

246 TESTIMONY OF A WITNESS GRANTED IMMUNITY OR OTHER CONCESSIONS

You have heard testimony from (name of witness) who has received [immunity] [concessions].

["Immunity" means that (name of witness)'s testimony and evidence derived from that testimony cannot be used in a later criminal prosecution against (name of witness).]

[(Describe concessions).]

This witness, like any other witness, may be prosecuted for testifying falsely.

You should consider whether receiving [immunity] [concessions] affected the testimony and give the testimony the weight you believe it is entitled to receive.

COMMENT

Wis JI-Criminal 246 was originally published in 1983 and was revised in 1992. This revision was approved by the Committee in January 2000.

The 1999 revision expanded the instruction to cover other concessions that may have been extended to a witness in addition to or instead of a formal grant of immunity. The other concessions might involve agreements by the state not to charge (see *State v. Jones*, 217 Wis.2d 57, 576 N.W.2d 580 (Ct. App. 1998), to reduce or dismiss other charges, to agree to a recommended sentence, etc. Because there may be a dispute about whether concessions were actually granted, the Committee recommends this instruction be used in this form only where there is no dispute about the existence and nature of the concessions.

An earlier version of this instruction (© 1983) described "transactional immunity": the immunity grant meant that the witness could not be prosecuted for involvement in any crime about which the witness testified. The Wisconsin immunity statutes were amended by 1989 Wisconsin Act 122 (effective date: January 31, 1990) to provide that all immunity grants are for "use immunity." For example, § 972.085 provides as follows:

972.085 Immunity; use standard. Immunity from criminal or forfeiture prosecution under ss. 13.35, 17.16(7), 77.61(12), 93.17, 111.07(2)(b), 128.16, 133.15, 139.20, 139.39(5), 195.048, 196.48, 551.56(3), 553.55(3), 601.62(5), 767.47(4), 767.65(21), 776.23, 885.15, 885.24, 885.25(2), 891.39(2), 968.26, 972.08(1) and 979.07(1), provides immunity only from the use of the compelled testimony or evidence in subsequent criminal or forfeiture proceedings, as well as immunity from the use of evidence derived from that compelled testimony or evidence.

The original version of this instruction was labeled "optional." The Wisconsin Supreme Court has held it is not error to refuse to give a special instruction on the testimony of a witness who has been granted immunity, provided that the jury was aware of the immunity grant and was given the instruction on credibility of witnesses. See Linse v. State, 93 Wis.2d 163, 168, 286 N.W.2d 554 (1980), and Loveday v. State, 74 Wis.2d 503, 520-21, 247 N.W.2d 116 (1976).

A more recent case, however, indicated that where an immunity grant or other concessions have been made to a witness, a cautionary instruction is an important part of the due process safeguards to which a defendant is entitled. In State v. Nerison, the court of appeals had reversed Nerison's conviction because the trial testimony of two accomplices "was so indelibly and irreparably tainted by the state's actions in securing it that its admission violated Nerison's due process rights." The court of appeals found that the state had "crossed the line" in bargaining with the accomplices for specific testimony. 130 Wis.2d 313, 387 N.W.2d 128 (Ct. App. 1986). The Wisconsin Supreme Court reversed, holding that the due process line referred to by the court of appeals was not crossed due to the presence of corroborating evidence of guilt and the fact that all the traditional due process safeguards were made available: full disclosure of the state's agreement with the accomplices, cross-examination of the witnesses, and a specific jury instruction on the credibility of the accomplices. 136 Wis.2d 37, 401 N.W.2d 1 (1987).

The court in Nerison did not explicitly require a specific cautionary instruction in all cases. But given the emphasis on an instruction as one of three important safeguards, the Committee concluded in 1991 that it was best to remove the "optional" designation from this instruction.

This instruction is drafted in neutral terms so that it could be applied to a witness called by either the state or the defendant. The concerns discussed in Nerison, *supra*, are directed at state witnesses and do not necessarily apply to a defense witness. See State v. Miller, 231 Wis.2d 447, 605 N.W.2d 567 (Ct. App. 1999).

Immunity may be granted only upon the motion of the prosecutor. The court cannot grant immunity sua sponte; the defendant does not have the right to compel the state to request immunity for a defense witness. Hebel v. State, 60 Wis.2d 325, 210 N.W.2d 695 (1973); Sanders v. State, 69 Wis.2d 242, 230 N.W.2d 845 (1975); Peters v. State, 70 Wis.2d 22, 233 N.W.2d 420 (1975); State v. Evers, 163 Wis.2d 725, 472 N.W.2d 828 (Ct. App. 1991).

While the defendant has no reciprocal right to immunity grants for defense witnesses, the rule is tempered by two considerations. First, the Wisconsin Supreme Court has noted that the prosecutor's duty is "'to seek justice, not merely to convict.'" When the prosecutor is considering whether or not to make a motion for immunity, he should bear in mind this predominant objective of impartial justice, and not merely whether the evidence will be favorable to the prosecution. He should not hesitate to move for immunity solely on the basis that the testimony thus elicited might exonerate the defendant." Peters, *supra*, 70 Wis.2d 22, 41. Second, developments in other contexts suggest that a prosecutor's refusal to request immunity for a defense witness based solely on tactical considerations may violate due process. See McMorris v. Israel, 643 F.2d 458 (7th Cir.

1981), where, under Wisconsin's since-abandoned polygraph stipulation rule, it was held that a prosecutor must have valid, nontactical reasons for refusing to enter into a stipulation.

For a discussion of several issues relating to immunity grants, see SM-55.