CHAPTER 906

EVIDENCE — WITNESSES

NOTE: Extensive comments by the Judicial Council Committee and the Federal Advisory Committee are printed with chs. 901 to 911 in 59 W (2d). The court did not adopt the comments but ordered them printed with the rules for information purposes.

906.01 General rule of competency. Every person is competent to be a witness except as provided by ss. 885.16 and 885.17 or as otherwise provided in these rules.

History: Sup. Ct. Order, 59 W (2d) R1, R157 (1973).

Trial court may not declare witness incompetent to testify, except as provided in this section; witness's credibility is determined by fact–finder. State v. Hanson, 149 W (2d) 474, 439 NW (2d) 133 (Ct. App. 1989).

906.02 Lack of personal knowledge. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of s. 907.03 relating to opinion testimony by expert witnesses.

History: Sup. Ct. Order, 59 W (2d) R1, R160 (1973); 1991 a. 32.

906.03 Oath or affirmation. (1) Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the witness's duty to do so.

(2) The oath may be administered substantially in the following form: Do you solemnly swear that the testimony you shall give in this matter shall be the truth, the whole truth and nothing but the truth, so help you God.

(3) Every person who shall declare that the person has conscientious scruples against taking the oath, or swearing in the usual form, shall make a solemn declaration or affirmation, which may be in the following form: Do you solemnly, sincerely and truly declare and affirm that the testimony you shall give in this matter shall be the truth, the whole truth and nothing but the truth; and this you do under the pains and penalties of perjury.

(4) The assent to the oath or affirmation by the person making it may be manifested by the uplifted hand.

History: Sup. Ct. Order, 59 W (2d) R1, R161 (1973); 1991 a. 32.

Witness who is young child need not be formally sworn to meet oath or affirmation requirement. State v. Hanson, 149 W (2d) 474, 439 NW (2d) 133 (1989).

906.04 Interpreters. An interpreter is subject to the provisions of chs. 901 to 911 relating to qualification as an expert and the administration of an oath or affirmation that the interpreter will make a true translation.

History: Sup. Ct. Order, 59 W (2d) R1, R162 (1973); 1981 c. 390; 1991 a. 32.

906.05 Competency of judge as witness. The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

History: Sup. Ct. Order, 59 W (2d) R1, R163 (1973).

906.06 Competency of juror as witness. (1) AT THE TRIAL. A member of the jury may not testify as a witness before that jury in the trial of the case in which the member is sitting as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(2) INQUIRY INTO VALIDITY OF VERDICT OR INDICTMENT. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may the juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received.

History: Sup. Ct. Order, 59 W (2d) R1, R165 (1973); 1991 a. 32.

Defendant's failure to have evidence excluded under rulings of court, operates as a waiver. Sub. (2) cited. State v. Frizzell, 64 W (2d) 480, 219 NW (2d) 390.

Impeachment of verdict through juror affidavits or testimony discussed. After Hour Welding v. Lanceil Management Co. 108 W (2d) 734, 324 NW (2d) 686 (1982).

There was probable prejudice where question of depraved mind was central and juror went to jury room with dictionary definition of "depraved" written on card. State v. Ott, 111 W (2d) 691, 331 NW (2d) 629 (Ct. App. 1983).

Conviction was reversed where extraneous information improperly brought to jury's attention raised reasonable possibility that error had prejudicial effect on hypothetical average jury. State v. Poh, 116 W (2d) 510, 343 NW (2d) 108 (1984).

Evidence of juror's racially–prejudiced remark during jury deliberations was not competent under (2). Three–step procedure for impeachment of jury verdict discussed. State v. Shillcutt, 119 W (2d) 788, 350 NW (2d) 686 (1984).

Entry of a jury decision on the wrong verdict form is not extraneous evidence "improperly brought to the jury's attention" under sub. (2); a written verdict not reflecting the jury's oral decision may not be impeached. State v. Williquette, 180 W (2d) 589, 510 NW (2d) 708 (Ct. App. 1993).

In any jury trial, material prejudice on the part of any juror impairs the right to a jury trial. That prejudicial material was brought to only one juror's attention and was not communicated to any other jurors is irrelevant to determining whether that information was "improperly brought to the jury's attention" under sub. (2). Castenada v. Pederson, 185 W (2d) 200, 518 NW (2d) 246 (1994), State v. Messelt, 185 W (2d) 255, 518 NW (2d) 232 (1994).

906.07 Who may impeach. The credibility of a witness may be attacked by any party, including the party calling the witness.

History: Sup. Ct. Order, 59 W (2d) R1, R169 (1973); 1991 a. 32.

906.08 Evidence of character and conduct of witness. (1) OPINION AND REPUTATION EVIDENCE OF CHARACTER. Except as provided in s. 972.11 (2), the credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to these limitations: a) the evidence may refer only to character for truthfulness or untruthfulness, and b), except with respect to an accused who testifies in his or her own behalf, evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(2) SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crimes as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11 (2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross–

examination of the witness or on cross–examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

(3) TESTIMONY BY ACCUSED OR OTHER WITNESSES The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the privilege against self–incrimination when examined with respect to matters which relate only to credibility.

History: Sup. Ct. Order, 59 W (2d) R1, R171 (1973); 1975 c. 184, 421; 1991 a. 32.

Trial court committed plain error by admitting extrinsic impeaching testimony on collateral issue. McClelland v. State, 84 W (2d) 145, 267 NW (2d) 843 (1978).

See note to 751.06, citing State v. Cuyler, 110 W (2d) 133, 327 NW (2d) 662 (1983).

Impeachment of accused by extrinsic evidence on collateral matter was harmless error. State v. Sonnenberg, 117 W (2d) 159, 344 NW (2d) 95 (1984).

Absent attack on credibility, complainant's testimony that she has not initiated civil action for damages is inadmissible when used to bolster credibility. State v. Johnson, 149 W (2d) 418, 439 NW (2d) 122 (1989), confirmed, 153 W (2d) 121, 449 NW (2d) 845 (1990).

See note to Art. I, sec. 7 citing State v. Lindh, 161 W (2d) 324, 468 NW (2d) 168 (1991).

Whether witness's credibility has been sufficiently attacked to constitute an attack on the witness's character for truthfulness permitting rehabilitating character testimony is discretionary decision. State v. Anderson, 163 W (2d) 342, 471 NW (2d) 279 (Ct. App. 1991).

906.09 Impeachment by evidence of conviction of crime. (1) GENERAL RULE For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is admissible. The party cross–examining the witness is not concluded by the witness's answer.

(2) EXCLUSION. Evidence of a conviction of a crime may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

(3) ADMISSIBILITY OF CONVICTION. No question inquiring with respect to conviction of a crime, nor introduction of evidence with respect thereto shall be permitted until the judge determines pursuant to s. 901.04 whether the evidence should be excluded.

(4) JUVENILE ADJUDICATIONS. Evidence of juvenile adjudications is not admissible under this rule.

(5) PENDENCY OF APPEAL. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

History: Sup. Ct. Order, 59 W (2d) R1, R176 (1973); 1991 a. 32.

This section applies to both civil and criminal cases. Where plaintiff is asked by his own attorney whether he has ever been convicted of crime, he can be asked on cross examination as to the number of times. Underwood v. Strasser, 48 W (2d) 568, 180 NW (2d) 631.

Where a defendant's answers on direct examination with respect to the number of his prior convictions are inaccurate or incomplete, then the correct and complete facts may be brought out on cross–examination, during which it is permissible to mention the crime by name in order to insure that the witness understands which particular conviction is being referred to. Nicholas v. State, 49 W (2d) 683, 183 NW (2d) 11.

Proffered evidence that a witness had been convicted of drinking offenses 18 times in last 19 years could be rejected as immaterial where the evidence did not affect his credibility. Barren v. State, 55 W (2d) 460, 198 NW (2d) 345.

Where defendant in rape case denies incident in earlier rape case tried in juvenile court, impeachment evidence of police officer, that defendant had admitted incident at the time, is not barred by (4). See note to 48.38, citing Sanford v. State, 76 W (2d) 72, 250 NW (2d) 348.

Where a witness truthfully acknowledges a prior conviction, inquiry into the nature of the conviction may not be made. Contrary position in 63 Atty. Gen. 424 is incorrect. Voith v. Buser, 83 W (2d) 540, 266 NW (2d) 304 (1978).

See note to 904.04, citing Vanlue v. State, 96 W (2d) 81, 291 NW (2d) 467 (1980).

Cross–examination on prior convictions without trial court's threshold determination under (3) was prejudicial. Gyrion v. Bauer, 132 W (2d) 434, 393 NW (2d) 107 (Ct. App. 1986).

Accepted guilty plea constitutes "conviction" for purposes of impeachment under (1). State v. Trudeau, 157 W (2d) 51, 458 NW (2d) 383 (Ct. App. 1990).

Expunged conviction is not admissible to attack witness credibility. State v. Anderson, 160 W (2d) 435, 466 NW (2d) 681 (Ct. App. 1991).

Under new evidence rule defendant may not be cross–examined about prior convictions until the court has ruled in proceedings under 901.04 that such convictions are admissible. Nature of former convictions may now be proved under the new rule. Defendant has burden of proof to establish that a former conviction is inadmissible to impeach him because obtained in violation of his right to counsel, under Loper v. Beto, 405 U.S. 473. Rule of Loper v. Beto, does not apply to claimed denial of constitutional rights other than the right to counsel, although the conviction would be inadmissible for impeachment if it had been reversed on appeal, whether on constitutional or other grounds, or vacated on collateral attack. 63 Atty. Gen. 424.

906.10 Religious beliefs or opinions. Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness's credibility is impaired or enhanced.

History: Sup. Ct. Order, 59 W (2d) R1, R184 (1973); 1991 a. 32.

906.11 Mode and order of interrogation and presentation. (1) CONTROL BY JUDGE. The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (a) make the interrogation and presentation effective for the ascertainment of the truth, (b) avoid needless consumption of time, and (c) protect witnesses from harassment or undue embarrassment.

(2) SCOPE OF CROSS–EXAMINATION. A witness may be cross–examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross–examination with respect to matters not testified to on direct examination.

(3) LEADING QUESTIONS. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony. Ordinarily leading questions should be permitted on cross–examination. In civil cases, a party is entitled to call an adverse party or witness identified with the adverse party and interrogate by leading questions.

History: Sup. Ct. Order, 59 W (2d) R1, R185 (1973); 1991 a. 32.

Since 885.14, Stats. 1967, is applicable to civil and not to criminal proceedings, the trial court did not err when it refused to permit defendant to call a court–appointed expert as an adverse witness, nor to permit the recall of the witness under the guise of rebuttal solely for the purpose of establishing that he had been hired by the state and to ask how this fee was fixed. State v. Bergenthal, 47 W (2d) 668, 178 NW (2d) 16.

A trial judge should not strike the entire testimony of a defense witness for refusal to answer questions bearing on his credibility which had little to do with guilt or innocence of defendant. State v. Monsoor, 56 W (2d) 689, 203 NW (2d) 20.

Trial judge's admonitions to expert witness did not give appearance of judicial partisanship and thus require new trial. Peeples v. Sargent, 77 W (2d) 612, 253 NW (2d) 459.

Extent of, manner, and even right of multiple cross–examination by different counsel representing same party can be controlled by trial court. Hochgurtel v. San Felippo, 78 W (2d) 70, 253 NW (2d) 526.

See note to art. I, sec. 7, citing Moore v. State, 83 W (2d) 285, 265 NW (2d) 540 (1978).

See note to 904.04, citing State v. Stawicki, 93 W (2d) 63, 286 NW (2d) 612 (Ct. App. 1979).

Leading questions were properly used to refresh witness' memory. Jordan v. State, 93 W (2d) 449, 287 NW (2d) 509 (1980).

See note to art. I, sec. 8, citing Neely v. State, 97 W (2d) 38, 292 NW (2d) 859 (1980).

Trial court's bifurcation of issues for trial was authorized under sub. (1). Zawistowski v. Kissinger, 160 W (2d) 292, 466 NW (2d) 664 (Ct. App. 1991).

906.12 Writing used to refresh memory. If a witness uses a writing to refresh the witness's memory for the purpose of testifying, either before or while testifying, an adverse party is entitled to have it produced at the hearing, to inspect it, to cross–examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the judge shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the judge shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the judge in the judge's discretion determines that the interests of justice so require, declaring a mistrial.

History: Sup. Ct. Order, 59 W (2d) R1, R193 (1973); 1991 a. 32.

906.13 Prior statements of witnesses. (1) EXAMINING WITNESS CONCERNING PRIOR STATEMENT. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown or its contents disclosed to the witness at that time, but on request the same shall be

shown or disclosed to opposing counsel upon the completion of that part of the examination.

(2) EXTRINSIC EVIDENCE OF PRIOR INCONSISTENT STATEMENT OF A WITNESS. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless: (a) the witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement; or (b) the witness has not been excused from giving further testimony in the action; or (c) the interests of justice otherwise require. This provision does not apply to admissions of a party–opponent as defined in s. 908.01 (4) (b).

History: Sup. Ct. Order, 59 W (2d) R1, R197 (1973); 1991 a. 32.

A statement by a defendant, not admissible as part of the prosecution's case because taken without the presence of his counsel, may be used on cross examination for impeachment if the statement is trustworthy. Wold v. State, 57 W (2d) 344, 204 NW (2d) 482.

Bright line test for determining whether defendant's prior inconsistent statement is admissible for impeachment is whether it was compelled. State v. Pickett, 150 W (2d) 720, 442 NW (2d) 509 (Ct. App. 1989).

906.14 Calling and interrogation of witnesses by judge. (1) CALLING BY JUDGE. The judge may, on the judge's own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross–examine witnesses thus called.

(2) INTERROGATION BY JUDGE. The judge may interrogate witnesses, whether called by the judge or by a party.

(3) OBJECTIONS. Objections to the calling of witnesses by the judge or to interrogation by the judge may be made at the time or at the next available opportunity when the jury is not present.

History: Sup. Ct. Order, 59 W (2d) R1, R200 (1973); 1991 a. 32.

Trial judge's elicitation of trial testimony discussed. Schultz v. State, 82 W (2d) 737, 264 NW (2d) 245.

906.15 Exclusion of witnesses. At the request of a party the judge or court commissioner shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and the judge or court commissioner may make the order of his or her own motion. This section does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employe of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause. The judge or court commissioner may direct that all such excluded and non–excluded witnesses be kept separate until called and may prevent them from communicating with one another until they have been examined or the hearing is ended.

History: Sup. Ct. Order, 59 W (2d) R1, R202 (1973); 1991 a. 32.