205 EXPERT[1] TESTIMONY: HYPOTHETICAL QUESTIONS

During the trial, a witness was told to assume certain facts and then was asked for an opinion based upon that assumption. This is called a hypothetical question.

The opinion does not establish the truth of the facts upon which it is based. Consider the opinion only if you believe the assumed facts upon which it is based have been proved. If you find that the facts stated in the hypothetical question have not been proved, then the opinion based on those facts should not be given any weight.

COMMENT

Wis JI-Criminal 205 was originally published in 1976 and revised in 1983, 1991 and 2000. This revision was approved by the Committee in October 2018; it eliminated the word "expert" from the text of the instruction.

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 The issue was discussed in State v. Schaffhausen, an unpublished decision of the Wisconsin Court of Appeals. 2014 AP 2370, decided July 14, 2015.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 instruction is based on McGaw v. Wassmann, 263 Wis. 486, 492 N.W.2d 920 (1953), citing Will of McGovern, 241 Wis. 99, 3 N.W.2d 717 (1942), and on Baxter v. Chicago & NW Ry., 104 Wis. 307, 330, 80 N.W. 644 (1899). See Ford v. State, 206 Wis. 138, 140, 238 N.W. 865 (1931).

Section 907.05, Wisconsin Rules of Evidence, permits experts to testify to their opinions without disclosure of underlying facts unless the judge requires otherwise. Questions calling for expert opinion, therefore, need not be in hypothetical form.

A hypothetical question may be based on facts not yet in evidence. However, at the conclusion of testimony every assumption in which the hypothetical question is based must be supported by facts in evidence. Novitzke v. State, 92 Wis.2d 302, 307 N.W.2d 904 (1979). Also see Rabata v. Dohner, 45 Wis.2d 111, 172 N.W.2d 409 (1969).

For a case approving the use of a hypothetical question, see State v. Owen, 202 Wis.2d 620, 636-38, 551 N.W.2d 50 (Ct. App. 1996).

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.

