

152 VIEW OF SCENE¹

You will now be taken to _____ in the custody of the bailiff.

During your trip to and from _____, or while there, you are not to discuss this case with anyone. While at _____, you are not to talk, and no one is to talk to you about the case except the judge.

You are to remain with the other jurors. You are not to conduct an independent investigation of _____ now or at any time during the trial.

Going to _____ is to enable you to better understand the evidence which is introduced in the courtroom and to assist you in weighing and applying that evidence.

What you see there is not evidence in the case and should not be considered as evidence.²

COMMENT

Wis JI-Criminal 152 was originally published in 1966 and revised in 1983 and 1991. This revision added footnote 2 and was approved by the Committee in May 1999.

Section 972.06 provides that the "court may order a view by the jury."

A view of the premises is discretionary with the court. Max L. Bloom Co. v. United States Casualty Co., 191 Wis. 524, 529-30, 210 N.W. 689 (1927).

It is improper for counsel to call the attention of the jurors to facts at the scene. Sasse v. State, 68 Wis. 530, 537, 32 N.W. 849 (1887). Where attorneys desire that the jury notice certain things at the site viewed, they should not take it upon themselves to point these out but should work through the court.

1. The instruction is to be given prior to the view. Upon returning from the view, or at the end of the case, or at both times, it may be appropriate to repeat the last two paragraphs, modified as follows:

Going to (state what was viewed) was to enable you better to understand the evidence presented in the courtroom, and to assist you in weighing and applying that evidence.

What you saw there is not evidence in the case and should not be considered as evidence.

2. The Committee realizes that the distinction that this instruction attempts to make can be a difficult one. Specifically, the troublesome statement is: "What you see there is not evidence in the case and should not be considered as evidence."

However, the Committee confirmed that this is a correct statement of the law. The most recent case to address jury views is State v. Coulthard, 171 Wis.2d 573 (Ct. App. 1992). The court stated: "The purpose of a jury view is to assist the jury in understanding the evidence." Citing: Townsend v. State, 257 Wis. 329, 43 N.W.2d 458 (1950).

In State v. Marshall, 92 Wis.2d 101, 284 N.W.2d 592 (1979), also cited in Coulthard, the court upheld the trial court's decision to allow a view and stated: ". . . the jury was specifically instructed that the view of the scene was not evidence and was not to be considered by it as evidence."

Section 805.08(4) allows jury views in civil cases:

(4) Jury View. On motion of any party, the jury may be taken to view any property, matter or thing relating to the controversy between the parties when it appears to the court that the view is necessary to a just decision. . . .

In American Family Mutual Insurance Co. v. Shannon, 120 Wis.2d 560, 356 N.W.2d 175 (1984), the court found it was error for the trial judge, sitting without a jury, to make "an unrequested, unannounced, unaccompanied and unrecorded" view of an accident scene. After concluding that the same rules apply to views by the judge or a jury, the court reiterated the standard reflected in Wis JI-Criminal 152:

. . . the viewing of the scene by a judge is justified if it enables the judge to better understand, correctly weigh, and assess the respective credibility of the evidence. A view and the facts or information thereby derived must not be considered as evidence independent of that produced in the course of the trial. The correct purpose of the view is to aid the judge to better understand and weigh the evidence, not to obtain new evidence or independently determine credibility.

So, although the rule that the view is not evidence may be difficult to apply, it remains the law in the state and the Committee determined that it should be communicated to the jury.