SM-52 DISCLOSURE OF THE IDENTITY OF AN INFORMER

Section 905.10(1) recognizes a privilege on the part of the government "to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of the law."[1] The privilege may be claimed by an appropriate representative of the federal government or of the state or local government unit involved.[2]

The privilege does not exist if the informer or the holder of the privilege discloses the identity of the informer "to those who would have cause to resent the communication."[3] The privilege also does not exist if the informer appears as a witness for the state.[4]

There are two instances where a court may be called upon to conduct an inquiry into whether the identity of an informer should be disclosed despite the existence of the privilege. One occurs at the pretrial stage, where information from an informer is relied upon to establish the legality of obtaining evidence. The other occurs at trial where the defendant seeks the testimony of the informer. Different procedures and standards apply to the disclosure inquiry in these two situations.

I. Pretrial Disclosure: Legality of Obtaining Evidence

In the context of a motion to suppress evidence, the informer's identity relates to evaluating his or her reliability and credibility as part of the probable cause determination. Where an informer has provided information relied upon to establish the legality of, for example, a search and seizure, disclosure of identity may be required if "the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible." § 905.10(3)(c).

If the judge orders disclosure, the state may request that the disclosure be made in-camera. If the request is made, the judge "shall" direct[5] that the disclosure be made in-camera. No counsel or party is permitted to be present. A record of the in-camera proceeding is to be made, but it is to be sealed and preserved to be made available in the event of an appeal.

II. Disclosure at Trial : Testimony on the Merits

Disclosure of an informer's identity at trial may become an issue when "it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence." § 905.10(3)(b). Upon such a showing, the court shall give the state an

opportunity to oppose disclosure in an in-camera proceeding. The amount of evidence required to justify the inquiry has been referred to as a "minimal burden. . . . The showing need only be one of a possibility that the informer could supply testimony necessary to a fair determination."[6]

The in-camera proceeding is to provide the state "an opportunity to show . . . facts relevant to determining whether the informer can, in fact, supply"[7] testimony necessary to a fair determination of guilt or innocence. The statute provides that the showing will ordinarily be in the form of affidavits but that the judge may direct that testimony may be taken. No counsel or party shall be permitted to be present at the in-camera proceeding.

The standard for deciding whether the informer's identity may be disclosed was stated in State v. Vanmanivong, 2003 WI 51, 261 Wis.2d 202, 661 N.W.2d 76, ¶24: ". . . a defendant must show that an informer's testimony is necessary to the defense before a court may require disclosure. 'Necessary' in this context means that the evidence must support an asserted defense to the degree that the evidence could create a reasonable doubt."[8]

The decision on whether to order disclosure is within the discretion of the trial court. The court should make sufficient findings "to show that its conclusion was reached by a reasoning process based on the facts of record or reasonable inferences from those facts."[9]

If the court concludes that the informer can give testimony that meets the "necessary" standard, and if the state elects not to disclose the informer's identity, the judge shall dismiss the charges to which the testimony would relate.[10]

Evidence submitted for the in-camera proceeding shall be sealed and preserved for possible reference on appeal. It is not to be otherwise revealed without the consent of the state.

COMMENT

SM-52 was originally published in 1991. This revision was approved by the Committee in October 2004.

1. Procedures relating to deciding whether an informer's identity must be disclosed are set forth in considerable detail in § 905.10 of the Wisconsin Rules of Evidence. The statute is based in part on preexisting Wisconsin precedent, see Stelloh v. Liban, 21 Wis.2d 119, 126, 124 N.W.2d 101 (1963), and

is consistent with the reasoning of the principal United States Supreme Court case, Roviaro v. United States, 353 U.S. 53 (1957). See State v. Outlaw, 108 Wis.2d 112, 120-24, 321 N.W.2d 145 (1982).

The privilege protects not only the identity of the informer but also the contents of a communication that will tend to reveal the identity. State v. Gordon, 159 Wis.2d 335, 464 N.W.2d 91 (Ct. App. 1990).

2. Section 905.10(2) "Who May Claim. The privilege may be claimed by an appropriate representative of the federal government, regardless of whether the information was furnished to an officer of the government or of a state or subdivision thereof. The privilege may be claimed by an appropriate representative of a state or subdivision if the information was furnished to an officer thereof." The text of this Special Material refers only to "the state," on the assumption that the majority of Wisconsin cases will involve the claim of privilege by the state.

3. Section 905.10(3)(a). "[T]he State is the holder of the privilege . . . disclosure by the confidential informer's attorney . . . without specific authorization by the informer, is not 'by the informer's own action.'" State v. Lass, 194 Wis.2d 591, 598, 535 N.W.2d 904 (1995). Lass also concluded that the privilege survives the death of the confidential informer.

4. The full statement in § 905.10(3)(a) is "as a witness for the federal government or a state or subdivision thereof."

5. Section 905.10(3)(c) provides in part: "The judge shall on the request of the federal government, state or subdivision thereof, direct that the disclosure be made in-camera."

See State v. Fischer, 147 Wis.2d 694, 433 N.W.2d 647 (Ct. App. 1988), for a case finding there was an insufficient showing to require disclosure.

6. State v. Outlaw, 108 Wis.2d 112, 126, 321 N.W.2d 145 (1982). For a case finding no "showing whatsoever," see State v. Hargrove, 159 Wis.2d 69, 70, 464 N.W.2d 14 (Ct. App. 1990). An in-camera proceeding is not necessary if, without one, the trial court concludes that the informant "could provide relevant testimony necessary to a fair determination on the issue of guilt or innocence." State v. Norfleet, 2002 WI App. 140, 254 Wis.2d 569, 582-83, 647 N.W.2d 341.

7. Section 905.10(3)(b).

8. The Vanmanivong decision based this standard on State v. Outlaw, 108 Wis.2d 112, 126, 321 N.W.2d 145 (1982). The rule of the Outlaw case is found in the concurring opinions in which four justices joined because only three justices joined in the lead opinion. State v. Dowe, 120 Wis.2d 192, 352 N.W.2d 660 (1984).

The disagreement in the Outlaw case was over the meaning of "necessary" in the phrase "necessary to a fair determination of the issue of guilt or innocence." The definition in the concurring opinion was approved by a majority of the court: "an informer's testimony is necessary if it could have created in the minds of the jurors a reasonable doubt regarding a defendant's guilt." 108 Wis.2d 112, 140 Further, the concurrence "would limit the test to evidence being necessary to support the theory of defense." 108 Wis.2d 112, 141. [Otherwise, evidence corroborating guilt would result in the disclosure of an informant's identity.] A second concurring opinion was also joined in by four justices and added two

caveats to the "necessary" definition: evidence that is merely cumulative cannot be necessary; and evidence is not necessary if it is also available from another source. 108 Wis.2d 112, 142.

The previously published version of this Special Material summarized the Outlaw rule as follows: the test for disclosure of the informer's identity is whether there is a reasonable probability that the informer could give testimony necessary to the defense. All justices in Outlaw agreed that the state is not required to show beyond a reasonable doubt that the informer's testimony would not be helpful to the defense. (See the lead opinion at 108 Wis.2d 127 and the concurring opinion at 108 Wis.2d 138.) Testimony is necessary to the defense when it could create in the minds of the jurors a reasonable doubt about guilt. Testimony is not necessary when it is cumulative or available from another source.

9. State v. Larsen, 141 Wis.2d 412, 420, 415 N.W.2d 535 (Ct .App. 1987). Also see Outlaw, supra, 108 Wis.2d 112, 128. A finding denying disclosure in the following terms was found to fail to show that discretion was exercised: "I do not consider that there is a reasonable probability that the testimony of either informer would be able to give testimony necessary to a fair determination of guilt or innocence." 141 Wis.2d 412, 419-20.

For a review of the application of the complete procedure required by § 905.10, see State v. Gerard, 180 Wis.2d 327, 509 N.W.2d 112 (Ct. App. 1993).

10. Section 905.10(3)(b) states that the judge "shall" dismiss the charges upon motion by the defense and "may" do so on the court's own motion.

