception**

*Application to Trial Court.* The statute provides a mechanism for piercing the shield to obtain the protected information in unusual cases. In the action in which the information is sought, application may be made to the trial judge for an order divesting protection. The motion will be granted only upon a showing by clear and convincing evidence (1) that probable cause exists to believe that the person has information clearly relevant to a specific probable violation of law; (2) that the information cannot reasonably be obtained by other means; and, (3) that the people of the state of Tennessee have a compelling and overriding public interest in obtaining the information.<sup>245</sup>

In *State ex rel. Gerbitz v. Curriden*,<sup>246</sup> the local prosecutor sought to divest a radio broadcaster's privilege in order to obtain the identity of a man who claimed, on a talk show, to be an unapprehended murderer. The broadcaster refused to testify about the incident when subpoenaed before a grand jury investigating the homicide. The Tennessee Supreme Court, evidencing a willingness to give news media substantial protection, held that the privilege would not be divested because the prosecutor had not established by clear and convincing evidence that the information could not reasonably be obtained from other sources. More particularly, the prosecutor had not indicated what efforts had been made to get information about the crime or the offender from other law enforcement agencies or people.

In *State v. Kendrick*, the criminal defendant, involved in a probation revocation proceeding, sought to subpoena a television reporter who had gathered information about a construction scam involving the defendant.<sup>247</sup> The defendant argued that the privilege does not apply because the reporter actually served as a mediator in resolving the dispute over the faulty construction project. The Tennessee Court of Criminal Appeals upheld the applicability of the privilege since the reporter was collecting information for his broadcast, irrespective of whether or not the reporter was also serving as a mediator. The court also noted that the information sought by subpoena was not relevant to the probation revocation and that there was no compelling and overriding public interest in the information gathered by the reporter. As a further ground for applying the privilege, the court held that the defendant had not established that the reporter was the only source of the information since there were other witnesses who could have testified about the same information gathered by the reporter.

*Appeal.* If a divestiture order is sought, any order may be appealed as a civil case to the Tennessee Court of Appeals and Tennessee Supreme Court.<sup>248</sup> The Court of Appeals is to make an independent determination of the issue without according a presumption of correctness to the trial court's findings.<sup>249</sup> An order divesting the privilege is automatically stayed pending appeal, which is to be expedited if requested by either party.

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

balanced and neutral." In affirming the appeals court, the Tennessee Supreme Court expressly held that neither express malice nor actual malice can defeat the fair report privilege; the privilege is defeated only by showing that a report about an official action or proceeding was unfair or inaccurate). [\*Funk v. Scripps Media, Inc.\*, 570 S.W.3d 205 \(Tenn. 2019\)](#).

<sup>244</sup> [Tenn. Code Ann. § 37-1-614](#) (2010). See below [§ 5.39](#).

<sup>245</sup> [Tenn. Code Ann. § 24-1-208\(c\)](#) (2000).

<sup>246</sup> [738 S.W.2d 192 \(Tenn. 1987\)](#). See [Dingman v. Harvell](#), 814 S.W.2d 362 (Tenn. Ct. App. 1991) (newspaper reporter not required to testify because subjects of article admitted making statements reported in article and proof failed to show probable cause that information could not be obtained by alternative means).

<sup>247</sup> [State v. Kendrick](#), 178 S.W.3d 734 (Tenn. Crim. App. 2005).

<sup>248</sup> [Tenn. Code Ann. § 24-1-208\(c\)\(3\)](#) (2000).

<sup>249</sup> *Id.*



---

End of Document

## 1 Tennessee Law of Evidence § 5.26

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE—PRIVILEGES**

#### **§ 5.26 Government Informant Privilege**

---

In order to protect confidential government informants, whose information and lives may depend on retaining their anonymity, Tennessee common law, following federal common law,<sup>250</sup> recognizes a privilege that bars disclosure of the informant's identity in some circumstances.<sup>250.1</sup> According to the Tennessee Court of Criminal Appeals,

[T]his practically universal rule is predicated on public policy and seeks to encourage citizens to assist in crime detection and prevention by giving information to law enforcement officials without unduly exposing themselves to the danger inherent in such laudable activity and to make possible their continued usefulness in future disclosures that the revelation of their identity would probably hamper and prevent.<sup>251</sup>

Ordinarily this privilege is asserted by the government in a criminal case, but it should apply in a civil case as well.<sup>252</sup>

The government informant's privilege is far from absolute. A Tennessee court can find the privilege inapplicable for many reasons. These reasons defy a fixed rule.<sup>253</sup> Whether there should be disclosure "is a matter which addresses itself to the sound discretion of the trial court" on a case by case basis.<sup>254</sup> One court indicated that disclosure is required if relevant and helpful to the defendant in presenting a defense and essential to a fair trial, if the informant was a participant in or witness to the crime, or if the informant has knowledge favorable to the

---

<sup>250</sup> See, e.g., [Roviaro v. United States](#), 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957).

<sup>250.1</sup> In addition to the common law privilege, statutory protections may apply. The Public Records Act provides that a law enforcement officer's "personal information shall be redacted" from personnel records when there is a reason not to disclose. [Tenn. Code Ann. § 10-7-504\(g\)\(1\)\(A\)\(ii\)](#). The discretionary authority of the chief law enforcement officer to redact includes "the right to segregate information that could be used to identify or to locate an officer designated as working undercover." [Tenn. Code Ann. § 10-7-504\(g\)\(1\)\(A\)\(iii\)](#). In [Henderson v. City of Chattanooga](#), 133 S.W.3d 192, 2003 Tenn. App. LEXIS 699 (Tenn. Ct. App. 2003), the Court of Criminal Appeals held that even though officers' photographs had not been "segregated" as provided for in the statute, the photographs fell within the Public Record Act's exempt records provision, because the officers were designated as working undercover and release of their photographs would have had the potential to threaten their safety or the safety of a member of their household or immediate family. The Court concluded that this interpretation of the statute "affords greater protection to undercover police officers in accordance with the obvious purpose of the legislature in enacting the undercover officer exemption." [Id.](#), \*206. The Court also construed "designated as working undercover" to include newly hired officers, not just those who are actually working on an undercover assignment at the time the personal information is requested. [Id.](#)

<sup>251</sup> [Roberts v. State](#), 489 S.W.2d 263, 264 (Tenn. Crim. App. 1972); [State v. Ostein](#), 293 S.W.3d 519, 527 (Tenn. 2009) (quoting [Roberts](#)).

<sup>252</sup> See, e.g., [United States v. Julius Doochin Enter.](#), 370 F. Supp. 942 (M.D. Tenn. 1973) (informer's privilege applies in Fair Labor Standards Act cases).

<sup>253</sup> [State v. Vanderford](#), 980 S.W.2d 390, 396 (Tenn. Crim. App. 1997).

<sup>254</sup> [Id.](#)

## 1 Tennessee Law of Evidence § 5.26

defendant.<sup>255</sup> The defendant has the burden of establishing by a preponderance of evidence that the necessary reasons for disclosure are present.<sup>256</sup> This is a “heavy burden” requiring more than “mere speculation.”<sup>257</sup>

The primary reason for mandating disclosure is that disclosure is necessary if the criminal accused is to have a fair trial. For example, in *Washington v. State*,<sup>258</sup> the privilege was denied when the Tennessee Bureau of Investigation engineered a drug buy in which the undercover agent was a “participating witness to the crime.” A subsequent Tennessee decision characterized the rule as requiring disclosure of the informant’s identity “if the informant is also a material witness whose testimony may be of benefit to the defense.”<sup>259</sup>

Another example is provided by *State v. Brown*,<sup>260</sup> in which the defendant was convicted of possession with intent to sell cocaine. The prosecution was allowed to prove that an anonymous police informant was sold drugs by the defendant. The appellate court held that the informant’s identity must be disclosed since the sales to the informant were proof that the defendant was involved with the cocaine and that he had the intent necessary for the offense.

Since disclosure may well cause harm to the informant and even his or her family, the Tennessee Supreme Court has held that danger to the informant’s life must be given significant weight in assessing the propriety of disclosure.<sup>261</sup> Disclosure is also denied for other reasons as well.

Tennessee cases do not require disclosure if the informant only provided information used by law enforcement authorities to obtain a search warrant.<sup>262</sup> Similarly, disclosure may be denied if the informant was a “mere tipster or introducer” rather than an active participant in the crime.<sup>263</sup> On the other hand, disclosure is required if the informer’s identity has already been revealed to those people who would resent the informer’s participation, or if disclosure would not reveal the informant’s real identity.<sup>264</sup> If the government invokes this privilege, the court may have to consider some information in camera to determine whether the privilege applies. When disclosure is ordered, the court may require it to occur before trial to allow the defense adequate preparation time.<sup>265</sup>

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

<sup>255</sup> [Id. at 397](#); See also [State v. Ostein, 293 S.W.3d 519, 528 \(Tenn. 2009\)](#)

<sup>256</sup> *Id.*

<sup>257</sup> [State v. Ostein, 293 S.W.3d 519, 528 \(Tenn. 2009\)](#) (quoting [United States v. Skeens, 449 F.2d 1066, 1070 \(D.C. Cir. 1971\)](#)).

<sup>258</sup> [534 S.W.2d 865, 867 \(Tenn. Crim. App. 1975\)](#).

<sup>259</sup> [Wells v. State, 509 S.W.2d 520, 521 \(Tenn. Crim. App. 1973\)](#), *aff’d*, [517 S.W.2d 755 \(Tenn. 1974\)](#). See also [Roberts v. State, 489 S.W.2d 263, \(Tenn. Crim. App. 1972\)](#) (informer present at drug buy; disclosure required because informer was material witness to crime being tried).

<sup>260</sup> [823 S.W.2d 576 \(Tenn. Crim. App. 1991\)](#).

<sup>261</sup> [State v. Ostein, 293 S.W.3d 519, 529 \(Tenn. 2009\)](#).

<sup>262</sup> [Wells v. State, 509 S.W.2d 520, 521 \(Tenn. Crim. App. 1973\)](#), *aff’d*, [517 S.W.2d 755 \(Tenn. 1974\)](#); ***Simmons v. State, 198 Tenn. 587, 281 S.W.2d 487 (1955)*** (disclosure discretionary); [State v. Ostein, 293 S.W.3d 519, 528 \(Tenn. 2009\)](#) (defendant not entitled to discover identity of informants for sole purpose of attacking a search warrant). Cf. [State v. Vanderford, 980 S.W.2d 390, 397 \(Tenn. Crim. App. 1997\)](#) (same).

<sup>263</sup> [State v. Ostein, 293 S.W.3d 519, 528 \(Tenn. 2009\)](#).

<sup>264</sup> [United States v. Julius Doochin Enter., 370 F. Supp. 942 \(M.D. Tenn. 1973\)](#).

<sup>265</sup> [State v. Ostein, 293 S.W.3d 519, 527 n. 4 \(Tenn. 2009\)](#).

---

End of Document

## 1 Tennessee Law of Evidence § 5.27

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE— PRIVILEGES**

#### **§ 5.27 Law Enforcement Privilege**

---

While some jurisdictions have adopted a law enforcement privilege to protect disclosure of law enforcement techniques and procedures, the Supreme Court of Tennessee has held that there is no such common law privilege in Tennessee.<sup>266</sup>

Records reflecting the identity of people or entities directly or indirectly involved in carrying out a death sentence are confidential.<sup>266.1</sup>

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>266</sup> [\*Schneider v. City of Jackson\*, 226 S.W.3d 332, 344 \(Tenn. 2007\)](#) (field interview cards are not protected from disclosure under the Public Records Act by a law enforcement privilege, which does not exist in Tennessee); see also [\*Swift v. Campbell\*, 159 S.W.3d 565, 578 \(Tenn. Ct. App. 2004\)](#) (Tennessee does not recognize a law enforcement investigative privilege).

<sup>266.1</sup> [\*Tenn. Code Ann. § 10-7-504\(h\)\(1\)\*](#) (Supp. 2013). See also [\*West v. Schofield\*, 460 S.W.3d 113 \(Tenn. 2015\)](#) (reviewing the legislative history of the statutory provision and affirming that the privilege extends to those individuals who are directly or indirectly involved in the execution).

## 1 Tennessee Law of Evidence § 5.28

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE— PRIVILEGES**

## **§ 5.28 Electronic Surveillance Results**

---

The law authorizing electronic surveillance for criminal investigative purposes includes a number of restrictions on the admissibility of the information obtained in the surveillance. Original and duplicate recordings made during surveillance are deemed confidential and are not open for public inspection. Applications for surveillance orders are also deemed to be confidential. Before the contents of intercepted communications can be received in evidence, each party must be given, at least ten days before trial, a copy of the court order and application for the surveillance.<sup>267</sup> A person who through authorized means obtained information through authorized electronic surveillance may testify in court about the contents of the surveillance.<sup>268</sup>

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>267</sup> *Id.* at § 40-6-304 (2006). See also [State v. Darnell, \\_\\_\\_ S.W.3d \\_\\_\\_, 2014 Tenn. Crim. App. LEXIS 1053 \(Tenn. Crim. App. 2014\)](#) (defendant could not establish that he was prejudiced by the state's failure to timely deliver the formal notice, where the materials given to his attorney gave the defendant far more information than that required in a formal notice; moreover, fact that his attorney was given the information instead of defendant was of no import, because defendant was considered to have notice of all facts charged upon his attorney; accordingly, where actual knowledge of the existence of the warrant is demonstrated within the time period allowed for notification by the prosecution, such formal written notification becomes a ministerial act, and the failure to so notify does not require suppression of evidence). [State v. Darnell, \\_\\_\\_ S.W.3d \\_\\_\\_, 2014 Tenn. Crim. App. LEXIS 1053 \(Tenn. Crim. App. Nov. 20, 2014\)](#).

<sup>268</sup> *Id.* at § 40-6-306(c) (2006).

## 1 Tennessee Law of Evidence § 5.29

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE—PRIVILEGES**

#### **§ 5.29 Automobiles**

---

The Tennessee Financial Responsibility Act of 1977 requires, in certain circumstances, that the operator of a vehicle file an accident report<sup>269</sup> and a report of financial responsibility.<sup>270</sup> This information, as well as any action or findings of the Tennessee Commissioner of Safety and any other evidence under this scheme, is privileged on the issue of due care or negligence in any lawsuit to recover damages as a result of the related accident.<sup>271</sup> This privilege does not bar evidence in a criminal case, but such evidence may be barred by the [Fifth Amendment](#) or some other rule. It also does not bar a person from testifying that he or she paid for damages to a car because of a desire to comply with the Financial Responsibility Law.<sup>272</sup>

Another, and even more important privilege, bars admission of “[a]ll accident reports made by any person or by garages.”<sup>273</sup> These reports generally may not be “used as evidence in any trial, civil or criminal, arising out of an accident.”<sup>274</sup> In *McBee v. Williams*,<sup>275</sup> the statute was interpreted as barring introduction of an accident report indicating the defendant had not been driving improperly.

*Ignition Interlock Information.* Though not technically a privilege, information gathered by an Ignition Interlock Provider is confidential and remains confidential when transmitted, maintained, and stored.<sup>275.1</sup>

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>269</sup> [Tenn. Code Ann. § 55-10-107\(a\)](#) (2008). A person failing to make the required report commits a Class C misdemeanor. [Tenn. Code Ann. § 55-10-111\(c\)](#). Officers who investigate traffic accidents are required to forward a written report of the accident to the department of safety within seven days of completing an accident investigation. [Tenn. Code Ann. § 55-10-108\(b\)\(1\)](#).

<sup>270</sup> *Id.* at § 55-12-120 (2008).

<sup>271</sup> *Id.* at § 55-12-128 (2008). While the accident report itself is inadmissible as evidence, a police officer can of course testify as to his or her personal recollection of an accident scene or accident investigation. [State v. Davis, 2012 Tenn. Crim. App. LEXIS 1079 \(Tenn. Crim. App. Dec. 27, 2012\)](#).

<sup>272</sup> *Nelson v. Mooneyhan*, 58 Tenn. App. 103, 426 S.W.2d 519 (1967).

<sup>273</sup> [Tenn. Code Ann. § 55-10-114](#) (2008).

<sup>274</sup> *Id.*

<sup>275</sup> [56 Tenn. App. 232, 405 S.W.2d 668 \(1966\)](#).

<sup>275.1</sup> [Tenn. Code Ann. § 55-10-423](#).

## 1 Tennessee Law of Evidence § 5.30

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE—PRIVILEGES**

## **§ 5.30 Tax Returns**

---

Tax returns for various Tennessee taxes are deemed confidential,<sup>276</sup> but may be disclosed to various interested individuals and governmental entities.<sup>277</sup> The law specifically provides that the state taxing authorities may provide copies of tax returns to the legislature and legislative committees pursuant to subpoena,<sup>278</sup> and to various law enforcement personnel for cases involving the tax laws.<sup>279</sup> The law also provides, however, that confidential information and legally privileged information covered by the attorney-client privilege may not be disclosed to determine the taxpayer liability of any professional practitioner in the state.<sup>279.1</sup>

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>276</sup> [Tenn. Code Ann. § 67-1-1702](#) (Supp. 2010) (confidentiality of tax records; the statute was amended in 2016 to specifically exempt tax records concerning hotel occupancy privileges; see [Tenn. Code Ann. § 67-1-1702\(c\)](#)); [Tenn. Code Ann. § 67-1-1704](#) (Supp. 2016) (various sales and use taxes, including alcohol and tobacco). See also [Carter v. Martin, 2016 Tenn. App. LEXIS 175 \(Tenn. Ct. App. 2016\)](#) (a public records request for tax study documents was denied because the definition of “tax administration” encompassed the documents at issue and made them confidential); [Coleman v. Kisber, 338 S.W.3d 895 \(Tenn. Ct. App. 2010\)](#), review or rehearing denied, [2011 Tenn. LEXIS 422 \(Tenn. 2011\)](#) (citizen’s petition for access to public records relative to the selection process of candidates for a special business tax credit under a program to encourage business organizations to locate in Tennessee was properly denied because the records constituted tax administration and tax information which, pursuant to [Tenn. Code Ann. § 67-1-1702](#) were not subject to disclosure under the Tennessee Public Records Act, [Tenn. Code Ann. § 10-7-503 et seq.](#)).

<sup>277</sup> See *Id.* at §§ 67-1-1703 to 67-1-1707 (Supp. 2010).

<sup>278</sup> *Id.* at § 67-1-1704(e) (Supp. 2010). Pursuant to [Tenn. Code Ann. § 67-1-1445](#) (2006), Tennessee law now provides for the disclosure of tax returns, and other tax information, to those persons with whom the state has contracted for assistance in the collection of taxes and other fees owed to the state. The tax information and returns remain subject to the statutory confidentiality provisions while in the hands of the private tax collector. [Tenn. Code Ann. § 67-1-1704\(f\)](#) (Supp 2010).

<sup>279</sup> [Tenn. Code Ann. § 67-1-1705](#) (2006).

<sup>279.1</sup> [Tenn. Code Ann. § 67-1-1710](#).



## [1 Tennessee Law of Evidence § 5.31](#)

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE—PRIVILEGES**

## **§ 5.31 Banks and Insurance**

---

### **[1] In General**

Information obtained by the commissioner of financial institutions or a bank examiner is privileged, but disclosure is permitted to various state and federal personnel for limited purposes. The bank may reproduce all or part of a report of examination and share it with a bank holding company, the bank's external auditors, and the bank's legal counsel without affecting the confidential nature of the disclosed communication.<sup>280</sup> The statute requires the financial institution to ensure that disclosures are made under safeguards designed to prevent further dissemination of the confidential information, however.<sup>280.1</sup>

### **[2] Records of Department of Financial Institutions**

Records of the Department of Financial Institutions cannot be revealed without the permission of the Commissioner of the Department.<sup>281</sup>

### **[3] Risk-Based Capital Reports**

Risk-based capital (RBC) reports are generally confidential, privileged, and not admissible when in possession of the Department of Commerce and Insurance.<sup>281.1</sup>

### **[4] Risk Management and Own Risk and Solvency Assessment**

Information in the possession or control of the Department of Commerce and Insurance may be trade secrets and are confidential and privileged, and not admissible in evidence.<sup>281.2</sup>

### **[5] Flexible Credit Act**

For purposes of the Flexible Credit Act, a person who directly or indirectly holds the power to vote at least 25% of outstanding voting securities issued by another person is presumed to control the other person.<sup>281.3</sup>

---

<sup>280</sup> *Id.* at § 45-2-1603 (2007). [Tenn. Code Ann. § 45-2-1603](#) was amended effective March 19, 2020 to add subsection (g), providing as follows: "Notwithstanding any other law to the contrary, the commissioner may, in the commissioner's discretion and in the interest of sound banking regulation, publicly disclose any written agreement jointly issued to a bank by the commissioner and the federal deposit insurance corporation, the federal reserve board, or the federal reserve board's duly authorized representative." [Tenn. Code Ann. § 45-2-1603\(g\)](#).

<sup>280.1</sup> [Tenn. Code Ann. § 45-2-1603\(b\)](#).

<sup>281</sup> *Id.* at § 45-1-120 (2007). See also [Tenn. Code Ann. § 45-1-126](#) (confidentiality of compliance review documents); TENN. CODE ANN. § 45-7-216 (2007), renumbered as § 45-7-116 in 2020 (data supplied to the Commissioner of Financial Institutions are confidential, but the Commissioner has the discretion to disclose confidential information to a local, state, or federal agency).

<sup>281.1</sup> [Tenn. Code Ann. §§ 56-46-109, 56-46-208](#).

<sup>281.2</sup> [Tenn. Code Ann. § 56-11-208](#).

**[6] Commerce and Insurance Investigations**

Some information of the Department of Commerce and Insurance obtained or disclosed in the course of certain investigations is confidential, privileged, and inadmissible.<sup>281.4</sup>

**[7] Bank Account and Credit Card Information**

Tennessee law makes confidential the bank account information known to a state agency. This extends to credit card account numbers and personal identification numbers.<sup>281.5</sup>

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>281.3</sup> [Tenn. Code Ann. § 45-12-102\(2\)\(B\)](#) (Supp. 2014).

<sup>281.4</sup> [Tenn. Code Ann. § 56-11-108](#). The statutory amendment effective May 3, 2018 amended subsection [Tenn. Code Ann. § 56-11-108\(a\)](#) as follows: in the first sentence, inserted “or provided to the department” following “reported”; substituted “§§ 56-11-103(b)(13)–(15), 56-22-205, 56-11-106, and 56-11-116(d), are” for “§§ 56-11-103(b)(12) and (b)(13), 56-11-105 and 56-11-106, shall be” preceding “confidential”; and substituted “are not” for “shall not be” twice, following “privileged,” and following “subpoena, and”.

<sup>281.5</sup> [Tenn. Code Ann. § 10-7-504](#) (Supp. 2016).

## 1 Tennessee Law of Evidence § 5.32

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE— PRIVILEGES**

#### **§ 5.32 Tenure Deliberations**

---

In *University of Pennsylvania v. E.E.O.C.*,<sup>282</sup> the United States Supreme Court refused to recognize a common law or [first amendment](#) privilege protecting information used in peer review deliberations which lead to a denial of tenure to a university professor. The Court expressed a hesitancy to approve new privileges that interfere with the public's right to have evidence presented in court. The Court also feared:

[A]cceptance of petitioner's claim would also lead to a wave of similar privilege claims by other employers who play significant roles in furthering speech and learning in society. What of writers, publishers, musicians, lawyers? It surely is not unreasonable to believe, for example, that confidential peer reviews play an important part in partnership determinations at some law firms. We perceive no limiting principle in petitioner's argument.<sup>283</sup>

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>282</sup> [493 U.S. 182, 110 S.Ct. 577, 107 L.Ed.2d 571 \(1990\)](#).

<sup>283</sup> [Id. at 194](#).

## **1 Tennessee Law of Evidence § 5.32A**

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE— PRIVILEGES**

#### **§ 5.32A Employment**

---

When job openings for state positions require applicants to complete an application form, Tennessee law sometimes permits questions about an applicant's criminal history. The criminal history so obtained is deemed confidential and not subject to the Tennessee open records law.<sup>283.1</sup> Also confidential are job performance evaluations for many state agencies, including treasury, comptroller, secretary of state, and higher education.<sup>284</sup>

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>283.1</sup> [\*Tenn. Code Ann. § 8-50-112\*](#) (Supp. 2017).

<sup>284</sup> [\*Tenn. Code Ann. § 10-7-504\(a\)\(26\)\*](#) (Supp. 2016).

## **1 Tennessee Law of Evidence § 5.33**

***Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE—  
PRIVILEGES***

### **§ 5.33 [Reserved]**

---

Tennessee Law of Evidence  
Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

## **1 Tennessee Law of Evidence § 5.34**

**Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE—  
PRIVILEGES**

### **§ 5.34 Corporations and Limited Liability Companies**

---

#### **[1] In General**

Various practitioners covered by statutory or common law privileges, such as attorneys and accountants, may opt to structure their practice as a professional corporation. Any privilege that applies to communications between the professional and the individual receiving the service applies as well to a domestic or foreign professional corporation and its employees who render professional services on behalf of the corporation.<sup>285</sup>

#### **[2] Professional Limited Liability Company**

A privilege applicable to communications between an individual rendering professional services and the person receiving the services is not affected if the services are rendered by a domestic or foreign professional limited liability company.<sup>286</sup>

Tennessee Law of Evidence  
Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>285</sup> [\*Tenn. Code Ann. § 48-101-620\*](#) (2002).

<sup>286</sup> *Id.* at § 48-248-405 (2002).

## [1 Tennessee Law of Evidence § 5.35](#)

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE— PRIVILEGES**

## **§ 5.35 Juveniles**

---

### **[1] Juvenile's Fingerprint, Photograph and Other Files**

Under Tennessee law, a child may not be fingerprinted or photographed as part of an investigation of a delinquent act unless the court gives permission or unless the act would be a felony if committed by an adult.<sup>287</sup> The fingerprint files and photographs are accessible only to law enforcement officers and a few other persons acting in their official capacity. The files may be kept indefinitely if the child is adjudicated a delinquent child on a felony. Certain exceptions exist, however. A photograph, videotape or audiotape of a juvenile may be made by a law enforcement officer if the juvenile is in the process of committing an offense or is undergoing field sobriety testing upon suspicion of driving under the influence.<sup>288</sup> Also, if the juvenile is the victim of a crime and consents, photographing or recording may occur, but only for use as evidence in the case.<sup>289</sup> The photograph or recording shall not be considered a public record and shall not be released to the public except by order of the court having jurisdiction over the charges brought against the juvenile.<sup>289.1</sup>

### **[2] Juvenile Court Records**

Juvenile Court files and records are open for inspection only by a limited number of people for professional purposes.<sup>290</sup> In delinquency cases, however, petitions and orders (though not other materials) are open to the public if the child was at least fourteen years old at the time of the delinquent act, and the conduct, for an adult, would be some form of murder, rape, robbery, or kidnapping.

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>287</sup> *Id.* at § 37-1-155(a)(1) (2010).

<sup>288</sup> [Tenn. Code Ann. § 37-1-155\(e\)\(1\)](#) (2010).

<sup>289</sup> [Tenn. Code Ann. § 37-1-155\(e\)\(1\)](#) (2010).

<sup>289.1</sup> [Tenn. Code Ann. § 37-1-155\(e\)\(3\)](#) (2017).

<sup>290</sup> *Id.* at § 37-1-153 (2010). See also [Tenn. Code Ann. § 37-1-136](#) (Supp. 2017) (various assessment records).

## **1 Tennessee Law of Evidence § 5.36**

**Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE—  
PRIVILEGES**

### **§ 5.36 Family Violence Shelter's Location**

---

The location of a family violence shelter is deemed confidential in order to ensure the safety of its inhabitants. No person can be compelled, in a criminal, civil, or administrative proceeding, to reveal the address or location of the shelter.<sup>291</sup>

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>291</sup> *Id.* at § 71-6-208 (2004).



## 1 Tennessee Law of Evidence § 5.37

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE— PRIVILEGES**

#### **§ 5.37 Sex Offenders**

---

Certain convicted sex offenders must register with law enforcement officers in Tennessee. Information on the various forms was previously by statute deemed confidential, but law enforcement officers had the right to release relevant information to protect the public.<sup>292</sup> That statutory scheme has been repealed. The current law is the “Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification and Tracking Act.”<sup>293</sup> The new laws are weighted in favor of making information available regarding sex offenders.<sup>293.1</sup> Registry information collected about violent juvenile sex offenders is confidential, unless they have committed a subsequent qualifying offense under the statute, in which case their registry information becomes public.<sup>293.2</sup>

Tennessee Law of Evidence  
Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>292</sup> *Id.* at § 40-39-106(c) (now repealed).

<sup>293</sup> *Id.* at §§ 40-39-201 et seq.

<sup>293.1</sup> *Id.*, at § 40-39-201(b)(4) (“in balancing the sexual offender’s and violent sexual offender’s due process and other rights against the interests of public security, the general assembly finds that releasing information about offenders under the circumstances specified in this part will further the primary governmental interest of protecting vulnerable populations from potential harm”). Since its enactment in 2004, the sex offender registration statute has undergone many legislative amendments, expanding the scope of information collected and made public. One Court of Criminal Appeals judge has suggested that the changes are significant enough that the Court should revisit its decision in *Ward v. State*, 315 S.W.3d, 461 (Tenn. 2010), which held the statute to be nonpunitive. See [Foley v. State, 2020 Tenn. Crim. App. LEXIS 199, \\*28 \(Tenn. Crim. App. Feb. 27, 2020\)](#) (concurring opinion, J. Robert L. Holloway) (noting that the statute’s “residential and work restrictions now severely limit almost every aspect of an offender’s life, including where an offender can live, work, stand, or sit idly”). Comparing the Tennessee statute to the Michigan Sex Offender Registration Act, which the 6th Circuit Court of Appeal in 2016 held unconstitutional and punitive, Judge Holloway concluded that the Tennessee statute has evolved to become “a byzantine code governing in minute detail the lives of ... sex offenders.” *Id.*, quoting *Does #1-5 v. Snyder*, 834 F.3d 696, 697(6th Cir. 2016).

<sup>293.2</sup> *Id.* at §§ 40-39-206(e), 40-39-207(j).

## **1 Tennessee Law of Evidence § 5.38**

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE— PRIVILEGES**

#### **§ 5.38 Health**

---

##### **[1] HIV Test Results**

Persons arrested for various sex assault offenses are required to undergo HIV testing.<sup>294</sup> The results are not a public record, but must be disclosed to the victim, and shall be made available to the defendant's and victim's physicians, a minor victim's parents or guardian, the departments of health and correction, the defendant, and the district attorney general. If the arrestee is convicted, the court also sees the results prior to sentencing.

Persons convicted of prostitution must also submit to an HIV test.<sup>295</sup> The results are available initially only to the defendant, judge, and, upon request, district attorney general, but may later be used as evidence in a prosecution for aggravated prostitution.<sup>295.1</sup>

##### **[2] Traumatic Brain Injury Registry**

Tennessee law authorizes extensive services and a registry for persons suffering brain injury. Information in the registry is restricted to appropriate uses.<sup>296</sup>

##### **[3] Certain Medical Records in Workers' Compensation Cases**

Medical records provided to the Department of Labor relative to benefit review conferences and settlement reviews are confidential and are not public records.<sup>297</sup>

Other medical records in workers' compensation cases are, by statute, specifically made not privileged.<sup>297.1</sup>

##### **[4] Information Employer Receives Through Drug-testing Program**

If an employer maintains a drug-free workplace under Tennessee law, all information and drug test results are confidential information and may not be used or received in evidence except as provided by statute.<sup>298</sup> An employer may, however, notify a minor's parents or legal guardians of any test results arising under the statute.<sup>298.1</sup>

##### **[5] Hospital Claims Data**

---

<sup>294</sup> *Id.* at § 39-13-521 (2010).

<sup>295</sup> *Id.*

<sup>295.1</sup> *Id.* at §§ 39-13-521(e). See also § 39-13-516 (aggravated prostitution).

<sup>296</sup> *Id.* at § 68-55-204 (2006).

<sup>297</sup> *Id.* at § 50-6-131 (2008).

<sup>297.1</sup> See, e.g., **TENN. CODE ANN. § 50-6-204** (Supp. 2014).

<sup>298</sup> *Id.* at § 50-9-109 (2008).

<sup>298.1</sup> *Id.*

## 1 Tennessee Law of Evidence § 5.38

Certain claims data submitted by licensed hospitals to the Commissioner of Health are confidential until processed and verified by the Commissioner.<sup>299</sup>

**[6] Evaluation of Health Care Provider**

A government survey, inspection, or investigation of a health care provider is inadmissible in a health care liability action.<sup>299.1</sup> It is admissible in an administrative or other proceeding initiated by a government entity. It may also be used to impeach a witness in a health care facility liability action.

**[7] Disposition of Fetus**

A physician performing abortions must keep a record of the disposition of the fetus.<sup>299.2</sup> These records “are confidential in nature” and not public records open for inspection.

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>299</sup> *Id.* at § 68-1-108(a) (2006).

<sup>299.1</sup> [Tenn. Code Ann. § 29-26-103](#) (2015).

<sup>299.2</sup> [Tenn. Code Ann. § 39-15-203](#) (Supp. 2016). The statute was amended in 2018, adding subsection (d), which requires the physician to report whether a heartbeat was detected.

## [1 Tennessee Law of Evidence § 5.39](#)

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE—PRIVILEGES**

## **§ 5.39 Child Sexual Abuse Exception to Privileges**

---

### **[1] In General**

Tennessee law contains a sweeping exception to testimonial privileges in child abuse cases. Except in the case of attorney-client privilege, no confidential communication otherwise protected from disclosure is privileged in “any situation involving known or suspected child sexual abuse ...”<sup>300</sup> This specifically includes spousal communications.<sup>301</sup> Although it could be argued that the Tennessee statute creating the privilege for psychologist-client communications exempts psychologists from this child abuse provision by treating psychologists as if they were lawyers,<sup>302</sup> this technical reading is inconsistent with the statute’s purpose of facilitating full disclosure in child abuse cases. This position is further supported by the fact that certain social workers are given the same privilege as psychologists, yet the statute relating to these social workers contains an exception for mandatory child abuse reports.<sup>303</sup>

In addition to spouses,<sup>304</sup> psychologists<sup>305</sup> and social workers,<sup>306</sup> this statutory exception to confidential communications applies to clergy,<sup>307</sup> accountants,<sup>308</sup> interpreters for the deaf,<sup>309</sup> news reporters,<sup>310</sup> psychiatrists,<sup>311</sup> licensed marital and family therapists and licensed professional counselors,<sup>312</sup> and all other privileged communications. An argument could be made that the attorney-private investigator<sup>313</sup> privilege is

---

<sup>300</sup> *Id.* at § 37-1-614 (2010).

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at § 63-11-213 (2010).

<sup>303</sup> *Id.* at § 63-23-107 (2010). This provision was transferred. See now, § 63-23-109.

<sup>304</sup> See above [§ 5.17](#).

<sup>305</sup> See above [§ 5.07](#).

<sup>306</sup> See above [§ 5.08](#).

<sup>307</sup> See above [§ 5.15](#). See also [State v. Workman, 2011 Tenn. Crim. App. LEXIS 909 \(Tenn. Crim. App. 2011\)](#), appeal denied by [Workman v. State, 2016 Tenn. LEXIS 557 \(Aug. 18, 2016\)](#) (trial court properly refused to exclude clergymen’s testimony about defendant’s confessions to them about having sex with minor victim because, under [Tenn. Code Ann. § 37-1-614](#), clergymen-penitent privilege did not apply to instances of child sexual abuse).

<sup>308</sup> See above [§ 5.06](#).

<sup>309</sup> See above [§ 5.16](#).

<sup>310</sup> See below [§ 5.25](#).

<sup>311</sup> See above [§ 5.12](#).

<sup>312</sup> See above [§ 5.09](#).

## 1 Tennessee Law of Evidence § 5.39

merely an extension of the attorney-client privilege in that it encompasses attorney work product and representation of the client. The statute makes no such distinction, however, and there is apparently no testimonial privilege for the private investigator hired by an attorney as to situations involving child sexual abuse.

The Tennessee Supreme Court has upheld the constitutionality of this exception to privileges against a due process challenge.<sup>314</sup> The Supreme Court also held that the counselor has an ethical obligation to advise the client of the limits of confidentiality in matters relating to child abuse, but the failure to so advise the client does not necessarily require suppression of the client's statement to the counselor.<sup>315</sup>

## [2] Child Sexual Abuse Reports

In order to protect the child and others responsible for a child's welfare, records of child sexual abuse reports and related items are confidential.<sup>316</sup> But limited disclosure is authorized for specified purposes relating to various judicial proceedings, investigation, research, and treatment. A hearing may be held to determine when disclosure is permitted.<sup>317</sup>

Any person who makes a child sex abuse report is immune from civil or criminal liability, to the extent provided by statute.<sup>317.1</sup>

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>313</sup> See above [§ 5.05](#).

<sup>314</sup> [State v. Smith, 933 S.W.2d 450 \(Tenn. 1996\)](#).

<sup>315</sup> [Id. at 457](#).

<sup>316</sup> [Tenn. Code Ann. § 37-1-612 \(2001\)](#).

<sup>317</sup> See [Munke v. Munke, 882 S.W.2d 803 \(Tenn. Ct. App. 1994\)](#) (parties in divorce sought access to tape recorded statements of child sexual abuse victim). See also [John B. v. Goetz, 879 F. Supp. 2d 787 \(M.D. Tenn. Jan. 28, 2010\)](#) (because all of the electronically stored information data from the Tennessee Department of Mental Health and Developmental Disabilities' and the Department of Children's Services' incident reporting data and another database contained highly relevant information on defendants' violation of federal law and plaintiffs' federal constitutional rights, and because an appropriate protective order for discovery and trial could avoid disclosures of the identities of the children, doctors and other protected persons, the state law privilege found in [Tenn. Code Ann. § 37-1-612](#) did not bar discovery.)

<sup>317.1</sup> [Tenn. Code Ann. §§ 37-1-613, 37-1-410](#). See also [Draper v. Westerfield, 181 S.W.3d 283, 2005 Tenn. LEXIS 824 \(Tenn. 2005\)](#) (since [Tenn. Code Ann. § 37-1-410\(a\)](#) only provided immunity to the physician if he informed the caseworker and the detective that the x-rays and CT scan of the child indicated child abuse, and the determination of whether the suspected child abuse had been reported involved a disputed issue of material fact, summary judgment was precluded).

## **1 Tennessee Law of Evidence § 5.39A**

### **Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE— PRIVILEGES**

#### **§ 5.39A Child Custody Exception to Privileges**

---

In a case requiring a court to make a custody determination for a minor child, the court is authorized to order the disclosure of certain confidential mental health information of a party.<sup>317.2</sup> The court must enter appropriate orders to minimize disclosure of such information.<sup>317.3</sup>

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>317.2</sup> [Tenn. Code Ann. § 36-6-106](#).

<sup>317.3</sup> The court order “must contain a qualified protective order that limits the dissemination of confidential protected mental health information to the purpose of the litigation pending before the court and provides for the return or destruction of the confidential protected mental health information at the conclusion of the proceedings.” [Tenn. Code Ann. § 36-6-106\(a\)\(8\)](#).

## [1 Tennessee Law of Evidence § 5.40](#)

**Tennessee Law of Evidence > CHAPTER 5 ARTICLE V. TENNESSEE LAW OF EVIDENCE—PRIVILEGES**

### **§ 5.40 Rule 502. Limitations on Waiver of Privileged Information or Work Product**

---

#### **[1] Text of Rule**

##### **Rule 502 Limitations on Waiver of Privileged Information or Work Product**

Inadvertent disclosure of privileged information or work product does not operate as a waiver if:

- (1) the disclosure is inadvertent,
- (2) the holder of the privilege or work-product protection took reasonable steps to prevent disclosure; and
- (3) the holder promptly took reasonable steps to rectify the error.

##### **2010 Advisory Commission Comment**

The language is taken from Federal [Rule of Evidence 502\(b\)](#). Compare [Tennessee Rule of Civil Procedure 26.02\(5\)](#) on discovery of electronically stored information. The 2018 amendment corrects a typographical error in the original text of the rule by adding the word “if” at the end of the introductory clause.

#### **[2] Inadvertent Disclosure Not Deemed Waiver**

In modern information exchanges, on rare occasions privileged information is disclosed unintentionally. For example, an email message containing privileged materials could be carelessly forwarded to adversary counsel, someone could hack into a lawyer’s computer and download sensitive documents, or work product documents could be mistakenly delivered to adversary counsel in a packet of routine discovery. Rule 502 specifically provides that these inadvertent disclosures do not constitute a waiver of the privilege or work product protection if the party disclosing the information takes two steps.<sup>318</sup>

#### **[3] Reasonable Steps to Prevent Disclosure**

First, the person must have taken *reasonable steps* to prevent disclosure. This may require that person to explain how the disclosure occurred despite reasonable efforts to protect the work product or privileged information. Note that the standard is *reasonable*, not heroic. Assessing whether this test is met may involve consideration of the exact processes that led to the disclosure, plus the cost and convenience of alternate methods of protecting the privileged information.

#### **[4] Reasonable Steps to Rectify the Erroneous Disclosure**

---

<sup>318</sup> The federal privilege rule is similar, but narrower. FED. [R. EVID. 502\(b\)](#). It is limited to information protected by the attorney client or work product rule. The Tennessee provision extends to information protected by the work product doctrine or any Tennessee privilege.

## 1 Tennessee Law of Evidence § 5.40

Second, Rule 502 provides that an inadvertent disclosure does not constitute a waiver of privileged or work product information if reasonable steps were taken to rectify the erroneous disclosure. This puts a burden on the party making the mistaken disclosure to take whatever measures are reasonably possible to remedy the error. For example, upon discovery of the inadvertent disclosure, counsel should immediately notify adverse counsel and request that the privileged information be returned unread. The court should also be notified to protect the record and obtain possible judicial relief.<sup>319</sup>

Tennessee Law of Evidence

Copyright 2021, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

---

End of Document

---

<sup>319</sup> The Tennessee Rules of Civil Procedure contain a somewhat similar provision to deal with privileged information inadvertently disclosed during discovery. [Tenn. R. Civ. P. 26.02\(5\)](#). Regarding notice, the Commentary to Rule 26.02 warns: “A party asserting a claim of privilege or protection after production must give notice to the receiving party. That notice should be in writing unless the circumstances preclude it. Such circumstances could include the assertion of the claim during a deposition. The notice should be as specific as possible in identifying the information and stating the basis for the claim. Because the receiving party must decide whether to challenge the claim and may sequester the information and submit it to the court for a ruling on whether the claimed privilege or protection applies and whether it has been waived, the notice should be sufficiently detailed so as to enable the receiving party and the court to understand the basis for the claim and to determine whether waiver has occurred. Courts will continue to examine whether a claim of privilege or protection was made at a reasonable time when delay is part of the waiver determination under the governing law.”