CHAPTER 904

EVIDENCE — RELEVANCY AND ITS LIMITS

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

904.01 Definition of "relevant evidence". "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

History: Sup. Ct. Order, 59 Wis. 2d R1, R66 (1973).

Evidence of a defendant's expenditure of money shortly after a burglary was properly admitted. State v. Heidelbach, 49 Wis. 2d 350, 182 N.W.2d 497 (1971).

The difference between relevancy and materiality is discussed. If counsel fails to state the purpose of a question objected to on grounds of immateriality, the court may exclude the evidence. State v. Becker, 51 Wis. 2d 659, 188 N.W.2d 449 (1971).

The introduction of a portion of a bloodstained mattress was both relevant and material by tending to make more probable the prosecution's claim that the victim had been with the defendant and had been molested by him. Bailey v. State, 65 Wis. 2d 331, 222 N.W.2d 871 (1974).

The most important factor in determining the admissibility of evidence of conduct prior to an accident is the degree of probability that the conduct continued until the accident occurred. Evidence of the defendant's reckless driving 12 1/2 miles from accident scene was irrelevant. Hart v. State, 75 Wis. 2d 371, 249 N.W.2d 810 (1977).

Evidence of crop production in other years was admissible to prove damages for injury to a crop. Cutler Cranberry Co. v. Oakdale Electric Cooperative, 78 Wis. 2d 222, 254 N.W.2d 234 (1977).

A complaining witness's failure to appear to testify on 2 prior trial dates was not relevant to the credibility of the witness. Rogers v. State, 93 Wis. 2d 682, 287 N.W.2d 774 (1980).

Testimony that weapons were found at the accused's home was admissible as part of a chain of facts relevant to the accused's intent to deliver heroin. State v. Wedgeworth, 100 Wis. 2d 514, 302 N.W.2d 810 (1981).

Evidence of a defendant's prior sexual misconduct was irrelevant when the only issue in a rape case was whether the victim consented. State v. Alsteen, 108 Wis. 2d 723, 324 N.W.2d 426 (1982).

Evidence of post–manufacture industry custom was admissible under the facts of a products liability case. Evidence of a good safety record of the product was not relevant. D.L. v. Huebner, 110 Wis. 2d 581, 329 N.W.2d 890 (1983).

HLA and red blood cell test results showing the probability of exclusion and the paternity index are generally admissible in a criminal sexual assault action in which the assault allegedly resulted in the birth of a child, but the probability of paternity is not generally admissible. State v. Hartman, 145 Wis. 2d 1, 426 N.W.2d 320 (1988).

Third–party testimony corroborating the victim's testimony against one defendant was relevant as to a 2nd defendant charged with different acts when the testimony tended to lend credibility to the victim's testimony against the 2nd defendant. State v. Patricia A.M. 176 Wis. 2d 542, 500 N.W.2d 289 (1993).

Evidence of noncriminal conduct to negate the inference of criminal conduct is generally irrelevant. State v. Tabor, 191 Wis. 2d 483, 529 N.W.2d 915 (Ct. App. 1995).

Evidence of why a defendant did not testify has no bearing on guilt or innocence, is not relevant, and is inadmissible. State v. Heuer, 212 Wis. 2d 58, 567 N.W.2d 638 (Ct. App. 1997).

A psychologist's testimony that the defendant did not show any evidence of having a sexual disorder and that absent a sexual disorder a person is unlikely to molest a child was relevant. State v. Richard A.P. 223 Wis. 2d 777, 589 N.W.2d 674 (Ct. App. 1998).

A negative gunshot residue test cannot conclusively prove that a person was not the shooter of a gun, but it is relevant as it has a tendency to make it less probable. State v. De Real, 225 Wis. 2d 565, 593 N.W.2d 461 (Ct. App.1999).

904.02 Relevant evidence generally admissible; irrelevant evidence inadmissible. All relevant evidence is admissible, except as otherwise provided by the constitutions of the United States and the state of Wisconsin, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible.

History: Sup. Ct. Order, 59 Wis. 2d R1, R70 (1973).

A defendant does not have a constitutional right to present irrelevant evidence. State v. Robinson, 146 Wis. 2d 315, 431 N.W.2d 165 (1988).

904.03 Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

History: Sup. Ct. Order, 59 Wis. 2d R1, R73 (1973).

Under this section, it was within the discretion of the trial court to admit the victim's bloodstained nightgown and to allow it to be sent to the jury room when: (a) the nightgown clearly was of probative value, since available photographs failed to show the underside of the garment; (b) the article was not of a nature that would shock the sensibilities of the jury and inflame it to the prejudice of defendant; and (c) no objection was made to sending the item to the jury room. Jones v. State, 70 Wis. 2d 41, 233 N.W.2d 430 (1975).

Evidence of alcoholic degenerative impairment of the plaintiff's judgment had limited probative value, far outweighed by possible prejudice. Walsh v. Wild Masonry Co., Inc. 72 Wis. 2d 447, 241 N.W.2d 416 (1976).

The trial court did not abuse its discretion in refusing to admit exhibits offered at the 11th hour to establish a defense by proof of facts not previously referred to. Roeske v. Diefenbach, 75 Wis. 2d 253, 249 N.W.2d 555 (1977).

When evidence was introduced for the purpose of identification, the probative value of conduct during a prior rape case exceeded the prejudicial effect. Sanford v. State, 76 Wis. 2d 72, 250 N.W.2d 348 (1977).

When the defendant was charged with attempted murder of police officers in pursuit of the defendant following an armed robbery, the probative value of evidence concerning the armed robbery and showing motive for the murder attempt was not substantially outweighed by the danger of unfair prejudice. Holmes v. State, 76 Wis. 2d 259, 251 N.W.2d 56 (1977).

If evidence of other conduct is not offered for a valid purpose under s. 904.04 (2), the balancing test under s. 904.03 is inapplicable. State v. Spraggin, 77 Wis. 2d 89, 252 N.W.2d 94 (1977).

Although a continuance is a more appropriate remedy for surprise, if an unduly long continuance would be required, exclusion of surprising evidence may be justified under this section. State v. O'Connor, 77 Wis. 2d 261, 252 N.W.2d 671 (1977).

In a prosecution for possession of amphetamines, it was an abuse of discretion to admit and send to the jury room a syringe and hypodermic needles that had only slight relevance to the charge. Schmidt v. State, 77 Wis. 2d 370, 253 N.W.2d 204 (1977).

The right of confrontation is limited by s. 904.03 if the probative value of the desired cross–examination is outweighed by the possibility of unfair or undue prejudice. Chapin v. State, 78 Wis. 2d 346, 254 N.W.2d 286 (1977).

Evidence that resulted in surprise was properly excluded under this section. Lease America Corp. v. Insurance Company of North America, 88 Wis. 2d 395, 276 N.W.2d 767 (1979).

The trial court abused its discretion by excluding an official blood alcohol chart offered in evidence by an accused driver. State v. Hinz, 121 Wis. 2d 282, 360 N.W.2d 56 (Ct. App. 1984).

When evidence of a sexual assault was the only evidence of an element of a charged kidnapping offense, withholding the evidence on the basis of unfair prejudice unfairly precluded the state from obtaining a conviction. State v. Grande, 169 Wis. 2d 422, 485 N.W.2d 282 (Ct. App. 1992).

A defendant's intoxication, for purposes of motor vehicle statutes, did not *per se* demonstrate that the defendant's statements were untrustworthy. State v. Beaver, 181 Wis. 2d 959, 512 N.W.2d 254 (Ct. App. 1994).

The right to confrontation is not violated when the court precludes a defendant from presenting evidence that is irrelevant or immaterial. State v. McCall, 202 Wis. 2d 29, 549 N.W.2d 418 (1996).

904.04 Character evidence not admissible to prove conduct; exceptions; other crimes. (1) CHARACTER EVI-

DENCE GENERALLY. Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(a) *Character of accused.* Evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution to rebut the same;

(b) *Character of victim.* Except as provided in s. 972.11 (2), evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(c) *Character of witness.* Evidence of the character of a witness, as provided in ss. 906.07, 906.08 and 906.09.

(2) OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

History: Sup. Ct. Order, 59 Wis. 2d R1, R75 (1973); 1975 c. 184; 1991 a. 32.

A defendant claiming self defense can testify as to specific past instances of violence by the victim to show a reasonable apprehension of danger. McMorris v. State, 58 Wis. 2d 144, 205 N.W.2d 559 (1973).

Evidence of delinquency in making withholding tax payments by 3 other corporations of which the accused had been president was admissible to show wilfulness of the accused in failing to make such payments as president of a 4th corporation. State v. Johnson, 74 Wis. 2d 26, 245 N.W.2d 687 (1976).

If a prosecution witness is charged with crimes, the defendant can offer evidence of those crimes and otherwise explore on cross–examination the subjective motives for the witness's testimony. State v. Lenarchick, 74 Wis. 2d 425, 247 N.W.2d 80 (1976).

When a defendant claims accident in shooting the deceased, the prosecution may present evidence of prior violent acts to prove intent and absence of accident. King v. State, 75 Wis. 2d 26, 248 N.W.2d 458 (1977).

The trial court did not err in refusing to grant a mistrial when police reports concerning an unrelated pending charge against the defendant and the defendant's mental history were accidentally sent to the jury room. Johnson v. State, 75 Wis. 2d 344, 249 N.W.2d 593 (1977).

Evidence of the defendant's prior sales of other drugs was admitted under s. 904.04 (2) as probative of the intent to deliver cocaine. Peasley v. State, 83 Wis. 2d 224, 265 N.W.2d 506 (1978).

Evidence of the defendant's prior fighting was admissible to refute the defendant's claim of misidentification and to impeach a defense witness. State v. Stawicki, 93 Wis. 2d 63, 286 N.W.2d 612 (Ct. App. 1979).

The defendant's 2 prior convictions for burglary were admissible to prove intent to use gloves, a long pocket knife, a crowbar, and a pillowcase as burglarious tools. Vanlue v. State, 96 Wis. 2d 81, 291 N.W.2d 467 (1980).

Criminal acts of the defendant's co–conspirators were admissible to prove plan and motive. Haskins v. State, 97 Wis. 2d 408, 294 N.W.2d 25 (1980).

Evidence of other crimes was admissible to show plan and identity. State v. Thomas, 98 Wis. 2d 166, 295 N.W.2d 784 (Ct. App. 1980).

Evidence of a similar killing committed 12 hours after the shooting in issue was relevant to show that both slayings sprang from like mental conditions, and to show plan or scheme. Barrera v. State, 99 Wis. 2d 269, 298 N.W.2d 820 (1980).

Evidence of the defendant's prior sexual misconduct was irrelevant when the only issue in a rape case was whether the victim consented. State v. Alsteen, 108 Wis. 2d 723, 324 N.W.2d 426 (1982).

Other crimes evidence was admissible to complete the story of the crime on trial by proving its immediate context of happenings near in time and place. State v. Pharr, 115 Wis. 2d 334, 340 N.W.2d 498 (1983).

Other crimes evidence was admissible to rebut the defendant's claim that his presence in the backyard of a burglarized home was coincidental and innocent. State v. Rutchik, 116 Wis. 2d 61, 341 N.W.2d 639 (1984).

When the accused claimed that a shooting was in self–defense, the court abused its discretion by excluding opinion evidence as to the victim's reputation for violence. State v. Boykins, 119 Wis. 2d 272, 350 N.W.2d 710 (Ct. App. 1984).

Under the "greater latitude of proof" principle applicable to other acts evidence in sex crimes, particularly those with children, sex acts committed against the complainant and another young girl 4 and 6 years prior to the charged assault were admissible under sub. (2) to show plan or motive. State v. Friedrich, 135 Wis. 2d 1, 398 N.W.2d 763 (1987).

The admission under sub. (2) of a prowling ordinance violation by the defendant accused of second–degree sexual assault and robbery was harmless error. State v. Grant, 139 Wis. 2d 45, 406 N.W.2d 744 (1987).

Evidence of the defendant's use of an alias was relevant to show the defendant's intent to cover up participation in a sexual assault. State v. Bergeron, 162 Wis. 2d 521, 470 N.W.2d 322 (Ct. App. 1991).

When evidence of a sexual assault was the only evidence of an element of the charged kidnapping offense, withholding the evidence on the basis of unfair prejudice unfairly precluded the state from obtaining a conviction for the charged offense. State v. Grande, 169 Wis. 2d 422, 485 N.W.2d 282 (Ct. App. 1992).

In addition to the sub. (2) exceptions, a valid basis for the admission of other crimes evidence is to furnish the context of the crime if necessary to the full presentation of the case. State v. Chambers, 173 Wis. 2d 237, 496 N.W.2d 191 (Ct. App. 1992).

There is no presumption of admissibility or exclusion for other crimes evidence. State v. Speer, 176 Wis. 2d 1101, 501 N.W.2d 429 (1993).

Evidence of other crimes may be offered in regard to the question of intent despite the defendant's assertion that the charged act never occurred. State v. Clark, 179 Wis. 2d 484, 507 N.W.2d 172 (Ct. App. 1993).

Other acts evidence is relevant if a jury could find by a preponderance of the evidence that the defendant committed the other act. An acquittal does not prevent offering evidence of a prior crime for purposes authorized under this section. State v. Landrum, 191 Wis. 2d 107, 528 N.W.2d 36 (Ct. App. 1995).

Other acts evidence in a child sexual assault case was admissible when the type of contact was different and the victims were of a different gender, because the prior act was probative of the defendant's desire for sexual gratification from children. State v. Tabor, 191 Wis. 2d 483, 529 N.W.2d 915 (Ct. App. 1995).

To be admissible for purposes of identity, "other–acts evidence" must have a similarity to the present offense so that it can be said that the acts constitute the imprint of the defendant. State v. Rushing, 197 Wis. 2d 631, 541 N.W.2d 155 (Ct. App. 1995).

Verbal statements may be admissible as other acts evidence even when not acted upon. State v. Jeske, 197 Wis. 2d 906, 541 N.W.2d 225 (Ct. App. 1995).

There is not a *per se* rule that enables the state to always submit other acts evidence on motive and intent. The evidence is subject to general strictures against use when the defendant's concession on the element for which it is offered provides a more direct source of proof. State v. Wallerman, 203 Wis. 2d 158, 552 N.W.2d 128 (Ct. App. 1996).

Evidence of a defendant's probation or parole status and the conditions thereof are admissible if the evidence demonstrates motive for or otherwise explains the defendant's criminal conduct. The status itself must provide the motive for the action. An action in direct violation of a condition may not be admitted to demonstrate an irresistible impulse to commit the particular crime. State v. Kourtidias, 206 Wis. 2d 573, 557 N.W.2d 858 (Ct. App. 1996).

A 3–step analysis is applied to determine the admissibility of other acts evidence. The proponent of the evidence bears the burden of persuading the court that the 3–step inquiry is satisfied. The proponent and opponent of the evidence must clearly articulate their reasons for seeking admission or exclusion and apply the facts to the analytical framework. State v. Sullivan, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

A psychologist's testimony that the defendant did not show any evidence of having a sexual disorder and that absent a sexual disorder a person is unlikely to molest a child was relevant and was admissible under this section in tandem with s. 907.02. State v. Richard A.P. 223 Wis. 2d 777, 589 N.W.2d 674 (Ct. App. 1998).

Other acts evidence may be admitted for purposes other than those enumerated in sub. (2). Evidence of a history of assaultive behavior was properly admitted in relation to entitlement to punitive damages that rested on proof of either the defendant's intentional disregard of the plaintiff's rights or maliciousness. Smith v. Golde, 224 Wis. 2d 518, 592 N.W.2d 287 (Ct. App. 1998).

When a defendant seeks to introduce other acts evidence of a crime committed by an unknown 3rd–person, courts should engage in the *Sullivan* 3–step analysis. State v. Scheidell, 227 Wis. 2d 285, 595 N.W.2d 661 (1999).

The exception to the general rule barring other acts evidence is expanded in sexual assault cases, particularly those involving children. However the evidence must still meet the requirements of the 3–step analytical framework articulated in *Sullivan.* State v. Davidson, 2000 WI 91, 236 Wis. 2d 537, 613 N.W.2d 606.

A "plan" in sub. (2) means a design or scheme to accomplish some particular purpose. Evidence showing a plan establishes a definite prior design that includes the doing of the acts charged. Similarity of facts is not enough to admit other acts evidence. State v. Cofield, 2000 WI App 196, 238 Wis. 2d 467, 618 N.W.2d 214.

Evidence of criminal acts by an accused that were intended to obstruct or avoid punishment was not evidence of "other acts" admissible under sub. (2), but was admissible to prove consciousness of guilt of the principal criminal charge. State v. Bauer, 2000 WI App 206, 238 Wis. 2d 687, 617 N.W.2d 902.

For other acts evidence to be admissible it must relevant, that is it must relate to a fact or proposition that is of consequence and have probative value. The measure of probative value in assessing relevance is the similarity between the charged offense and the other act. In a sexual assault case, the age of the victim is an important condition in determining similarity. State v. Meehan, 2001 WI App 119, 244 Wis. 2d 121, 630 N.W.2d 722.

When other acts evidence was erroneously allowed, additional testimony about that act was not harmless error. State v. Meehan, 2001 WI App 119, 244 Wis. 2d 121, 630 N.W.2d 722.

Pictures depicting violence were offered to prove the defendant's fascination with death and mutilation, and that trait is undeniably probative of motive, intent, or plan to commit a vicious murder. Dressler v. McCaughtery, 238 F.3d 908 (2001).

904.05 Methods of proving character. (1) REPUTATION OR OPINION. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross–examination, inquiry is allowable into relevant specific instances of conduct.

(2) SPECIFIC INSTANCES OF CONDUCT. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of the person's conduct.

History: Sup. Ct. Order, 59 Wis. 2d R1, R80 (1973); 1991 a. 32.

A detective's opinion of a drug addict's reputation for truth and veracity did not qualify to prove reputation in the community because it was based on 12 varying opinions of persons who knew the addict, from which a community reputation could not be ascertained. Edwards v. State, 49 Wis. 2d 105, 181 N.W.2d 383 (1970).

When a defendant's character evidence is by expert opinion and the prosecution's attack on the basis of the opinion is answered evasively or equivocally, then the trial court may allow the prosecution to present evidence of specific incidents of conduct. King v. State, 75 Wis. 2d 26, 248 N.W.2d 458 (1977).

Self–defense—prior acts of the victim. 1974 WLR 266.

904.06 Habit; routine practice. (1) ADMISSIBILITY. Except as provided in s. 972.11 (2), evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

(2) METHOD OF PROOF. Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

History: Sup. Ct. Order, 59 Wis. 2d R1, R83 (1973); 1975 c. 184.

Although a specific instance of conduct occurs only once, the evidence may be admissible under sub. (2). French v. Sorano, 74 Wis. 2d 460, 247 N.W.2d 182 (1976).

Use of specific instances evidence is discussed. State v. Evans, 187 Wis. 2d 66, 522 N.W.2d 554 (Ct. App. 1994).

Habit evidence must be distinguished from character evidence. Character is a generalized description of a person's disposition or of the disposition in respect to a general trait. Habit is more specific denoting one's regular response to a repeated situation. However, habit need not be "semi–automatic" or "virtually unconscious." Steinberg v. Arcilla, 194 Wis. 2d 759, 535 N.W.2d 444 (Ct. App. 1995).

904.07 Subsequent remedial measures. When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This section does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment or proving a violation of s. 101.11.

History: Sup. Ct. Order, 59 Wis. 2d R1, R87 (1973).

Evidence of subsequent remedial measures by the mass producer of a defective product is admissible in a products liability case if the underlying policy of this section not to discourage corrective steps is not applicable. Chart v. General Motors Corp. 80 Wis. 2d 91, 258 N.W.2d 681 (1977).

Evidence of a remedial change was inadmissible when the defendant did not challenge the feasibility of the change. Krueger v. Tappan Co. 104 Wis. 2d 199, 311 N.W.2d 219 (Ct. App. 1981).

Evidence of post–event remedial measures may be introduced under both negligence and strict liability theories. D. L. v. Huebner, 110 Wis. 2d 581, 329 N.W.2d 890 (1983).

904.08 Compromise and offers to compromise. Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This section does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, proving accord and satisfaction, novation or release, or proving an effort to compromise or obstruct a criminal investigation or prosecution.

History: Sup. Ct. Order, 59 Wis. 2d R1, R90 (1973); 1987 a. 355; Sup. Ct. Order No. 93–03, 179 Wis. 2d xv (1993); 1993 a. 490.

While this section does not exclude evidence of compromise settlements to prove bias or prejudice of witnesses, it does exclude evidence of details such as the amount of the settlement. Johnson v. Heintz, 73 Wis. 2d 286, 243 N.W.2d 815 (1976).

The plaintiff's letter suggesting a compromise between codefendants was not admissible to prove the liability of a defendant. Production Credit Association v. Rosner, 78 Wis. 2d 543, 255 N.W.2d 79 (1977).

When a letter from a bank to the defendant was an unconditional demand for possession of collateral and payment under a lease and was prepared without prior negotiations, compromise, or agreement, the letter was not barred by this section. Heritage Bank v. Packerland Packing Co. 82 Wis. 2d 225, 262 N.W.2d 109 (1978).

904.085 Communications in mediation. (1) PURPOSE. The purpose of this section is to encourage the candor and cooperation of disputing parties, to the end that disputes may be quickly, fairly and voluntarily settled.

(2) DEFINITIONS. In this section:

(a) "Mediation" means mediation under s. 93.50 (3), conciliation under s. 111.54, mediation under s. 111.11, 111.70 (4) (cm) 3. or 111.87, mediation under s. 115.797, negotiation under s. 289.33 (9), mediation under ch. 655 or s. 767.11, or any similar statutory, contractual or court–referred process facilitating the voluntary resolution of disputes. "Mediation" does not include binding arbitration or appraisal.

(b) "Mediator" means the neutral facilitator in mediation, its agents and employees.

(c) "Party" means a participant in mediation, personally or by an attorney, guardian, guardian ad litem or other representative, regardless of whether such person is a party to an action or proceeding whose resolution is attempted through mediation.

(3) INADMISSIBILITY. (a) Except as provided under sub. (4), no oral or written communication relating to a dispute in mediation made or presented in mediation by the mediator or a party is admissible in evidence or subject to discovery or compulsory process in any judicial or administrative proceeding. Any communication that is not admissible in evidence or not subject to discovery or compulsory process under this paragraph is not a public record under subch. II of ch. 19.

(b) Except as provided under sub. (4), no mediator may be subpoenaed or otherwise compelled to disclose any oral or written communication relating to a dispute in mediation made or presented in mediation by the mediator or a party or to render an opinion about the parties, the dispute whose resolution is attempted by mediation or any other aspect of the mediation.

(4) EXCEPTIONS. (a) Subsection (3) does not apply to any written agreement, stipulation or settlement made between 2 or more parties during or pursuant to mediation.

(b) Subsection (3) does not apply if the parties stipulate that the mediator may investigate the parties under s. 767.11 (14) (c).

(c) Subsection (3) (a) does not prohibit the admission of evidence otherwise discovered, although the evidence was presented in the course of mediation.

(d) A mediator reporting child or unborn child abuse under s. 48.981 or reporting nonidentifying information for statistical, research or educational purposes does not violate this section.

(e) In an action or proceeding distinct from the dispute whose settlement is attempted through mediation, the court may admit evidence otherwise barred by this section if necessary to prevent a manifest injustice of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation proceedings generally.

History: Sup. Ct. Order No. 93–03, 179 Wis. 2d xv (1993); 1995 a. 227; 1997 a. 59, 164, 292.

Judicial Council Note, 1993: This section creates a rule of inadmissibility for communications presented in mediation. This rule can be waived by stipulation of the parties only in narrow circumstances [see sub. (4) (b)] because the possibility of being called as a witness impairs the mediator in the performance of the neutral facilitation role. The purpose of the rule is to encourage the parties to explore facilitated settlement of disputes without fear that their claims or defenses will be compromised if mediation fails and the dispute is later litigated.

904.09 Payment of medical and similar expenses. Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

History: Sup. Ct. Order, 59 Wis. 2d R1, R93 (1973).

904.10 Offer to plead guilty; no contest; withdrawn plea of guilty. Evidence of a plea of guilty, later withdrawn, or a plea of no contest, or of an offer to the court or prosecuting attorney to plead guilty or no contest to the crime charged or any other crime, or in civil forfeiture actions, is not admissible in any civil or criminal proceeding against the person who made the plea or offer or one liable for the person's conduct. Evidence of statements made in court or to the prosecuting attorney in connection with any of the foregoing pleas or offers is not admissible.

History: Sup. Ct. Order, 59 Wis. 2d R1, R94 (1973); 1991 a. 32.

When an accused entered into a plea agreement and subsequently testified at the trials of other defendants, and when the accused later withdrew the guilty plea and

was tried, prior trial testimony was properly admitted for impeachment purposes. State v. Nash, 123 Wis. 2d 154, 366 N.W.2d 146 (Ct. App. 1985).

Statements made during a guilty plea hearing are inadmissible for any purpose, including impeachment, at a subsequent trial. State v. Mason, 132 Wis. 2d 427, 393 N.W.2d 102 (Ct. App. 1986).

A defendant's agreement to sign a written confession, after being told by the district attorney that the state would stand silent regarding sentencing if the defendant gave a truthful statement, was not the result of plea negotiations but negotiations for a confession, and therefore was not inadmissible under this section. State v. Nicholson, 187 Wis. 2d 687, 523 N.W.2d 573 (Ct. App. 1994).

This section does not apply to offers of compromise made to the police. State v. Pischke, 198 Wis. 2d 257, 542 N.W.2d 202 (Ct. App. 1995).

904.11 Liability insurance. Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This section does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

History: Sup. Ct. Order, 59 Wis. 2d R1, R97 (1973); 1991 a. 32.

904.12 Statement of injured; admissibility; copies. (1) In actions for damages caused by personal injury, no statement made or writing signed by the injured person within 72 hours of the time the injury happened or accident occurred, shall be received in evidence unless such evidence would be admissible as a present sense impression, excited utterance or a statement of then existing mental, emotional or physical condition as described in s. 908.03 (1), (2) or (3).

(2) Every person who takes a written statement from any injured person or person sustaining damage with respect to any accident or with respect to any injury to person or property, shall, at the time of taking such statement, furnish to the person making such statement, a true, correct and complete copy thereof. Any person taking or having possession of any written statement or a copy of said statement, by any injured person, or by any person claiming damage to property with respect to any accident or with respect to any injury to person or property, shall, at the request of the person who made such statement or the person's personal representative, furnish the person who made such statement or the person's personal representative, a true, honest and complete copy thereof within 20 days after written demand. No written statement by any injured person or any person sustaining damage to property shall be admissible in evidence or otherwise used or referred to in any way or manner whatsoever in any civil action relating to the subject matter thereof, if it is made to appear that a person having possession of such statement refused, upon the request of the person who made the statement or the person's personal representatives, to furnish such true, correct and complete copy thereof as herein required.

(3) This section does not apply to any statement taken by any officer having the power to make arrests.

History: Sup. Ct. Order, 59 Wis. 2d R1, R99 (1973); 1991 a. 32.

Postaccident Statements by Injured Parties. LaFave. Wis. Law. Sept. 1997.

904.13 Information concerning crime victims. (1) In this section:

(a) "Crime" has the meaning described in s. 950.02 (1m).

(b) "Family member" has the meaning described in s. 950.02 (3).

(c) "Victim" has the meaning described in s. 950.02 (4).

(2) In any action or proceeding under ch. 938 or chs. 967 to 979, evidence of the address of an alleged crime victim or any family member of an alleged crime victim or evidence of the name and address of any place of employment of an alleged crime victim or any family member of an alleged crime victim is relevant only if it meets the criteria under s. 904.01. District attorneys shall make appropriate objections if they believe that evidence of this information, which is being elicited by any party, is not relevant in the action or proceeding.

History: 1985 a. 132; 1995 a. 77.

904.15 Communication in farmer assistance programs. (1) Except as provided under sub. (2), no oral or written communication made in the course of providing or receiving advice or counseling under s. 93.51 or in providing or receiving assistance under s. 93.41 or 93.52 is admissible in evidence or subject to discovery or compulsory process in any judicial or administrative proceeding.

(2) (a) Subsection (1) does not apply to information relating to possible criminal conduct.

(b) Subsection (1) does not apply if the person receiving advice or counseling under s. 93.51 or assistance under s. 93.41 or 93.52 consents to admission or discovery of the communication.

(c) A court may admit evidence otherwise barred by this section if necessary to prevent a manifest injustice.

History: 1997 a. 264.