## 200 EXPERT[1] OPINION TESTIMONY: GENERAL

Ordinarily, a witness may testify only about facts. However, a witness with specialized knowledge in a particular field may give an opinion in that field.

In determining the weight to give to this opinion, you should consider:

- the qualifications and credibility of the witness;
- the facts upon which the opinion is based; and
- the reasons given for the opinion.

Opinion evidence was received to help you reach a conclusion. However, you are not bound by any witness's opinion.

[CONTINUE WITH THE FOLLOWING IF EXPERTS HAVE GIVEN CONFLICTING TESTIMONY.]

[In resolving conflicts in opinion testimony, weigh the different opinions against each other. Also, consider the qualifications and credibility of the witnesses and the facts supporting their opinions.]

**COMMENT**

Wis JI-Criminal 200 was originally published in 1976 and revised in 1983, 1991, 2000, 2011, 2012, and 2019. The 2019 revision eliminated the use of the word "expert" in the text of the instruction. This revision was approved by the Committee in August 2023; it added to the comment.

The 2019 revision modified the text to eliminate the use of the word "expert" to describe the witness. The change was made to address the risk of "judicial vouching," a term used to describe the idea that the jury may give undue deference to the opinion of a witness whom the judge has called an "expert." The issue was discussed in State v. Schaffhausen, an unpublished decision of the Wisconsin Court of Appeals. 2014 AP 2370, decided July 14, 2015. Also see the report of the National Commission on Forensic Science titled

"Views of the Commission Regarding Judicial Vouching," May 20, 2016, which recommends that trial judges not declare a witness to be an expert in the presence of the jury or refer to a witness as an expert.

The last paragraph of this instruction includes material formerly published separately at Wis JI-Criminal 200A.

In 2011, Wisconsin adopted the so-called Daubert standard for determining the admissibility of expert testimony. See Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993). 2011 Wisconsin Act 2 renumbered § 907.02 as § 907.02(1) and amended it to read:

> 907.02(1) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case. [Emphasis added.]

As amended, § 907.02 tracks Federal Rule of Evidence 702.

See Wis. Stat. §§ 907.02 – 907.07 and the commentary found at 59 Wis.2d R204 – R219. Also see Wis JI-Criminal 205, **EXPERT TESTIMONY – HYPOTHETICAL QUESTION**.

The key issues with regard to expert testimony are whether the witness is, in fact, qualified as an expert "by knowledge, skill, experience, training, or education" and whether the testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue." See § 907.02. If proposed testimony satisfies these criteria, it will usually be admissible and may be excluded only if it would be superfluous or a waste of time. See Judicial Council Committee's Note to § 907.02, 59 Wis.2d R207. The leading cases discussing general rules relating to expert testimony are Milbauer v. Transport Employes' Mut. Benefit Soc'y, 56 Wis.2d 860, 203 N.W.2d 135 (1973); Rabata v. Dohner, 45 Wis.2d 111, 172 N.W.2d 409 (1969); Andersen v. Andersen, 8 Wis.2d 278, 283, 99 N.W.2d 190, 193 (1959); Anderson v. Eggert, 234 Wis. 348, 361, 291 N.W. 365, 371 (1940).

Before § 907.02 was amended by 2011 Wisconsin Act 2, the criteria by which an expert's qualifications are judged were broad enough to include persons who have become an expert by virtue of experience as opposed to academic training. Whether this will continue to be the case after Act 2 is open to question. Wisconsin law referred to these persons as "lay experts":

> A lay expert is one whose expertise or special competence derives from experience working in the field of endeavor rather than from studies or diploma. Indeed, experience in some cases may be the most important element of expertise. 'Whether an opinion of a witness may be given depends upon his superior knowledge in the area in which the precise question lies.'

Black v. General Electric Co., 89 Wis.2d 195, 212, 278 N.W.2d 224 (1979).

When lay witnesses qualify as experts under these guidelines, their opinion is admissible as an expert opinion, to be treated just as the opinions of scientists, engineers, doctors, and other "true experts" are treated. In those cases, the standard instruction on expert testimony (Wis JI-Criminal 200) is appropriate, not the instruction for opinion testimony by a lay witness (see Wis JI-Criminal 201).

Examples of the types of persons recognized as "lay experts" are:

- a drug user on the identification of a substance as LSD. State v. Johnson, 54 Wis.2d 561, 564-67, 196 N.W.2d 717 (1972); and

- a foreman of a concrete construction crew on the capacity of fresh concrete to cause burns. Netzel v. State Sand & Gravel Co., 51 Wis.2d 1, 7-8, 186 N.W.2d 258 (1971).

Also see Luke v. Northwestern National Casualty Co., 31 Wis.2d 530, 535-36, 143 N.W.2d 482 (1966), and cases cited therein.

In criminal cases, considerable attention has been directed to the testimony of psychiatrists or psychologists and on testimony relating to polygraph tests. Decisions have precluded expert testimony in the following areas: polygraph tests, State v. Dean, 103 Wis.2d 228, 307 N.W.2d 628 (1981); expert opinion testimony on the defendant's capacity to form the intent to kill, Steele v. State, 97 Wis.2d 72, 294 N.W.2d 2 (1980), State v. Dalton, 98 Wis.2d 725, 298 N.W.2d 398 (1980), Muench v. Israel, 715 F.2d 1124 (7th Cir. 1983); psychiatric opinion on the appropriate degree of criminal responsibility, Roe v. State, 95 Wis.2d 226, 290 N.W.2d 291 (1980); and psychiatric testimony on the credibility of a witness, State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (1980).

The exclusion of a witness upon a party's motion under § 906.15 was previously considered discretionary. See Ramer v. State, 40 Wis.2d 79, 82–83, 161 N.W.2d 209, 210 (1968). However, this procedure is now mandatory. See Bagnowski v. Preway, Inc., 138 Wis. 2d 241, 250, 405 N.W.2d 746 (1987). If a party requests witness exclusion, the court must issue an order to exclude the specific witness or witnesses, ensuring they cannot hear the testimony given by other witnesses. See Wis. Stat. § 906.15. However, this exclusion does not apply to "a person whose presence is shown by a party to be essential to the presentation of the party's cause." Id.

It should not be assumed that one party's witness will be permitted to review the testimony of the other party's witness. If presented with a request for exclusion, the Committee recommends that the trial court make a finding as to whether it is essential for a witness to hear the testimony of another. The Committee concluded that this approach represents the best practice.

1. Although the 2019 revision removed the word "expert" from the text of the instruction (see discussion in the comment preceding this footnote), it was retained in the title so that the instruction would continue to be easy to find. The Committee recommends that the title not be included in the written instructions that are provided to the jury.