

**640 MENTAL DISEASE OR DEFECT: EXPERT<sup>1</sup> OPINION TESTIMONY****Statutory Definition of the Crime**

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.]

ADD THE FOLLOWING IF AN EXPERT WHO HAS BEEN APPOINTED BY THE COURT UNDER § 971.16(2) HAS TESTIFIED

[The court has appointed (name) to examine the defendant and to testify at trial. You should weigh the testimony of (name) as you would any other opinion testimony.]

**COMMENT**

This instruction was originally published as “JI 640-CPC” in 1971. It was revised and republished as Wis JI-Criminal 640 in 1988, republished with an editorial change in 1990, and revised in 2003 and 2011.

This revision was approved by the Committee in October 2018; it eliminated the use of the word “expert” in the text of the instruction.

Except for the last paragraph, this instruction is identical to Wis JI-Criminal 200. The last paragraph of the instruction is intended to implement § 971.16(2) which provides in part: “The fact that the physician or psychologist has been appointed by the court shall be made known to the jury and the physician or psychologist shall be subject to cross-examination by both parties.” The purpose of the appointment under this statute is to provide the court with a neutral and independent expert. See State v. Burdick, 166 Wis.2d 785, 480 N.W.2d 528 (Ct. App. 1992), below.

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 The issue was discussed in State v. Schaffhausen, an unpublished decision of the Wisconsin Court of Appeals, 2014 AP 2370, decided July 14, 2015.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 United States Supreme Court addressed the defendant’s right to a court-appointed expert in Ake v. Oklahoma, 470 U.S. 68 (1985). The court held that when a defendant’s sanity at the time of the offense has been shown to be “likely to be a significant factor at trial, the Constitution requires that a state provide access to a psychiatrist’s assistance . . . if the defendant cannot otherwise afford one.” Though announced in a capital case, the holding was not limited to those cases. The type of expert assistance approved was also stated broadly: “access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.”

The interplay between the appointment of an expert under § 971.16(2) and the right to an appointed expert under the Ake decision was addressed in State v. Burdick, 166 Wis.2d 785, 480 N.W.2d 528 (Ct. App. 1992). The court affirmed the right that Ake recognized, but held that § 971.16(2) “is not the statutory vehicle by which a trial court must satisfy the constitutional obligation laid down by the Ake court.” 166 Wis.2d 785, 790. Rather, the statute’s purpose “is to provide the court . . . with the means of obtaining ‘some evidence in the case, not bought and paid for, coming from impartial witnesses who owe no duty or allegiance to either side of the controversy.’” 166 Wis.2d 785, 792, quoting Jessner v. State, 202 Wis. 184, 193, 231 N.W. 634 (1930). [Note: the Burdick decision referred to subsec. (1) of § 971.16, 1989-90 Wis. Stats. That subsection was renumbered as § 971.16(2) by 1991 Wisconsin Act 39.]

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.