## 201 OPINION OF A NONEXPERT WITNESS

Ordinarily, a witness may testify only about facts. However, in this case (name of witness) was allowed to give an opinion as to (identify the subject on which an opinion was given) .[1]

In determining the weight you give to this opinion, you should consider the witness' opportunity to observe what happened and the extent to which the opinion is based on that observation.

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

### COMMENT

Wis JI-Criminal 201 was originally published in 1983 and revised in 1991 and 2000. This revision was approved by the Committee in July 2011; it added reference to 2011 Wisconsin Act 2 to the Comment.

This instruction is for the situation where a nonexpert witness is allowed to testify in the form of an opinion. § 907.01.

Section 907.01 was amended by 2011 Wisconsin Act 2 to read as follows:

> 907.01 Opinion testimony by lay witnesses. If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are all of the following:
> (1) Rationally based on the perception of the witness.
> (2) Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.
> (3) Not based on scientific, technical, or other specialized knowledge within the scope of a witness under s. 907.02(1).

Subsections (1) and (2) were part of the prior statute; subsection (3) was created by Act 2.

The rule is in accord with prior Wisconsin case law which had rejected the proposition that lay witnesses may testify only to fact, not opinion. See Bennett v. State, 54 Wis.2d 727, 735, 196 N.W.2d 704 (1972), and York v. State, 45 Wis.2d 550, 173 N.W.2d 693 (1970).

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The requirement that admissible opinion be "rationally based on the perception of the witness" is the standard rule that a witness' testimony must be based on first hand knowledge or observation. The second requirement, that the opinion be "helpful to a clear understanding of his testimony or the determination of a fact in issue," allows the trial judge to exclude evidence that will not assist the jury. See the Committee Notes to Rule 907.01, 59 Wis.2d R205-06 (1973). The third requirement, that the opinion not be based on "scientific, technical, or other specialized knowledge" under § 907.02 is apparently intended to emphasize that opinion by a lay witness is not the same as "expert opinion testimony."

The primary reason for the rule allowing nonexperts to sometimes testify in opinion form is the recognition of the difficulty that witnesses may have in presenting certain testimony in a way that technically does not involve an "opinion." For example, it would be extremely difficult, if not impossible, for a witness to describe how fast a car was traveling if the witness was not allowed to express it in terms of an opinion as to the car's speed. The expression of this testimony in terms of miles per hour is technically an opinion but is permitted in order to save time and to assure that the jury gets relevant information in a useful form. The testimony is not actually being admitted as a conclusion that the jury is to accept as true. Rather, it is being admitted to show the impression or conclusion reached by the witness, which may be helpful to the jury in understanding the facts. Practical concerns require that it be allowed to be phrased in terms of an opinion. This concept was explained in connection with a "lay opinion" on sanity in Duthey v. State:

> A little consideration of the reasons why anything more than evidence of the actual physical facts observed by the witness should be allowed to be stated would greatly aid courts and counsel in this field. First, it is obvious that one not an expert can no more aid the jury by an expert opinion as to sanity than any other fact or condition. If all the physical facts can be stated, the jury are as competent to form an opinion as the witness, and their province ought not to be invaded. But all experience teaches the frequent if not general impossibility of stating all things which the eye and ear note in an interview with another, the wildness of the eye, the incoherence of the ideas in speech, hurried or erratic manner, and the like. Ordinarily it is impossible for the narrator either to remember the specific acts, words, and gestures or to adequately describe them so as to convey to his hearer their significance to the real information desired, namely, the mental state, without stating that they were excited, incoherent, unreasonable, unusual, or the like, all of which is but statement of conclusion or opinion. Hence the rule has grown that the ordinary observer may so state his impression of his interview. Courts have seemingly been unable to express verbal distinctions between the mere statement by a witness as to the impression on his mind of certain acts narrated as fully as he can and a declaration of opinion generally that the person was sane or insane, and a direct inquiry as to such opinion is now sanctioned by the weight of authority, with which the expressions in our own decisions agree. The subject received lucid treatment at the pen of Harlan, J., in Conn. Mut. L. Ins. Co. v. Lathrop, 111 U.S. 612, 4 Sup. Ct. 533, which case presents ideal illustration of the best manner of propounding the proper question to the witness. After a conversation had been narrated, the manner described as agitated, face flushed and expressionless, the question was propounded, substantially. What impression was made upon your mind by the conduct, actions, manner, expressions, and conversation which you observed? This was fully approved. We do not mean that there would be error in the direct inquiry as to witness's opinion as to the person's sanity, based, of course, on what he saw and heard; but the form quoted above is much more likely to prevent confusion in the mind of the witness and to impress the jury with the true significance of the testimony.

Duthey v. State, 131 Wis. 178, 186-87, 111 N.W. 222 (1907).

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1. Wisconsin cases have recognized the admissibility of opinion testimony by nonexpert witnesses on the following subjects:

a. Bodily appearance or condition – Heiting v. Heiting, 64 Wis.2d 110, 218 N.W.2d 334 (1974); Freven v. Brenner, 19 Wis.2d 445, 114 N.W.2d 334 (1962); Stanislawski v. Metropolitan Life Ins. Co., 231 Wis. 572, 286 N.W. 10 (1939).

b. Collective facts – State v. Ewald, 63 Wis.2d 165, 216 N.W.2d 213 (1974); York v. State, 45 Wis.2d 550, 173 N.W.2d 693 (1970).

c. Condition of land/real property – Konrad v. State, 4 Wis.2d 532, 91 N.W.2d 203 (1958).

d. Crop damage estimate – Watry v. Hiltgen, 16 Wis. 543 (1863).

e. Defective condition of machinery – S.F. Bowser v. Savidusky, 154 Wis. 76, 142 N.W. 182 (1913).

f. Drunkenness – State v. Bailey, 54 Wis.2d 679, 196 N.W.2d 664 (1972); Milwaukee v. Bichel, 35 Wis.2d 66, 150 N.W.2d 419 (1967).

g. Identification – State v. Schmack, 264 Wis. 333, 58 N.W.2d 668 (1953).

h. Mental condition – Cramer v. Theda Clark Memorial Hospital, 45 Wis.2d 147, 172 N.W.2d 427 (1969); In re Will of Zych, 251 Wis. 108, 28 N.W.2d 316 (1947).

i. Pain and suffering – Drexler v. All-American Life & Casualty Co., 72 Wis.2d 420, 241 N.W.2d 401 (1976); Heiting v. Heiting, 64 Wis.2d 110, 218 N.W.2d.334 (1974); Werner v. Chicago & Northwestern Ry. Co., 105 Wis. 300, 81 N.W. 416 (1900).

j. Presence of blood – Cullen v. State, 26 Wis.2d 652, 133 N.W.2d 284 (1965), cert. denied, 382 U.S. 863, 86 S.Ct. 126, 15 L.Ed.2d 101 (1965).

k. Room temperature – Leopold v. VanKirk, 29 Wis. 548 (1872).

l. Speed – Wagner v. State, 76 Wis.2d 30, 250 N.W.2d 331 (1977); Bennett v. State, 54 Wis.2d 727, 196 N.W.2d 704 (1972); Pagel v. Kees, 23 Wis. 462, 127 N.W.2d 816 (1964).

m. Estimating time of day – Schwantes v. State, 127 Wis. 160, 106 N.W. 237 (1906).

n. Value of personal property – Wilbersheid v. Wilbersheid, 77 Wis.2d 40, 252 N.W.2d 76 (1977); Estate of Ensz v. Brown Ins. Agency, Inc., 66 Wis.2d 193, 223 N.W.2d 903 (1974); Trible v. Tower Ins. Co., 43 Wis.2d 172, 168 N.W.2d 148 (1969).

o. Value of real estate – Clay v. Bradley, 74 Wis.2d 153, 246 N.W.2d 142 (1976); Genge v. City of Baraboo, 72 Wis.2d 531, 241 N.W.2d 183 (1976); Trible v. Tower Ins. Co., 43 Wis.2d 172, 168 N.W.2d 148 (1969).

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p. Weather conditions/temperature – Curtis v. Chicago & Northwestern Ry. Co., 18 Wis. 327 (1864).

q. Opinion formed by judge about writing's authenticity – Jax v. Jax, 73 Wis.2d 572, 243 N.W.2d 831. (1976).

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